

DELAWARE BUSINESS COURT INSIDER

What the Theranos Settlement Solves—And What It Doesn't

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Theranos Inc. announced Monday that it has [settled two lawsuits](#) brought by one of its biggest early investors, a move the embattled blood-testing company said would allow it to proceed with a short-term tender offer and set its sights on eventually bringing new technology to market.

Theranos on Monday touted the upside of the confidential settlement with the San Francisco-based hedge fund [Partner Fund Management](#), which had accused the biotech startup of duping it into investing more than \$96 million to prop up flawed technology.

According to Theranos, PFM agreed to drop all claims. The company also confirmed that it would still go ahead with a [challenged tender offer](#) involving its most significant shareholders.

What wasn't immediately clear, however, was what PFM was given in return for its broad release or the impact the agreement would have on the two other major cases pending against Theranos in federal court—a \$140 million breach of contract suit by Walgreen Co. in Delaware and an indirect-purchaser class action in California.

On Tuesday, observers said it was hard to handicap the full impact of the settlement on the pending litigation without knowing the terms of the PFM accord. Still, they doubted that it would have much effect beyond eliminating one formidable courtroom challenger from the fray.

"I don't really think it has an impact one way or the other," said Kirk Dillman, a partner with McKool Smith in Los Angeles. "But it gets one matter off the plate."

Lawrence Hamermesh, a professor at Widener University Delaware Law School, saw the settlement mostly as an attempt by Theranos to "keep the patient alive," as it tries to fend off litigation while also trying to pivot to a new business platform. He said the tender offer, scheduled to close May 15, was likely an attempt to restructure Theranos' capital and avoid bankruptcy.

Theranos GC David Taylor put a positive spin on the confidential settlement. "Although we are confident that we would have prevailed at trial, resolution of these two cases allows our tender offer to go forward and enables us to return our focus where it belongs, which is on executing our business plans and delivering value for our shareholders," Taylor said in a statement announcing the agreement.

According to court papers, the tender offer purported to give certain investors nonvoting shares from CEO Elizabeth Holmes and a liquidity preference, should the company file for bankruptcy. In exchange, the investors were required to sign a broad release of claims against Theranos.

PFM argued that it was nothing more than a ploy for Theranos to escape liability for allegedly misleading investors into funding a now-abandoned business model.

Delaware Court of Chancery Vice Chancellor J. Travis Laster expressed his own concerns about the tender offer during a teleconference last month and entered an order temporarily halting it. Now, with the deal back on, plaintiffs attorneys in the California class action are trying to unearth the specifics in order to determine if it was the product of collusion.

In that case, indirect purchasers—who bought Theranos securities from intermediaries and not from Theranos itself—were [recently allowed to proceed with fraud claims](#) against Theranos, even though the plaintiffs had no dealings with the issuer and hold no actual shares.

Reed Kathrein, a Hagens Berman Sobol Shapiro attorney representing the plaintiffs, said the PFM settlement "did not settle" the claims of his clients, but it would be a point of contention in the case.

"Our main concern is the collusive nature of the settlements, side deals and the drain on funds available to the class," he said.

Kathrein said the deal amounted to "a way around" the class action, and he confirmed that he would push to obtain details in discovery. He said full access to the documents would give his clients a look into the resources available to Theranos after a bruising fall from grace in Silicon Valley.

"I think they lost all their money," he said. "I think this is a dead company."

Theranos, on the other hand, said it was poised to transition to its so-called miniLab platform, which the company describes as a self-contained laboratory capable of carrying out a wide range of tests from a small sample of blood.

Little is known about the new technology, and questions remain about who would be willing to fund the company after it failed to deliver on its fundamental promise to revolutionize blood testing by running a full battery of lab tests using just a few drops of blood taken from a patient's finger.

In court filings, PFM accused Theranos CEO Holmes and the company's former president, Ramesh Balwani, of making "misrepresentations, misleading statements and material omissions about, among other things, the company's technology, methods, regulatory interactions and business plan."

PFM said it relied on false statements from Theranos when it made its \$96.1 million commitment to the startup in 2014. But had it known the "troubled reality" of the company, it never would have made the investment, PFM said.

Theranos' agreement with PFM was the third in a string of high-profile settlements in less than a month. In April, Theranos agreed to pay back \$4.46 million to customers in Arizona, where it sold more than 1.5 million blood tests between 2013 and 2015. The company also reached an agreement with the Centers for Medicare & Medicaid Services to pay a \$30,000 fine and stay out of the blood-testing business for two years. Under the settlement, it would be able to operate a lab again in 2019.