

Expert Perspectives on Biggest Court Cases

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By Ross Todd



Litigators at **Duane Morris** this week dropped their annual review of the happenings in the class action world, which weighed in with 651 pages, 23 chapters and six appendices. Phew!

For those looking for an abridged version, the firm has neatly packaged the report with an executive summary with 10 key takeaways and a multimedia site with videos featuring the two general editors of the project: **Gerald "Jerry" Maatman Jr.**, chair of the firm's class action defense group, and **Jennifer Riley**, the practice's co-chair.

For an even tidier summary of the report's findings, I reached out directly to Maatman yesterday. One of my annual early January traditions used to be checking in with Maatman back when he was co-chair of the class action litigation practice group at labor and employment firm **Seyfarth Shaw** about its annual survey of workplace class action settlements. When he moved to Duane Morris back in 2022, he brought with him a vision to create "the ultimate desk reference" covering the full body of class action filings and decisions from each year.

"How many cases were certified last year in the Fourth Circuit on wage and hour cases? It's in the book," Maatman said. "The idea was [to] help general counsel and corporate decision-makers try to avoid these things or, if they're sucked into a class action, to have the best, most up-to-date information statistically about what's going on in all the courthouses."

So ... what's going on in all the courthouses?

"In doing this for 20 years, I've never seen anything quite like this," Maatman said. "We've crossed a line. And the line we've crossed is into an area of heightened risk and exposure that has never existed before."

Total settlements for class actions and government enforcement lawsuits topped \$51 billion in 2023 according to the report, bringing the combined total for last year and 2022 combined to \$114 billion—a historic high.

“I’ve always thought that success begets copycats, and so [with] these big settlement numbers, the success of the plaintiffs bar is emboldening them to invest in this area, bring more cases, bring bigger cases,” Maatman said. “If you’re operating as an American business, your risk today is very, very different than it was pre-COVID.” He said that when you couple the current level of activity and settlement numbers with the prospects of plaintiffs firms harnessing the power of artificial intelligence to be more efficient at bringing and valuing cases, he expects the number of class action filings and the total settlement amounts to continue to grow.

The report also highlights the current conundrum of data breach cases. In those matters, where the standing issues are thorny for plaintiffs, classes were certified just 16% of the time last year, according to the Duane Morris data. That’s compared to a 72% class certification success rate for plaintiffs across all cases.

At the same time that class certification success is fleeting in those cases, they just keep coming: Plaintiffs filed nearly 250 data breach cases within the first half of 2023, roughly the equivalent of the total number of filings for all of 2022. The report notes that the uptick coincides with the increased cybersecurity risks from remote work and some major data breaches of third-party providers of certain data services.

Maatman said that he thinks “we’re at mile marker number one or two of the marathon” when it comes to data breach litigation. “The case law is just kind of percolating and yet-to-be-developed,” he said. Right now, he said, plaintiffs are constantly running into issues under the Supreme Court’s *TransUnion* decision when it comes to showing the sort of concrete harm needed to state a viable cause of action, and all of the follow-on issues when it comes time to consider class certification. “My sense is because of the massive amount of filings there’s going to be a ton of case law all over the place in 2024,” he said. “I think what you’re seeing is this sifting out, and the formulation of data breach theories. But it’s not going away.”

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Jan. 11, 2024, 8:26 AM PST

UiPath Directors Sued Again for Allegedly Hiding Demand Issues

By Ben Miller

Documents

- Complaint
- Docket

COURT: S.D.N.Y.

TRACK DOCKET: 1:24-cv-00214

Bloomberg Law News 2024-01-11T11:32:28561380042-05:00

UiPath Directors Sued Again for Allegedly Hiding Demand Issues

By Ben Miller 2024-01-11T11:26:06000-05:00

UiPath Inc.’s board of directors spent nearly a year concealing key details about the artificial intelligence software company’s market and demand, a shareholder derivative lawsuit says.

The automation products had a smaller market than the directors portrayed, due to the relatively high cost of UiPath’s offerings and competition with Microsoft Corp., IBM Corp., and Salesforce Inc., according to the complaint filed Wednesday in US District Court for the Southern District of New York.

The company didn’t disclose to investors that it was losing market share to those vendors during the period of alleged misrepresentations, partly due to their ability to bundle low-code automation products into their enterprise software suites. This lessened the need for add-on automation software like UiPath’s, which was also more costly than Microsoft’s Power Automate, the filing alleged.

The automation startup’s board, as well as the company itself, were each sued for similar claims last year.. That prior class action against UiPath is still pending in the Southern District of New York, while the previous shareholder derivative lawsuit against the directors is also pending in US District Court for the Eastern District of New York.

UiPath’s board started making the alleged misrepresentations in filings related to its initial public offering in April 2021. Then in September 2021, the company’s second quarter financial results revealed a slowdown in revenues and noted that financial results provided in connection with the company’s IPO had been inflated by previously undisclosed discounting, the complaint says.

The following trading day, UiPath’s stock price fell nearly 13% to close at \$54.40 on Sept. 9, according to the complaint.



UiPath's fiscal year 2023 guidance also showed revenue projections and annualized renewal run-rate figures that were lower than expected, showing that the company anticipated a continued downward growth trend.

One day after that disclosure, the company's share price fell nearly 26% to close at \$21.59 per share on Mar. 31, 2022, according to the complaint. That was the stock's biggest drop ever, according to data compiled by Bloomberg.

Several directors allegedly made lucrative stock sales during the period of share price inflation due to the alleged misrepresentations, including Philippe Botteri, who sold nearly 5.6 million shares for more than \$314 million in proceeds, the complaint says. UiPath founder and co-CEO Daniel Dines allegedly sold more than 1.4 million shares for over \$80 million during the nearly yearlong period highlighted in the suit.

Dines will no longer serve as UiPath's CEO effective Jan. 31, when he will transition into the new role of Chief Innovation Officer and Rob Enslin will become sole CEO, according to a July press release.

Shareholder Octavian Ristea seeks to recover damages on behalf of the company for the directors' alleged violations of the Securities and Exchange Act between April 21, 2021 and Mar. 30, 2022, as well as disgorgement from their sales of UiPath stock during that period. He also seeks legal fees, the complaint says.

UiPath didn't immediately respond to a request for comment.

Bragar Eagel & Squire PC represent the plaintiff.

The case is Ristea v. Botteri , S.D.N.Y., No. 1:24-cv-00214, complaint filed 1/10/24 .

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Delaware loses some claims against oil companies but can proceed with disinformation lawsuit

 legalnewsline.com/stories/653632838-delaware-loses-some-claims-against-oil-companies-but-can-proceed-with-disinformation-lawsuit

January 11, 2024

Climate Change



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WILMINGTON, Del. (Legal Newsline) - Delaware has presented enough evidence to proceed with its lawsuit accusing BP, ExxonMobil and several other oil companies of misleading consumers about the dangers of global warming, although it can't sue over damages stemming from out-of-state emissions, a state court judge ruled.

Superior Court Judge Mary M. Johnston also dismissed claims based on Delaware's consumer-protection law, saying the facts oil companies supposedly hid were widely known well before the five-year statute of limitations expired. And the judge limited damages to state-owned land, not the state as a whole.

Delaware, like many other government plaintiffs, is represented by private lawyers at Sher Edling working under contingency-fee contracts that could potentially reward them with billions of dollars in fees. Those lawyers devised a strategy of suing under state consumer protection laws in order to keep their cases in more advantageous state courts after federal appeals courts in New York and California halted similar litigation. Delaware succeeded in having its case remanded to state court in 2022.

In her ruling, Judge Johnston noted difficulties for Delaware ahead in trying to prove that misrepresentations by the oil companies caused damage to property the state owns, given the global spread and impact of greenhouse gases.

She refused to dismiss claims against the American Petroleum Institute, which argued its statements about greenhouse gas policy were protected by the First Amendment, saying it was too soon in the litigation to decide whether those statements were misinformation or unactionable “puffery.”

“We are pleased with the Delaware Superior Court’s decision holding that the ‘claims in this case seeking damages for injuries resulting from out-of-state or global greenhouse emissions and interstate pollution, are pre-empted by the’ Clean Air Act and ‘beyond the limits of Delaware common law,’” said Chevron attorney Ted Boutrous of Gibson Dunn & Crutcher.

“The global challenge of climate change requires a coordinated international policy response, not a series of baseless state and local lawsuits.”

In its lawsuit, Delaware accuses the oil companies of “influencing the tenor of the climate change debate,” “maintaining strong working relationships between government regulators” and organizations “carrying defendants’ message,” and pushing for long-term solutions to climate change instead of immediate regulations on carbon emissions.

The state says those alleged deceptions caused consumers – presumably including the state itself, which operates thousands of vehicles and owns buildings heated with fossil fuels – to consume more oil and gasoline products than they otherwise would, increasing global warming and damage to state property.

The oil companies’ “deceit only recently became discoverable,” Delaware claims, although the basic theories behind carbon-driven global warming have been known for more than a century and were the subject of news coverage and repeated Congressional hearings since at least the 1960s.

ORGANIZATIONS IN THIS STORY

Delaware Superior Court

Plaintiffs Say Mitsubishi Waived 'Centerpiece' Argument for Do-Over of \$976M Defective Seatbelt Trial

 [law.com/thelegalintelligencer/2024/01/10/plaintiffs-say-mitsubishi-waived-centerpiece-argument-for-do-over-of-976m-defective-seatbelt-trial](https://www.law.com/thelegalintelligencer/2024/01/10/plaintiffs-say-mitsubishi-waived-centerpiece-argument-for-do-over-of-976m-defective-seatbelt-trial)

By Aleeza Furman

What You Need to Know

- The plaintiffs who won a \$976 million defective seatbelt case against Mitsubishi contend that the carmaker's attempts to challenge the verdict are baseless.
- Mitsubishi claimed the jury was given an improper instruction on crashworthiness.
- The plaintiffs contend that the defendants waived their chance to challenge the instruction.

The plaintiffs who won a nearly \$1 billion defective seatbelt case against Mitsubishi contend that the carmaker's attempts to challenge the verdict are baseless.

Attorneys for the plaintiffs in *Amagasu v. Fred Beans Family of Dealerships* argued in a Jan. 5 brief, that, among other things, the defendants missed their chance to raise one of the key issues in their challenge.

"Post-trial motions are not an appropriate time to make entirely novel arguments disconnected from the evidence and the advocacy presented at trial," Daniel Sherry of Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck, who represented plaintiffs Francis and Soomi Amagasu, said.

Sherry called the various requests found in the defendant's motion for post-trial relief "farcical."

William Conroy of Campbell Conroy & O'Neil, who represents the defendants, did not respond to requests for comment.

In an emailed statement, appellate counsel for Mitsubishi, Maureen McBride of Lamb McErlane, said, "Mitsubishi is confident that the court will carefully review the parties' respective filings and reach the right conclusion in this case."

Mitsubishi raised a litany of arguments in its post-trial challenge to the \$976 million *Amagasu* verdict, which a Philadelphia jury awarded in October. The "centerpiece" of that motion, according to the plaintiffs' 103-page response brief, was the assertion that the jurors were not given proper instructions on crashworthiness.

Mitsubishi wrote in its motion that, "Whether by accident or design, plaintiffs' counsel misled the court" into omitting a portion of the jury instruction saying the plaintiff must prove that the defect caused more damages than would likely have been caused by the original impact. Because of the purported mistake, the defendants argued, the court should award a new trial.

The plaintiffs refuted the notion that they misled the court, commenting that the defense "notably toned down and receded from the accusatory rhetoric" in its subsequent brief.

The plaintiffs argued that the defendants, too, played a role in the omission of a section of the suggested standard jury instructions.

According to the Amagasus' brief, Mitsubishi never objected to or mentioned the omitted text to the court. "Instead," the plaintiffs wrote, "Mitsubishi objected to the failure to give its instruction, but Mitsubishi's proposed instruction did not include the language of the missing second paragraph from plaintiffs' proposed instruction that Mitsubishi now characterizes as a critical omission."

As a result, the plaintiffs asserted, Mitsubishi waived its challenge to the omission.

The plaintiffs additionally argued that the crashworthiness charge was proper under Pennsylvania law and that verdict form confirms that the jury found in the plaintiffs' favor on the various elements of the crashworthiness test.

"Even if Mitsubishi's challenge to this court's crashworthiness instructions had merit (and it does not)," the plaintiffs added, "a new trial would not be necessary or appropriate unless this court's jury instructions concerning plaintiffs' other alternate grounds for recovery—consumer expectation, risk utility and failure to warn—also were defective, which is something Mitsubishi nowhere contends in its motion for post-trial relief."

Mitsubishi also took aim at the size of the jury's verdict for the Amagasus, which included \$176.5 million in compensatory damages and \$800 million in punitive damages.

But Sherry asserted that the defendants did not present evidence on damages at trial to support their claim that the award was excessive.

"If you're going to court and saying 'that was wrong, that needs to be reduced,' one would expect that you would have evidence to point to," Sherry said.

Sherry said that, despite the many issues raised in the defendants' post-trial filings, "there is not the scintilla of merit that should even raise any level of eyebrow."

The parties' motions are pending before Judge Sierra Thomas Street of the Philadelphia Court of Common Pleas, who also presided over the trial.

The plaintiff claimed that an improper seatbelt design in Mitsubishi's 1992 model 3000GT sports car allowed Francis Amagasu to sustain head injuries in a car crash that left him quadriplegic.

According to Sherry, the case itself was fairly simple, involving significant agreement on issues of what happened and the extent of the plaintiffs' injuries.

"This is not a situation where there's a lot of ambiguity or mystery," he said. "Instead it is remarkably straightforward in all aspects."

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Consumer group sues Starbucks over 'ethical' sourcing claims

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Brendan Pierson

The logo of a Starbucks coffee shop is seen in New York June 25, 2013. REUTERS/Brendan McDermid//File Photo Acquire Licensing Rights 

Jan 10 (Reuters) - A U.S. consumer group sued Starbucks (SBUX.O) on Wednesday, accusing the Seattle-based coffee chain of falsely advertising its tea and coffee as "ethically" sourced while obtaining it from farms plagued by human rights abuses in Kenya, Brazil and Guatemala.

The National Consumers League said in a lawsuit filed in the Superior Court of the District of Columbia that Starbucks "sources coffee beans and tea leaves from cooperatives and farms that have committed documented, severe human rights and labor abuses, including the use of child labor and forced labor as well as rampant and egregious sexual harassment and assault."

Starbucks said the company would defend itself against the claims.

"We take allegations like these extremely seriously and are actively engaged with farms to ensure they adhere to our standards," it said.

National Consumers League, a Washington, D.C.-based consumer advocacy group founded in 1899, said Starbucks' false statements included saying it was "committed to 100% ethical coffee sourcing" and to "100% ethically sourced tea."

In fact, the group said, investigations by journalists and governments have uncovered abuses at Starbucks suppliers around the world.

For example, it said, last year, BBC reporters exposed "rampant" sexual violence against women at a tea plantation in Kenya, and Brazilian authorities issued a complaint against Starbucks' largest Brazilian coffee supplier for conditions "analogous to slavery." In 2020, the United Kingdom's Dispatches television program documented widespread child labor at coffee farms in Guatemala, according to the lawsuit.

Starbucks said last year that it had halted purchases from the operator of the Kenya plantation. In 2020, it said that it had halted purchases from farms implicated in child labor for that harvest season.

It was not immediately clear what action it has taken in response to the Brazilian prosecutor's action.

National Consumers League said in its lawsuit Starbucks has continued using suppliers after abuses were uncovered, and even certified them as ethical according to purported standards it developed itself.

The group is accusing Starbucks of violating the District of Columbia's consumer protection law, and is asking the court to order Starbucks to halt its allegedly false advertising and award unspecified money damages.

Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi and Aurora Ellis

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Danone must face Evian water 'carbon neutral' lawsuit

 [reuters.com/legal/danone-must-face-evian-water-carbon-neutral-lawsuit-2024-01-10](https://www.reuters.com/legal/danone-must-face-evian-water-carbon-neutral-lawsuit-2024-01-10)

Jonathan Stempel

Bottles of Evian mineral water are displayed in a supermarket in Nice, France, January 9, 2023. REUTERS/Eric Gaillard/File Photo Acquire Licensing Rights 

Jan 10 (Reuters) - A judge in New York ruled on Wednesday that Danone (DANO.PA) must face a lawsuit challenging its "carbon neutral" claim on bottles of Evian spring water.

Consumers in the proposed class action said they would not have bought Evian had they known that Danone's manufacturing process allowed the release of carbon dioxide into the atmosphere or otherwise caused pollution.

In a 30-page decision, U.S. District Judge Nelson Roman in White Plains, New York, called "carbon neutral" an ambiguous term that confuses consumers, and said Danone "expects too much" for them to learn what it meant from Evian's labels.

The plaintiffs, Stephanie Dorris of California and John Axiotakis of Massachusetts, said they paid premium prices for Evian in 2022, mistakenly believing that the "carbon neutral" claim meant the water was more environmentally friendly.

Roman said the plaintiffs may pursue fraud, unjust enrichment and breach of express warranty claims, and claims under California and Massachusetts consumer protection laws.

He dismissed claims under comparable New York laws, but said the plaintiffs may amend their complaint.

Neither Danone nor its lawyers immediately responded to requests for comment. Lawyers for the plaintiffs did not immediately respond to similar requests.

Danone's products also include Dannon, Oikos and Activia yogurt.

The lawsuit is among hundreds of proposed class actions filed annually against food producers, often challenging the precision of their labels.

Dorris and Axiotakis had cited Merriam-Webster's dictionary defining "carbon neutral" as "having or resulting in no net addition of carbon dioxide to the atmosphere."

Danone said its use of the term reflected a certification from the independent Carbon Trust, and that the plaintiffs' view defied science and common sense.

Roman called it premature to decide who was right.

"Rather than possessing a common, everyday meaning, the term 'carbon neutral' is more technical and scientific," he wrote. "Consumers thus may reasonably become confused ... if it has not previously been explicitly defined for them - as in, before seeing it on the product's label."

Danone is based in Paris. Its North American headquarters are in White Plains.

The case is *Dorris et al v Danone Waters of America*, U.S. District Court, Southern District of New York, No. 22-08717.

Reporting by Jonathan Stempel in New York; Editing by Richard Chang

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Why Elon Musk was able to duck a deposition but Satya Nadella was not

 [reuters.com/legal/transactional/column-why-elon-musk-was-able-duck-deposition-satya-nadella-was-not-2024-01-10](https://www.reuters.com/legal/transactional/column-why-elon-musk-was-able-duck-deposition-satya-nadella-was-not-2024-01-10)

Alison Frankel



Microsoft's CEO Satya Nadella speaks at the Asia-Pacific Economic Cooperation (APEC) CEO Summit in San Francisco, California, U.S., November 15, 2023. REUTERS/Carlos Barria Acquire Licensing Rights 

Jan 10 (Reuters) - Two decisions in the span of just a few days prove the vagaries of a controversial doctrine that shields high-ranking corporate executives from being deposed in civil lawsuits.

The apex doctrine, as it's known, is intended to prevent plaintiffs from harassing high-level executives for purely strategic reasons, like when a slip-and-fall victim suing a big-box store purports to need testimony from the chain's CEO but really just wants to use the deposition subpoena as settlement leverage.

State and federal procedural rules, of course, allow subpoenaed witnesses to contest the demand for their testimony. But the apex doctrine treats top corporate executives as a special class of witnesses whose time and energy are uniquely valuable. In its most sweeping form, the doctrine allows corporate bosses to duck depositions unless plaintiffs can prove the executives have specific information that is not available from any other source.

That's what happened last week in a Florida lawsuit brought by the estate of a teenage passenger who died in the crash of a Tesla traveling at 116 miles per hour. The teenager's estate, which contends that Tesla (TSLA.O) negligently disabled speed-limiting software, sought to depose Tesla CEO Elon Musk about a call he made to the father of the Tesla's

driver, who also died in the crash. The plaintiffs, my colleague Mike Scarcella has reported, allege that Musk told the driver's father that Tesla perhaps should not have removed the speed-limiting software.

But Musk has said in sworn statements that he does not recall the phone call. And according to a Florida appeals court, that's reason enough to quash the subpoena for his testimony. Musk otherwise has no unique knowledge of information relevant to the case, the appeals court ruled, so requiring him to sit for a deposition "would serve no purpose other than to harass and burden Tesla and disrupt Mr. Musk's ability to meet his obligations to consumers, stockholders [and] Tesla's employees."

Contrast that reasoning with a Jan. 8 order from U.S. District Judge Jacqueline Scott Corley of San Francisco in an antitrust class action by video gamers challenging Microsoft's \$69 billion purchase of "Call of Duty" maker Activision (ATVI.MX).

The gamers, as Scarcella reported on Tuesday, want to depose Microsoft CEO Satya Nadella about the company's negotiations with Activision in advance of the biggest deal Microsoft (MSFT.O) has ever made. The company's lawyers tried to block the deposition, citing the apex doctrine. But Corley held that the plaintiffs are entitled to ask the Microsoft CEO about the deal since he has unique information as Microsoft's ultimate decisionmaker.

A key distinction between the two new decisions is who bears the burden of persuasion. Under Florida's version of the apex doctrine, which was codified by the state Supreme Court in 2021, if a high-ranking corporate official asserts in a sworn affidavit that she has no unique knowledge about disputed issues, plaintiffs are required to show why they still need to depose her. The appeals court in the Tesla case said the dead teen's estate failed to carry that burden after Musk said he had no unique information to offer.

But California federal trial judges require companies and their executives to prove why apex witnesses are entitled to special protection. The seminal California ruling on the apex doctrine calls for judges to strike a balance between the risk that plaintiffs are harassing executives for unnecessary testimony and the liberal discovery provisions of the Federal Rules of Civil Procedure. In the Microsoft case, Corley said the company did not meet the burden of showing that plaintiffs would gain no valuable information from Nadella.

State and federal courts have struggled for decades to reconcile the tension between protecting apex witnesses and respecting discovery rules, as you can see from a great overview by lawyers from Finnegan, Henderson, Farabow, Garrett & Dunner on federal appellate precedent.

To make a long and nuanced story short, the doctrine's application varies widely among the federal circuits. The 1st U.S. Circuit Court of Appeals is the most protective of apex witnesses, requiring plaintiffs to provide evidence that they will obtain new and relevant

information by deposing high-level executives. The 2nd, 3rd, 4th, 8th and 9th Circuits are more skeptical, requiring apex witnesses to show why they deserve special treatment.

In state courts, meanwhile, apex doctrine appears to be losing favor. Florida, to be sure, moved in the opposite direction when its state high court formally adopted the doctrine in 2021. Four other states – West Virginia, Michigan, Texas and California – have also adopted the doctrine, albeit in years-old precedent.

But seven states have explicitly refused to shield high-ranking corporate officials merely by virtue of their jobs, according to the Washington Supreme Court's detailed examination of the doctrine in a ruling last September.

In just the last three years, appellate courts in four states — Washington, Georgia, Colorado and Pennsylvania — have considered and rejected defense requests to adopt the apex doctrine. The Colorado panel, which refused to block a CEO's deposition by shareholders in an appraisal case, predicted that the apex doctrine “has reached its zenith and has begun to decline.”

The Washington Supreme Court confirmed the trend in its decision last September, which denied apex protection to Umpqua Bank executives because the doctrine “improperly shifts the burden of proof in violation of our discovery rules and ... undermines the right of access to courts.” After examining how the doctrine is applied — or not — in both state and federal courts, the Washington justices said there's no clear consensus on apex parameters.

“We conclude that the apex rule is not widely followed,” the state justices said. “Its application is inconsistent and its acceptance is waning.”

Again, none of the courts rejecting the apex doctrine has said corporate officials can't try to squelch harassing subpoenas. They've just held that C-suiters are not entitled to any more protection than everyone else.

Money and prestige can buy a lot — but courts seem to be increasingly reluctant to extend the privileges of rank to discovery in civil suits.

Read more:

Microsoft's Nadella can be questioned in gamers' Activision deal lawsuit

Elon Musk defeats bid to be questioned in Tesla fatal crash lawsuit

The apex doctrine and depositions of high-level executives: the divide among circuit courts

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X Corp., Musk Defend Severance Suit by Disputing Plan Existence

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- ERISA claims fail where ERISA plan doesn't exist, company says
- Ex-workers say they're collectively owed at least \$500 million

Twitter successor X Corp. asked a federal court to dismiss litigation over severance benefits allegedly owed to former employees in the wake of Elon Musk's takeover of the company, saying the lawsuit is based on "fantastical assertions."

The proposed class action, which says thousands of former workers are together owed at least \$500 million under Twitter's severance plan, "fails for the simple reason that there is no such thing as a 'Twitter Severance Plan,'" X and Musk said Tuesday in a motion to dismiss. The workers' failure to show that the company sponsored a severance plan governed by the Employee Retirement Income Security Act is fatal to their claims under the statute, X said.

The workers' own allegations show that Twitter's severance payments were calculated and distributed in lump sums using a single formula that hinged on "ministerial calculations," the company said. These allegations don't show an "ongoing administrative scheme" that could qualify as an ERISA-governed benefits plan, the company said.

"Simply because Twitter paid certain former employees lump-sum severance packages does not on its own mean it maintained an ERISA severance plan," the company said.

"Indeed," it said, "Plaintiffs point to no governing plan documents, no summary plan descriptions, no plan handbook, no formal benefits statements, no administrative committee that reviewed severance benefit claims, no procedures for requesting severance payments or for appealing denial of such payments, and no plan-related public filings with the Department of Labor or Internal Revenue Service—all hallmarks of any ERISA plan."

X also disputed claims that it improperly failed to fund the purported severance plan, saying that ERISA doesn't impose funding requirements on plans of that type.

The case is assigned to Judge Trina L. Thompson of the US District Court for the Northern District of California.

X and another group of laid-off employees announced last week that they were unable to reach a settlement in a severance lawsuit that relies on different legal theories.

Sanford Heisler Sharp LLP represents the workers. Morgan, Lewis & Bockius LLP represents the defendants.

The case is McMillian v. X Corp. , N.D. Cal., No. 3:23-cv-03461, motion 1/9/24 .

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HealthEC Hit With Lawsuit Over Data Breach Affecting 4.5 Million

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Health-care technology company HealthEC LLC failed to protect the personal information of nearly 4.5 million people that was exposed in a July data breach, a proposed federal class action said.

Bree Marano alleged that HealthEC failed to implement adequate data-security measures, properly monitor its network for intrusions, or provide adequate and timely notice of the breach to victims.

Information exposed in the incident included names, medical-treatment information, health-insurance information, billing and claims information, and Social Security numbers, according to a complaint filed Tuesday in the US District Court for the District of New Jersey.

HealthEC didn't respond immediately to a request for comment.

Victims are now at increased risk of fraud and identity theft, and have suffered damages in the form of lost time and out-of-pocket costs related to the breach, anxiety and emotional distress, reduced value of their personal information, and lost benefit of the bargain, the complaint said.

Marano also alleged she was the victim of fraudulent charges on her credit card after the incident, and was notified by credit monitoring services that her personal information was available on the dark web, it said.

She seeks to represent a nationwide class and a New Jersey subclass of people whose information was exposed in the breach.

The lawsuit brings claims of negligence, breach of implied contract, unjust enrichment, and breach of confidence.

Marano is seeking actual damages, statutory damages, equitable relief, restitution, disgorgement, lifetime credit-monitoring and identity-theft insurance for class members, attorneys' fees and costs, and pre- and post-judgment interest.

Pogust Goodhead LLC and Morgan & Morgan PA represent Marano and the proposed class.

The case is Marano v. HealthEC LLC , D.N.J., No. 2:24-cv-00153, case filed 1/9/24 .

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Estee Lauder beats biometric class action over virtual 'try-on' tool

 [reuters.com/legal/transactional/estee-lauder-beats-biometric-class-action-over-virtual-try-on-tool-2024-01-10](https://www.reuters.com/legal/transactional/estee-lauder-beats-biometric-class-action-over-virtual-try-on-tool-2024-01-10)

Diana Jones

An Estee Lauder cosmetics counter is seen in Los Angeles, California, U.S., August 19, 2019. REUTERS/Lucy Nicholson/File Photo Acquire Licensing Rights 

Jan 10 (Reuters) - Estee Lauder and several of its well-known cosmetics brands on Wednesday dodged a proposed class action claiming its virtual "try-on" tool violates Illinois' biometric privacy law, after a judge said the plaintiffs provided no proof that the company could connect facial scans to customers' identities.

U.S. District Judge Lindsay Jenkins in Chicago granted Estee Lauder Companies' motion to dismiss the lawsuit, brought under a stringent Illinois biometric privacy law that sets standards for companies collecting and storing information like retina scans, facial geometry and fingerprints. The judge's decision said the customers could file an amended complaint.

The lawsuit accused Estee Lauder and its brands Bobbi Brown, Smashbox and Too Faced of failing to warn customers that their biometric information would be collected when they used tools on the companies' websites that allow people to submit a photo or use a live camera feed to virtually "try on" cosmetics. The lawsuit also named Perfect Corp, a Taiwanese company that makes the technology in question.

Jenkins said the four customers who brought the lawsuit hadn't shown how Estee Lauder could connect the facial scans the virtual try-on widgets collect to a person's actual identity. She also dismissed Perfect from the lawsuit, saying the company lacked sufficient ties to Illinois to be sued there.

Representatives for the customers, Estee Lauder and Perfect did not immediately respond to requests for comment.

Illinois' unique Biometric Information Privacy Act grants a private right of action to sue over the mishandling of biometric information. It has spurred thousands of lawsuits and several hefty settlements and judgments, including a 2020 settlement that saw Meta Platforms' Facebook agree to pay \$650 million to settle a BIPA class action involving its use of facial recognition software. The company denied wrongdoing.

Reporting by Diana Jones

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Facebook Denied Review for Alleged Discriminatory Ad Algorithms

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Facebook lost a bid to get the California Supreme Court to consider a class-action lawsuit alleging the social network advertising algorithms discriminate against women and older users.

Justices during their weekly conference denied a request by Facebook, now known as Meta Platforms Inc., to review an appellate ruling that the company wasn't immune from suit under Section 230 of the Communications Decency Act. The provision immunizes platforms from lawsuits based on the content posted by their users.

The California Court of Appeal reversed a trial judge and held Samantha Liapes alleged sufficient facts to support her putative class action that claims the ad tools bypass women and older users, thus depriving them of seeing ads for cheaper insurance in violation of the state Unruh Civil Rights Act prohibiting discrimination.

Liapes alleged Facebook requires all advertisers to choose the age and gender of its users who will receive ads, and companies offering insurance products routinely tell it to not send their ads to women or older people, the appeals court noted. She claims Facebook's ad delivery algorithm, the system that determines which users will receive ads, discriminates by relying heavily on the two key data points of age and gender. As a result, Liapes alleged, women and older people were excluded from receiving insurance ads.

"Because the algorithm ascertains data about a user and then targets ads based on the users' characteristics, the algorithm renders Facebook more akin to a content developer. Facebook is not entitled to section 230 immunity for the claims here," the appeals court said.

"That third-party advertisers are the content providers doesn't preclude Facebook "from also being an information content provider by helping 'develop' at least 'in part' the information" at issue here, contrary to Facebook's assertions," the appeals court said, citing a 2008 US Court of Appeals for the Ninth Circuit decision in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC.

The California high court also refused to depublish the appellate ruling, meaning it can continue to be cited as precedent.

Facebook is defending a separate putative class-action lawsuit in the US District Court for the Northern District of California alleging the company's targeting methods and tools enable redlining.

Munger Tolles & Olson LLP and Gibson, Dunn & Crutcher LLP represent Facebook. Outten & Golden LLP, Aqua Terra Aeris Law Group, Law Offices of William Most, Gupta Wessler PLLC, and Peter Romer-Friedman Law PLLC represent plaintiffs.

The case is Liapes v. Facebook , Cal., No. S282529, review denied 1/10/24 .

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Lawyers Collide Over What Is 'Physical' Damage in Case Over Restaurant Business Interruption in Pandemic

 [law.com/newyorklawjournal/2024/01/10/lawyers-collide-over-what-is-physical-damage-in-case-over-restaurant-business-interruption-in-pandemic](https://www.law.com/newyorklawjournal/2024/01/10/lawyers-collide-over-what-is-physical-damage-in-case-over-restaurant-business-interruption-in-pandemic)

By Adam Safer and Muryum Khalid

What You Need to Know

- Arguing for restaurant owners, a lawyer said physical alteration to the air caused them to be dispossessed from their property.
- If property can be made safe by wiping down with a cleaning product, you can't term it a physical event, insurers counsel said.
- Attorneys from Pillsbury Winthrop wrote an amicus brief for the New York State Trial Lawyers Association in support of the restaurants.

New York's top court heard an influential pandemic-related business interruption case on Wednesday, with the court reviewing whether the coronavirus accounted for a string of restaurants' tangible physical loss, similar to a broken chair or fire-damaged warehouse.

Robin Cohen, chair of Cohen Ziffer Frenchman & McKenna, and the lead attorney for 55 restaurants under the umbrella of the Consolidated Restaurant Operations, argued before the New York Court of Appeals, saying it had to close many of the restaurants, albeit voluntarily, because the air and surfaces were dangerous.

Cohen said the physical alteration to the air caused CRO to be dispossessed from its property.

But Court of Appeals Judge Jenny Rivera sounded unconvinced.

"That sounds like economic loss," Rivera said. "I can't run my business because of the air quality."

Cohen countered that it wasn't just the air quality by itself; rather, the air microscopically had changed to make the properties unsafe, along with the restaurants' surfaces.

Court of Appeals Associate Judge Jenny Rivera (David Handschuh/NYLJ)

But Rivera asked about last summer's

Canadian wildfires' impact on businesses.

"You couldn't even see the front of your hand," Rivera said. "I assume there were businesses that had to close, or people wouldn't go in, or coughing was affecting their eyes or their lungs and so forth."

Cohen said courts throughout the country have used that example as causing physical loss or damage.

Aidan McCormack of DLA Piper argued on behalf of respondent Westport Insurance, which had issued the CRO an all-risk commercial property insurance policy in July 2019, months before the World Health Organization declared COVID-19 a global pandemic.

The policy set a \$50 million per-occurrence limit and insured against all risks of direct physical loss or damage to insured property. It also insured against business interruption losses.

McCormack told the court that the plain meaning of the contract didn't include the phrase "physical event," and that "any ordinary person on the street" would reason that a chair couldn't be damaged by a virus because it could be cleaned.

"I don't want to make light of the situation because we all know it was very serious... we lived through it," the appeals lawyer answered. "But they're cleaning with Lysol instead of Pine-Sol every night, OK. That's what we're talking about. And regular cleaning of a restaurant, we all hope, is occurring anyway. I'm not suggesting that they didn't have to do more. But it isn't physical loss or damage to ensure property where you can wipe it down."

McCormack added that many of the state's lower courts are looking toward the Court of Appeals' decision on this case.

He added that there's 172 federal appellate court decisions on this issue, with every one of them dismissing these kinds of allegations.

Some of those included an exclusionary issue, McCormack said in response to Cohen's argument that the insurer wanted to put a period of liability into the agreement and use it as an exclusion or limitation on physical loss or damage. She said that's now how the policies worked.

Cohen was asking the top court to reverse two lower court rulings.

The Appellate Division, First Department had rejected CRO's argument that the policy term "physical" damage is ambiguous, citing state and federal precedents.

Attorneys from Pillsbury Winthrop wrote an amicus brief for the New York State Trial Lawyers Association in support of the restaurants. The association of more than 3,500 attorneys, the majority of whom specialize in personal injury law, wrote that the First Department decision

should be reversed because “claims containing well-pleaded factual allegations should not be preemptively dismissed at the pleading stage, but, rather, should be decided on a fully developed evidentiary record, including expert testimony.”

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Debit card users can sue American Express as a class over fees, judge rules

 [reuters.com/legal/government/debit-card-users-can-sue-american-express-class-over-fees-judge-rules-2024-01-10](https://www.reuters.com/legal/government/debit-card-users-can-sue-american-express-class-over-fees-judge-rules-2024-01-10)

Mike Scarcella

Credit cards of American Express are photographed in this illustration picture at an office in Frankfurt, Germany, March 17, 2016. REUTERS/Kai Pfaffenbach Acquire Licensing Rights



Jan 10 (Reuters) - A U.S. judge on Tuesday said debit card users in nearly a dozen states may pursue class-action claims accusing American Express (AXP.N) of driving up merchants' fees on transactions and causing consumers to pay hundreds of millions of dollars in overcharges.

U.S. District Judge Nicholas Garaufis in Brooklyn certified class of debit card users that includes consumers in Illinois, Ohio, North Carolina and other states and the District of Columbia.

Garaufis denied class action status for credit card users, however. The judge found credit card reward programs and other variables introduced too many differences among the potential class members.

The 59-page ruling was the latest development in long-running litigation over rules that can bar merchants from encouraging, or "steering," consumers to use certain cards for purchases over others.

An expert for the plaintiffs in March 2023 estimated the overcharge damages for the then-proposed debit-card class at more than \$319 million.

An American Express spokesperson on Tuesday declined to comment.

Plaintiffs' attorney Todd Seaver said they were "grateful for the court's thorough decision."

The ruling from Garaufis did not address the merits of the plaintiffs claims, which could still be thrown out.

The plaintiffs use Visa or Mastercard cards, but not American Express. Their lawsuit challenged alleged restraints that American Express imposes on merchants that accept Amex cards.

The consumers contend that those restrictions caused them to pay higher prices at retailers such as Ikea, Target, CVS and Dick's Sporting Goods.

Attorneys for American Express had challenged the reliability of the plaintiffs' expert and questioned whether the named plaintiffs adequately represented the interests of the proposed classes.

Garaufis said the company's objections were not enough to undermine the debit card holders' arguments for class certification.

The case is *Oliver et al v. American Express*, U.S. District Court, Eastern District of New York, No. 1:19-cv-00566-NGG-SJB.

Read more:

Apple sued with Visa, Mastercard in card-fee antitrust case

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Reporting by Mike Scarcella

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Top Big Law Partners Are Earning More Than \$2,400 Per Hour, as Rates Continue to Climb

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What You Need to Know

- Big Law rates are nearing \$2,600 hourly for top partners, recent bankruptcy court filings show.
- Rate hikes above 10% have gotten more common in recent years compared to 2020.
- Dechert said a 20% rate increase brought it into alignment with the market as many firms make significant fee increases to meet historical leaders.

In September, a committee of unsecured creditors hired Dechert to represent them in the bankruptcy of Benitago Group, an Amazon e-commerce business acquirer. At most, Dechert would charge them \$2,000 per hour, according to an employment application in the U.S. Bankruptcy Court for the Southern District of New York.

While Dechert's current top-billing partner for the Benitago bankruptcy costs \$1,825 hourly, the law firm disclosed a 20% firmwide rate increase for top partners of \$2,400 hourly in a recent court filing.

In a statement, a Dechert spokesperson said the firm adjusted billing rates to "reflect market standards and align with our peers," noting that rates are based on a variety of factors for individual cases.

Dechert's peers are indeed marching ahead on rates with above-average 2024 increases compared to recent years, an American Lawyer analysis of federal bankruptcy court records and BankruptcyData.com data found. Rate increase notices filed in bankruptcy court typically disclose firmwide rate increases, with restructuring partners usually billing under the firm's highest possible rate.

 McDermott, Will & Emery has been charging \$2,590 for top-billing partners since at least May 2023, according to a retention application in the bankruptcy of Mountain Express Oil Co. filed in the U.S. Bankruptcy Court for the Southern District of Texas.

While McDermott listed top partners at \$2,330 and \$1,850 in other bankruptcies, it also listed the \$2,590 rate in at least two other bankruptcies last year and announced it in a recent rate increase notice in the Wesco Aircraft Holdings bankruptcy.

The trend of above-average rate increases began during the pandemic, with firms like Paul, Weiss, Rifkind Wharton & Garrison and Quinn Emanuel Urquhart & Sullivan jumping above \$2,000 an hour for top partners in 2022 after previously charging \$300 to \$400 less in 2021. Like Dechert, such firms leaped up to meet historical fee leaders like Kirkland & Ellis and Latham & Watkins, which had already been charging at least \$1,800 hourly the year before they went to \$2,000.

Of the major firms that have announced 2024 rate increases in bankruptcy dockets, Kirkland boasts the next-highest rate of \$2,465, which it rolled out in bankruptcies such as Yellow Corp. and Rite Aid.

Not to be outdone, Latham announced a \$225 increase for top-billing partners in the bankruptcy of pharmaceutical company Endo International for a new rate of \$2,455. Paul Weiss came in just under \$2,400 when it stated a \$220 increase in the bankruptcy of electric vehicle manufacturer Proterra Inc.

Sullivan & Cromwell followed closely with a \$210 increase to \$2,375 for top-billing partners in the FTX bankruptcy, and Paul Hastings crept up to \$2,300 in the same bankruptcy from a former top rate of \$2,215.

On a percentage basis, annual rate hikes have gotten larger in recent years as well. Going into 2021, leading bankruptcy firms announced single-digit rate increases: 3% for Kirkland, 8% for Latham, and 5% for Paul Weiss. Over the following three years, annual rate increases at Kirkland, Latham and Paul Weiss averaged 9%, 11% and 11%, respectively.

While most top firms hadn't cracked \$2,000 in bankruptcy filings only two years ago, the \$2,500 barrier might already be broken in other practice areas. In a 2022 U.S. Department of Justice filing, Covington & Burling listed a top rate for senior partners of \$2,500, Reuters reported at the time. Also in 2022, Hogan Lovells billed former U.S. solicitor general Neal Katyal out at \$2,465 hourly in the bankruptcy of Johnson & Johnson subsidiary LTL Management.

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Hillel Aron

Cummins engines are displayed in a showroom. (Travelarz / Wikipedia)

(CN) — The United States Attorney General on Wednesday announced the details of a settlement with the engine manufacturer Cummins, under which the multinational corporation will pay a \$1.675 billion civil penalty — the largest-ever fine for a Clear Air Act violation — and spend more than \$325 million to remedy violations.

The deal puts to bed accusations that Cummins installed devices, known as "defeat devices" or "auxiliary emission control devices," that can bypass or alter the operation of the car's emissions control system, allowing the vehicle to meet rigorous emission standards during certification testing in the lab, before the car is released and sold to the public.

Cummins also must recall more than 600,000 vehicles — Ram 2500 and 3500 pickup trucks — and replace their diesel engines. The company will also fund projects "to mitigate excess ozone-creating nitrogen oxides," according to a Department of Justice press release.

"Those software defeat devices helped the trucks pass standard EPA emissions tests, but they artificially reduced the effectiveness of the emission controls — and increased [nitrogen oxide] emissions — during normal driving outside of the standard test conditions," the Justice Department said.

"The types of devices we allege that Cummins installed in its engines to cheat federal environmental laws have a significant and harmful impact on people's health and safety," U.S. Attorney General Merrick Garland said in a written statement.

The emissions test cheating scandal was uncovered by EPA, which tested Ram pickup trucks at its National Vehicle and Fuel Emissions Laboratory in Michigan as a follow-up to a similar scandal in 2015, involving Volkswagen.

According to the Justice Department nearly a million Ram trucks, from 2013 to 2019, were fitted with "illegal emissions control software defeat device features."

The California Attorney General's office said Cummins' engines emitted "smog-forming NOx in excess of the legal limit."

"This pollution contributes to the formation of ozone and particulate matter and can aggravate health problems such as asthma and cardio-pulmonary disease," the office said in a press release.

The settlement also calls for Cummins to fully offset nitrogen oxide, or NOx, emissions from the Ram trucks.

Cummins will pay more than \$175 million to the California Air Resources Board to fund mitigation measures. To satisfy its obligations to the rest of the country, the company will pay to swap out 27 "old, high-emitting diesel locomotive engines" for "new, low-emitting diesel or electric engines," in addition to 50 other train-related projects aimed at reducing fuel use and emissions.

In a written statement, a Cummins spokesman said, "We are looking forward to obtaining certainty as we conclude this lengthy matter and continue to deliver on our mission of powering a more prosperous world. We remain committed to advancing our Destination Zero strategy — Cummins' vision for achieving a zero-emissions future — which is driven by decarbonization and aimed at promoting economic growth while using fewer of the world's resources."

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Wall Street criminal enforcer urges whistleblowers to come forward

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Luc Cohen

Damian Williams, U.S. Attorney for the Southern District of New York, arrives to attend the trial of former FTX Chief Executive Sam Bankman-Fried who is facing fraud charges over the collapse of the bankrupt cryptocurrency exchange, at Federal Court in New York City, U.S., October 4, 2023. REUTERS/Brendan McDermid/File Photo Acquire Licensing Rights 

NEW YORK, Jan 10 (Reuters) - The top enforcer of criminal malfeasance on Wall Street is calling on whistleblowers to come forward and report wrongdoing under a new program aimed at uncovering illegal activity.

Damian Williams, the top federal prosecutor in Manhattan, told reporters on Wednesday his office would enter into non-prosecution agreements under the program with individuals involved in non-violent criminal conduct who voluntarily report offenses and cooperate with investigators.

Currently, cooperating witnesses with criminal culpability themselves often enter guilty pleas in the hopes of receiving a lenient sentence. The new policy provides an alternative under which prosecutors would agree not to bring charges in exchange for meaningful cooperation.

"That, in turn, will help us bring more misconduct to light," said Williams, who has brought high-profile financial fraud and public corruption cases since becoming the U.S. Attorney for the Southern District of New York in 2021 including the successful prosecution of former cryptocurrency mogul Sam Bankman-Fried last year.

The program is focused on cases involving fraud, failures of corporate controls or bribery, and will apply only to instances in which prosecutors were not already aware of the misconduct a witness discloses to them. It also will not apply to chief executive officers or chief financial officers of companies, elected officials, or other public figures.

Since taking office, Williams has prioritized speeding up prosecutions and often has urged people with knowledge of wrongdoing to come forward.

In 2022, after charging FTX founder Bankman-Fried with stealing billions of dollars from the cryptocurrency exchange's customers, Williams urged anyone who participated in the scheme to "come see us before we come see you." Three of Bankman-Fried's former closest colleagues pleaded guilty and testified against him.

Joshua Naftalis, a former Southern District of New York prosecutor, said the new guidelines will encourage more cooperation. In the past, prosecutors generally did not tell witnesses whether they would earn a non-prosecution agreement or be required to plead guilty until after they shared information, Naftalis said.

"It adds more certainty, which is what people want when they go into the U.S. attorney's office and self-report," added Naftalis, now a partner at law firm Pallas.

Williams' office and other Justice Department entities already consider non-prosecution agreements for companies that voluntarily disclose wrongdoing. The U.S. Securities and Exchange Commission, which brings civil financial fraud cases, offers financial compensation to whistleblowers who alert the agency to wrongdoing.

Reporting by Luc Cohen in New York; Editing by Will Dunham and Noeleen Walder

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SAP to Pay \$220 Million to Resolve US Foreign Bribery Case (1)

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Environmental, Social & Governance (ESG)

Jan. 10, 2024, 12:54 PM PST

Sabrina Willmer

Bloomberg News

German software company SAP SE agreed to pay more than \$220 million to resolve a foreign bribery investigation by US authorities, which said the deal shows their corporate enforcement strategy in action.

The pact with the Justice Department and the Securities and Exchange Commission addresses a pair of schemes to bribe government officials in South Africa and Indonesia, according to a DOJ statement. The company entered into a three-year deferred-prosecution agreement with the DOJ after it was charged with two counts of conspiracy to violate the Foreign Corrupt Practices Act.

According to the US, SAP and co-conspirators paid bribes in cash, political contributions and luxury goods to win business in South Africa from 2013 through 2017 and in Indonesia from 2015 through 2018, and falsified records to make the payoffs look like business expenses. Under the agreement, the US won't pursue a prosecution as long as the company meets certain conditions, including assisting in related ongoing or future criminal investigations.

SAP has made agreements with US authorities in the past related to bribery and export law violations.

Read More: [SAP Reaches Deal With U.S. After Violating Iran Sanctions](#)

The DOJ said the accord highlights the effectiveness of its incentives to companies to cooperate with investigations and fix internal problems.

"SAP has accepted responsibility for corrupt practices that hurt honest businesses engaging in global commerce," Jessica D. Aber, US attorney for the Eastern District of Virginia, said in the statement. "We will continue to vigorously prosecute bribery cases to protect domestic companies that follow the law while participating in the international marketplace."

SAP said in a separate statement that the schemes are in the past and that it has acted to avoid a recurrence.

“SAP separated from all responsible parties more than five years ago and has since significantly enhanced its global compliance program and related internal controls,” it said.

(Updates with details of agreement and broader context.)

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RISK & COMPLIANCE JOURNAL

SAP to Pay More Than \$220 Million to End Bribery Probes

Prosecutors said the German software company, which allegedly paid bribes to foreign officials in South Africa and Indonesia, has entered into a deferred prosecution agreement

By [Richard Vanderford](#) [Follow](#)

Updated Jan. 10, 2024 4:39 pm ET



German software company SAP allegedly violated the Foreign Corrupt Practices Act. PHOTO: APARNA JAYAKUMAR/BLOOMBERG NEWS

SAP has agreed to pay more than \$220 million to settle foreign bribery probes brought against the German software maker by U.S. and South African authorities.

SAP and its co-conspirators paid bribes to foreign officials in South Africa and Indonesia, delivering money in the form of cash, wire transfers, political contributions and sometimes luxury goods, U.S. prosecutors said Wednesday.

The company has agreed to enter into a three-year deferred prosecution agreement with the U.S. Justice Department. Under the agreement, two

conspiracy charges under the Foreign Corrupt Practices Act will be dismissed if SAP satisfies certain conditions.

“SAP has accepted responsibility for corrupt practices that hurt honest businesses engaging in global commerce,” said Jessica Aber, U.S. attorney for the Eastern District of Virginia, where the charges were brought.

SAP has also agreed to settle cases brought by the Securities and Exchange Commission and South African authorities. The SEC, which conducted its own investigation, said in addition to touching on South Africa and Indonesia, the alleged bribery scheme also involved officials in Malawi, Kenya, Tanzania, Ghana and Azerbaijan. The agency said that the bribery violated the FCPA.

SAP said it has significantly enhanced its compliance program and controls. The company said it has “zero tolerance” for those who don’t adhere to its compliance policies.

SAP employed third-party intermediaries and consultants to pay the bribes starting in at least 2014, according to the SEC. The agency said that the company improperly booked the payments as legitimate business expenses.

The payments were meant to win favor with a variety of entities, including the city of Johannesburg, a South African water company and Eskom Holdings, South Africa’s state-owned power company, according to prosecutors. SAP agents made payments in Indonesia to influence a number of entities there, including the country’s fisheries ministry and a telecommunications agency, prosecutors said.

Prosecutors said SAP received credit for its cooperation. The company made employees available, collected complex financial information and quickly imaged phones to capture text messages that could serve as evidence, they said.

SAP also has taken steps to improve its compliance program, including increasing its budget and restructuring its compliance office to ensure its autonomy, prosecutors said. SAP is participating in a Justice Department pilot program that gives companies credit for clawing back executive compensation.

Prosecutors said SAP will pay a criminal penalty of \$118.8 million and forfeit \$103.4 million, with some credit being given for amounts paid to other authorities and reductions for compensation that was withheld from employees.

U.S. antibribery enforcers previously cooperated with their South African counterparts in a \$327 million settlement announced in December 2022, involving Swiss industrial company ABB. Like SAP, ABB was accused of paying bribes in connection with work for Eskom.

SAP in 2016 agreed to give up \$3.7 million in profits to settle a separate SEC foreign bribery case.

—Ben Glickman contributed to this article.

Write to Richard Vanderford at Richard.Vanderford@wsj.com

Appeared in the January 11, 2024, print edition as 'SAP to Pay \$98 Million To Settle SEC Claims'.

SAP pays DOJ and SEC \$222 million to settle global FCPA 'large bait' violations

F fcpablog.com/2024/01/10/sap-pays-doj-and-sec-221-million-to-settle-global-fcpa-large-bait-violations

January 10, 2024

The FCPA Blog

SAP SE agreed Wednesday to pay the DOJ and SEC around \$222 million in penalties and disgorgement to resolve FCPA offenses related to bribing government officials around the world.

The Walldorf, Germany-headquartered software giant entered into a three-year deferred prosecution agreement with the Department of Justice imposing a \$118.8 million criminal penalty and an administrative forfeiture of \$103.4 million.

The DOJ said it will credit up to \$55.1 million of the criminal penalty against amounts that SAP pays to resolve an investigation by law enforcement authorities in South Africa for related conduct, and up to the full forfeiture amount against disgorgement that SAP pays to the SEC or South African authorities.

Wednesday's DPA settles criminal charges filed in federal court in Virginia, charging the company with conspiracy to violate the anti-bribery and books and records provisions of the FCPA relating to its scheme to pay bribes to South African officials, and conspiracy to violate the anti-bribery provisions for its scheme to pay bribes to Indonesian officials.

In an internal administrative order, the SEC charged SAP with violating the FCPA's anti-bribery, recordkeeping, and internal accounting controls provisions.

According to the SEC, SAP — whose American Depositary Shares are listed on the New York Stock Exchange — violated the FCPA by paying bribes in South Africa, Malawi, Kenya, Tanzania, Ghana, Indonesia, and Azerbaijan.

As part of the SEC settlement, SAP agreed to pay around \$98.5 million in disgorgement and prejudgment interest. The SEC didn't impose a separate penalty. The SEC said the company's payment will be offset by up to \$59 million paid by the company to the South African government in connection with a parallel investigation into the same conduct.

According to the DOJ, SAP, between around 2013 and 2017, in South Africa, through certain of its agents, engaged in a scheme to bribe South African officials and to falsify SAP's books, records, and accounts, all with the goal of obtaining improper advantages for SAP in

connection with various contracts with South African government entities including the City of Johannesburg, the City of Tshwane, the Department of Water and Sanitation (a South African state-owned and state-controlled custodian of water services), and Eskom Holdings Limited (a South African state-owned and state-controlled energy company).

In Indonesia, between around 2015 and 2018, SAP, through certain of its agents, engaged in a scheme to bribe Indonesian officials to obtain improper business advantages for SAP in connection with various contracts between and among SAP and Indonesian government entities, including the Indonesian Ministry of Maritime Affairs and Fisheries (Kementerian Kelautan dan Perikanan) and the Telecommunications and Information Accessibility Agency (Balai Penyedia dan Pengelola Pembiayaan Telekomunikasi dan Informatika), the DOJ said.

In November 2016, SAP South Africa closed a deal with Eskom, a state-owned entity and the largest producer of electricity in South Africa, to renew software licenses for nearly \$28.6 million. Internally, SAP South Africa set aside several million dollars from this renewal fee to pay an intermediary who was a purported IT consultant on the Eskom project. The intermediary “never performed any services,” the SEC said.

According to the SEC, SAP Indonesia paid bribes to obtain a March 2018 contract valued at about \$268,000. WhatsApp chat transcripts show one of the SAP Indonesia account executives messaging an employee at an Indonesian intermediary, saying, “Hehehe... This is government bro, to catch a big fish we need to use a large bait (sic).”

In Azerbaijan, an SAP employee provided improper gifts to government officials in connection with a May 2022 deal with the State Oil Company of the Republic of Azerbaijan (SOCAR) valued at around \$1.6 million. Text messages indicate that the employee was rewarding senior officials who supported, and were directly responsible for, approving the pending sale. The employee also prepared a fake Act of Acceptance between SOCAR and an SAP Azerbaijan partner, which she submitted to the SAP contract booking team in February 2022, the SEC said.

“SAP has accepted responsibility for corrupt practices that hurt honest businesses engaging in global commerce,” a DOJ spokesperson said Wednesday.

SAP received credit for its cooperation with the DOJ’s investigation, which included immediately beginning to cooperate after South African press reports made public allegations of the South Africa-related misconduct in 2017 and providing regular, prompt, and detailed updates to the department regarding factual information obtained through its own internal investigation.

The company also expeditiously produced relevant documents and other information from multiple foreign countries, voluntarily made company officers and employees available for interviews at the DOJ’s request, took significant affirmative steps to facilitate interviews while

addressing witness security concerns, raising and resolving potential deconfliction issues between SAP's internal investigation and the DOJ's investigation, and other factors.

The DOJ said Wednesday the settlement reflected a 40 percent reduction of the U.S. Sentencing Guidelines fine range.

In a company statement Wednesday, SAP said the company “has zero tolerance for those who do not adhere to the company’s compliance policies and procedures.”

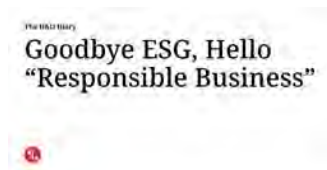
In February 2016, SAP SE agreed to pay the SEC nearly \$3.9 million to settle charges that it violated the Foreign Corrupt Practices Act by paying bribes to win business in Panama.

According to FCPA Tracker, SAP first disclosed the investigation about the matters resolved today in a company statement in July 2017.

Goodbye ESG, Hello “Responsible Business”

K [dandodiary.com/2024/01/articles/esg/goodbye-esg-hello-responsible-business](https://www.dandodiary.com/2024/01/articles/esg/goodbye-esg-hello-responsible-business)

January 10, 2024



By Kevin LaCroix on January 10, 2024

Posted in ESG



As I have noted in prior posts, due to a political “backlash” against ESG, many companies have found it expedient to avoid talking about ESG altogether – a developing that has been referred to as “greenhushing.” Indeed, some academics have even suggested that it may be time to say “RIP” to ESG. But if the expression

“ESG” is now verboten, how are we going to talk collectively about the various topics encompassed by the term “ESG”?

According to a January 10, 2024, front-page *Wall Street Journal* article entitled “The Latest Dirty Word in Corporate America: ESG” (here), as “ESG” has become the three letters that corporate officials dare not utter, they have found other ways to talk about “responsible business.” Meanwhile, corporate environmental and social responsibility efforts continue despite the apparent banishment of “ESG” as an expression. Moreover, as also discussed below, due to regulatory changes, the likelihood is that discussion of the concepts underlying what was referred to in past as “ESG” are only going to increase, regardless whether or not the term “ESG” is used.

As the *Journal* article notes, due to “investor backlash, political pressure, and legal threats,” business leaders are now “making a conscious effort to avoid the once widely used acronym for such initiatives.” ESG has become that which must not be named, sort of like Voldemort. Companies are “stripping ESG” from program titles, initiatives, and presentation headings. The key here seems to be that companies are not dropping what they had previously called their ESG initiatives; rather, companies are using different terms to describe them, focusing on “alternative ways to describe their efforts,” using such terms as “responsible business.”

The fact is, as a commentator quoted in the *Journal* article notes, “ESG is complicated.” The use of the term has become “divisive,” particularly given the campaigns of certain state officials to decry what they call “woke capitalism.” To be sure, the *Journal* reports, many companies “continue to follow sustainability commitments,” but they “are no longer talking about them as often publicly.”

The problem for the companies is that, if they have to avoid particular phraseology, how are they to refer to their ongoing efforts?

The *Journal* quotes various commentators as suggesting that companies should discuss their initiatives in “clear language,” using terms such as “our people” and “our natural resources.” One commentator suggest that businesses should adopt the phrase “responsible business,” on the theory that you can be anti-ESG but “it’s hard to be anti-responsibility.”

At one level, this is all very unfortunate, and yet another reflection of the way that in our polarized political environment, certain voices manage to scramble the dialog through massive efforts to suppress ideas and actions with which they disagree.

On the other hand, I have long said that the expression “ESG” itself is unfortunate, as it encompasses a host of disparate topics in a way that leaves many speakers using the expression talking about different things. It may not be altogether a bad thing if we retire the expression “ESG” – I have long thought that the overall dialog would be improved if instead of lumping a bunch of topics together into “ESG,” that we instead separated out the three pillars of Environmental, Social and Governance into separate topics for separate discussion.

In any event, it should be emphasized that what is happening is a change in terminology, not a wholesale abandonment of the principles and concerns formerly housed within the term “ESG.” As the *Journal* article makes clear, many companies remain committed to environmental and sustainability goals. And in that regard, it is probably worth noting that at a time when the climate data is becoming increasingly worrisome, nothing would be more unfortunate than if a small number of tinpot politicians managed to so impoverish the public dialog — simply to advance their own short term political interests — that we could not even talk about matters of potentially grave concern.

A January 10, 2024, survey report by the Littler Mendelson law firm underscores the point that even given the ESG backlash, many firms are continuing social responsibility efforts. The law firm surveyed over 300 corporate executives about their firms’ diversity, equity and inclusion efforts. The survey reports notes that “despite legal challenges and backlash toward corporate diversity programs, the survey finds most employers staying committed to, or even expanding, their efforts.”

In other words, corporate executives may find it expedient to avoid using the expression “ESG,” but the underlying environmental and social responsibility efforts are likely to continue, albeit perhaps under a different guise.

It is worth noting that regardless of the terminology, many companies, particularly publicly traded companies, increasingly are going to find, as a result of regulatory requirements, that they are required to discuss the constituent components of ESG, even if they no longer

otherwise use the expression "ESG." Recent disclosure requirements enacted by California and the EU (as discussed here and here, respectively) will require many companies (not just in California and not just in the EU) to discuss both the climate impacts of the companies' operations and the impact of changing climate conditions on their operations and financial performance, among other things. Moreover, the SEC is likely to issue its final climate change disclosure guidelines some time in 2024.

The bottom line is that using the term "ESG" may now be ill-advised, but talking about the concerns behind "ESG" may become more important than ever, even if couched in terms of "responsible business."

Workplace diversity & equality

Diversity backlash pits activists against corporate America

Critics of initiatives on US campuses are turning their fire to workplace policies



Members of the National Action Network protest outside Bill Ackman's hedge fund office on January 4 © Getty Images

Taylor Nicole Rogers in Chattanooga YESTERDAY



Conservative activists who have led a backlash to diversity, equity and inclusion initiatives on US campuses are turning their focus to corporate America, putting pressure on business leaders at a moment when some were already backing away from such programmes.

Attacks from critics such as hedge fund manager Bill Ackman, who called DEI the “root cause” of a jump in antisemitism at universities since the Israel-Hamas war began, have sparked a public debate among executives about policies that have proliferated in businesses in recent years.

Opponents argue that measures companies have taken to support employees from various minority groups effectively discriminate against white people and men.

“DEI is just another word for racism,” X owner Elon Musk wrote on the social media site last week. “Shame on anyone who uses it.”

Conservatives have disparaged [corporate diversity initiatives](#) since their inception in the 1960s, noted Joelle Emerson, chief executive of DEI consulting firm Paradigm, but companies largely tuned out opponents as fringe voices before Hamas's deadly attack on Israel on October 7.

Many DEI executives were more afraid of litigation from civil rights groups accusing them of doing too little to end discrimination and create diverse workforces than from campaigners such as Edward Blum, whose Supreme Court victory over Harvard and the University of North Carolina last year effectively ended race-based affirmative action in college admissions.

Yet the anti-DEI movement's successes in higher education have energised conservative activists to target corporations, shifting the conversation around diversity programmes from whether they are sincere enough to whether they should exist at all.

"I think what is more concerning [to me] is that moderate and progressive groups are starting to get caught up in the backlash and to question if this work actually isn't good," Emerson said. "And that's what I'm seeing happen more right now."

The backlash is part of a larger debate on cultural issues, spearheaded by Republican lawmakers, that has drawn companies such as Disney, Target and Anheuser-Busch into the headlines.

Corporate DEI initiatives such as anti-bias training and recruiting outreach strategies multiplied after the murder of George Floyd in 2020, but have come under pressure as companies cut costs amid economic uncertainty.

Several large corporations cut diversity funding, and a handful, including Twitter, Meta and online property broker Redfin, laid off members of their inclusion teams last spring.



Corporate diversity initiatives multiplied after the murder of George Floyd in 2020 © Getty Images

Then, in June, the Supreme Court ruled against race-conscious university admissions, prompting many companies to [rethink their hiring practices](#) amid a wave of litigation and political pressure. Republican attorneys-general from 13 states warned Fortune 100 chief executives of “serious legal consequences” for companies “treating people differently because of the colour of their skin, even for benign purposes”.

Pharmaceutical group Pfizer and law firms Morrison Foerster and Perkins Coie opened up applications to their diversity fellowships to students of all races last autumn after lawsuits accused them of racial discrimination.

Legal analysts warn that factoring a job applicant’s ethnicity into hiring decisions could be considered unconstitutional under the logic used in the university affirmative action case.

The growing pressure has left executives confused over how to respond. Paradigm’s surveys have found that many DEI initiatives remain popular among workers. None of the 194 chief resource officers The Conference Board surveyed last month said they planned to scale back their diversity efforts.

But The Conference Board [also found](#) that just 12 per cent of US chief executives saw the creation of a more inclusive culture as a priority, down from 15 per cent two years ago.

Calls from conservative groups such as Blum's American Alliance for Equal Rights to overturn corporate DEI plans have continued. Conservative legal groups including former Donald Trump adviser Stephen Miller's America First Legal and the American Civil Rights Project sent shareholder letters to at least 25 companies last year, including Starbucks and McDonald's, arguing that their racial diversity initiatives breached their duties to investors.

Some businesses have renamed their race-oriented recruitment programmes to avoid legal scrutiny since the Supreme Court ruling while leaving the initiatives largely unchanged, said Porter Braswell, founder of 2045, a membership network for professionals of colour.

At other companies, programmes that were once advertised to black employees now appeal to "diverse individuals", Braswell said, and policies that once aimed for "inclusion" now target "employee wellness".

American Airlines, BlackRock and JPMorgan Chase are among the companies to have revised race-related language in their DEI policies, Reuters reported last month.

Black professionals, who have been the focus of many corporate DEI efforts since Floyd's murder, are responding "with an eye roll", Braswell said.

Trier Bryant, an inclusion consultant who previously worked on diversity efforts at Twitter and Goldman Sachs, painted the developments as part of a pattern where progress on diversity has been followed by backsliding or backlash. "We know there's a pendulum that swings where there's scrutiny [of DEI programmes], and then effort and actual prioritisation of DEI and then there's none of that," she said.

Proponents of corporate DEI programmes argue that businesses have commercial as well as moral reasons to help under-represented groups. Mark Cuban, the billionaire entrepreneur, wrote on X last week that people trusted businesses whose workforces look like them, and ensuring that minority employees were comfortable at work made them more productive.

"When companies do DEI well, you see a well run, successful company," Cuban wrote.

For now, few businesses are thinking of ending their DEI programmes, said Emerson: "It's more, 'wow, this external conversation is making it a lot harder for us to do the work that we're trying to do'."

In some cases, though, companies are dealing with DEI critiques from closer to home. After Lululemon co-founder Chip Wilson criticised the athletic wear brand's "whole diversity and inclusion thing" in a Forbes interview, the company quickly distanced itself from him.

"Chip has not been involved with the company since his resignation from the board in 2015," its statement read. "We are a very different company today."

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Jan. 10, 2024, 4:30 AM PST

Even BlackRock Funds Buying Oil Stocks Banned by Texas ESG Fight

By Amanda Albright, Mathieu Benhamou and Saijel Kishan

- Funds prohibited in Texas invested \$5 billion in fossil fuels
- Texas's list of funds that boycott has gotten little scrutiny

Bloomberg Law News 2024-01-11T10:12:01581165357-05:00

Even BlackRock Funds Buying Oil Stocks Banned by Texas ESG Fight

By Amanda Albright, Mathieu Benhamou and Saijel Kishan2024-01-10T07:30:00000-05:00

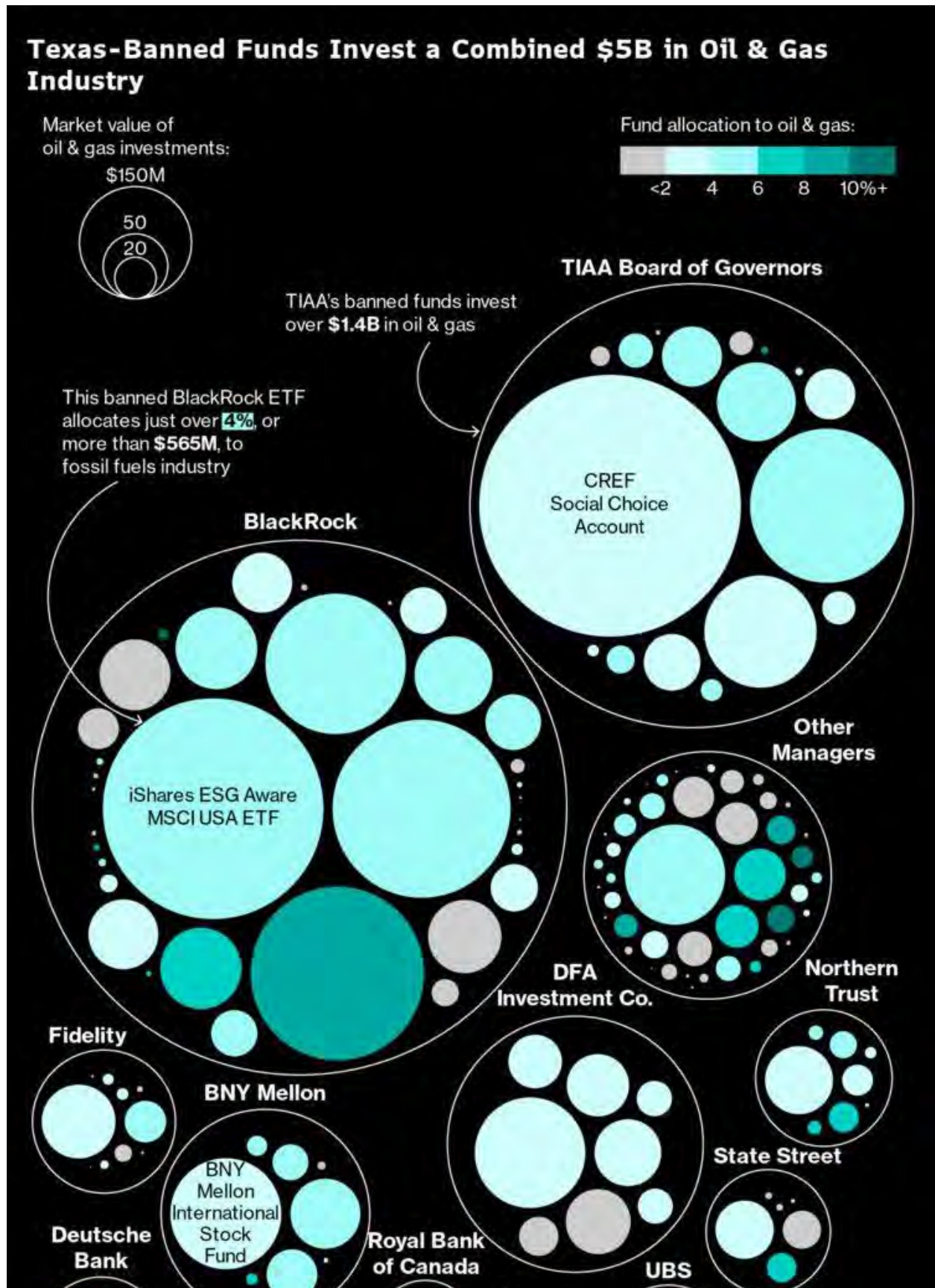
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- Texas's list of funds that boycott has gotten little scrutiny

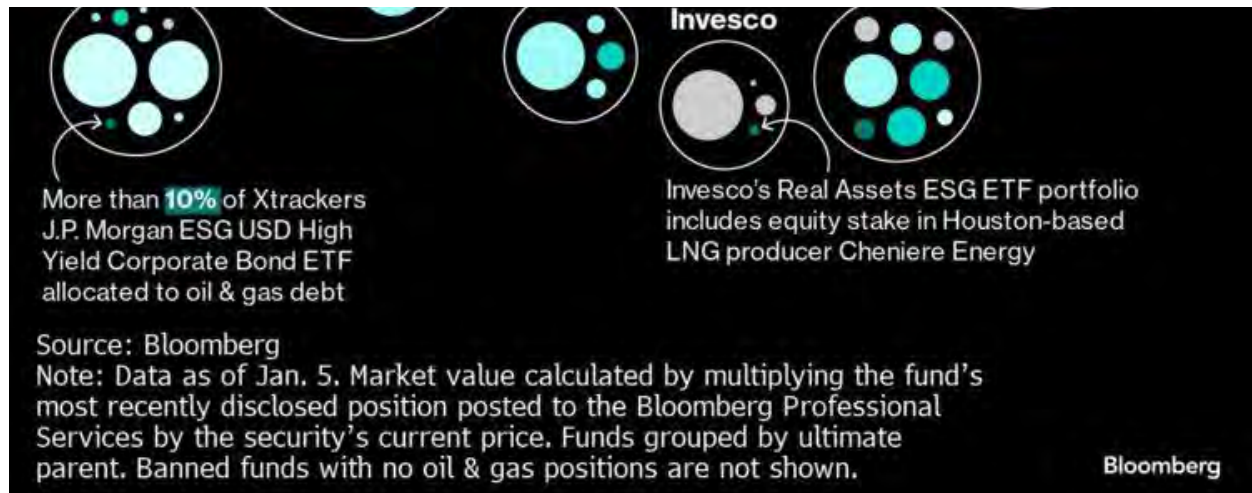
Texas bars its public pensions from investing in 350 funds run by asset-management giants such as BlackRock Inc. and Invesco Ltd. because a key Republican state official says they "boycott" the oil and gas industries.

But a Bloomberg News analysis found that the 72 BlackRock funds on the prohibited list have invested more than \$2 billion in the oil industry, while an Invesco fund allocates about 20% to oil and natural gas companies, some of which are also Texas-based. The TIAA-CREF Social Choice International Equity Fund has a nearly 5% allocation to fossil fuels.

Altogether, almost half the funds on the boycotters list have invested a combined \$5 billion directly in the oil and gas industry. And two thirds of the now banned funds have more than \$13 billion invested in Texas-based companies, including Tesla Inc. and Waste Management Inc.

The findings demonstrate how vague rhetoric used by Republicans attacking what they call "woke" capitalism has found its way into statutes that have proven difficult to interpret and seemingly contradictory to the state's self-proclaimed reputation as business friendly.





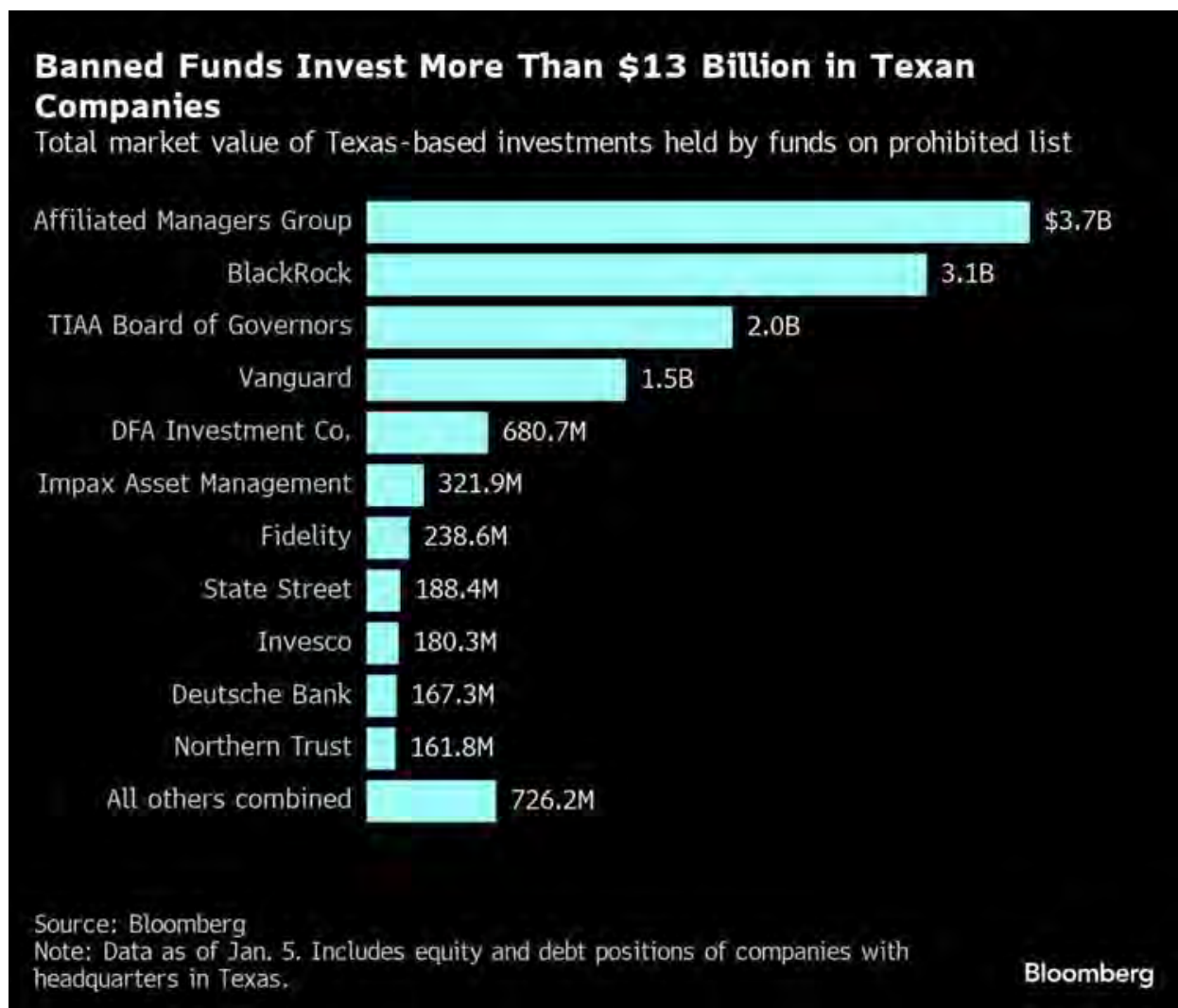
"Texan politicians are responding more to the hype about these asset managers rather than to the way they actually invest," said Jill Fisch, a professor of business law at the University of Pennsylvania. "The big asset managers have been described as 'woke' or spurning certain industries. In reality, it's not really true."

In November, Comptroller Glenn Hegar, the state's chief financial officer, published a list of entities that he determined engage in a "boycott" of fossil fuels under Republican legislation passed in 2021. The legislation prohibits investments in companies considered to be unfriendly to the oil and gas industry, which accounted for 8% of the state's GDP in 2021.

The law is part of a salvo of legislation launched across the country by Republicans against environmental, social and governance investing, which they've made into a culture war target. Texas has a similar law aimed at punishing Wall Street firms for restricting their work with the firearms industry.

The Bloomberg analysis of the list of prohibited investments highlights the confusion that continues to exist around the law two years after it was passed and the phrase "boycott" of the energy industry — language that's been criticized as vague. Firms like BlackRock have emphasized that they do invest heavily in fossil fuels on behalf of clients.

The law says a boycott could include a company refusing to deal with, terminating business activities with, or taking any action intended to "penalize, inflict economic harm on, or limit commercial relations" with a company because it engages in the exploration, production, utilization, transportation, sale or manufacturing of fossil fuel-based energy.



Chris Bryan, a spokesperson for the Texas comptroller's office, said in an email that a fund "simply investing in oil and gas does not exempt an entity from this law."

"A fund or financial firm may invest in fossil fuels but still boycott the industry under the statutory definition of 'boycott,' which we follow in administering this law," Bryan said. "Furthermore, our listing decisions are based in large part on the responses given to us by the firms themselves."

Brent Bennett, policy director at the Texas Public Policy Foundation, a conservative think tank which advocated for the legislation, said that funds could still invest in the oil industry and still be considered boycotters because they may be putting conditions on those investments. "Setting conditions on investment, we consider that sanctioning," he said.

Spokespeople for Invesco and Nuveen, the investment manager of TIAA, declined to comment.

“Texas is an incredibly important market for BlackRock and our clients,” said **Mark McCombe**, vice chairman at BlackRock. “We are helping millions of Texans invest and save for retirement. On behalf of our clients, we’ve invested more than \$300 billion in Texas-based companies, infrastructure and municipalities, including \$125 billion invested in the energy sector.”

While state pension funds like the Employees Retirement System of Texas, Teacher Retirement System of Texas and the Texas Municipal Retirement System must divest from funds or companies on the comptroller’s list, the law provides for exceptions if a state pension, for example, found that divestment would be inconsistent with their fiduciary duties.

And the pension funds don’t appear to have directly invested heavily in the barred entities to begin with.

The Teacher Retirement System of Texas does own some of the funds but indirectly — meaning through an external investment manager — so it’s not required to divest, according to a letter sent to Hegar. Still, the pension said in late November that it would divest its direct holdings of Credit Agricole SA, Societe Generale SA and AMP Ltd. after they were labeled as boycotters. The Texas Municipal Retirement System wrote in a letter to Hegar in November that it didn’t directly own any of the companies or investment funds on the banned list.

“Policies that block responsible investing hurt the economy, and now we see they can’t be executed,” said Kyle Herrig, spokesperson for Unlocking America’s Future, a left-leaning political group that’s critical of anti-ESG legislation. “Texas wanted to pave the way for other states to attack ESG, but they’ve just shown the nation their plan is a failure and, in the process, damaged their reputation as a state that’s good for business.”

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Jan. 10, 2024, 11:10AM PST

The SEC Got Trolled on Bitcoin ETFs

By Matt Levine

(Bloomberg Opinion) --

SEC Bitcoin ETF hack

I kind of don't understand the trade here?

A highly anticipated decision by the US Securities and Exchange Commission on whether to approve a spot-Bitcoin exchange-traded fund quickly morphed into a major cybersecurity incident on Tuesday.

The SEC's X account was compromised and a fake post claiming that the agency had green lit plans for the products fueled a brief surge in the price of the world's biggest cryptocurrency. It also has sparked an investigation by US authorities into how a social media account at Wall Street's main regulator was compromised. ...

The breach gave fodder to crypto faithful who have long viewed the commission's chair, Gary Gensler, as an enemy due to his zeal to rein in the industry. The irony of a cybersecurity incident befalling a regulator that's repeatedly warned of crypto's online vulnerabilities was not lost on critics who have spent years waiting for the SEC to approve a Bitcoin ETF. Traders have been speculating for weeks that the agency could approve several of the products as soon as Wednesday.

In statements late Tuesday, the regulator said that it would work with law enforcement to investigate the incident, the unauthorized access had been terminated, and that the post wasn't made by the SEC or its staff. In a separate statement, Gensler clarified that no decision on ETFs had been made.

Look, I have no inside information, but most of the reporting I have read about spot Bitcoin ETFs has said that

1. the SEC is going to approve them,
2. by the end of today, and
3. this is public knowledge that everyone believes.

So you would think it would be pretty priced in? It just does not seem to me like there would be a ton of alpha in (1) constantly refreshing the SEC's Twitter account, (2) looking for a tweet saying "okay spot Bitcoin ETFs are cool now," and (3) buying Bitcoin on the news. Which implies there would not be a ton of alpha in (1) buying a bunch of Bitcoin, (2) *hacking* the SEC's Twitter account, (3) *tweeting* "okay spot Bitcoin ETFs are cool now" and (4) selling your Bitcoin into the resulting enthusiasm.

There was a little though:

The false post on the SEC's X account was up for a number of minutes before the agency clarified that it was inaccurate. In that period, Bitcoin posted a relatively modest jump to almost \$48,000 from about \$46,700 before falling back toward \$45,000.

Eh? If you bought Bitcoin at \$48,000 upon seeing that tweet, and then sold it at \$45,000 after realizing that the tweet was fake, I would love to hear from you. Why? Why not just wait? If you think Bitcoin is worth \$48,000 when the SEC approves spot Bitcoin ETFs, then ... I mean ... the tweet was fake, but if the contents of the tweet turn out to be true *today*, won't you regret selling yesterday? 1

Fine, yes, probably someone hacked the SEC's Twitter to do some market manipulation here: They wanted to bet on, what, a 2.5% short-term move in Bitcoin prices, and they made that bet pay off with a fake SEC tweet. But I have suggested before that there are two possible reasons to issue fake announcements that move asset prices:

1. Market manipulation: You buy the asset, you issue the fake announcement, the price moves, you sell it at a profit; or
2. General trolling and hijinks: You don't buy the asset, you issue the fake announcement, the price moves, you have a laugh and high-five your online friends.

Doesn't it seem at least *possible* that this hack was just trolling? It didn't move Bitcoin prices that much, and it *shouldn't have*: The fake announcement was something that everyone expects to actually be true today. But it is very funny? The key element of online trolling is irony, and there is plenty of irony here. Like:

1. The crypto community and the SEC do not particularly like each other: Gensler's SEC has launched a broad and aggressive crackdown on crypto, and it is only going to (probably!) approve spot Bitcoin ETFs today because a court forced it to. If you're a Bitcoin enthusiast with the skills to hack the SEC's Twitter, you might want to manipulate the price of Bitcoin, but you might also just want to make the SEC look bad.
2. Having the SEC (1) announce that Bitcoin ETFs are approved, (2) walk back that announcement, and then (3) announce it again, for real this time, *the next day*, really is quite embarrassing. Like if the hacker made the SEC say something outlandish and false, that would be a little funny. But making the SEC *say something true a day early* is extremely funny.
3. In addition to cracking down on crypto, one of the SEC's big regulatory priorities under Gensler has been punishing companies for cybersecurity incidents. 2 The SEC once sued a company for using weak passwords, and its enforcement director said that the case "underscores our message to issuers: implement strong controls calibrated to your risk environments." But apparently the SEC's Twitter was compromised because it didn't turn on two-factor authentication. Nyah nyah nyah nyah nyah!

I don't know, the whole thing works better as trolling than as market manipulation.

A few further ironies. First, it does bear mentioning that X, formerly Twitter, is owned by Elon Musk, who (1) loves trolling and (2) hates the SEC. "I want to be clear. I do not respect the SEC. I do not respect them," is one of the nicer things Musk has said in public about the SEC. It is ... convenient and funny ... that Musk's Twitter was used yesterday to make the SEC look stupid. I mean, it's not necessarily great for Twitter/X/Musk as a business matter:

The high-profile breach comes at a time when X and billionaire owner Elon Musk are seeking to win back trust from both users and advertisers, many of which have been dismayed by Musk's free-for-all style of leadership since his 2022 takeover. Musk has pivoted away from some of the prior regime's efforts to rein in offensive or harmful content, and has severely scaled back staff to save on costs. Those cuts have led to regular bugs and outages.

"This has to be the most sophisticated use of a stolen Twitter account ever," said Alex Stamos, chief trust officer at SentinelOne and former security chief at Meta Platforms Inc. "At a minimum, this indicates that the hollowed-out X team can't keep up with advances in account takeover techniques."

But it's definitely a point for Musk in his long dumb game of trolling the SEC.

To be clear, I am not saying it is *likely* that Elon Musk, who controls Twitter, took over the SEC's account in order to tweet a fake announcement to troll the SEC. I think the likelihood of that is close to zero. I am just saying that it would be the absolute funniest Money Stuff story of all time. Just all of my interests, right there.

Another irony: I like to say around here that “everything is securities fraud,” and so of course when this story came out people emailed me to say “is this securities fraud yuk yuk yuk.” But: no? I mean, nothing here is legal advice, and everything is securities fraud, but let’s say that someone hacked the SEC to manipulate the price of Bitcoin. Bitcoin is not a security? The SEC thinks that almost every crypto asset is a security, but it really does make a single explicit exception for Bitcoin. 3 So if the SEC figures out who hacked its Twitter account, and if it figures out that that person did it to make a quick profit on Bitcoin by manipulating the market and deceiving investors, that’s still not securities fraud. It’s regular fraud, it’s wire fraud, maybe it’s commodities fraud, but whatever it is is not under the SEC’s jurisdiction. The SEC “said that it would work with law enforcement to investigate the incident,” but it has no power *itself* to bring charges against anyone for manipulating Bitcoin.

Still, there are securities that are tied to the price of Bitcoin, and whose prices would be influenced by news about Bitcoin ETFs, and which were arguably manipulated by this fake tweet. The most obvious examples would be ... spot Bitcoin ETFs? Those don’t trade yet. Because the SEC hasn’t approved them. So the fake tweet couldn’t have manipulated them. But Bitcoin *futures* ETFs *do* trade, as does the Grayscale Bitcoin Trust (GBTC), a pot of Bitcoins that hopes to convert into an ETF. I suppose you could have manipulated their prices with this tweet. The tweet went out after 4 p.m. so the stock market was closed, but the price of the ProShares Bitcoin Strategy ETF did in fact bounce around a bit in after-hours trading yesterday; it closed at \$22.72 and spiked as high as \$23.50 at 4:12 p.m., after the tweet. So, sure, securities fraud, fine.

Anyway, the great counter-troll here would be for the SEC to announce today “you know what, all the Bitcoin ETF applications are rejected, we’ll see you in court again. We were going to approve them, but it turns out that the Bitcoin market is still too vulnerable to manipulation, as you can tell by the fact that someone hacked our Twitter to manipulate Bitcoin.”

The Boeing thing

Obviously many, many readers sent me this Reddit Wallstreetbets post:

Is it insider trading if I bought Boeing puts while I am inside the wrecked airplane? ...

Imagine sitting in an airplane when suddenly the ... door blows out.

Now, while everyone is screaming and grasping for air, you instead turn on your noise-cancelling head-phones to ignore that crying baby next to you, calmly open your robin-hood app (or whatever broker you prefer, idc), and load up on Boeing puts.

There is no way the market couldve already priced that in, it is literally just happening.

Would that be considered insider trading? I mean you are literally inside that wreck of an airplane...

On the other hand, one could argue that you are also outside the airplane, given that the door just blew off...

Thanks everyone. Nothing here is ever legal advice but this seems fine? Insider trading, I like to say, is not about fairness, it’s about theft. It’s illegal to trade on information that isn’t public and that you have some duty to keep secret. If you work for Boeing Co. and you put the bolts in wrong and trade on that information, that’s bad: You learned the nonpublic information in your job, and you had a duty to Boeing to use it only for the good of Boeing rather than trading on it. If you’re the *pilot*, don’t buy puts when the door flies off. (Land the plane!) But if you are just a regular person and you go to McDonald’s and buy a burger and say “this burger tastes bad, I’m gonna short the stock,” that’s fine, that’s legitimate research. If you log into Instagram and say “hey this app is good” and buy Meta stock, that’s good. People are *supposed* to go around observing companies’ products and services, evaluating them, and incorporating those evaluations into their investment decisions. That’s how stock prices become efficient and how capital gets allocated to good uses rather than bad ones.

Similarly if you’re on a plane and the door blows off and you think “this plane is poorly constructed, I’m gonna short some stocks here,” seems fine. What duty do you have to keep it confidential? Maybe there’s some fine print in your ticket contract but I doubt it. There are probably edge cases. What if you are flying for a work trip: Do you owe some obligation to your employer not to use the information to trade for your own account? Still probably not a huge enforcement priority to come after you.

Elsewhere in Bitcoin ETFs

One rude but not entirely inaccurate way to describe the business model of Grayscale Investments LLC is:

1. Grayscale operates a pot, the Grayscale Bitcoin Trust (GBTC), into which people can put Bitcoins.
2. They cannot take them out.
3. Grayscale pays itself 2% of the value of the pot every year in fees.

This is not a good business model, when you describe it that way – who would put Bitcoins into the pot? – but it is an *extremely* good business model if you *don't* describe it that way. There's like \$29 billion in the pot. The fees are good. Meanwhile people whose Bitcoins are in the pot sometimes sue to get them out, or at least to cut the fees, but that doesn't work.

This description is very rude because Grayscale does *want* people to be able to get their Bitcoins out: It has filed to convert GBTC into an exchange-traded fund, which would allow for efficient creations (putting more Bitcoins in) and redemptions (taking Bitcoins out). And Grayscale sued SEC to force it to allow this conversion, and last year it won, and everyone expects the SEC to approve Grayscale's application to turn GBTC into an ETF by today. And a bunch of other issuers have filed to launch Bitcoin ETFs, and the SEC will probably approve them too, and GBTC will have competition.

We talked a bit on Monday about how this will affect Grayscale's business model. One problem is: The ETF structure will allow investors to take Bitcoins out of GBTC. Another problem is: All those *other* Bitcoin ETFs will charge *much lower fees* than Grayscale. Grayscale has already said that its fees will go down to 1.5% once it converts into an ETF, which is less than the current 2%, but still way more than the 0.3% that BlackRock plans to charge. I wrote:

If you are the first person to offer "Bitcoins in a pot" as a product, you can charge a huge premium.

But eventually, like, BlackRock will catch up, and then you probably can't.

A reader emailed to point out that this isn't necessarily the whole story. If you are the first person to offer "Bitcoins in a pot," people will put Bitcoins in your pot, and GBTC does have \$29 billion of Bitcoins. And those Bitcoins have appreciated in value: Most of them were put in the pot at considerably lower Bitcoin prices than today's \$46,000-ish, and Grayscale stopped putting new Bitcoins in the pot in 2021. If you bought GBTC shares in 2019, or most of 2022 or 2023 for that matter, your shares are worth much more than you paid for them.

This is good for you, generally, but it is a tax problem: If you *sell* your GBTC shares, you'll have a big gain and have to pay taxes on it. If you just keep those shares, you don't pay taxes (yet). That is a reason not to sell.

Soon, probably, you will have your choice of Bitcoin ETFs. They will all be about the same, and you might prefer to buy one with 0.2% fees rather than one with 1.5% fees. But if you *already own* shares in Grayscale's Bitcoin trust when it converts to an ETF, the math isn't so simple. If you *sell* the Grayscale ETF and *buy* a cheap one, you will save on annual fees – but you'll probably pay a lot of taxes on your gains. 4 Paying 15% or 20% capital gains taxes on 50% or 80% gains on your GBTC shares might look a lot more expensive than paying an extra 1.3% per year in fees.

ESG

We have talked a few times, including this week, about the very simplest method to take something – a mutual fund, a pipeline company, a coal lobbying group – and make it ESG, that is, make it appealing to investors who care about environmental, social and governance factors. The method is: You put "ESG" in the name. Or "Green," or "Clean," or "Renewable," or even, like, "Future." Some people will be misled by the new name. Other people *won't* be misled, but they will like it anyway, because they are in turn marketing to some other audience. An investment manager who runs an ESG fund might buy shares in an oil pipeline called GreenPipes. A retail investor with environmentally minded children might buy shares of a mostly-coal ESG fund so she can tell her kids "oh all of our money is in ESG funds." The point is that *the term ESG* has some independent value; some people are willing to pay a bit more *purely* to be able to say that they have "ESG" investments, without caring at all about the substance of those investments.

Also though in reverse. The Wall Street Journal reports:

Many companies no longer utter these three letters: E-S-G.

Following years of simmering investor backlash, political pressure and legal threats over environmental, social and governance efforts, a number of business leaders are now making a conscious effort to avoid the once widely used acronym for such initiatives.

Avoid the *acronym*. You don't, like, start dumping pollutants or doing racism; you just do what you were doing before, but stop calling it "ESG." You call it something else, or you don't call it anything:

"We've seen a great deal of reframing and adjusting by CEOs in the ESG arena. Not only of what they say, but also where they say it and how they characterize it," said Brad Karp, chair of law firm Paul Weiss who advises a number of CEOs. "Most companies are moving forward operationally with their ESG programs, but not publicly touting them, or describing them in different ways."

When Thomas Buberl, CEO of Paris-based insurer AXA, met in the U.S. last year with the leaders of an asset manager, a fertilizer maker and a tech company, executives suggested that he reflect the newfound caution. "I used the abbreviation ESG, and people taught me not to use that word," Buberl said. "I said, 'What do you want me to call it?'"

Again your investors are not deceived: They want to buy shares in companies that are working to reduce carbon emissions, but they don't want the headache of the ESG political backlash. *The term ESG* has some independent value, but that value is currently negative, so you can create value by just *not using the term*.

Meanwhile in asset management:

Just six funds citing environmental, social and governance factors launched in the second half of 2023, compared with 55 in the first half, and an annual average of almost 100 between 2020 and 2022, according to data from Morningstar Direct.

ESG labels have also been removed from some fund names. The asset manager Abrdn plans to drop the phrase "sustainable leaders" from two funds in February, according to a filing with the US Securities and Exchange Commission. Morgan Stanley and UBS also dropped ESG-oriented labels from some funds last year.

The trick is to have a fund that is kind of ESG and kind of not, and add or subtract "ESG" in the name depending on the marketing environment.

Alternative data

I don't know, here's a paper finding that when bankers in New York are visiting the Federal Reserve Bank of New York a lot, that is bad for the stock market:

We introduce taxi ridership between the Federal Reserve (Fed) Bank of New York and large financial institutions headquartered in New York City as a novel proxy for Fed-bank face-to-face interactions. We document a negative relation between past Fed-bank interactions and future stock market returns, particularly on days around the Fed's public announcements. We also find significantly elevated Fed-bank interactions immediately following the lifting of the Federal Open Market Committee blackout. Our findings suggest that the Fed increases its information gathering via face-to-face interactions when it possesses negative private information about the condition of the economy.

The paper is "When Bankers Go to Hail: Insights into Fed-Bank Interactions from Taxi Data," by Daniel Bradley, David Andrew Finer, Matthew Gustafson and Jared Williams, and I guess that makes sense: When the Fed is more worried about the economy, it meets with bankers more often, and measuring those meetings gives you some signal about the economy.

The problem is that *taxi rides* are a weaker measure of those meetings than they used to be. From the paper:

We generally employ a daily sample that runs from January, 2009, through December, 2014, where each day is defined as 5:00am through 4:59am the following day. The year 2014 saw a large increase in the use of rideshare apps by businesses and the first public release of the taxi data under New York State's Freedom of Information Law (Rao 2015, Saitto 2014, White 2015, Whong 2014). Significant patterns in rides may reflect the movements of small sets of individuals, and substitution by any of them away from taxis due to changes in business practice or due to concerns about privacy could result in a significant loss of signal.

If you wanted to measure bank/Fed meetings in 2024, you'd use ... Uber data? (Or has everyone permanently gone virtual, and you'd use Zoom data?) I hope Uber Technologies Inc. is selling that data to some hedge funds.

Things happen

Dish Bonds Plummet on EchoStar Spectrum Transfer Maneuver. Jane Street Scores \$7 Billion Trading Haul During Market Swings. BlackRock Cuts 3% of Global Workforce, Citing Dramatic Industry Shifts. The Bond Market Rally Is Overlooking a Soaring \$2 Trillion Debt Problem. Strong gains by newly listed stocks raise hopes of IPO market revival. Crypto Startup Funding Down Two-Thirds, But Founders See Bright Side. BuzzFeed's 'Dire' Debt Problem. Logan Paul's NFT zoo catastrophe takes an unexpected turn: He's buying back the eggs and suing his co-founders.

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1. Or not, I don't know, it's entirely possible that the hype around Bitcoin ETFs has gone too far and people will end up selling more Bitcoin once they are actually approved. But then why were you buying at \$48,000 on the fake tweet? I just don't understand why there was any information content in *either* the fake tweet *or* the retraction.
2. Also punishing financial firms for using informal communications channels. "It's even more important that registrants appropriately conduct their communications about business matters within only official channels," Gensler once said. Is Twitter/X an official communications channel? Should the SEC not be making real announcements on it, in order to avoid also making fake ones that look real?
3. Also probably a grudging exception for Ether.
4. I gather that there's no taxable event on ETF conversion; here's the prospectus section on tax consequences.

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SEC account hack renews spotlight on X's security concerns

 [reuters.com/technology/sec-account-hack-renews-spotlight-xs-security-concerns-2024-01-10](https://www.reuters.com/technology/sec-account-hack-renews-spotlight-xs-security-concerns-2024-01-10)

Zeba Siddiqui, Raphael Satter

'X' logo is seen on the top of the headquarters of the messaging platform X, formerly known as Twitter, in downtown San Francisco, California, U.S., July 30, 2023. REUTERS/Carlos Barria/File Photo Acquire Licensing Rights 

SAN FRANCISCO/WASHINGTON, Jan 9 (Reuters) - The hack of the U.S. Securities and Exchange Commission's official account on X on Tuesday renewed concerns about the social media platform's security since its takeover by billionaire Elon Musk in 2022.

The hackers posted false news about a widely anticipated announcement the SEC was expected to make about bitcoin, leading the cryptocurrency's price to spike and alarming observers. The false post on @SECGov said the securities regulator had approved exchange-traded funds to hold bitcoin. The SEC deleted the post about 30 minutes after it appeared.

X confirmed later on Tuesday, following a preliminary investigation, that the SEC's account was compromised because an unidentified individual gained control over a phone number associated with the account through a third party.

The social media platform also said in a post that the SEC did not have two-factor authentication enabled at the time the account was compromised.

While X said the compromise was not because of a breach of the platform's systems, security analysts called the incident disquieting.

"Something like that, where you can take over the SEC account and potentially affect the value of bitcoin in the market - there's massive opportunity for disinformation," said Austin Berglas, a former cybersecurity official at the FBI's New York office and a senior executive at the security firm BlueVoyant.

Accounts on X, formerly known as Twitter, can be hijacked by stealing passwords or tricking targets into giving up their login credentials, just like on any other social media platform. Accounts can also be taken over by breaching X's security, as happened in 2020, when a teenager masterminded a break-in of Twitter's internal computer network and seized control of dozens of high-profile accounts, including those of former President Barack Obama and Musk, well before he bought Twitter.

An SEC spokesperson on Tuesday said the "unauthorized access" of its account by an "unknown party" had been revoked and the agency was working with law enforcement and others in the government to investigate the matter.

SECURITY PROBLEMS

Even before it was acquired by Musk and changed its name to X, however, Twitter was the subject of persistent security problems.

The 2019 arrest of a Saudi agent who had secretly combed the site's backend for personal information about the kingdom's dissidents raised concerns about Twitter's internal safeguards.

The mass hijacking of top accounts the following year by the Florida teen heightened the concerns, with New York state's Department of Financial Services scolding the firm for falling prey to a "simple" hack. In 2022 Twitter's former security chief Peiter Zatko publicly turned on the company, before it was acquired by Musk, accusing it of a litany of security failings that he said jeopardized national security.

Musk has touted the company's security since buying Twitter in October 2022, but former staff say it has worsened since then. Musk ordered a 50% cut in X's physical security budget after buying the social media platform, and wanted to scrap programs aimed at helping it find and fix digital vulnerabilities, according to a lawsuit filed last month by Alan Rosa, former IT security chief at X. Rosa alleges he was fired when he objected to the measures.

A former Twitter executive, who declined to be named, said the protection of prominent accounts such as those of government officials was a major focus there prior to Musk's acquisition, and included alerts for suspected hacks with rapid response measures, but staffers who worked on that effort were part of an "election integrity" team that suffered layoffs last year.

Early last year, X limited the ability of non-paying users to implement two-factor authentication, a key security measure. X's website says the firm "proactively" protects and secures the accounts of government officials and political candidates that "may be particularly vulnerable during certain civic processes."

Without such security in place, hackers could have taken over the account through various methods including using an old leaked password or gaining access to a phone number linked to the account through a technique known as SIM swapping, said Berglas.

"Anytime you're reducing a security function in a platform that does what X does, it is incredibly concerning," he added.

X Corp. suit against Israeli scraping service moves forward

DJ [dailyjournal.com/articles/376522-x-corp-suit-against-israeli-scraping-service-moves-forward](https://www.dailyjournal.com/articles/376522-x-corp-suit-against-israeli-scraping-service-moves-forward)

Technology,

Data Privacy

Jan. 11, 2024

The social media platform claims that Bright Data illegally collected information from X users and sold it to third parties, which is prohibited under the plaintiff's terms of service.

Elon Musk, owner of X Corp. (New York Times News Service)

Elon Musk's X Corp. can move forward with discovery in a breach of contract lawsuit filed against an Israeli internet scraping service as a federal judge denied on Wednesday the defendant's motion for a stay.

"It's unreasonable for you not to turn over discovery so they can understand who you're selling these tools to," U.S. District Judge William H. Alsup in San Francisco told an attorney for Bright Data Ltd. "That is ridiculous."

Bright Data, which has its U.S. headquarters in New York, describes itself as a data collection platform that helps businesses understand how their customers are interacting with the brand. The company was sued by X last year for allegedly violating the social media website's terms of service. Attorneys at Haynes & Boone LLP claimed that Bright Data illegally collected information from X users and sold it to third parties, which is prohibited under the plaintiff's terms of service.

Proskauer Rose LLP partners Colin Kass and David A. Munkittrick defended Bright Data at Wednesday's hearing. "We don't want them to shut down our business, to send cease and desist letters to our customers, even to send subpoenas. That could shut down our entire business," Munkittrick said in response to Alsup's concern that Bright Data was not allowing discovery to proceed.

"Too bad. That's your line of business that you chose to get into," said Alsup. The judge also heard Bright Data's bid to dismiss X's claims and took the motion under submission. X Corp. v. Bright Data Ltd., 3:23-cv-03698-WHA (N.D. Cal., filed Jul. 26, 2023).

Kass argued that since people do not need an account to browse X, there is no valid third-party “browsewrap” contract that the social media website can point to. A “browsewrap” agreement limits how online users can access content found on websites. If the plaintiff gets over that hurdle, it has to show that Bright Data has induced users to breach their contract with X, which it cannot do, the attorney continued.

To support his position, Kass cited last year’s decision by the U.S. Supreme Court that Twitter, as X was formerly known, was not liable for terrorist organizations like ISIS using the platform for recruiting and messaging. Similarly, Bright Data should not be at fault for providing a service that users can apply in lawful or unlawful ways, he said. *Twitter Inc. v. Taamneh*, 21-1496 (Supr. Ct., filed May 18, 2023).

Bright Data has created a system that has no lawful purpose, replied Haynes & Boone partner Jason P. Bloom. “It’s only designed to violate X’s terms of service of which Bright Data was aware when it designed the system and sold the system to others,” said Bloom, adding that Bright Data works with other companies but advertises itself as a Twitter scraper.

His client has a product with Twitter in the name, Kass acknowledged, but not all data collection on X’s website is illegal. “You first have to find that the entire world, everybody that visits Twitter, is bound by contract to conclude that our service has no lawful purpose,” he said.

The lawsuit also brings up the question of whether courts exercising California law have personal jurisdiction can tell a globally available platform how to operate, Kass continued. “What if California passes a statute that says the internet shall not be available in California? Can people then sue platforms all over the world under California law and do California courts have the authority to entertain that claim?”

According to a decision by the 9th U.S. Circuit Court of Appeals two months ago, said Kass, the answer is no. In that ruling, an appellate panel held that a district court did not have personal jurisdiction in an unfair competition lawsuit against e-commerce company Shopify. The Canadian platform did not target its allegedly unlawful conduct toward the state, read the unanimous opinion by Judge Daniel A. Bress. *Briskin v. Shopify Inc.*, 22-15815 (9th Circ., filed Jun. 2, 2022).

“Where do you contend that X can sue Bright Data?” Alsup asked Kass.

“X can sue us in Israel, for sure,” said Kass. “I think for state law, that’s the only place they can sue us.”

“But here you are exploiting servers in California and certainly in the U.S.,” said the judge. “I don’t like that argument. That’s not the American way.”

X is also represented by Andrea Levenson and Jason T. Lao of Haynes & Boone. Rogers Joseph O'Donnell PC partners Lauren Kramer Sujeeth and Robert C. Goodman are on Bright Data's defense team.

#376522

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Artificial intelligence

US companies and Chinese experts engaged in secret diplomacy on AI safety

OpenAI, Anthropic and Cohere held back-channel talks with Chinese state-backed groups in Geneva



The previously unreported talks are a rare sign of Sino-US co-operation amid a race for supremacy in cutting-edge technologies
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Madhumita Murgia in London 2 HOURS AGO



Artificial intelligence companies OpenAI, Anthropic and Cohere have engaged in secret diplomacy with Chinese AI experts, amid shared concern about how the powerful technology may spread misinformation and threaten social cohesion.

According to multiple people with direct knowledge, two meetings took place in Geneva in July and October last year attended by scientists and policy experts from the North American AI groups, alongside representatives of Tsinghua University and other Chinese state-backed institutions.

Attendees said the talks allowed both sides to discuss the risks from the emerging technology and encourage investments in AI safety research. They added that the ultimate goal was to find a scientific path forward to safely develop more sophisticated AI technology.

“There is no way for us to set international standards around AI safety and alignment without agreement between this set of actors,” said one person present at the talks. “And if they agree, it makes it much easier to bring the others along.”

The previously unreported talks are a rare sign of Sino-US co-operation amid a race for supremacy between the two major powers in the area of cutting-edge technologies such as AI and quantum computing. Currently, Washington has blocked US exports of the [high-performance chips](#) made by the likes of Nvidia that are needed to develop sophisticated AI software.

But the topic of AI safety has become a point of common interest between developers of the technology across both countries, given the potential existential risks for humanity.

The Geneva meetings were arranged with the knowledge of the White House as well as that of UK and Chinese government officials, according to a negotiator present, who declined to be named. The White House declined to comment.

“China supports efforts to discuss AI governance and develop needful frameworks, norms and standards based on broad consensus,” said the Chinese embassy in the UK.

“China stands ready to carry out communication, exchange and practical co-operation with various parties on global AI governance, and ensure that AI develops in a way that advances human civilisation.”

The talks were convened by the Shaikh Group, a private mediation organisation that facilitates dialogue between key actors in regions of conflict, particularly in the Middle East.

“We saw an opportunity to bring together key US and Chinese actors working on AI. Our principal aim was to underscore the vulnerabilities, risks and opportunities attendant with the wide deployment of AI models that are shared across the globe,” said Salman Shaikh, the group’s chief executive.

“Recognising this fact can, in our view, become the bedrock for collaborative scientific work, ultimately leading to global standards around the safety of AI models.”

Those involved in the talks said Chinese AI companies such as ByteDance, Tencent and Baidu did not participate; while Google DeepMind was briefed of the details of the discussions, it did not attend.

During the talks, AI experts from both sides debated areas for engagement in technical co-operation, as well as more concrete policy proposals that [fed into discussions](#) around the UN Security Council meeting on AI in July 2023, and the UK's AI summit in November last year.

The success of the meetings has led to plans for future discussions that will focus on scientific and technical proposals for how to align AI systems with the legal codes and the norms and values of each society, according to the negotiator present.

There have been growing calls for co-operation between leading powers to tackle the rise of AI.

In November, Chinese scientists working on artificial intelligence joined western academics to [call for tighter controls on the technology](#), signing a statement that warned that advanced AI would pose an “existential risk to humanity” in the coming decades.

The group, which included Andrew Yao, one of China's most prominent computer scientists, called for the creation of an international regulatory body, the mandatory registration and auditing of advanced AI systems, the inclusion of instant “shutdown” procedures, and for developers to spend 30 per cent of their research budget on AI safety.

OpenAI confirmed a member of its global affairs team attended the Geneva talks. Anthropic and Cohere declined to comment about their participation. Tsinghua University did not respond to a request for comment.

This article has been amended to make clear in the subheading that Anthropic not Inflection were involved in the Geneva talks

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\$8M Atty Fee OK'd For \$27M Maxar Investor Settlement

By **Sydney Price**

Law360 (January 10, 2024, 6:09 PM EST) -- A Colorado federal judge approved an \$8.1 million award for attorneys who secured a \$27 million settlement for shareholders in a suit accusing Maxar Technologies of using its \$2.4 billion acquisition of a space imaging business to inflate its assets and hide problems with its vendor's satellite.

U.S. District Judge William J. Martinez said the attorneys are entitled to a 30% cut of the \$27 million class settlement, which received final approval Tuesday. The attorneys will also receive roughly \$826,000 in litigation expenses, and the Oregon Laborers Employers Pension Trust Fund will be reimbursed \$3,900 for its efforts representing the class, according to **Tuesday's order**.

The \$27 million recovery represents approximately 28% of the estimated total recoverable damages, the order says.

"Prosecuting this case required lead counsel to expend nearly 14,000 hours, equivalent to approximately \$8.6 million in attorney and staff time, over the course of more than four years of vigorous litigation," the order states.

The parties **announced their intentions** to settle in September 2022, and the court preliminarily approved the settlement in June 2023.

The case began in January 2019 when investor Logan Durant claimed Maxar fed shareholders misleading information surrounding its purchase of DigitalGlobe Inc., covering up past problems with an accounting scheme and failing to disclose that the WorldView-4 satellite contained faulty parts. Durant said that those revelations ultimately caused Maxar's share price to tumble from more than \$44 to roughly \$6 around the time of the complaint.

The acquisition of DigitalGlobe by Maxar — which until then had been known as MacDonald Dettwiler and Associates Ltd. — sparked a handful of securities suits from DigitalGlobe investors seeking to delay the shareholder vote on the offer, which they said included overly restrictive protections and lowballed the company's value.

But the shareholders' efforts were unsuccessful, and the deal closed in early October 2017. As part of the sale, Maxar acquired DigitalGlobe's satellites, including the WorldView-4, which was valued at about \$155 million at the end of 2018, according to the complaint.

In August 2018, Spruce Point Capital Management released a research report claiming that Maxar had "pulled one of the most aggressive accounting schemes" the investment manager had ever seen to cover up past problems, according to the complaint.

The day the report came out, Maxar's stock fell about 13% to close at \$38.44.

On Jan. 7, 2019, Maxar revealed that the WorldView-4 had experienced a failure in critical devices that help rotate the spacecraft, keeping it from collecting imagery, and that the satellite likely wouldn't be recoverable.

Stock prices fell again, closing at \$6.03 on Jan. 8, 2019, according to the complaint.

Counsel for the parties did not immediately respond to requests for comment Wednesday.

The shareholders are represented by Spencer A. Burkholz, Ellen Gusikoff Stewart, Trig R. Smith, Jeffrey J. Stein, Christopher D. Stewart, Nicole Q. Gilliland and Patton L. Johnson of Robbins Geller Rudman & Dowd LLP.

Maxar is represented by Matthew W. Close and Brittany Rogers of O'Melveny & Myers LLP.

The case is Oregon Laborers Employers Pension Trust Fund et al. v. Maxar Technologies Inc. et al., case number 1:19-cv-00124, in the U.S. District Court for the District of Colorado.

--Additional reporting by Katryna Perera. Editing by Michael Watanabe.

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Zayo Shareholders' \$27M Settlement Gets Chancery's OK

By **Leslie A. Pappas**

Law360 (January 10, 2024, 7:12 PM EST) -- Zayo Group Holding Inc. shareholders who sued over the communications infrastructure company's \$14.3 billion take-private merger in 2019 settled their class litigation Wednesday with the Delaware Chancery Court's approval of a \$27.1 million cash settlement.

Vice Chancellor Paul A. Fioravanti Jr. certified the class, and approved the settlement, the \$5.15 in attorney fees and a \$5,000 incentive award to shareholder plaintiffs at a bench ruling Wednesday after a short hearing in Wilmington, Delaware.

"This recovery is a very good result for the class given the difficulties" the shareholders would have faced at trial, the vice chancellor said.

Zayo is a communications infrastructure and network services company that provides data transmission through dark fiber, wavelengths, private networks and mobile infrastructure, according to its website.

The settlement ends nearly four years of litigation over Zayo's **\$35-per-share sale** to an investor consortium led by Digital Colony Partners and EQT Partners in 2019.

The Teamsters Local 237 Additional Security Benefit Fund, the Teamsters Local 237 Supplemental Fund for Housing Authority Employees and individual Zayo Group investor Alan Waterhouse **filed the proposed class action** against Zayo co-founder and former CEO Dan Caruso in July 2020.

The suit **accused** Caruso of scheming behind the scenes to personally benefit from a buyout of the Boulder, Colorado-based company, and causing the company to issue a "materially misleading" proxy statement ahead of the \$14.3 billion merger.

Vice Chancellor Fioravanti dismissed most of the stockholders' claims in August 2021, but he allowed the disclosure claim to survive, saying it was "reasonably conceivable" that Caruso may have breached his fiduciary duties when preparing the proxy statement because it omitted information about "significant exchanges" Caruso had had with the buyers ahead of the acquisition.

While the fiduciary duty claims survived, they faced "an uncertain fate" at trial, especially because the transaction was the product of a multibidder process, the vice chancellor said Wednesday.

Shareholders **agreed to settle** the dispute in August after several months of negotiations overseen by an independent mediator, former U.S. District Judge Layn R. Phillips.

The fact that the settlement was proposed by a well-known and respected mediator, and that no shareholders objected to it, are both testament to the strength of the deal, the vice chancellor said in his bench ruling Wednesday.

The class that the vice chancellor approved included stockholders of Zayo common stock from May 7, 2019, through March 9, 2020, excluding certain stockholders such as Caruso, Zayo board members and the consortium that bought the company.

The all-in \$5.15 million fee award for the shareholder attorneys represents 19% of the \$27.125

million settlement, an amount Vice Chancellor Fioravanti called "reasonable."

Shareholders' counsel spent more than 2,885 hours litigating the case and incurred \$122,364.59 in expenses, reimbursement of which is included in the all-in fee award, according to court documents.

Minus expenses, the award implies an hourly rate of \$1,744 per hour, "which is well within the range of fees awarded by this court," the vice chancellor said.

Plaintiff's counsel's "reputation for tenacity and willingness to take the case to trial" likely contributed to the size of the settlement, Vice Chancellor Fioravanti added.

The plaintiff shareholders requested a total \$5,000 fee award, with \$2,500 to Waterhouse and \$2,500 to the Teamster Local 237 Funds, paid out from the attorney fees award.

The parties at the hearing declined to comment on the vice chancellor's ruling.

The stockholders are represented by Joel Friedlander, Jeffrey M. Gorris and Christopher M. Foulds of Friedlander & Gorris PA, Randall J. Baron and Christopher H. Lyons of Robbins Geller Rudman & Dowd LLP, Brett M. Middleton of Johnson Fistel LLP, and Gregory V. Varallo, Jeroen van Kwawegen, Andrew E. Blumberg and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP.

Caruso is represented by William M. Lafferty, Ryan D. Stottmann and Alexandra M. Cumings of Morris Nichols Arsht & Tunnell LLP, and Tariq Mundiya, Sameer Advani and Ferdinand G. Suba Jr. of Willkie Farr & Gallagher LLP.

The case is Teamsters Local 237 Additional Security Benefit Fund et al. v. Caruso, case number 2020-0620, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Lakshna Mehta.

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5 Firms Ask To Lead Payroll Tech Investor Suit

By **Katryna Perera**

Law360 (January 10, 2024, 4:27 PM EST) -- Five firms, including Levi & Korsinsky LLP and Robbins Geller Rudman & Dowd LLP, have put in their bids to lead a class action against human resources technology company Paycom Software Inc. over investors' allegations the company failed to disclose that the success of its self-service payroll software was hindering the growth of the company's other services and revenue.

The firms, which include Hagens Berman Sobol Shapiro LLP, Glancy Prongay & Murray LLP and The Rosen Law Firm PA alongside Levi & Korsinsky and Robbins Geller, submitted motions for appointment as lead counsel in Oklahoma federal court on Tuesday.

Each firm's client claims to have suffered the most significant financial loss from the alleged misconduct, and are therefore asking the court to choose them as lead plaintiff.

Hagens Berman Sobol Shapiro's client, Amy Fisher, **says** she purchased 4,771 shares of Paycom securities during the proposed class period and suffered approximately \$348,000 in losses.

Levi & Korsinsky's client, Calvin Mein, **claims** to have lost roughly \$1.6 million, while Brenda Herbert, represented by Glancy Prongay & Murray, **says** she lost approximately \$39,800.

Joseph Minarik, represented by The Rosen Law Firm, **claims** to have suffered about \$1.2 million in losses, and the Michigan Laborers' Pension Fund, represented by Robbins Geller, **says** it purchased 2,510 Paycom shares and suffered approximately \$321,000 in losses.

The pension fund also says the court should name it lead plaintiff since it oversees more than \$1 billion in assets and "is precisely the type of institutional investor whose participation in securities class actions Congress sought to encourage through the enactment of the [Private Securities Litigation Reform Act]."

The motions further state that the firms are each experienced in handling complex class actions and would serve the class well and asks the court to consolidate several class actions filed against Paycom in the last two months.

Angelo Ventrillo Jr. filed the first suit **in November** over Paycom's employee-driven payroll software, Beti, rolled out in 2021. The suit alleges that as more customers adopted Beti, Paycom was losing out on other forms of revenue, which led to slower-than-projected growth for the 2023 fiscal year.

Ventrillo seeks to represent a class of investors who purchased or otherwise acquired Paycom securities between May 3 and Nov. 1, 2023. In addition to the Oklahoma-based software company, Paycom CEO Chad Richison and Chief Financial Officer Craig E. Boelte are named individual defendants in the suit.

The class period begins the day after Paycom held its first-quarter 2023 earnings call. During the call, Boelte told investors the company was raising its outlook for the year and was now expecting more revenue. Beti was a main driver of the expected revenue increase, the company told investors, according to the complaint.

In the call, and during its next earnings call in August, the company touted the success of Beti while omitting that Beti's prosperity would damage Paycom's overall services and revenue, the complaint states.

Paycom allegedly "shocked the market" on Oct. 31, by admitting the impact Beti was actually having on the company financially, according to the complaint. The same day, it held its third-quarter 2023 earnings call and announced lower-than-expected revenues for the quarter and lowered guidance.

On this news, the price of Paycom shares fell by \$94.28 per share, or 39%, to close at \$150.69 per share on Nov. 1, according to the complaint.

Representatives for the parties did not immediately respond to requests for comment Wednesday.

Amy Fisher is represented by Reed Kathrein and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP.

Calvin Mein is represented by Adam M. Apton of Levi & Korsinsky LLP.

The Michigan Laborers' Pension Fund is represented by Samuel H. Rudman, David A. Rosenfield, Danielle S. Myers and Kenneth P. Dolitsky of Robbins Geller Rudman & Dowd LLP.

Brenda Herbert is represented by Robert V. Prongay, Charles H. Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Joseph Minarik is represented by Laurence M. Rosen and Phillip Kim of The Rosen Law Firm.

Paycom and the individual defendants are represented by Craig Zieminski, K. Virginia Burke DeBeer and Robert Ritchie of Vinson & Elkins LLP and Michael F. Lauderdale and Spencer F. Smith of McAfee & Taft.

The case is Ventrillo et al. v. Paycom Software Inc et al., case number 5:23-cv-01019, in the U.S. District Court for the Western District of Oklahoma.

--Additional reporting by Sydney Price. Editing by Drashti Mehta.

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Chancery Pans 'Farcical' Portrayal Of \$5.8B Cornerstone Deal

By **Leslie A. Pappas**

Law360, Wilmington, Del. (January 10, 2024, 9:50 PM EST) -- Exchanges between Clayton Dubilier & Rice LLC and Cornerstone Building Brands, over what ultimately became the private equity firm's \$5.8 billion buyout of the construction materials company in 2022, were clearly price negotiations, and attempts to portray them otherwise are a "farce," a Delaware Chancery Court vice chancellor said Wednesday.

In a bench ruling after oral arguments in Wilmington, Vice Chancellor J. Travis Laster denied motions to dismiss a proposed stockholder class action challenging the take-private deal, calling the "linguistic contortions" and "head-hurting verbal gymnastics" that CD&R and Cornerstone used to get around a standstill agreement "comical."

"Anyone without a law degree, if you just pull them off the street, they would immediately recognize [the exchanges] as an offer, a counter-offer, and negotiation on price," the vice chancellor said. The "farcical effort to portray those things as hypotheticals that people were just floating out there ... is too cute by half."

Cornerstone, based in North Carolina, bills itself as the largest manufacturer of exterior building products in North America, including metal roofing material, windows and vinyl siding. The company was created in 2018 through a \$1.2 billion merger of NCI Building Systems Inc. and Ply Gem Building Products.

CD&R owned a stake in both companies, and NCI shareholders **challenged the transaction**, leading to a **settlement** in January 2022.

Cornerstone then **announced** in February 2022 that CD&R had made an offer to take the company private by purchasing the 51% of Cornerstone shares that it did not already own.

Cornerstone shareholders balked, saying that negotiations leading up to the proposed merger had violated standstill provisions of a shareholder agreement struck in 2018, when CD&R was a 49% Cornerstone shareholder. In the standstill agreement, the private equity firm promised it would not try to acquire any more Cornerstone stock, shareholders say.

But in September 2021, CD&R made an offer to buy Cornerstone. Cornerstone didn't waive the standstill agreement, but it formed a special committee to consider the possibility of a merger. Over the next several months, in a back-and-forth between CD&R and the Cornerstone special committee, the offer increased from \$22 per share to \$24.65 per share.

"The complaint clearly establishes that CD&R took Cornerstone private in an unfair process punctuated by numerous standstill violations," stockholder attorney Michael C. Wagner of Labaton Keller Sucharow LLP told the court Wednesday during the dismissal arguments.

Two sets of plaintiffs **filed their complaints** against CD&R and several Cornerstone directors and officers in January 2023, alleging that the deal's \$24.65 per share price was too low and the company hadn't fully informed stockholders before the June 2022 vote on the transaction.

One set of plaintiffs was led by Firefighters' Pension System of the City of Kansas City, Missouri, Trust, which sued in June 2022 for **books and records** about the deal.

The other suit came from private investment fund Whitebark Value Partners LP, which became the lead plaintiff when the suits were **consolidated** in May 2023.

Shareholders assert that the proxy statement to shareholders about the \$5.8 billion buyout misrepresented or omitted important details about the standstill provisions.

The terms of the standstill agreement was "material information" for stockholders, Wagner argued. Yet "the proxy woefully fails to disclose the standstill's terms" and didn't explain its restrictions, Wagner said. The proxy's description of the standstill agreement was "slanted, incomplete, and materially misleading," Wagner said.

Matthew Solum of Kirkland & Ellis LLP, an attorney for CD&R and the other defendants, argued Wednesday that the standstill provisions were "adequately disclosed" and clearly described in the proxy statement.

Shareholder allegations that CD&R co-opted or coerced a special board committee that evaluated the deal are also unfounded, Solum argued. "The special committee was in the driver's seat the whole way through."

But Vice Chancellor Laster said he found it "reasonably conceivable" that "when a special committee is willing to turn these kinds of backflips ... you can draw an inference that they may be co-opted."

The vice chancellor called the proxy statement an "Orwellian" portrayal of the negotiations that was "profoundly misleading," and said it was "reasonably conceivable" that the companies were trying to "avoid a disclosable event."

The vice chancellor dismissed one claim in the suit — a breach of contract claim regarding the standstill agreement. The vice chancellor said shareholders had no standing to pursue that claim because they were a third party.

Counsel who were at the hearing declined to comment on the vice chancellor's ruling.

Lead plaintiff Whitebark Value Partners LP is represented by David Schwartz, John Vielandi, Ned Weinberger, Michael C. Wagner and Casimir O. Szustak of Labaton Keller Sucharow LLP and Joel Fleming, Amanda R. Crawford, Saranna E. Soroka, Kimberly A. Evans and Robert Erikson of Block & Leviton LLP.

Clayton Dubilier & Rice LLC, its related funds and Cornerstone general counsel Alena S. Brenner are represented by Matthew Solum, Mike Rusie and Joseph Taglienti of Kirkland & Ellis LLP and Garrett B. Moritz and Eric D. Selden of Ross Aronstam & Moritz LLP.

The case is In re: Cornerstone Building Brands Inc. Shareholder Litigation, case number 2023-0092, in the Court of Chancery of the State of Delaware.

--Additional reporting by Rose Krebs, Brian Steele, Charlie Innis and Jeff Montgomery. Editing by Dave Trumbore.



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Express Scripts Fixed Prices, Pharmacies' Class Action Says

By **Rachel Riley**

Law360 (January 10, 2024, 9:20 PM EST) -- Cigna's pharmacy benefit manager Express Scripts was slapped with a proposed class action in Washington federal court on Wednesday by several locally owned pharmacies who say it conspired with lesser rivals to deflate reimbursement rates paid for prescription drugs and boost service fees.

Iowa-based Osterhaus Pharmacy Inc., along with three other mom-and-pop pharmacies in Washington, say Express Scripts Inc. has leveraged its position as one of the nation's top pharmacy benefit managers to collude with "at least" three smaller competitors, leaving pharmacies with no choice but to accept less favorable terms. According to **the lawsuit**, instead of independently competing for the business of pharmacies, co-conspirators Prime Therapeutics LLC, Benecard Services LLC and Magellan Rx Management LLC allegedly agreed to set rates and fees matching Express Scripts' and pass on a share of the illegally inflated revenue to the Missouri-based Cigna affiliate.

"These blatant price-fixing Agreements have eliminated the normal market forces and have allowed the Co-Conspirators to enjoy excess revenues at the expense of pharmacies," the lawsuit says. "Express Scripts demanded and receives a share of those revenues."

Berger Montague, among the law firms representing the plaintiffs, describes Express Scripts and other PBMs as the "pharmaceutical middlemen that manage pharmacy benefit for health plans" in a Wednesday announcement. These firms contract with pharmacies to distribute prescription drugs at negotiated reimbursement rates, in addition to handling other matters, such as pricing talks with drugmakers.

"Several independent, community pharmacies seek to represent a proposed class of pharmacies across the nation and recoup hundreds of millions of dollars in wrongful overcharges," the firm said.

In a statement emailed to Law360 on Wednesday, Express Scripts said it's "committed to reimbursing network pharmacies fairly and will vigorously defend ourselves against the baseless allegations in this complaint."

The lawsuit describes Express Scripts as one of the "Big Three" pharmacy benefit managers that controls more than 80% of U.S. prescriptions, alongside Aetna-affiliated CVS Caremark and UnitedHealthcare-affiliated Optum Rx.

Express Scripts handles pharmaceutical benefits for more than 100 million health plan members, according to the complaint. And if a pharmacy refuses to do business with Express Scripts, it cannot accept insurance to cover refills for a patient whose plan relies on the Cigna-owned company for benefit management services.

"Pharmacies must either bow to Express Scripts' demands on Reimbursement Rates and Fees, or effectively lose access to millions of plan members," the suit says. "Plaintiffs and other pharmacies have no realistic option other than to accept Express Scripts' terms because they cannot reasonably operate if they are cut off from such a large segment of potential customers."

The pharmacies claim the price-fixing agreements date back at least three years, starting with Express Scripts' alleged arrangement with Prime, effective in April 2020, for private health plan

members and January 2021 for Medicare. According to the lawsuit, the Cigna affiliate's deal with Benecard took effect two years ago, and the Magellan agreement was effective last April.

Express Scripts is accused of violating Section 1 of the Sherman Antitrust Act by allegedly forming each of the three horizontal agreements to fix reimbursement rates and fees.

Osterhaus Pharmacy is joined by plaintiffs Cammack's Pharmacies Inc., doing business as Jim's Pharmacy and Home Health, Harbor Drug Co. Inc., and Valu Drugs Inc.

The four named plaintiffs seek to represent a class of thousands of pharmacies across the United States that have, since April 2020, received reimbursement or paid fees for prescriptions or related pharmacy services for patients whose plans are served by any of the alleged co-conspirators, so long as those transactions were subject to Express Scripts' rates and fees.

According to the complaint, Express Scripts is a subsidiary of Evernorth Health Inc., which is also named as a defendant.

Among other relief, the complaint seeks a judgment against Express Scripts for treble class damages on their transactions with each of the benefit managers.

Express Scripts and Prime, owned by Blue Cross and Blue Shield plans, announced the formation in December 2019 of "a new three-year collaboration designed to deliver more affordable care for clients and their members by enhancing pharmacy networks and pharmaceutical manufacturer value." According to a joint announcement issued that month, Express Scripts was to "provide services to Prime related to retail pharmacy network and pharmaceutical manufacturer contracts" with both companies continuing to work independently with pharmaceutical manufacturers and other stakeholders.

The National Community Pharmacists Association expressed support for the new lawsuit Wednesday, echoing concerns about market concentration it raised to state attorneys general in 2020 after Express Scripts publicized its arrangement with Prime.

"Now, Express Scripts has the same kind of sweetheart deal with multiple PBMs and many more pharmacies are affected," association CEO B. Douglas Hoey said in a statement. "The goal of these non-merger mergers was to create collusive and anticompetitive price fixing arrangements and the effects have been devastating to independent pharmacies."

The pharmacies are represented by Beth E. Terrell, Amanda M. Steiner and Blythe H. Chandler of Terrell Marshall Law Group PLLC, Joseph M. Vanek, Paul E. Slater, Phil F. Cramer, Trevor K. Scheetz and Kathryn M. DeLong of Sperling & Slater LLC, Steve D. Shadowen, Nicholas W. Shadowen and Kathryn Allen of Hilliard Shadowen LLP, Mark R. Cuker of Cuker Law Firm, Joshua P. Davis and Julie A. Pollock of Berger Montague and Michael L. Roberts, Erich P. Schork and Kelly Rinehart of Roberts Law Firm US PC.

Counsel information for Express Scripts was not immediately available on Wednesday.

The case is Osterhaus Pharmacy Inc et al. v. Express Scripts Inc et al., case number 2:24-cv-00039, in the U.S. District Court for the Western District of Washington.

--Editing by Alex Hubbard.



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Union Funds Exit Amgen, Teva Antitrust MDL

By **Nadia Dreid**

Law360 (January 10, 2024, 10:18 PM EST) -- Teva Pharmaceuticals has settled its differences with the union funds making up the indirect purchase class in multidistrict litigation accusing it of hatching an illegal deal to remove a generic calcium-control drug from the market.

The parties asked the Delaware federal judge overseeing the MDL to dismiss the indirect purchasers' claims with prejudice Tuesday, according to a **stipulation of dismissal** that didn't reveal any details about the settlement.

The matter had taken a trip up to the Third Circuit for an interlocutory appeal after a partially failed motion to dismiss from Amgen and Teva, but it appears the matter was resolved before the appellate court was much involved.

The pharmaceutical companies had asked to appeal the matter straight away but were rebuffed, after the new judge overseeing the case said he didn't think he had the power to certify a previous judge's ruling for interlocutory appeal. The Third Circuit was asked to weigh in on that question specifically, though the matter never made it to argument.

At the center of the dispute lies the calcium reducing drug Cinacalcet — known by its brand name Sensipar — and Amgen's alleged efforts to keep a generic from coming to market via patent infringement battles against more than a dozen companies.

One such lawsuit was against Teva, which eventually settled. But the union funds claimed that the terms they reached to end the patent litigation were anticompetitive and resulted in Teva and other generic-drug makers agreeing to keep their generics off the market until another had already made its debut. In one case from 2011, though, a court blocked Teva from selling its version until 2018.

Teva's generic eventually hit the market, but only for about a week until it reached a deal with Amgen to push its rerelease back to mid-2021, only five years before Amgen's patent would expire, according to the lawsuits in the MDL.

UFCW Local 1500 Welfare Fund, which dropped its claims against Teva Tuesday, said in its suit that the generic-drug maker earned \$59 million in profits in the single week its generic was available.

The lawsuits against Amgen and Teva were consolidated for pretrial purposes before Judge Stark back in 2019.

The indirect purchasers are represented by Ian Connor Bifferato of the Bifferato Firm PA, Gregory S. Asciolla, Karin E. Garvey and Matthew J. Perez of Labaton Sucharow LLP, Lee Albert of Glancy Prongay & Murray LLP, Melinda Coolidge of Hausfeld LLP, and Adam J. Pessin of Fine Kaplan & Black RPC.

Amgen is represented by Jack B. Blumenfeld and Brian P. Egan of Morris Nichols Arsht & Tunnell LLP, and Eric J. Stock, Joshua J. Obear and Ashley E. Johnson of Gibson Dunn & Crutcher LLP.

Teva and the other defendants are represented by Karen E. Keller and Nathan R. Hoeschen of Shaw Keller LLP, and Richard A. Spehr, Henninger S. Bullock, Niketa Patel and Nicolas E. Rodriguez of Mayer Brown LLP.

The case is In re: Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust Litigation, case number 1:19-

md-02895, in the U.S. District Court for the District of Delaware.

--Editing by Adam LoBelia.

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X, Musk Want 'Fantastical' \$500M Severance Suit Axed

By **Dorothy Atkins**

Law360 (January 10, 2024, 8:04 PM EST) -- X and its billionaire ex-CEO Elon Musk asked a California federal court Tuesday to toss a proposed class action by laid-off workers seeking \$500 million in severance, arguing the allegations are "fantastical" because there's never been a severance plan, and even if there were, Musk isn't a fiduciary.



Workers at the site formerly known as **Twitter** claim X's severance plan — a purported welfare benefit plan regulated by ERISA — has been active since at least 2019, but the company has not paid the promised severance after layoffs began in November 2022. (AP Photo/Noah Berger, File)

In a Tuesday motion, the social media platform formerly known as Twitter and Musk argued the court must dismiss the proposed class action, which alleges violations of the Employee Retirement Income Security Act.

They claim there's no evidence that such a severance agreement actually existed between workers and the company, and the lawsuit fails to establish Musk was ever a fiduciary to the alleged "Twitter Severance Plan."

"Even if such a plan existed (and it did not), [the] plaintiffs do not allege defendant Musk exercised any discretionary authority or control respecting the management of Twitter's severance packages that could possibly confer de facto fiduciary status," the motion says.

The dismissal bid is the latest development in a lawsuit led by Courtney McMillian and Ronald Cooper that

was initially **filed in July**. The suit seeks at least \$500 million in unpaid severance for a proposed class of workers who were let go after Musk bought the social media platform for **\$44 billion** in October 2022.

The workers claim the severance plan — a purported welfare benefit plan regulated by ERISA — has been active since at least 2019, but the company has not paid the promised severance after layoffs began in November 2022.

According to the complaint, the company referred to the plan in companywide FAQs and emails before the merger, and an April 2022 merger agreement between Musk and Twitter even specified post-merger severance benefits would be no less favorable for workers than pre-merger benefits for a year after the deal closed.

The workers claimed that under the severance plan, senior employees were entitled to six months of base pay, plus one week for each full year of service, and less senior employees were entitled to two months of base pay, plus one week for each full year of service.

But after roughly 6,000 employees were laid off following Musk's \$44 billion purchase of the platform in October 2022, they were offered at most three months' worth of benefits, the complaint said.

The suit also alleges the laid-off employees were entitled to vested restricted stock units, bonuses, a cash contribution for health insurance and three to six months of outplacement services.

Musk was CEO until early June, when Linda Yaccarino took over; Yaccarino isn't named in the suit, although the complaint names "Defendant Does" as a placeholder for unknown individuals who purportedly had fiduciary duties to severance plan participants.

The initial complaint also included a purported copy of the plan attached as an appendix, and the document includes a legal disclaimer that the documentation is attorney-client privileged, confidential and for "initial planning purposes only."

The three-count complaint asserts violations of ERISA, including a denial-of-benefits claim seeking to recover benefits due to participants; a claim for failure to provide complete and accurate information about the plan; and a count alleging liability related to a failure to monitor others in charge of the plan.

In October, workers beefed up their allegations in an amended complaint, adding details to back their claims that Musk is personally liable for not giving employees their owed severance.

Among the new allegations, the workers claimed Musk and Twitter publicly presented themselves as each other's alter egos and Musk routinely used his personal account to propose and announce changes in company policy, including hiring and firing decisions.

Official Twitter communications at the time also described the company as "Twitter 2.0: an Elon company," the workers said.

But in the defendants' motion to dismiss, Musk and X Corp. argued the litigation is a "copycat" suit that mimics others pending in state court over state law theories of breach of contract and promissory estoppel.

"In dressing up their lawsuit as a putative ERISA class action, [the] plaintiffs offer a series of fantastical assertions," the motion says.

Musk and X argue that "there is no such thing as a 'Twitter Severance Plan,'" and the lawsuit's "conclusory assertions" fail to plausibly assert the existence of such a plan. Therefore, the ERISA claims and any claims seeking duplicative relief can't proceed, the motion says.

The motion argues the allegations show the administration of Twitter severance payments required "minimal, if any, administrative discretion," and the workers don't allege the severance payments necessitated "an ongoing administrative scheme" that would constitute a "plan" under ERISA.

"In attempting to conjure a plan out of thin air, [the] plaintiffs resort to vague and conclusory allegations that Twitter used a 'Matrix' to calculate severance packages and that 'internal procedures existed' for administering and amending the alleged plan," the motion says. "These allegations are not enough. Simply because Twitter paid certain former employees lump-sum severance packages does not on its own

mean it maintained an ERISA severance plan."

The motion notes the complaint doesn't point to any governing plan documents, summary plan descriptions, plan handbook, formal benefits statements or administrative committee that reviewed severance benefit claims.

The workers also don't cite any company procedures for requesting severance payments or for appealing denial of such payments, and there has been no plan-related public filings with the U.S. Department of Labor or Internal Revenue Service, which are all "hallmarks of any ERISA plan," the motion says.

The defendants added that allegations claiming a senior Twitter executive told workers that human resources officials repeatedly informed Musk the company had to pay severance are nothing more than a "game of Telephone," and just because Musk was a corporate officer of Twitter after the buyout, that doesn't establish fiduciary duty liability under ERISA.

A hearing on the motion is set before U.S. District Judge Trina L. Thompson for April 9.

The workers' counsel, Kate Mueting of Sanford Heisler Sharp LLP, said in a statement Wednesday that she and her co-counsel have reviewed X's motion, and remain confident in the claims that defendants violated ERISA.

Counsel and representatives for X and Musk didn't immediately respond to requests for comment Wednesday.

The proposed class is represented by Kate Mueting, Charles Field, Christopher Owens, Samone Ijoma and Dacey Romberg of Sanford Heisler Sharp LLP.

Musk and X Corp. are represented by Mark A. Feller, Melissa Hill, Sean K. McMahan and Jared R. Killeen of Morgan Lewis & Bockius LLP.

The case is McMillian et al. v. X Corp. et al., case number 3:23-cv-03461, in the U.S. District Court for the Northern District of California.

--Additional reporting by Kellie Mejdrich and Beverly Banks. Editing by Caitlin Wolper.

SAP To Pay \$220M And Enter DPA To End Feds' FCPA Probes

By **Sarah Jarvis**

Law360 (January 10, 2024, 10:21 PM EST) -- SAP SE on Wednesday agreed to pay more than \$220 million to settle investigations by the U.S. Department of Justice and the U.S. Securities and Exchange Commission into allegations the Germany-based software company paid bribes to government officials in South Africa and Indonesia.



German software maker SAP was charged with conspiracy to violate the Foreign Corrupt Practices Act, specifically, its anti-bribery and books and records provisions, on allegations the company bribed South African and Indonesian foreign officials with cash, political contributions, wire transfers and luxury goods. (AP Photo/Michael Probst, File)

The DOJ said in its announcement that SAP's three-year deferred prosecution agreement includes a criminal penalty of \$118.8 million and forfeiture of roughly \$103.4 million. The agency will credit up to \$55.1 million of the criminal penalty against amounts the company pays to resolve an investigation by South African law enforcement, and it will credit up to the full forfeiture amount against disgorgement SAP pays to the SEC or South African authorities.

Prosecutors charged SAP with conspiracy to violate the Foreign Corrupt Practices Act, specifically, its anti-bribery and books and records provisions. The company and unnamed co-conspirators allegedly bribed South African and Indonesian foreign officials with cash, political contributions, wire transfers and luxury

goods, the DOJ said.

In South Africa, the company also falsified its books, records and accounts from 2013 to 2017, aiming to receive "improper advantages" tied to various contracts with the City of Johannesburg, the City of Tshwane and the country's state-owned water provider and energy company, according to the DOJ's announcement.

And in Indonesia, SAP allegedly bribed officials for business advantages related to contracts with the Indonesian Ministry of Maritime Affairs and Fisheries and a state-owned telecommunications agency between 2015 and 2018, per the DOJ announcement.

In the **SEC's announcement**, the regulator said the FCPA violations stemmed from bribery schemes in South Africa, Malawi, Kenya, Tanzania, Ghana, Indonesia and Azerbaijan.

Acting Assistant Attorney General Nicole M. Argentieri of the DOJ's Criminal Division said in a statement that the resolution "marks an important moment in our ongoing fight against foreign bribery and corruption," noting it is the division's second coordinated resolution with South African authorities in just over a year.

"We look forward to continuing to strengthen our relationship with South African authorities and others around the world," Argentieri said. "This case demonstrates not only the critical importance of coordinated international efforts to combat corruption, but also how our corporate enforcement policies incentivize companies to be good corporate citizens, by cooperating with our investigations and appropriately remediating, so that we can take strong action to address misconduct."

Charles E. Cain, chief of the SEC Enforcement Division's FCPA unit, said in a statement that the agency's order "holds SAP accountable for misconduct that spanned seven jurisdictions and persisted for several years and serves as a stark reminder of the need for global companies to be attuned to both the risks of their business and the need to maintain adequate entity-level controls over all their subsidiaries."

Counsel for SAP said in a statement that the company welcomes the resolutions with the DOJ, SEC and South Africa National Prosecuting Authority, noting its criminal fine to the DOJ "represents a 40% reduction from the applicable U.S. sentencing guideline range based on SAP's strong cooperation and commitment to compliance."

The DOJ noted that SAP received credit for cooperating with the department's investigation, including quickly producing documents, voluntarily making employees and officers available for interviews and translating "voluminous" foreign language documents, among other things.

The company also conducted a root cause analysis and addressed those root causes, enhanced its compliance program and risk assessment process, eliminated its third-party sales commission model globally, prohibited all sales commissions for public sector contracts in high-risk markets, disciplined all employees involved in the misconduct and adjusted its compensation incentives, among other things.

The department noted the criminal penalty "reflects a 40% reduction off the tenth percentile above the low end of the otherwise applicable guidelines fine range," noting the company's prior history includes a non-prosecution agreement with the DOJ's National Security Division from 2021, administrative agreements with the U.S. Department of Commerce and the U.S. Department of the Treasury tied to export law violations, and a **2016 deal** with the SEC regarding FCPA violations in Panama.

The DOJ also said the criminal penalty was reduced for compensation that SAP withheld from employees under the Criminal Division's **pilot program** for compensation incentives and clawbacks. The company is also obligated to implement criteria tied to compliance in its compensation and bonus system, under that pilot program.

SAP is represented by Kwame Manley of Paul Hastings LLP.

The government is represented by Jonathan P. Robell, William E. Schurmann, Anthony Scarpelli and Gwendolyn A. Stamper of the DOJ's Criminal Division's Fraud Section and Heidi B. Gesch of the U.S. Attorney's Office for the Eastern District of Virginia.

The SEC is represented in-house by Sana Muttalib and Sonali Singh.

Case information for the DOJ proceeding wasn't immediately available Wednesday.

The SEC case is In the Matter of SAP SE, case number 3-21824, before the U.S. Securities and Exchange Commission.

--Editing by Dave Trumbore.

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