

## 9th Circ. Won't Revive HP Investors' Suit Over CEO Ethics

By **Melissa Daniels**

*Law360, Los Angeles (January 19, 2017, 10:24 PM EST)* -- A lower court properly tossed a proposed shareholder class action alleging Hewlett-Packard Co. and its ex-CEO Mark Hurd committed securities fraud by touting their high ethical standards while Hurd hid an illicit relationship with a company contractor, a Ninth Circuit panel ruled Thursday.

At issue was whether shareholders could bring securities fraud claims when a CEO and chairman has violated the business' corporate code of ethics after publicly touting the company's high ethical standards. The shareholders, including lead plaintiff Retail Wholesale & Department Store Union Local 338 Retirement Fund, argued that Hurd's unethical behavior while promoting the company's ethics equated to securities fraud by giving investors false impressions.

HP had argued that the investors failed to sufficiently prove any material misrepresentations or misleading omissions had been made, and got the complaint tossed by the district court in 2014. On Thursday, the Ninth Circuit panel agreed, finding that the complaint did not give rise to any actionable claim for securities fraud.

"This is not to say that Hurd's conduct was consistent with the general ethical values espoused within the [standards of business conduct] and related statements," the panel said. "Indeed, Hurd did not demonstrate the 'uncompromising integrity' asked of him by the [standards of business conduct]. However, there was no fraud."

HP back in 2006 had experienced high-profile ethical scandals that led to Hurd taking over as the first joint chairman and CEO. The company then reinforced its ethical standards and took many public steps to better its image, including appointing new ethics compliance personnel, while revising its standards of business conduct, or SBC.

Hurd, who had a hand in creating the new SBC and stressed the importance of ethics, in the summer of 2010 was accused of sexual harassment by Julie Fisher, an independent contractor who worked part-time for HP and a former adult film actress. The company launched an investigation, which revealed that Hurd lied about having an ongoing personal relationship with Fisher and that he had falsified expense reports to prevent the relationship from being discovered, according to the court's history.

Hurd resigned shortly after the investigation wrapped up. HP stocks dropped, resulting in an alleged loss of \$10 billion to stockholders, according to the court's history of the case.

The instant suit was filed on behalf of those who bought HP stock between November 2007 and August 2010 and held the shares as of Aug. 6, 2010, when Hurd resigned. They alleged that HP and Hurd made false and misleading statements prior to his resignation, and that Hurd had a duty to disclose any violations of the company's SBC.

A California federal judge dismissed the case in June 2014, saying that the suit failed to adequately allege materiality and falsity.

The shareholders appealed, and during oral arguments in July 2016 argued that the district court wrongly tossed the case, as investors who purchased the stocks during the class period would find it material that he was engaged in potential violations of corporate ethics policies.

The panel on Thursday said that the Ninth Circuit hadn't addressed whether ethical codes or statements about them count as actionable representations, so the court had to first analyze whether the code or statements about it were false, and then if any misrepresentations were significant to stockholder decision making.

In this case, there was no statement made during the class period that could be objectively false, the panel said. And even if it was, it could not have been material to investors' decisions, the panel said, noting that U.S. Securities and Exchange Commission regulations required HP to put its ethical standards online.

The panel also addressed the investors' arguments that HP and Hurd failed to disclose material facts, namely that Hurd wasn't complying with the SBC.

"As noted, the SBC, and the statements within the class period promoting it, were transparently aspiration," the panel said. "The promotion of ethical conduct at HP did not reasonably suggest that there would be no violations of the SBC by the CEO or anyone else. Nor did Hurd's own statements warrant that he had been personally compliant or that he personally would comply with the SBC in the future."

Counsel for HP declined to comment.

U.S. Circuit Judges Marsha S. Berzon and N. Randy Smith and U.S. Chief District Judge Dana L. Christensen by designation sat on the panel for the Ninth Circuit.

Retail Wholesale & Department Store Union Local 338 Retirement Fund is represented by Ira M. Press, Mark A. Strauss and Thomas W. Elrod of Kirby McInerney LLP.

Hewlett-Packard Co. is represented by Marc J. Sonnenfeld, Karen Pieslak, Thomas M. Peterson, Joseph E. Floren, Robert E. Gooding and Laura Hughes McNally of Morgan Lewis & Bockius LLP.

Mark V. Hurd is represented by Lawrence D. Lewis, Dwight D. Armstrong, Amy Wintersheimer Findley and Keith Paul Bishop of Allen Matkins Leck Gamble Mallorly & Natsis LLP.

The case is Retail Wholesale & Department Store Union Local 338 Retirement Fund v. Hewlett-Packard Co. and Mark A. Hurd, case number 14-16433, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Bonnie Eslinger. Editing by Breda Lund.

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