

Clients & Friends Memo

DOJ's First 10b5-1 Plan Prosecution Survives Motion to Dismiss

March 11, 2024

Introduction: In a first-of-its-kind case, the United States Attorney's Office for the Central District of California announced a grand jury indictment on February 24, 2023 against former chairman and CEO of Ontrak, Terren Peizer. Peizer was charged with securities fraud and insider trading based on 10b5-1 plan certifications he made in connection with his sale of Ontrak stock while knowing that the company was in the midst of losing a contract with its biggest client which it had not announced. The government filed a superseding indictment earlier this year, on January 24, 2024. Recently, on March 7, 2024, the court denied Peizer's motion to dismiss the indictment.

United States v. Peizer marks the first time that DOJ has brought insider trading charges against an executive based primarily on the filing of 10b5-1 plans. In public remarks following the indictment, Assistant Attorney General Kenneth Polite credited the work of DOJ analysts who searched 10b5-1 filings to identify "company insiders who greatly outperformed the market when trading pursuant to 10b5-1 plans," and noted that Peizer "allegedly tried to use the cloak of a 10b5-1 plan as cover for his criminal conduct."¹ Polite dubbed the case "groundbreaking" and promised that DOJ "will not allow corrupt executives to misuse 10b5-1 plans as a shield for insider trading."²

Background: Ontrak is a publicly traded telehealth company that contracts with health insurance providers to provide behavioral health services. Peizer held insider roles as Ontrak's CEO and later also its chairman. As alleged in the indictment, on May 10 and August 13, 2021, Peizer falsely certified two 10b5-1 trading plans to sell 600,000 shares of Ontrak stock, based on material nonpublic information (MNPI) that Ontrak was about to lose its relationship with its biggest client, Cigna.

¹ Press Release, *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual National Institute on White Collar Crime*, U.S. Dep't of Justice (Mar. 3, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national>.

² Press Release, *CEO of Publicly Traded Health Care Company Charged for Insider Trading Scheme*, U.S. Dep't of Justice (Mar. 1, 2023), <https://www.justice.gov/opa/pr/ceo-publicly-traded-health-care-company-charged-insider-trading-scheme>.

Specifically, the government alleged that Peizer sold shares based on nonpublic information, including that Cigna had slowed referrals to Ontrak, informed the company that it would need to renegotiate its contract, and scheduled an imminent meeting to discuss the business relationship.³ In so doing, according to the government, Peizer certified that the trades were not based on his possession of MNPI, and further allegedly dismissed the advice of his broker to wait to sell the stock pending a cooling-off period.

On August 19, 2021, just days after Peizer had executed his second 10b5-1 plan, Ontrak publicly disclosed that Cigna had ended its relationship with the company, and Ontrak's stock price dropped by more than 44 percent.⁴ In all, Peizer had sold approximately \$20 million in stock and avoided approximately \$12.5 million in losses pursuant to the trade plans.⁵

Recent Developments: On February 9, 2024, Peizer moved to dismiss the indictment, arguing in part that certain public disclosures made before he implemented his trade plans undercut the government's factual basis for alleging that he possessed and acted on MNPI.

Peizer argued that he did not trade on material *nonpublic* information because, in his view, Ontrak had publicly disclosed the material information about the company's relationship with Cigna prior to Peizer's execution of his 10b5-1 plans. For example, days before Peizer executed his May 10 trading plan, Ontrak disclosed in a May 6, 2021 10-Q filing that its "business currently depends upon four large customers"—with the largest being Cigna—and "the loss of any one such customers would have a material adverse effect on" the company.⁶ Additionally, the company disclosed that its key customers "may not achieve the savings [Ontrak] expect[s]" and "may decrease their enrollment levels."⁷ Peizer also pointed out that Ontrak adjusted its revenue guidance downwards in May 2021, reflecting its "current expectations with [its] existing health plan customers."⁸

Similarly, Peizer observed that in 10-Q and 8-K filings from August 5, 2021—eight days before Peizer executed the second trade—the company disclosed downward revenue projections "reflecting current expectations with [its] existing health plan customers,"⁹ as well as the adverse "impact of continued development and enhancement of [its] customer relationships, [its] product

³ First Superseding Indictment, *United States v. Peizer*, No. 23-00089, ECF Doc. No. 105, at ¶ 9(a)(i)-(ii), (g) (Jan. 31, 2024).

⁴ *Id.* at ¶ 11(r).

⁵ *Id.* at ¶ 11(a), (q).

⁶ Ontrak Inc. Form 10-Q, at 33 (May 6, 2021).

⁷ *Id.* at 33, 36; Def.'s Mot. to Dismiss, *United States v. Peizer*, No. 23-00089, ECF Doc. No. 113, at 9 (Feb. 9, 2024).

⁸ Ontrak Inc. Form 8-K, at 2 (May 6, 2021); Mot. to Dismiss at 9.

⁹ Ontrak Inc. Form 8-K, at 2 (Aug. 5, 2021).

solutions and new lines of business, and related pricing structures.”¹⁰ The filings reiterated that “[a] substantial percentage of” the company’s revenues “are attributable to four large customers, any or all of which may terminate [Ontrak’s] services at any time.”¹¹

In Peizer’s view, the company’s May and August disclosures “cover[ed]” all of the MNPI the government alleged that he had traded on, except for an alleged nonpublic statement made by Cigna in May 2021 that it intended to terminate its contract with Ontrak (a statement that Peizer claims Cigna later withdrew), the purported (and subjective) belief of Ontrak’s lead negotiator that Cigna would terminate its contract, and the plans for an August 18 meeting between Cigna and Ontrak representatives that would cover Cigna’s potential termination.¹² Peizer argued that such information was “speculative” and “uncertain,” and “therefore immaterial.”¹³

In response, the government argued that the language in Ontrak’s May and August 2021 disclosures constituted “boilerplate risk language” that was insufficient to constitute a public disclosure of the material information which served as the basis of Peizer’s trade plans.¹⁴ Specifically, the government observed that the May and August disclosures did not “reference any specific customer,” were “framed as hypothetical risks,” and, “more importantly,” had been “included in every annual and quarterly filing dating back to at least 2019.”¹⁵

On March 7, 2024, Judge Dale S. Fischer denied Peizer’s motion to dismiss in a four-page order, holding that the government had alleged facts sufficient to give rise to a charge of insider trading based on Peizer’s 10b5-1 trading plans. The court’s denial did not address the parties’ specific contentions on the materiality of the information at issue.¹⁶

Practice Points:

- Though the court did not squarely decide the question, it appears doubtful that general revenue guidance disclosures of the sort Peizer pointed to in Ontrak’s Form 10-Q and 8-K disclosures, which predicted downward revenue figures, would be enough to render public the more particularized information that Peizer allegedly possessed and used to implement his trading plans.

¹⁰ Ontrak Inc. Form 10-Q, at 30 (Aug. 5, 2021).

¹¹ *Id.* at 38.

¹² Mot. to Dismiss at 13-14.

¹³ *Id.* at 13.

¹⁴ Gov.’s Opp’n, *United States v. Peizer*, No. 23-00089, ECF Doc. No. 115, at 7 (Feb. 16, 2024).

¹⁵ *Id.* at 8.

¹⁶ Order, *United States v. Peizer*, No. 23-00089, ECF Doc. No. 126, at 2 (Mar. 7, 2024).

- Insiders should think carefully about foregoing a “cooling-off period” in executing their 10b5-1 plans, as the indictment notes Peizer’s alleged rejection of such a period was suggestive of his intent to commit insider trading.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Kenneth M. Breen	+1 (212) 504-6240	ken.breen@cwt.com
Phara A. Guberman	+1 (212) 504-6241	phara.guberman@cwt.com
Elizabeth R. Gorman	+1 (212) 504-6437	elizabeth.gorman@cwt.com