

FirstEnergy scolds shareholders for meddling ahead of key class action appeal

 [reuters.com/legal/government/column-firstenergy-scolds-shareholders-meddling-ahead-key-class-action-appeal-2024-02-05](https://www.reuters.com/legal/government/column-firstenergy-scolds-shareholders-meddling-ahead-key-class-action-appeal-2024-02-05)

Alison Frankel

The Davis-Beese nuclear power station is seen near Oak Harbor, Ohio February 11, 2010. REUTERS/Aaron Josefczyk [Acquire Licensing Rights](#)  , opens new tab

Feb 5 (Reuters) - Ohio utility FirstEnergy is accusing shareholder lawyers from Robbins Geller Rudman & Dowd of attempting a procedural sleight-of-hand to avert a potentially problematic appellate ruling on an increasingly popular defense in securities litigation.

If nothing else, the fight over a Robbins Geller request for the trial judge to revise a class certification opinion that's now under review at the 6th U.S. Circuit Court of Appeals highlights the stakes of an issue that hasn't previously gotten much attention.

First, some background. FirstEnergy (FE.N)  , opens new tab is facing \$8 billion in claims by investors accusing the company of covering up a multimillion-dollar bribery scheme to get Ohio legislators to bail out two aging nuclear plants. (FirstEnergy paid \$230 million  , opens new tab in 2021 to resolve federal charges stemming from the bribery scheme.) In March 2023, U.S. District Judge Algenon Marbley of Columbus, Ohio, certified  , opens new tab two investor classes — one for shareholders, the other for noteholders who invested in two FirstEnergy offerings — to pursue fraud claims.

The 6th U.S. Circuit Court of Appeals agreed  , opens new tab in November to review Marbley's class certification decision. As I told you at the time, the appellate court will consider two issues raised by FirstEnergy: whether Marbley erred by applying the lenient standard for class actions based on deceptive corporate omissions, rather than the tougher standard for corporate misstatements, in a case alleging a mix of omissions and misrepresentations; and whether the trial judge rigorously analyzed shareholders' theory of classwide damages, as required by U.S. Supreme Court in 2013's *Comcast v. Behrend*  , opens new tab.

FirstEnergy and its friends in the business lobby emphasized the first issue in their briefs urging the 6th Circuit to grant mid-case review of Marbley's class certification opinion. But the Comcast issue could actually have broader consequences across securities fraud litigation.

Defendants in shareholder fraud cases are increasingly likely to invoke Comcast in their briefs opposing class certification, arguing that plaintiffs haven't offered adequate models for classwide damages. So far, those arguments haven't gotten much traction. But if the 6th Circuit sides with FirstEnergy to hold that shareholders' damages model is flawed — or even if the appeals court merely concludes that Marbley's analysis of shareholders' model was not sufficiently rigorous — you can expect Comcast challenges to mushroom.

Robbins Geller seems to want to take the Comcast question out of the 6th Circuit's purview.

In an unusual motion [opens new tab](#) last month, the shareholder firm asked Marbley, the trial judge, to revise his class certification opinion to clarify that he did indeed engage in rigorous analysis — including a probe of the expert witness reports on both sides during oral arguments on class certification — to conclude that shareholders met the Comcast standard. When FirstEnergy asked the 6th Circuit to review Marbley's class certification decision, its lawyers at Sullivan & Cromwell told the appeals court that Marbley erroneously cited his analysis of noteholders' statutory damages under the Securities Act to justify his conclusion that shareholders offered an adequate damages model for their Exchange Act claims. The Exchange Act does not provide for statutory damages, so FirstEnergy argued that Marbley's analysis was flawed.

But Robbins Geller said in last month's motion for clarification that the full record proves Marbley did not rely on his Securities Act analysis to certify shareholders' Exchange Act class. Robbins Geller urged Marbley to revise his opinion to reflect that he looked carefully at all of the evidence both sides offered before rejecting FirstEnergy's Comcast challenge to certification of the shareholder class.

That "simple clarification," the shareholder firm said, would avert "the waste of judicial resources" that would result from the 6th Circuit's consideration of the Comcast question. It would also, according to Robbins Geller, "avoid the possibility of confusion at the appellate court."

FirstEnergy responded in a brief [opens new tab](#) last week that contends Robbins Geller's motion for clarification is procedurally improper and wouldn't even take the Comcast issue off the 6th Circuit's table.

The company's opening brief to the 6th Circuit is due on Feb. 9, Sullivan & Cromwell told Marbley in last week's brief. So now is not the time for the trial judge to rewrite the opinion under appellate review.

"Plaintiffs should not be permitted to force the 6th Circuit or defendants to redo their work because plaintiffs have decided that they do not like their chances on appeal," FirstEnergy argued.

Sullivan & Cromwell said it would be “extraordinary — indeed unprecedented” for Marbley to reclaim jurisdiction over an issue that is before the 6th Circuit in order to substantively revise his opinion.

The federal rule that allows trial judges to issue indicative rulings while their cases are on appeal, FirstEnergy said, applies in only a narrow set of circumstances in which the indicative ruling would not alter the issues under appellate consideration. Those are not the circumstances here, the company said, because the revision proposed by Robbins Geller directly affects the 6th Circuit case.

If shareholders wanted Marbley to clarify his class certification decision, Sullivan & Cromwell said, they should have asked the judge to do so before the appeals court granted FirstEnergy’s petition for interlocutory appeal. But with the Comcast issue now before the appeals court, FirstEnergy said, shareholders have no choice but to direct their arguments to the 6th Circuit.

Moreover, according to FirstEnergy, the revision sought by Robbins Geller wouldn’t eliminate the Comcast issue on appeal, because the company would still challenge the validity of shareholders’ damages model. So instead of streamlining the appeal, the company said, Robbins Geller’s proposed revision of the class certification opinion would waste everyone’s time.

Robbins Geller declined to comment on FirstEnergy’s assertions. The company declined through a spokesperson to comment on the skirmish.

I was already interested in how the 6th Circuit would handle FirstEnergy’s Comcast arguments before Robbins Geller asked Marbley to revise his opinion.

Now, thanks to the Streisand effect, I’m even more intrigued.

Read more:

FirstEnergy investor class action will get appellate review in multibillion case

FirstEnergy says trial judge botched investor class certification decision

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Reporting By Alison Frankel

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New York Community Bancorp is sued by shareholders as stock tumbles

 [reuters.com/legal/new-york-community-bancorp-is-sued-over-disclosures-stock-price-2024-02-06](https://www.reuters.com/legal/new-york-community-bancorp-is-sued-over-disclosures-stock-price-2024-02-06)

Jonathan Stempel

A screen displays the trading information for New York Community Bancorp on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., January 31, 2024.

REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights  , opens new tab

NEW YORK, Feb 6 (Reuters) - New York Community Bancorp (NYCB.N)  , opens new tab was sued on Tuesday by shareholders in a proposed class action after the lender posted unexpected commercial real estate loan losses and slashed its dividend, causing its stock price to fall by more than half.

In a complaint filed in Brooklyn federal court, shareholders said the bank defrauded them by failing to disclose it would need to set aside more money for credit losses, and cut its dividend to preserve capital.

Led by Tennessee resident Walter Lemm, shareholders said the bank had since last March instead offered an "unrealistically positive assessment of the Company and its financial well-being and prospects," inflating its stock price.

New York Community Bancorp did not immediately respond to a request for comment. Chief Executive Thomas Cangemi and Chief Financial Officer John Pinto are also defendants.

The Hicksville, New York-based lender, which operates about 400 branches under several names, surprised investors last Wednesday with a \$260 million fourth-quarter loss, as it set aside more money for losses in offices and apartment buildings.

It attributed the 71% dividend cut to a need to boost capital to meet regulatory requirements, after its takeover last spring of the failed Signature Bank in a government-arranged auction boosted overall assets to well above \$100 billion.

New York Community Bancorp's problems have spurred concern about other midsized lenders exposed to commercial real estate.

Landlords have been struggling with low occupancy rates because of the pandemic, while elevated interest rates make it costlier to refinance loans.

In Tuesday afternoon trading, New York Community Bancorp shares were down \$1.02, or 18.9%, at \$4.38. That compared with \$10.38 on Jan. 30, before the bank released quarterly results.

It is common for companies to be sued by shareholders after unexpected news that causes stock prices to fall.

The case is Lemm v New York Community Bancorp et al, U.S. District Court, Eastern District of New York, No. 24-00903.

Reporting by Jonathan Stempel in New York; Editing by Chris Reese and Chizu Nomiya

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Guest Post: Supreme Court Considers Whether Pure Omissions Can Support Section 10(b) Liability

K [dandodiary.com/2024/02/articles/securities-litigation/guest-post-supreme-court-considers-whether-pure-omissions-can-support-section-10b-liability](https://www.dandodiary.com/2024/02/articles/securities-litigation/guest-post-supreme-court-considers-whether-pure-omissions-can-support-section-10b-liability)

February 6, 2024



By Kevin LaCroix on February 6, 2024
Posted in Securities Litigation



Sarah Eichenberger



Jonathan Rotenberg

*As I noted in a post at the time, last Fall, the U.S. Supreme Court in the *Macquarie Infrastructure Corporation v. Moab Partners, L.P.* case agreed to take up the question of whether whether the failure to make disclosure required by Item 303 of Reg. S-K is an actionable omission under Section 10(b) and Rule 10b-5. In January, the Court heard oral argument in the case. In the following guest post, Sarah Eichenberger and Jonathan Rotenberg, Partners in the Securities Litigation practice at the Katten law firm, discuss the questions the Justices as asked the oral argument and assess the possible outcomes of the case, as well as the potential significance of the outcomes. I would like to thank Sarah and Jonathan for allowing me to publish their article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is Sarah and Jonathan's article.*

On January 16, 2024, the U.S. Supreme Court held oral argument on a question that could have significant consequences for securities litigants: whether a failure to disclose information under Item 303 of Regulation S-K is, standing alone, an actionable omission

under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. While it remains to be seen what the Court will ultimately decide, the Justices' questions signaled a narrow ruling that would foreclose such liability.

The Interplay Between Section 10(b) Liability and Disclosure Obligations Under Item 303 of Regulation S-K

Section 10(b) and Rule 10b-5 make it unlawful for securities issuers “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” Under the plain text of Rule 10b-5—and the later-enacted PSLRA—actionable omissions are limited to situations in which a disclosure’s absence renders an issuer’s affirmative statements misleading.

Nevertheless, securities plaintiffs often allege Rule 10b-5 claims based on a defendant’s failure to abide by independent disclosure obligations that are not necessarily tied to affirmative statements. Securities plaintiffs frequently predicate this so-called “pure omissions” theory of liability on Item 303 of Regulation S-K. Item 303 requires issuers to disclose, in the “Management’s Discussion and Analysis of Financial Condition and Results of Operation,” or “MD&A” section of their annual SEC filings, “any known trends or uncertainties that have had” or that the registrant reasonably expects will “have a material favorable or unfavorable impact” on the company’s net revenues or income. Securities plaintiffs use Item 303 to allege that an issuer’s failure to disclose a “known trend[] or uncertain[y]” in the MD&A results in Rule 10b-5 liability *even* in the absence of an affirmatively misleading statement.

Courts have viewed this argument—and these pleading tactics—with skepticism. Many courts—including the Ninth, Eleventh, and Third Circuits—have rejected pure omissions claims. For example, in 2014, the Ninth Circuit held that Item 303 does not create a duty to disclose under Section 10(b) and Rule 10b-5. Instead, liability “must be separately shown” on the basis of an affirmative misstatement. In so holding, the Ninth Circuit reasoned that Rule 10b-5’s plain text differs from that of Sections 11 and 12(a)(2) of the Securities Act, which *do* allow for a private right of action based solely on an Item 303 violation. Specifically, whereas Sections 11 and 12(a)(2) provide liability for an omission of “a material fact required to be stated,” Rule 10b-5 only addresses omissions that are necessary to render an issuer’s affirmative statements not materially misleading.

The Second Circuit disagrees with that analysis and has upheld “pure omission” claims. It takes the position that a violation of Item 303 *would* be actionable under Section 10(b) and Rule 10b-5 if plaintiffs can show that the omitted information is material. As the Second Circuit recently explained, regulations that obligate a party to speak, like Item 303, can trigger a broad duty to disclose because a “reasonable investor would interpret the absence

of an Item 303 disclosure to imply the non-existence of known trends or uncertainties.” Accordingly, in the Second Circuit’s view, Item 303 omissions can be a basis for Rule 10b-5 liability even in the absence of affirmative misstatements.

Case Background

The Supreme Court is poised to resolve this circuit split in *Macquarie Infrastructure Corporation v. Moab Partners LP*. Moab Partners sued Macquarie Infrastructure Corporation under Section 10(b) and Rule 10b-5, alleging that Macquarie violated its obligations under Item 303 by not disclosing the potential impact that a ban on high sulfur fuels could have on its oil storage business. The District Court dismissed the case, holding that the plaintiff had failed to allege any false statements or omissions, including Item 303 omissions. On appeal, the Second Circuit reinstated the plaintiff’s Section 10(b) and Rule 10b-5 claims. Macquarie then sought a *writ of certiorari* to the Supreme Court, which the Court granted on September 29, 2023.

The Supreme Court Hears Oral Argument and Signals a Narrow Ruling

The tenor of the Court’s January 16, 2024 oral argument foreshadowed how it may rule. The Justices’ questioning focused primarily on the language of Rule 10b-5, which, according to the Court, only contemplates liability for affirmative misstatements. Justice Jackson, for example, emphasized the difference between the language in Section 11 of the Securities Act and the language in Rule 10b-5, opining: “When you’re required to state something and you don’t state it, Section 11 says there’s liability. We have different language in 10b-5.” Justice Jackson suggested that allowing Item 303 to *per se* support a Rule 10b-5 omission claim would “write[] out of [Rule 10b-5] something about the statement being rendered misleading.” It would mean that “anytime you are required to disclose certain information in a statement and it isn’t there you have a misleading statement.” Justices Alito, Barrett, Kavanaugh, and Gorsuch voiced similar concerns about adopting such an expansive interpretation of Rule 10b-5 liability.

That was not the only concern that surfaced during oral argument. Chief Justice Roberts raised the related issue of whether allowing Item 303 to support pure omission claims would create the sort of implied private right of action that the Court has historically been hesitant to confer. In questioning that appeared to sound the death knell for a Moab Partners’ theory of liability, he expressed reticence “to get any further into the business of implying private rights of action.”

Implications of the Supreme Court’s Ruling

Regardless of how the Court rules, one thing is clear: the consequences of its decision are potentially far-reaching. A ruling that Item 303 violations can serve as a basis for liability under Section 10(b) and Rule 10b-5 would broaden their scope to more closely resemble

Section 11 and Section 12(a)(2) liability for omissions of “a material fact required to be stated.” It would also raise questions about whether other disclosure obligations under Regulation S-K should be afforded similar treatment. This could have particularly significant implications for issuers given the SEC’s recent changes to Regulation S-K, including its imposition of significant new disclosure requirements related to cybersecurity risk management.

The opposite ruling—that Item 303 omissions cannot serve as an independent basis for Section 10(b) and Rule 10b-5 liability—would have a more moderate impact. While it would reduce the number of pleading tools in securities plaintiffs’ arsenal, it is unlikely to reduce the number of securities cases filed. Few securities class action complaints are based solely on Item 303 omissions. Thus, the more likely outcome would be a change in *how* omission cases are pled. As Justice Barrett indicated in her questioning, if securities plaintiffs cannot rely on Item 303 to establish a duty of disclosure, they will be forced to re-frame pure omission claims as “misleading statement” claims. But as Justice Kagan pointed out, this reframing would not necessarily cause a tectonic shift in securities pleadings because if an issuer’s MD&A “lists three trends, but it doesn’t list a fourth that’s actually much more consequential” and “cuts in the opposite direction,” a securities plaintiff may have satisfied its Rule 10b-5 pleading requirement even without relying on Item 303.

Regardless of how the Court rules, its decision is unlikely to change the way issuers approach their MD&A disclosures. True, a ruling in Moab Partners’ favor could incentivize issuers to over-disclose information to ward off costly shareholder suits. However, because issuers are already subject to SEC review and enforcement action regarding their MD&A disclosures, the Court’s ruling is likely to have a negligible effect on what registrants disclose.

This Week in Chancery Court: Philip Morris Seeks to Intervene

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Litigation

Various brands of Philip Morris International Inc. cigarettes packs, including Benson & Hedges, Marlboro, Parliament and Virginia Slims, are arranged for a photograph in Tiskilwa, Illinois, U.S., on Tuesday, April 17, 2012.

Photographer: Daniel Acker/Bloomberg via Getty Images

Philip Morris USA Inc. will ask the Delaware Court of Chancery this week if it can intervene in a long-running dispute between two other Big Tobacco companies over a settlement meant to cover the public health costs of smoking.

Here's more from the court's calendar:

Monday: ITG Brands LLC v. Reynolds American Inc., Del. Ch., No. 2017-0129, oral argument 2/5/24.

At issue: Last October, Vice Chancellor Lori Will ruled that ITG Brands, the US unit of Imperial Brands Plc, had to compensate Reynolds American Inc. for annual payments Reynolds had to make to the state of Florida under a 1990s-era tobacco settlement for brands ITG bought from Reynolds in 2014. The amount of the damages owed to Reynolds will be determined at trial, as well as any reduction based on separate "profit adjustment" payments required from all parties to the settlement. Philip Morris wants to get involved in the case now "to protect its interests and prevent the existing parties from being unjustly enriched at its expense," it said in a brief. Also a party to the Florida settlement, Philip Morris argues it's been paying larger profit adjustment payments than Reynolds. ITG, which wasn't a party to the Florida settlement, and Reynolds both oppose any intervention from Philip Morris.

Court action: Oral arguments on Philip Morris's motion to intervene will be heard in Wilmington, Del.

Reynolds, Imperial Brands Unit Spar Over Florida Tobacco Damages

Tuesday: Seavitt v. N-able Inc., Del. Ch., No. 2023-0326, oral argument 2/6/24.

At issue: An investor sued N-able Inc. in March 2023, claiming the IT services company's investment agreements with two private equity giants, Silver Lake Group LLC and Thoma Bravo LLC, improperly gave them control over N-able's board of directors and matters the

board is legally required to oversee. Both N-able and the investor have filed motions for summary judgment. Brian Seavitt, the investor, argues a “stockholders agreement” N-able signed with Silver Lake and Thoma Bravo will allow the private equity firms “to maintain their improper control over the Company’s business and affairs even in situations where their economic ownership and voting power dwindles well below a majority.” N-able says “well-settled” Delaware law states that a board’s “rights to manage a corporation include the right to enter into contracts limiting the corporation’s future actions.”

Court action: Oral arguments on the motions for summary judgment will be heard in Wilmington, Del.

N-able Inc. Sued Over Silver Lake, Thoma Bravo Investment Deals

Wednesday: Trifecta Multimedia Holdings Inc. v. WCG Clinical Serv. LLC, Del Ch., No. 2023-0699, oral argument 2/7/24.

At issue: The founder of Trifecta Multimedia Holdings Inc., a health care technology business, sued WCG Clinical Services LLC last July, claiming it bought and shuttered the smaller company as part of a scheme to avoid a \$69 million post-deal payment. The lawsuit accuses WCG of duping Trifecta’s founder Dave Young into deferring nearly one-third of the \$214 million total transaction price, then deliberately missing revenue targets that would have triggered three “earnout” payments. WCG wants the case dismissed, arguing in a brief that it’s Trifecta that missed its milestones, and its claims of fraud are conjured “from thin air.” Trifecta and Young say WCG’s argument for dismissal side-steps “well-pleaded allegations in favor of an alternative narrative,” according to an answering brief.

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del.

Leonard Green-Backed WCG Clinical Faces \$69 Million Deal Lawsuit

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Warner Bros. Discovery Beats Post-Merger Stock Drop Class Action

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Warner Bros. Discovery Inc. and its top executives won't face allegations that they failed to provide investors details about subscriber numbers, content licensing, and streaming strategy until after the company's \$43 billion merger in 2022.

Investors alleged that the entertainment giant's misrepresentations prompted stock drops, but couldn't show that the statements highlighted in offering documents were false or misleading, Judge Valerie E. Caproni said in an opinion filed Monday in US District Court for the Southern District of New York, dismissing the case.

Plaintiffs alleged that the offering documents were misleading because they stated that Discovery and WarnerMedia had scrutinized each other's investment plans and non-public financial information as part of a due diligence process. The subsequent shuttering of news streaming service CNN+, revelation of lower HBO Max and Discovery subscriber numbers, negative statements about spending on content development, and downward revision of financial figures prompted a trio of stock drops, according to the complaint.

Warner Bros. Discovery's stock price dropped more than 16% to close at \$14.59 on Aug. 5, 2022. That was the company's biggest single-day decline since the merger took place, according to data compiled by Bloomberg Law.

The amended complaint discusses a year-long due diligence process, contradicting the plaintiffs' suggestion that Discovery didn't engage in any such preparations, and the fact that the offering documents didn't disclose details of that process doesn't render the representations false or misleading, Caproni said.

Warner Bros. Discovery's downward revision of financial figures also doesn't indicate that the companies had misled investors about their revenue prospects pre-merger. The amended complaint "attempts to engineer" Securities Act allegations based on the company's downward adjustment of the earnings figure, but that method of "hindsight" pleading falls short, according to Caproni's ruling.

The judge also found that the companies made thorough statements about the future of CNN+, the profitability of its investments in content development, and its number of streaming subscribers, as well as direct-to-streaming and licensing strategies.

Lead plaintiffs the Ohio Public Employees Retirement System and the State Teachers Retirement System of Ohio sought to establish a class with all investors who purchased Warner Bros. Discovery stock at allegedly inflated prices between April 11 and Aug. 4, 2022.

The dismissal with prejudice puts an end to litigation that originated in September 2022 against the combined company, executives including CEO David Zaslav and CFO Gunnar Wiedenfels, as well as major Discovery stockholder Advance/Newhouse Partnership and individual affiliates.

Grant & Eisenhofer PA represent the plaintiffs and the proposed class.

Weil, Gotshal & Manges LLP represent Warner Bros. Discovery, Zaslav, and Wiedenfels.

Paul, Weiss, Rifkind, Wharton & Garrison LLP represent Advance/Newhouse Partnership and the other individual defendants.

The case is Ohio Pub. Emps. Ret. Sys. v. Discovery Inc. , S.D.N.Y., No. 22-cv-8171, 2/5/24 .

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Warner Bros Discovery beats Ohio AG lawsuit over merger disclosures

 [reuters.com/legal/warner-bros-discovery-beats-ohio-ag-lawsuit-over-merger-disclosures-2024-02-05](https://www.reuters.com/legal/warner-bros-discovery-beats-ohio-ag-lawsuit-over-merger-disclosures-2024-02-05)

Jonathan Stempel

[1/2]The exterior of the Warner Bros. Discovery Atlanta campus is pictured after the Writers Guild of America began their strike against the Alliance of Motion Pictures and Television Producers, in Atlanta, Georgia, U.S. May 2, 2023. REUTERS/Alyssa Pointer/File Photo Acquire Licensing Rights  , opens new tab

NEW YORK, Feb 5 (Reuters) - Warner Bros Discovery (WBD.O)  , opens new tab on Monday won the dismissal of a proposed class action led by Ohio Attorney General Dave Yost, claiming it concealed negative financial information prior to the April 2022 merger of AT&T's WarnerMedia and Discovery.

The attorney general said offering documents for the merger overstated how many streaming subscribers were paying for content including at HBO and HBO Max; concealed WarnerMedia's strategies for licensing content and distributing films; and hid the impending demise of the CNN+ streaming service.

Yost, on behalf of the Ohio Public Employees Retirement System and the State Teachers Retirement System of Ohio, said that as the truth came out, Warner Bros Discovery's stock price fell more than 40% over four months, wiping out nearly \$25 billion of market value.

U.S. District Judge Valerie Caproni in Manhattan, however, said the offering documents accurately explained how the company calculated streaming numbers, and that defendants including Chief Executive David Zaslav were not required to disclose various other information under federal securities laws.

She also said Yost failed to explain how the planned CNN+ cancellation rendered statements about Warner Bros Discovery's broader content strategy misleading.

Monday's dismissal was with prejudice, meaning the lawsuit cannot be brought again.

A lawyer representing Yost's office declined to comment.

Warner Bros Discovery's dozens of brands  , opens new tab also include DC Comics, Food Network, Magnolia Network, TBS and TNT.

The law firm Weil, Gotshal & Manges represented Warner Bros Discovery, Zaslav and some other defendants.

It called the decision a "complete victory," and said the challenged statements were "objectively true."

Warner Bros Discovery's stock price closed on Monday down 18 cents at \$10.07, which is 58% below where it began trading on April 11, 2022.

The case is Ohio Public Employees Retirement System et al v Discovery Inc et al, U.S. District Court, Southern District of New York, No. 22-08171.

Reporting by Jonathan Stempel in New York; Editing by Stephen Coates

Rhode Island sues Boeing over stock woes caused by 737 MAX

 legalnewsline.com/stories/654132323-rhode-island-sues-boeing-over-stock-woes-caused-by-737-max

February 6, 2024

Lawsuits



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ALEXANDRIA, Va. (Legal Newsline) - The State of Rhode Island is taking Boeing to court over losses in its investment with the company caused by recent failures of its 737 MAX planes.

Boeing Company - along with its executives David L. Calhoun, Dennis A. Muilenburg, Brian J. West, and Gregory D. Smith - is facing a class action lawsuit filed by the State of Rhode Island Office of the General Treasurer on behalf of the Employees' Retirement System of the State of Rhode Island.

The lawsuit alleges violations of federal securities laws and is brought on behalf of all entities that purchased or acquired Boeing common stock between October 23, 2019 and January 24, 2024.

The plaintiffs accuse Boeing of outsourcing the production and assembly of its airplane components to third-party suppliers to cut costs and production time, thereby compromising safety standards. This practice allegedly led to two fatal crashes involving Boeing's 737 MAX 8 planes due to design flaws in the flight control software.

The case also alleges that despite promising enhanced focus on safety following these disasters, Boeing failed to uphold adequate quality control standards. The company had previously entered into a deferred prosecution agreement with the U.S Department of Justice in January 2021 related to these incidents.

The case was filed in the United States District Court for the Eastern District of Virginia on January 30. Rhode Island has hired the private firms Cohen Milstein and Labaton Keller Sucharow for the case, with Cohen lawyer Steven Toll signing the complaint.

Okta Faces Investor Class in Suit Over Bumpy Merger, Stock Drop

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Class Action

- Company allegedly falsely touted 'seamless' integration
- Court grants rare unopposed class certification request

A shareholder suit against Okta Inc. over post-merger statements about sales will proceed as a class action, a federal court ruled.

Okta didn't oppose the class certification request, a choice that's unusual for a securities case.

Judge Susan Illston of the US District Court for the Northern District of California granted the request Monday and appointed the plaintiffs, two state funds that invested in Okta, as the class representatives.

The investors alleged that after the user-authentication software company acquired Auth0 Inc. in March 2021 for \$6.5 billion, Okta and three executives reassured investors that the companies were integrating seamlessly. But numerous Auth0 employees left, and the company had difficulty unifying the sales teams, the shareholders said. The company allegedly shut down a year-long sales integration plan abruptly, leaving the remaining employees only two weeks to adapt.

The revelations caused the company's share price to drop 34% on Sept. 1, 2022, the complaint said.

Illston trimmed some claims from the suit in April 2023.

Labaton Keller Sucharow LLP is lead counsel for the investors. Gibson, Dunn & Crutcher LLP represents Okta and the individual defendants.

The case is *In re Okta, Inc. Sec. Litig.*, N.D. Cal., No. 3:22-cv-02990, 2/5/24.

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Powerfleet Prospectus Allegedly Omitted MiX Telematics Deal Data

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- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:24-cv-00781

Powerfleet Inc. and its directors omitted key details in a prospectus for a proposed deal to merge with MiX Telematics Limited in a tie-up that would form one of the nation's largest provider of mobile asset management, vehicle tracking, and other transportation services, a shareholder complaint says.

The proxy statement left out information shareholders need to cast their votes to approve or deny the deal at a Feb. 28 shareholder meeting, including financial projections for the combined company, as well as financial analyses, and potential conflicts of interest faced by financial adviser William Blair & Co. LLC, according to the complaint filed Feb. 2 in the US District Court for the Southern District of New York.

Powerfleet and MiX Telematics, which both provide internet of things asset management solutions, reached an agreement to combine the companies on Oct. 10, 2023. Upon completion of the proposed deal, Powerfleet shareholders will own approximately 34.5% of the combined company, while MiX investors will own 65.5%, according to a press release.

The combined business will carry the Powerfleet name and have a total revenue of \$279 million, including \$210 million in recurring software-as-a-service revenue. The companies expect to close the deal in the first quarter of this year, according to the press release.

The missing financial figures include unlevered free cash flow and other metrics William Blair relied upon in assessing the fairness of the deal, including the data from prior mergers it used as comparators for the Powerfleet and MiX figures. The prospectus also fails to disclose whether William Blair has performed any services for MiX or its affiliates in the past two years or received any fees from the company, the complaint says.

Shareholder Joseph Clark alleges that Powerfleet and its board violated the Securities Exchange Act by issuing a false and misleading prospectus. He seeks to block the shareholder vote until the missing information is disclosed or to rescind the deal after it closes and collect rescissory damages, as well as legal fees, the complaint says.

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

Acocelli Law PLLC represents the plaintiff.

The case is Clark v. PowerFleet , S.D.N.Y., No. 1:24-cv-00781, complaint filed 2/2/24 .

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Ontrak, Ex-CEO Beat Client Relationship Fraud Lawsuit, for Now

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- Judge tosses proposed class action, grants leave to amend
- Investors allege Ontrak overstated Aetna, Cigna deal prospects

Ontrak Inc. and four top executives are free of investor allegations that they failed to disclose issues with the company's demand and client pipeline from major customers Aetna Inc. and Cigna Corp.

The behavioral health company, which uses predictive technology to connect insurance plan members with cost-saving programs, allegedly misrepresented the relationships it had with Aetna and Cigna before the sudden termination of both contracts. The investors who brought the suit, however, didn't show that Ontrak or the executives intentionally made false statements about those relationships, according to a Feb. 2 order by the US District Court for the Central District of California.

The amended class action complaint filed last year relies on allegations that Ontrak's management played an important role in the company, but doesn't contain detailed information about their actual prior exposure to the information they allegedly misrepresented to investors, Judge Fernando L. Aenlle-Rocha said in his ruling.

When former CEO Terren Peizer, who now serves as executive chairman, and COO Curtis Medeiros made statements about an ongoing client relationship with Aetna, for example, the negotiations between the two companies may have been tenable and the prospect of expanding or restoring their members' data to Ontrak could still have been possible, the judge said in his order explaining the plaintiffs' failure to show the executives knowingly made false statements.

The complaint also didn't show that defendants knowingly misled investors with positive forward-looking statements, which may have been disclosed without sufficient understanding the full gravity of the customer issues before Aetna and Cigna terminated their contracts, both citing inadequate cost savings, according to the Aenlle-Rocha's order.

Ontrak's stock price fell 46% on March 1, 2021 the day that the termination of the Aetna contract was announced, which was the stock's biggest single-day decline in nearly four years, according to data compiled by Bloomberg. The company's share price fell another 44% on Aug. 19, 2021 the day after the Cigna contract was terminated.

Peizer was charged with criminal securities fraud and insider trading in a probe by the US Justice Department and US Securities and Exchange Commission last year, due to his alleged use of prearranged stock-sale plans to avoid losses on his holdings before Cigna ended its contract with Ontrak. The SEC alleged that he sold more than \$20 million in Ontrak stock between May and August 2021, ahead of the Cigna contract termination.

Statements made by Peizer and other executives, which plaintiffs alleged amounted to puffery, weren't actionable because many were expressions of opinion rather than fact. Peizer, for example, said that he would personally be surprised if Ontrak didn't expand its scope of coverage, and current CEO Jonathan Mayhew's vaguely optimistic statements didn't offer any specific details or forecasts of company performance, Aenlle-Rocha said.

The shareholders who brought the suit will have 14 days to file an amended complaint.

The Rosen Law Firm PA and Brian Schall, who practices in Los Angeles, represent the plaintiffs and the proposed class.

Sheppard Mullin Richter & Hampton LLP represents Ontrak, Medeiros, and CFO Brandon LaVerne. King & Spalding LLP and Brown Rudnick LLP represent Peizer. Bergeson LLP represents Mayhew.

The case is Farhar v. Ontrak , C.D. Cal., No. 2:21-cv-01987, 2/2/24 .

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Y-mAbs Investor Suit Over Failed Cancer Drug Survives With Trims

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Feb. 6, 2024, 11:44 AM PST

Matthew Bultman

Reporter

- Suit alleges investors misled about approval process for drug
- Judge trims shareholder lawsuit but allows case to proceed

A federal judge narrowed but declined to completely toss a shareholder lawsuit alleging Y-mAbs Therapeutics Inc. misled investors about the regulatory process for a failed cancer treatment.

Various statements Y-mAbs executives made during the company's attempt to win approval of the drug, while optimistic, were not misleading, Judge Arun Subramanian in the US District Court for the Southern District of New York said in a Monday opinion.

Subramanian said he will allow securities fraud claims based on a handful of statements from executives commenting on feedback that Y-mAbs received from the Food and Drug Administration during the drug review process.

The judge was ruling on Y-mAbs' motion to dismiss. Y-mAbs and an attorney for the shareholder plaintiff didn't immediately respond to a request for comment.

The proposed class action stems from an application Y-mAbs filed in 2020 seeking FDA approval for omburtamab, which was designed to treat patients with neuroblastoma that relapses in certain parts of the body.

The FDA declined to approve the treatment in late 2022. The decision came after an advisory committee said Y-mAbs didn't provide enough evidence to conclude omburtamab improved overall survival. The committee's decision sent share prices tumbling, the suit said.

Some statements Y-mAbs executives made after the FDA identified issues with the initial application could be misleading because they appear to contradict feedback that Y-mAbs received from the health agency, Subramanian said.

In one example, then-CEO Claus Juan Møller San Pedro said he thought Y-mAbs put together a "very strong package" that should satisfy the FDA's concerns. The FDA had previously said that it had "outstanding concerns," according to court documents.

Pomerantz LLP is lead counsel for plaintiff. Cooley LLP represents Y-mAbs.

The case is In re Y-Mabs Therapeutics, Inc. Secs. Litig. , S.D.N.Y., No. 23-cv-431, 2/5/24 .

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Volta Investor Loses Bid for Attorney Fees in Shell Merger Suit

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- Lawsuit moot after Volta disclosed requested information
- Revised disclosure wasn't material to shareholders, judge says

A shareholder who pushed Volta Inc. to disclose more details about banks involved in Shell Plc's purchase of the electric-vehicle charging company lost his request for over \$171,000 in attorneys' fees.

Volta amended its proxy statement to include the requested information after the shareholder, David Belcher, sued. But the information, which was already publicly available, didn't meaningfully benefit Volta shareholders, Judge Jed Rakoff in the US District Court for the Southern District of New York said Friday.

Investors are filing more lawsuits in federal court objecting to companies' merger disclosures, after Delaware's Chancery Court cracked down on disclosure-based settlements in 2016. Rakoff's ruling is the latest example of federal judges scrutinizing requests for attorneys' fees after the cases become moot.

"Belcher has not identified any false or misleading statement in the preliminary proxy statement that required correction," Rakoff said in the opinion. "Moreover, the supplemental disclosures, while not previously embedded in the proxy statement itself, consisted of publicly available information and were thus not material."

Belcher's lawsuit was filed weeks after Shell announced the \$169 million dollar deal in January 2023. The suit complained Volta's proxy statement didn't disclose specific details of Shell's relationship with Barclays Plc and Goldman Sachs Group Inc., or the amount the banks would be paid for work related to the deal.

Volta agreed to amend the statement to include the requested information, making the case moot.

Belcher asked for \$171,150 in attorneys' fees. Pushing back, Volta argued the "disclosures provided no information plausibly affecting how a reasonable stockholder would vote on the Merger."

Wohl & Fruchter LLP represents Belcher. Norton Rose Fulbright US LLP represents Volta.

The case is Belcher v. Volta Inc. , S.D.N.Y., No. 23-cv-01406, 2/2/24 .

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Juniper Networks' \$3 Million 401(k) Deal Approved, With Fee Trim

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- Deal driven by law change, warranting lower fees, judge says
- Court also awards reduced amounts for class representatives

Current and former Juniper Networks Inc. employees received final approval for a \$3 million class settlement over the company's 401(k) plan fees, but a California judge awarded them only about half of their requested attorneys' fees.

Judge James Donato granted final approval to the deal Monday, after initially expressing doubt that the \$3 million figure was sufficient given the plan participants' estimated damages of about \$26 million. The participants defended the deal last year, saying their potential damages declined significantly after a 2022 decision in which the Ninth Circuit rejected ERISA claims based on a company's alleged failure to consider passively managed funds for its retirement plan.

Donato, who sits in the US District Court for the Northern District of California, awarded the participants' lawyers \$373,715 in fees, down from their request of \$750,000. A lower fee is warranted because the settlement "was driven in part by a change in law outside of this litigation, and was reached early with minimal work required of counsel," he said.

The judge added that only about \$280,000 in attorneys' fees will be distributed at this time; the remaining 25% will be released after counsel has filed the required paperwork following the distribution of settlement proceeds.

Donato also awarded the two class representatives service awards of \$2,000 each, saying their requested service awards of \$4,000 weren't warranted based on their minimal involvement in the case.

The lawsuit says Juniper's 401(k) plan paid annual administrative fees of about \$80 per person, which is about double the amount a well-run plan would have charged. Plan participants were also charged excessive fees for managed account services that provided no material benefit, according to the lawsuit.

Donato allowed the case to advance over Juniper's motion to dismiss in 2022, saying the employees stated viable claims under the Employee Retirement Income Security Act by presenting significant details about the plan's management, including data comparing Juniper's fees and investments to other options.

Walcheske & Luzi LLC and Creitz & Serebin LLP represent the plan participants. Jackson Lewis PC represents Juniper.

The case is Reichert v. Juniper Networks, Inc. , N.D. Cal., No. 3:21-cv-06213, 2/5/24 .

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Abbott Formula Economic Injury Allegations Face Skeptical Judges

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Federal appellate judges on Monday were dismissive of claims that consumers purchasing Abbott Laboratories Inc. infant formula were economically injured when some of it may have been contaminated since no infant fell ill.

A three-judge panel for the US Court of Appeals for the Seventh Circuit appeared ready to affirm a dismissal of a case against Abbott, openly questioning key elements of the appeal.

An Illinois federal district court judge dismissed a class action against Abbott following a recall of its Alimentum, EleCare, and Similac infant formula products in 2022, ruling the plaintiffs lacked standing.

“What is the damage? They paid a premium for a product they thought they were getting. That’s exactly what they got,” Judge Thomas Kirsch said Monday.

Judge Ilana Rovner noted the complaints weren’t filed because any infants got sick from the formula. The class action was filed only after Abbott voluntarily recalled its products Feb. 17, 2022.

Bradley Grombacher LLP founding partner Kiley Grombacher argued the class she represents can sue Abbott because it didn’t receive the benefit of a premium-priced infant formula and thus suffered financial injury.

Abbott’s lawyer and Kirkland & Ellis litigation partner John C. O’Quinn argued consumers got exactly what they paid for. He likened Grombacher’s complaint to diners suing a restaurant after it shut down for sanitary violations even though no diner became ill from their meals.

A second case against Abbott involving its recall alleging personal injuries is pending in federal district court.

Product Recall

The complaint alleged consumers purchased Abbott infant formula products manufactured at a Sturgis, Mich., company facility before Abbott recalled the products due to hygienic concerns. The same day the recall was announced, the Food and Drug Administration and Centers for Disease Control and Prevention advised consumers not to use recalled Similac, Alimentum, or EleCare powdered infant formulas.

The closure of the Abbott's Michigan facility was a key factor leading to a national shortage of baby formula in 2022, however this economic loss litigation isn't related to the formula shortage.

Several lawsuits were launched against Abbott following the recall. In August 2022, those cases were consolidated in the US District Court for the Northern District of Illinois. US District Judge Matthew Kennelly dismissed the economic loss complaints in May 2023. The plaintiffs appealed.

Abbott claims the plaintiffs risk-of-contamination allegations didn't create standing to sue. The class also failed to assert other theories of injury, Abbott lawyers argued in their brief.

The class argued it suffered economic loss because the formula was "at risk" and could have contained bacteria.

Arguments about paying a premium for an allegedly inferior product and not being able to use it fail, Abbott said.

John C. O'Quinn, Michael A. Glick, and Joseph C. Schroeder, Kirkland & Ellis LLP, represent Abbott Laboratories. Kiley Grombacher of Bradley Grombacher LLP and Timothy Becker and Stacy Kathryn Hauer of Johnson Becker PLLC, represent the economic loss plaintiffs.

The case is Economic Loss Plaintiffs v. Abbott Laboratories , 7th Cir., No. 23-2525, oral arguments 2/5/24 .

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Parents seek to revive claims they overpaid for Abbott formula before recall

 [reuters.com/legal/litigation/parents-seek-revive-claims-they-overpaid-abbott-formula-before-recall-2024-02-05](https://www.reuters.com/legal/litigation/parents-seek-revive-claims-they-overpaid-abbott-formula-before-recall-2024-02-05)

Brendan Pierson

Abbott Laboratories logo is displayed on a screen at the New York Stock Exchange (NYSE) in New York City, U.S., October 18, 2021. REUTERS/Brendan McDermid Acquire Licensing Rights , opens new tab

Feb 5 (Reuters) - Parents who say they overpaid for Abbott Laboratories' (ABT.N) , opens new tab baby formula before one of its plants was shuttered for unsanitary conditions urged a federal appeals court on Monday to revive their lawsuit against the company.

Kiley Grombacher of Bradley Grombacher, a lawyer for the parents, told a three-judge panel of the 7th U.S. Circuit Court of Appeals that her clients would not have bought, or would have paid less, for Similac and other Abbott brands if they had known of the safety risks that led to the plant shutdown and a subsequent recall.

U.S. District Judge Matthew Kennelly in Chicago last year dismissed those claims, finding that the parents had not shown that their children were actually harmed. Other lawsuits, alleging that babies were sickened by contaminated formula, remain pending. The 7th Circuit panel appeared skeptical of the case.

"What specifically is your injury?" Circuit Judge Thomas Kirsch asked Grombacher at the outset of the argument. "They got the product they bought."

"The injury here is that they paid for a product that should never have been on the market," Grombacher said.

Circuit Judge Ilana Rovner also questioned the plaintiffs' argument that they were exposed to a greater risk by buying the formula.

"If there was a one in a billion chance that someone could buy a contaminated product, does every person who ever bought that product have standing to sue?" she asked.

Grombacher responded that, in light of the recall and a subsequent consent decree with federal regulators, all of the formula the parents bought should be considered "adulterated." John O'Quinn, a lawyer for Abbott, said the court should uphold Kennelly's dismissal, and rejected Grombacher's argument that the formula they bought was unsafe.

"There is no admission in the consent decree that Abbott sold adulterated foods," he said. "It's not in the consent decree. It's not in their complaint."

He said the plaintiffs' argument was equivalent to allowing any past patrons of a restaurant later found to have health code violations to sue, even if they did not get sick.

Kirsch, Rovner and the third member of the panel, Circuit Judge Michael Brennan, were all appointed by Republican presidents. They did not indicate when they would rule.

Abbott closed its Sturgis, Michigan, baby formula plant on Feb. 1, 2022, and recalled batches of its products, triggering a nationwide baby formula shortage.

In May 2022, U.S. Food and Drug Administration Commissioner Robert Califf told Congress that conditions in the plant were "egregiously unsanitary." The plant reopened that July following the company's agreement with the FDA.

Eighty-five lawsuits were still pending before Judge Kennelly as of Feb 1. Those lawsuits allege that contaminated formula cause caused salmonella infection, bacterial meningitis and other health problems.

Abbott has denied the claims.

The case is Economic Loss Plaintiffs v. Abbott Laboratories, 7th U.S. Circuit Court of Appeals, No. 23-2525.

For plaintiffs: Kiley Grombacher of Bradley Grombacher

For Abbott: John O'Quinn of Kirkland & Ellis

Read more:

Judge tosses out some claims in Abbott baby formula litigation

Abbott, FDA reach agreement to reopen baby formula facility in Michigan

Reporting By Brendan Pierson in New York

Judge Weighing 3M's \$10 Billion PFAS Offer Frets Over Bankruptcy

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The federal judge overseeing claims alleging harm from PFAS pollution praised the years-long effort that resulted in 3M Co. offering at least \$10.5 billion to public water systems, but warned the company's potential bankruptcy looms over the case.

Judge Richard M. Gergel, of the US District Court for the District of South Carolina, held the final fairness hearing on Friday for the settlement, which would relieve 3M of uncertainty about its liability while offering an estimated 12,000 public water systems money to pay for their removal of PFAS from drinking water serving millions of people.

"There are parts of the settlement that aren't perfect," Gergel said. "At some point you have to say it isn't perfect, but are the imperfections too big not to support it."

3M in June 2023 made the settlement offer of \$10.5 billion to \$12.5 billion to resolve current and future claims by drinking water utilities that the company's per-and polyfluoroalkyl substances (PFAS) made their way into the systems.

Water utilities need the offered settlement to help pay for efforts they've already made to remove the PFAS from drinking water, and to comply with national drinking water limits the Environmental Protection Agency plans to issue this year, Scott Summy, the plaintiffs' co-lead counsel, told the court.

The agency's proposed drinking water limits of 4 parts per trillion for the two most well-known PFAS found around the US are the strictest in American history, said Summy, who leads Baron & Budd PC's Environmental Litigation Group.

Gergel's praise for the efforts all parties have made in negotiating the complex settlement doesn't constitute a final opinion on whether it's fair, reasonable, and adequate. That ruling will come later.

Bankruptcy Threat

Looming over the multidistrict litigation (MDL) is the "real risk" that 3M could go bankrupt by the number and scope of the claims against it, Gergel said.

Water utilities make up only one group of litigants. Other cases come from firefighters claiming their cancers and other diseases stem from their PFAS exposures, states that maintain PFAS have damaged their natural resources, and property damage claims by businesses and other parties.

The court has already begun to tee up bellwether trials for personal injury cases and litigation for additional water utility lawsuits against multiple companies making telomers, a type of PFAS.

The private sector doesn't have enough money to pay for the entire alleged PFAS problem, Gergel said. Congress will have to provide more help, he said.

Meanwhile, "I don't think it's in anyone's interest for 3M to be pushed into bankruptcy," Gergel said.

3M is only one of many companies being sued in the MDL. Kidde-Fenwal Inc., a defendant over its production of PFAS-laden firefighting foam, declared Chapter 11 bankruptcy last year on the cusp of litigation.

Summy described regulations driving the need for the settlement and utilities' fears that state laws setting time limits for lawsuits—statutes of limitation and statutes of repose—may prevent them from paying for PFAS treatment without the protections the settlement offers.

The case is *In Re Aqueous Film-Forming Foams Products Liab. Litig.* MDL 2873 , D.S.C., No. 18-mn-02873, Final Fairness Hearing, 2/2/24 .

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Abuse of Public Nuisance Tort Litigation Is the Real Nuisance

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California and many other states, counties, and cities nationwide are waging an aggressive battle against the US energy industry in state courts. They have sued energy companies such as ExxonMobil, Shell, and the oil and gas industries' main trade association for creating or aiding/abetting the public nuisance of climate change.

The plaintiffs believe that, based on previous public nuisance mass-tort settlements, they will be able to force the energy companies into a massive settlement worth tens, maybe hundreds, of billions of dollars.

In the 2022 opioid public nuisance mass-tort settlements, Johnson & Johnson, AmerisourceBergen, Cardinal Health, and McKesson agreed to pay \$26 billion; pharmacies CVS, Walgreens, and Walmart settled for \$13.8 billion; and Purdue Pharma (which manufactured OxyContin) and the Sackler family settled with the Department of Justice for approximately \$8 billion. But even these huge amounts pale when compared to the granddaddy of all mass-tort settlements: the Clinton-era tobacco industry settlement, \$246 billion.

The plaintiffs, however, misapply public nuisance law and inappropriately try to expand it far beyond its original meaning and intent.

Since at least 12th-century England and the inception of common law, a public nuisance has been defined as an unlawful, unwarranted, or unreasonable interference with the general public's common right to enjoy public lands or waters. It can also be the intentional misuse of private land to engage in illegal activity that disturbs the public's use of or access to nearby public lands or waters—a factory that dumps toxic waste into a river, for instance.

When that happens, the state or municipal government sues to protect the public's common right to access and use the public lands or waters, asks the court to enjoin the illegal activities, and recovers abatement costs from the people who actually engaged in the illegal activities. Traditionally, public nuisance hasn't encompassed legal activities such as manufacturing or selling legal products, especially those heavily regulated at both the state and federal levels.

California's and other state legislatures made the public policy choices to permit and regulate oil and gas exploration, production, refinement, and sales despite their concerns about climate change because the legislatures also determined that Americans need energy to power all the basics of modern-day life.

It is wrong for state and municipal plaintiffs to now punish the energy companies for following state and federal laws and regulations, and it's wrong for them to contravene traditional separation of powers and attempt to make policy through litigation instead of through the normal legislative process, which even the California Supreme Court recognized in 1997.

It isn't clear that the energy companies are the main "climate-changing" entities in the US. They produce, refine, and sell petroleum and natural gas products but don't manufacture the vehicles or power plants that burn them and create the carbon emissions. The plaintiffs appear to ignore the significant roles of other industries, international actors, and the population at large. The plaintiffs claim that the energy companies' global profits should be considered fair game, but they haven't sued any Chinese companies even though China's greenhouse gas emissions in 2021 exceeded the emissions of all Organization for Economic Cooperation and Development members combined.

Courts should reject the plaintiffs' bar's attempts to twist public nuisance law away from its original purpose. If they don't, there will be no limit to where these lawsuits end, especially if the courts choose to ignore intervening criminal acts that normally break the control and causation chains, and/or conjure non-existent public rights, such as the "right" to be free from climate change or free from criminals who use legal products to break the law.

Under the plaintiffs' legal theory, restaurants, bars, distilleries, breweries, wineries, grocery stores, liquor stores, and automobile manufacturers could be liable for the public nuisance of drunk drivers. Cereal and snack food manufacturers, grocery stores, sugar companies, and fast-food chains could be liable for diabetes and heart disease.

It is worth noting that the mass-tort plaintiffs' firms and their client states such as California so far haven't filed public-nuisance lawsuits against wind turbine manufacturers, even though they theoretically could be held liable for the public nuisances of noise and aesthetic pollution, as well as dead birds and dolphins.

Public nuisance law never was intended to be a legislative policy substitute to address societal harms or a replacement for a plaintiff's inability to plead and prove fraud, deceptive practices, false advertising, or product liability.

Misapplying public nuisance law in this way creates an untenable situation where "liability is based upon unidentified ills allegedly suffered by unidentified people caused by unidentified products in unidentified locations," and, as the US Court of Appeals for the Eighth Circuit warned in *Tioga Public School District v. U.S. Gypsum*, public nuisance "thus would become a monster that would devour in one gulp the entire law of tort." The courts must prevent this from happening.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Write for Us: Author Guidelines

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Roundup User's Cancer Labeling Suit Not Preempted by Federal Law

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A state failure-to-warn claim brought by Roundup user who says his cancer was caused by his use of Monsanto Co.'s weedkiller isn't preempted by a federal law regulating pesticide labels, a federal appeals court said Monday.

Though the Federal Insecticide, Fungicide, and Rodenticide Act includes a provision that preempts some state requirements, Georgia's state-law duty to warn consumers about foreseeable dangers the manufacturer should reasonably know about is less demanding of pesticide manufacturers and is consistent with the federal law, the US Court of Appeals for the Eleventh Circuit said.

John D. Carson Sr. sued Monsanto after he was diagnosed with soft-tissue cancer and alleged the company was aware that Roundup contained a dangerous carcinogen, glyphosate, but didn't warn customers.

Bayer, which bought Monsanto, has been hit with a string of verdicts stemming from glyphosate in Roundup.

Monsanto said that between 1986 and 2016, the period Carson used Roundup, the Environmental Protection Agency repeatedly said glyphosate wasn't likely to cause cancer and cancer warnings weren't required.

The parties previously partially settled the dispute for \$100,000, in a "high-low" agreement where Carson reserved his right to appeal his failure-to-warn claim.

The company argued Carson's claims are expressly preempted by FIFRA because it disallows state-law labeling or packaging requirements that are different from FIFRA's.

But based on Supreme Court precedent, "so long as the state-law duty parallels or is 'fully consistent with FIFRA, FIFRA does not preempt it," Judge Robin S. Rosenbaum said for the court. "And here, the practical effect is the same: both FIFRA and Georgia common law require pesticide manufacturers to warn users of potential risks to health and safety."

The Eleventh Circuit rejected Monsanto's argument that FIFRA's requirements are more broad and that EPA approval of its registration and reregistration preempted Carson's claims.

But Rosenbaum noted that the EPA can retract its label approval so "it would make little sense to deem it a 'requirement' on equal footing" with FIFRA's misbranding prohibition.

"FIFRA expressly contemplates a role for states in pesticide regulation, and that role includes common-law claims that parallel FIFRA's requirements."

Monsanto's argument that Carson's claim was also impliedly preempted because it would be impossible for the company to comply with both state and federal requirements was also rejected.

"The Agency's repeated approvals of a label without a cancer warning do not mean the Agency necessarily would have rejected a label with a cancer warning," Rosenbaum said. Also, Monsanto didn't request a cancer warning label so it can't meet its burden to show that the EPA wouldn't approve the label change, she said.

The court didn't address Carson's argument that implied preemption isn't a defense available under FIFRA because it has an express preemption.

The Eleventh Circuit remanded for further proceedings.

The Third Circuit is also reviewing a similar preemption question after Monsanto appealed a district court ruling against it.

Judges Gerald Bard Tjoflat and James S. Moody Jr., sitting by designation from the US District Court for the Middle District of Florida, joined the opinion.

Carson is represented by Kellogg Hansen Todd Figel & Frederick PLLC and Southeast Law LLC.

Monsanto is represented by Covington & Burling LLP, Hollingsworth LLP, Bryan Cave Leighton Paisner LLP, and Pennington PA.

The case is Carson v. Monsanto , 11th Cir., No. 21-10994, 2/5/24 .

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US Oil Refiner Says Residents Can't Prove Toxic Dust Liability

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Class Action

Flames from a flare stack at an oil refinery at dusk.

Photographer: Luke Sharrett/Bloomberg

- Residents said oil refinery responsible for flaring, pollution
- Court lacks jurisdiction over Clean Air Act claims, PBF says

PBF Energy Inc. is vying to dismiss claims brought by California residents seeking compensation for exposure to toxic dust that allegedly emanated from one of the petroleum energy company's oil refineries in the San Francisco Bay Area.

The residents lacked jurisdiction to bring Clean Air Act claims because they didn't provide the company with a required notice of the lawsuit, specify how an air emission rule was purportedly violated, and allege facts establishing that the company had direct involvement or liability in the refinery's operations and emissions, PBF said in a motion to dismiss filed with the US District Court for the Northern District of California on Feb. 2.

Furthermore, California law doesn't consider the operation of a refinery as "ultrahazardous activity" and recognize medical and environmental monitoring as standalone causes of action, PBF said.

The proposed class-action, which was filed in November, says flaring from a mismanaged PBF oil refinery in Contra Costa County, Calif., blanketed surrounding areas with a dust byproduct of gasoline, diesel, and refined jet fuel containing aluminum and other hazardous metals on several occasions between November 2022 and July 2022. Petroleum coke dust, a known carcinogen, was also released by the refinery, the lawsuit said.

The residents are represented by Cotchett Pitre & McCarthy LLP. PBF and its subsidiaries are represented by Alston & Bird LLP.

The case is Cruz v. PBF Energy Inc. , N.D. Cal., No. 3:23-cv-06142, motion to dismiss filed 2/2/24 .

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US appeals court finds Bayer not shielded from Roundup lawsuit

 [reuters.com/legal/us-appeals-court-finds-bayer-not-shielded-roundup-lawsuits-2024-02-05](https://www.reuters.com/legal/us-appeals-court-finds-bayer-not-shielded-roundup-lawsuits-2024-02-05)

Brendan Pierson

Bottles of Roundup, a brand owned by Bayer, are seen for sale in a store in Manhattan, New York City, U.S., June 30, 2022. REUTERS/Andrew Kelly/File Photo Acquire Licensing Rights [↗](#), opens new tab

Feb 5 (Reuters) - A U.S. appeals court on Monday refused to dismiss a Georgia doctor's lawsuit claiming that Bayer AG's (BAYGn.DE) [↗](#), opens new tab Roundup weedkiller caused cancer, the latest setback in the German company's efforts to fend off thousands of similar cases carrying potentially billions of dollars in liability.

A three-judge panel of the Atlanta-based 11th U.S. Circuit Court of Appeals rejected Bayer's argument that federal regulators' approval of Roundup shielded the company from being sued under state law for failing to warn consumers of the product's risks. Several other appeals courts had previously reached the same conclusion in similar lawsuits.

Bayer said in a statement that it disagreed with the ruling and that it "continues to stand fully behind its Roundup products," which it maintains are safe.

The ruling comes as some investors have been pressuring the company to change its strategy on the litigation, by pursuing settlements or breaking up its business. So far, however, the company has doubled down on continuing to fight Roundup cases in court, saying it believes it can win key victories on appeal.

If the 11th Circuit had broken with those other appeals courts, it would have made it more likely for the U.S. Supreme Court to take up the issue. Another federal appeals court, the Philadelphia-based 3rd Circuit, is currently considering the issue in a separate case.

Bayer has said that it hopes a favorable Supreme Court ruling could eliminate much of its liability from the Roundup-related litigation, but the court has so far rebuffed its appeals.

Roundup-related lawsuits have dogged Bayer since it acquired the brand as part of its \$63 billion purchase of Monsanto in 2018. The company settled most Roundup claims that were pending against it in 2020 for up to \$10.9 billion, but still faces more than 50,000 claims over the product.

David Carson, the plaintiff in Monday's case, said in his lawsuit he was diagnosed with a type of cancer called malignant fibrous histiocytoma in 2016 after using Roundup for 30 years.

Much of his case was initially dismissed by a trial judge, who agreed with Bayer that his failure-to-warn claims were barred by federal law.

The 11th Circuit panel in July 2022 disagreed and revived the case. Monday's ruling comes after the panel was ordered by the full 11th Circuit to reconsider its earlier decision.

The panel said that a Georgia law that requires companies to warn consumers of foreseeable dangers from using their products does not conflict with the Federal Insecticide, Fungicide, and Rodenticide Act, the federal law under which Roundup's label was approved.

The court said it would have been possible for the company to seek to put a cancer warning on Roundup to comply with Georgia law.

"We're gratified the court rejected Monsanto's defense and upheld the validity of Dr. Carson's claims," David Frederick, Carson's attorney, said in an email. "The harm Monsanto caused with Roundup is immeasurable."

Bayer has won 10 of the last 16 trials over Roundup. But it has been hit in the cases it lost with more than \$4 billion in jury verdicts since last October. Some of those awards are likely to be reduced on appeal because they exceed U.S. Supreme Court guidance.

Most plaintiffs allege that Roundup caused a type of cancer called non-Hodgkin's lymphoma, though some like Carson say it caused other cancers.

Reporting By Brendan Pierson in New York; Editing by Josie Kao, Alexia Garamfalvi, Will Dunham and Aurora Ellis

Apple Users Win Class Status in Suit Over iPhone App Monopoly

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Class Action

- Plaintiffs sued Apple with antitrust claims in 2011
- Federal judge grants motion for class certification

Apple Inc. users won class action status in a yearslong suit accusing the tech giant of monopolizing the market for iPhone apps and inflating prices for app content.

Judge Yvonne Gonzalez Rogers of the US District Court for the Northern District of California on Feb. 2 granted the Apple users their motion for class certification, saying their proposed class met the predominance standard requiring class members to show they were harmed in the same way and can prove their claims as a group.

The decision adds to the regulatory pressure on Apple in both Europe and the US, where it has faced concerns over how it operates its App Store as well as allegations of hurting competition in the mobile payment arena. The Justice Department is expected to file an antitrust suit against the tech giant as early as March.

Plaintiffs sued Apple in 2011, claiming the company monopolized the market for iPhone apps in violation of Section 2 of the Sherman Act, which prohibits attempts to monopolize. Apple required iPhone software developers to pay 30% of what they charge for an app, which the iPhone users said increased prices for consumers and excluded competitors from the iPhone apps market.

Apple had argued that the plaintiffs failed to allege they were direct purchasers and hadn't met the burden to plead antitrust injury.

Rogers had previously denied class certification, saying the plaintiffs didn't reliably identify which class members, and how many, were injured. The plaintiffs then narrowed their class definition to only include Apple account holders who spent \$10 or more on apps or in-app content.

The plaintiffs are represented by law firms including Wolf Haldenstein Adler Freeman & Herz, LLP. Apple is represented by firms including Latham & Watkins LLP and Gibson, Dunn & Crutcher LLP.

The case is *In re Apple iPhone Antitrust Litigation*, N.D. Cal., No. 4:11-cv-06714, 2/2/24 .

Fiction, Nonfiction Authors File Consolidated Complaint Against OpenAI and Microsoft

 [law.com/nationallawjournal/2024/02/05/fiction-nonfiction-authors-file-consolidated-complaint-against-openai-and-microsoft](https://www.law.com/nationallawjournal/2024/02/05/fiction-nonfiction-authors-file-consolidated-complaint-against-openai-and-microsoft)

Fiction and nonfiction writers pursuing copyright infringement claims against ChatGPT developer OpenAI and Microsoft filed a consolidated complaint in the Southern District of New York on Friday, bringing together two cases filed in 2023.

The plaintiffs are “seeking redress for Defendants’ flagrant and harmful infringements of Plaintiffs’ registered copyrights,” according to the complaint.

The first proposed class action copyright infringement suit in the SDNY was filed by Lief Cabraser Heimann & Bernstein and Cowan, DeBaets, Abrahams & Sheppard on behalf of fiction writers including John Grisham, George R.R. Martin and Jodi Picoult in September. They are identified as the “fiction author class” in the consolidated complaint.

Attorneys at Susman Godfrey filed a second proposed class action copyright infringement suit on behalf of author and editor Julian Sancton in November, and more nonfiction writers—including political writer Jonathan Alter, civil rights historian Taylor Branch and New Yorker staff writer and author Jia Tolentino—joined the suit in December.

In the consolidated complaint, the plaintiffs argued that OpenAI’s large language models “endanger authors’ ability to make a living, in that the LLMs allow anyone to generate—automatically and freely (or very cheaply)—texts that they would otherwise pay writers to create.”

“Without Plaintiffs’ copyrighted works on which to ‘train’ their LLMs, Defendants would have no commercial product with which to damage—if not usurp—the market for these professional writers’ works. OpenAI’s willful copying thus makes Plaintiffs’ works into engines of Plaintiffs’ own destruction, notwithstanding that professional writers often spend years conceiving of and writing their creations,” the attorneys wrote.

The plaintiffs asserted that the LLMs were trained on “tens or hundreds of thousands of fiction and nonfiction books” in order to produce text resembling human expression.

“In training their models, Defendants reproduced copyrighted texts to exploit precisely what the Copyright Act was designed to protect: the elements of protectable expression within them, like the choice and order of words and sentences, syntax, flow, themes, and paragraph and story structure,” they wrote.

The defendants' deadline to respond to the consolidated complaint is set for Feb. 16. OpenAI is represented by attorneys at Morrison Foerster and Latham & Watkins, and Microsoft's attorneys are at Orrick, Herrington & Sutcliffe.

The case is assigned to U.S. District Judge Sidney Stein of the Southern District of New York.

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The plaintiffs claim that this win-win situation for both PBMs and manufacturers sowed the seeds for collusion among executives from both industries. According to the lawsuit, several instances of lockstep price increases of insulin drugs occurred shortly after pharmaceutical industry executives and PBMs met in private rooms at industry conferences.

For example, the plaintiffs claim that Sanofi increased the list price of its blockbuster insulin drug Lantus by 3% just days after drugmakers hosted private rooms with competitors at a Pharmaceutical Care Management Association conference in 2017.

Lawyers for Erie County also noted that in 2014 Novo Nordisk “raised the list price of Levemir a matter of hours after Sanofi made its list price increase on Lantus.” Both price hikes “occurred just weeks after the 2014 PCMA spring conference in Washington, D.C.,” according to the lawsuit.

The complaint said the alleged scheme has cost the plaintiffs millions of dollars in overcharges.

The plaintiffs seek injunctive relief, restitution, disgorgement, actual damages, treble damages, punitive damages, and attorneys’ fees and costs to address and abate the harm caused by the alleged scheme.

The case is Erie County, N.Y. vs. Eli Lilly & Co. , D.N.J., No. 2:24-cv-00632, 2/2/24 .

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Attorney Mikal Watts Resigns, Shuts Down Puerto Rico Office

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High-profile mass tort law firm Watts Guerra, helmed by attorney Mikal Watts, is shutting down its office in Puerto Rico and laying off at least 50 employees according to emails reviewed by Bloomberg Law.

Watts, who is known for leading big-dollar, multi-district litigation against corporations, told Bloomberg Law last month that he was “restructuring” Watts Guerra but did not intend to leave. But according to emails provided to Bloomberg Law, Watts sent a companywide email announcing that he was resigning from the firm for health reasons on Jan. 7. Watts then told Bloomberg Law that he and Guerra are separating and he will continue to practice law and handle his cases.

On Jan. 19, employees in the Puerto Rico office received a notice that Watts Guerra would commence “mass layoffs” that will affect at least 50 employees and at least 33% of its workforce. Around 110 employees work in the Puerto Rico office and handle much of the case management for Watts Guerra’s thousands of clients, said the employee who shared the emails. Watts said the other offices also have administrative staff. The employee declined to be named due to fear of retribution.

Watts told Bloomberg Law that he and Guerra were separating and as of this morning his new law firm began operations. He said subject to his clients’ approval, he will be keeping most of the mass tort cases and Guerra will take the individual personal injury docket.

Watts said that he’s referred employees to other law firms in Puerto Rico to help them obtain new employment and he will retain some employees in the area but does not know how many at this time.

Face of Mass Torts

Watts Guerra is among the firms handling some of the largest ongoing torts including water contamination at the Camp Lejeune Marine base causing cancer, and allegations of negligence from Hawaiian Electric causing deadly wildfires in Maui, and Johnson & Johnson talcum products linked to cancer. Watts is often the face of these cases, appearing in court and speaking to the media.

He represents around 16,000 J&J talc claimants and is part of the group of attorneys supporting a \$8.9 billion proposed settlement.

In an email sent to employees on Jan. 8, the day after Watts announced his resignation, capital partner Frank Guerra and partner Alicia O'Neill wrote, "I know that many of you do not know Frank as well as you know Mikal—and that this may be a scary time - but you can rest assured that I do. He is kind, professional and a fierce advocate for our clients and for each and every one of us. I would go into any battle, any time with him. He wouldn't even have to tell me who we were fighting. You all are safe to do the same."

Less than two weeks later, a layoff notice was sent to employees. The notice, which was signed by Watts, said the layoffs were a preamble to closing of its operations in Puerto Rico by the end of 2024. He wrote that employees should consider the layoff to be permanent. They will begin layoffs on March 20, 2024 and may come in stages.

Regarding severance, the letter states, "it will depend." Each employee will receive notice of termination on or before the last day of 2024. Watts Guerra will offer a voluntary separation payment to employees that execute and do not revoke a separation agreement and general release.

In 2015, he was among seven people charged with fabricating thousands of clients in a bid to collect payouts from BP arising from a settlement over its 2010 Deepwater Horizon oil spill in the Gulf of Mexico. Watts and four co-defendants were acquitted.

Last year, he spoke at the semi-annual conference Mass Torts Made Perfect and was vociferous about the prevalence of false claims being filed in large mass torts. He outlined the way money travels—from litigation funders to law firms and then eventually to lead generators—who at times sign up clients providing fake information. He said he and his firm audited their leads and found "hundreds and hundreds" were bogus.

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Matt Levine's Money Stuff: Adam Neumann Wants We Back
By Matt Levine
Opinion

Bloomberg Law News 2024-02-06T15:40:39007292197-05:00
Matt Levine's Money Stuff: Adam Neumann Wants We Back

By Matt Levine 2024-02-06T14:00:45118-05:00

We're back!

Man he is really going to do [the funniest trade](#) in the whole history of financial markets:

Adam Neumann and capital providers including Dan Loeb's Third Point are exploring an offer to buy WeWork Inc. out of bankruptcy, according to a letter sent to WeWork's lawyers that was seen by Bloomberg News.

Neumann and Third Point have been trying to get information from WeWork necessary to formulate a bid since December, according to the letter. More recently they've worked to put together a bankruptcy financing package for the co-working firm.

The bid would be for the entire company or its assets, according to the letter. It did not include details of how much Neumann, who co-founded WeWork, stood ready to offer for the firm.

Currently, WeWork's bankruptcy plan proposes handing ownership to the company's most senior debt holders, including those holding its credit line, first-lien notes and second-lien notes, according to court papers. Third-lien noteholders and unsecured creditors are likely to be wiped out.

Here is the letter, from Dealbook. The short version of this trade is that Adam Neumann started WeWork, sold it to SoftBank Group Corp. head Masayoshi Son for \$47 billion in one of the greatest [feats of salesmanship](#) ever, left, watched it collapse, and will now buy it back for \$0. The slightly longer version is:

- 1. Adam Neumann started WeWork and raised billions of dollars to expand, largely from SoftBank, at equity valuations [as high as \\$47 billion](#) ; he also took out roughly \$1.7 billion for himself in stock sales and [non-recourse loans](#) .
- 2. WeWork filed for bankruptcy in November, its current equity value is \$0, and SoftBank has torched its multibillion-dollar investment.
- 3. But Neumann still has *his* money, and he clearly misses WeWork. (He currently keeps busy with [a startup called Flow](#) , a sort of residential-real-estate clone of WeWork, with social events and a lot of tech-company blather.)

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X9DEV4S8000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6...> 1/8

- 4. WeWork is now on sale for \$0, and Neumann might buy it.
- 5. Then he could take Masayoshi Son out for lunch and be like “that was fun, let’s do it again sometime” and leave Son with the check.

The actual numbers are not *quite* as good as that. WeWork’s equity is worthless, but it has a lot of debt, and buying it out of bankruptcy would presumably require paying off at least some of that debt. But the current bankruptcy plan actually does *not* involve paying off any of the debt: Holders of WeWork’s roughly \$3.7 billion of first- and second-lien debt would swap their debt into equity and own the surviving company, while the third-lien, unsecured and stock would get nothing. (SoftBank, in addition to its now-worthless equity, also owns a chunk of the debt.)

Presumably to compete with that – and to own the company himself, rather than giving it to the lenders – he would need to offer the lenders something better. Maybe that would mean paying off the most senior debt in full (so like \$4 billion), or maybe it would mean giving them some cash plus some ownership in the surviving company, while getting the rest for himself. Neumann can’t actually acquire WeWork for \$0 in cash, which is why he is working with capital providers. And “some experts have suggested that WeWork could be sold for a fraction of its outstanding debt, perhaps for as little as \$500 million,” reports Dealbook, so the bid/ask could be wide and it could be hard to get a deal done. Also SoftBank is one of the lenders and there might be hard feelings there. Still, Adam Neumann has gotten a lot of hilarious deals done in his life; maybe he’ll pull this one off.

And, just, what a great trade. Here are three fairly conventional things you could say about WeWork:

- 1. As a business idea it seems fine? You rent big chunks of office buildings for long periods, you divide them up, you provide nice desks and common areas and happy hours, and you rent them in smaller chunks for shorter time periods to customers, at a premium to your cost. This seems like a *particularly* good idea *now*, as companies navigate a new world of flexible working arrangements: Managing flexible workspace is a valuable service for companies, and WeWork seems well positioned to provide it.
- 2. On the other hand, in a world of flexible work, the absolute demand for office space is lower than it used to be, so WeWork probably has too many long-term leases on too much space, and is paying too much for them. Fortunately [bankruptcy gives WeWork flexibility](#) to cancel leases it doesn’t need, and leverage to renegotiate others!
- 3. WeWork’s big problem is not that it was a bad idea but that it grew insanely fast, adding new space faster than it could fill the old space and leaving it particularly vulnerable to a downturn. This was good for raising money from SoftBank at a \$47 billion valuation, because SoftBank prioritized growth and ambition above everything else. But it incinerated a lot of value and was bad for WeWork’s ability to survive. But, again, bankruptcy fixes that: WeWork can cut its debt, get rid of leases it doesn’t want, and end up at a rational size for its business model.

We have [talked around here](#) about what I call the Wag trade. Wag Labs Inc. is a dog-walking startup that raised \$300 million from SoftBank at a \$650 million valuation in 2018. A dog-walking startup! Three hundred million dollars! It didn’t even *want* that much – it was trying to raise \$75 million – but SoftBank, loving growth and ambition, insisted that it take \$300 million to expand rapidly. And then, a year later, when that had not worked out, Wag bought back SoftBank’s stake at a discount. [I wrote](#) :

Wag was looking to raise \$75 million. It went to SoftBank and was like “will you give us \$75 million?” SoftBank was like “no haha we’ll give you \$300 million,” because that is SoftBank’s whole thing, it loves to give startups vastly more money than they want or need. And so Wag took the money. And then like a year and a half later Wag will get rid of SoftBank by giving back, I don’t know, but I am going to say some number less than \$225 million (“well below” the valuation at which it invested). Wag got the \$75 million it needed *for free*.

The trade, to be clear, is: If you need a little bit of money to grow your business modestly, you can raise a lot of money from SoftBank to grow your business crazily, and then put most of it in the bank and use a little bit of it to grow modestly instead. SoftBank will be disappointed with the modest growth, and you can say “sorry it didn’t work out” and then buy them out at a lower valuation with the money you have left over from not growing your business crazily. Free (modest) growth capital!

That is clearly not what WeWork did. WeWork took a lot of money from SoftBank to grow its business crazily, and really did that, and it worked out terribly, and WeWork was left with nothing in the bank.

But Adam Neumann wasn't there for most of that run; he was enjoying his mansions and doing Flow for the worst parts of WeWork's collapse. And if you just *ignore*, you know, 2017 through 2023, and focus on Neumann's personal balance sheet, you get roughly the Wag trade:

- 1. Neumann had a smallish, growing, exciting real estate company.
- 2. SoftBank gave him something like \$1.7 billion for himself.
- 3. Events occurred.
- 4. He might end up with roughly that same smallish exciting real estate company, now with more reasonable expenses, plus he'll probably keep a lot of the \$1.7 billion.

Surely *SoftBank* wishes that none of it had ever happened, but for Neumann, I mean, *could be worse*. He's probably richer than he would have been without SoftBank. In some ways this has not been great for his reputation, but in other ways it has been *amazing* for his reputation? You have to respect a good trade, and *Neumann's timing is impeccable*. He found the top of the startup bubble, he found (in Masayoshi Son) the best possible person to sell overhyped startup stock to, and he sold Son a pile of overhyped startup stock so he could become a billionaire. But buried within Neumann's overhyped startup stock, and his amazing patter about being "the world's first physical social network" and "a state of consciousness," was ... a perfectly fine little real estate company? That was the prop that he needed to extract billions of dollars out of Son. But now it has done its job, and Neumann would like the real estate company back. It's not like SoftBank needs it anymore.

The basis trade

Periodically people worry about "the basis trade," usually meaning the trade in which:

- 1. Hedge funds buy a lot of Treasury bonds, putting up very little of their own money and using mostly money borrowed in the repo markets, and
- 2. Those hedge funds sell a lot of Treasury futures, putting down very little of their own money as margin.

Treasury bonds are supposed to be very safe, and the two legs of this trade mostly offset each other, which means that the trade can be very leveraged, which means that if something goes wrong it goes very wrong, which means, like, Danger Lurking in the Safest Asset, so it's an exciting thing to worry about.

But why *is* there a basis trade? Somebody is buying Treasury futures from hedge funds: Why? Why aren't those people just buying Treasury bonds directly? Why do hedge funds need to sit between the US Treasury (which sells Treasury bonds) and whoever wants Treasury exposure? Why do futures trade at a premium to cash Treasuries? Why do the hedge funds make money? Why is this trade a trade?

I *tried to answer those questions last September*, basically pointing to long-term asset managers who (1) want *credit* exposure, so they don't own Treasuries (they own corporate bonds or other things with credit risk) but (2) also want *duration* exposure, and most credit product has less duration than long-term Treasuries. So asset managers invest their actual cash in corporate bonds, and then add duration through futures, and hedge funds get paid to provide them that duration.

This is not a perfect explanation – why is there a basis trade in fairly short-dated Treasuries? – but it seems to be roughly right. Last week the Treasury Borrowing Advisory Committee released a "Discussion of Treasury Futures Positions Across Different Investor Types," trying to explain the basis trade. Alexandra Scaggs wrote about it at FT Alphaville; here's her summary:

Remember that rates were very low in the pre-2022 world. So asset managers who wanted to juice their fund's yield often kept larger allocations to credit than existed in the benchmark (often the Bloomberg US Agg). But credit has shorter duration by design, meaning it doesn't carry as much interest rate risk as the benchmark for most funds. So instead of changing the fund's entire strategy, a manager could maintain his or her duration exposure by taking leveraged Treasury positions.

In theory, this leverage could come from futures or repo markets, but the cost of repo trades are reported as interest expense, unlike repo futures markets. The TBAC presentation suggests that dissuades fund managers from pursuing that leverage in repo markets.

An asset manager who wants to have 100% of her assets in credit, and who also wants to have the same duration as the benchmark, could in theory just put 100% in credit *plus* 20% (or whatever) in long-dated cash Treasuries, and borrow money (in the repo market) to buy the extra 20%. But there are reasons not to do that: reporting repo as interest expense, but also regulatory reasons. Traditional asset managers tend to be nervous about getting leverage by *borrowing money*, whereas getting leverage in *futures markets* is more acceptable. The TBAC report notes that "for many years prior to 2020, the applicable rules created incentives for mutual funds to favor derivatives like futures over repo in certain cases, including limitations on the size of repo borrowing"; those rules have been relaxed recently, but "in our view, many mutual funds are still limiting the size of their repo borrowing and achieving leverage through futures." And so instead of borrowing from repo markets themselves, asset managers effectively borrow from the futures markets; hedge funds borrow from the repo market, lend in the futures market, and collect a spread for their trouble.

By the way, the numbers in the previous paragraph are fake, but you can get more realistic numbers on page 16 of the TBAC report. "Presently, the Agg is about 42% Treasuries, and in total, about 80% government risk." But the credit component of the index has *more* duration than the Treasuries component: The average duration of Treasuries in the index is 6.15, versus 7.10 for investment-grade corporate bonds. So the story is not quite "asset managers want to be overexposed to credit, which has shorter duration than Treasuries, so they get their duration from futures." It is more that asset managers want to be overexposed to credit, which has *different* duration from the Treasuries in the index, so they *adjust* their duration exposure using futures. From the report:

Spread sector investment decisions are made in assets of varying durations and maturities, and are often thought of separately from interest rate investment decisions.

Although asset managers have different investment approaches, we believe it's common to separate decisions made on interest rate duration and credit spread duration.

Futures allow asset managers to make credit allocation decisions relatively seamlessly, without impacting interest rate risk exposures, but can introduce basis risk between the futures allocation and the Treasury allocation in the index. ...

It's likely that structural overweight positions in credit products could result in persistently higher allocations to Treasury futures amongst asset managers.

Elsewhere in, loosely, the basis trade: "Hedge funds and proprietary trading firms that regularly trade US Treasuries are [set to be labeled as dealers](#) by the Securities and Exchange Commission – a tag that brings greater compliance costs and scrutiny."

Yandex

Weird trade:

Yandex, the tech company often referred to as Russia's Google, has agreed to sell its Russian assets to a group of local investors for \$5.2 billion, the largest corporate exit from the country since Moscow's invasion of Ukraine almost two years ago.

The company, which is listed on Nasdaq and based in the Netherlands, said Monday it was selling about 95% of its assets, including its search engine, the biggest in Russia. It will retain some of its assets outside of Russia, including autonomous-driving, cloud-computing and artificial-intelligence businesses, and plans to rebrand under a new name. ...

Monday's announcement caps months of uncertainty for Yandex, which has been looking at options to restructure its ownership and governance for more than a year. While trading in Yandex's Nasdaq-listed shares has been suspended since the invasion, its stock has plummeted in Moscow. The company's market capitalization stands today at about \$10 billion, down from a peak of around \$30 billion before the war.

Here is Yandex's announcement. Yandex NV – the Dutch parent company – will sell almost all of its assets to a buyer consortium for \$5.2 billion in a combination of cash and its own stock. The local investors are a consortium "led by members of the senior management team of our Russian businesses, and supported by four financial investors," none of whom are currently subject to sanctions. "The cash consideration will be paid in Chinese Yuan (CNH) outside of Russia," though it is denominated in rubles ("a cash equivalent of at least RUB 230 billion"). The stock consists of up to 176 million Yandex shares that the buyers already own or plan to acquire in Russia, a bit more than half of Yandex's 325 million outstanding shares. So Yandex will:

- 1. Get rid of 95% of its assets,
- 2. Cancel a bit more than half of its shares, and
- 3. Get about \$2.6 billion in cash.

Shrinking your business by 95%, and your share count by 54%, leaves you with, uh, too many shares? Or rather, each share is worth a lot less? Yandex plans to use some of the cash "to finance the development of the retained international businesses," and use the rest on a stock buyback, to further shrink its capitalization to match its shrinking business.

Bitcoin accounting

For a while, US generally accepted accounting principles treated Bitcoin in kind of a strange way. If a company bought some Bitcoin, it would hold that Bitcoin on its balance sheet at cost, reporting that it was worth what it paid. If the price of Bitcoin went up, the company would not increase the value on its balance sheet, or report any income: GAAP disregarded the mark-to-market move. But if the price went *down*, the company *would* reduce the value on its balance sheet, and report a loss in its income statement: GAAP did reflect "impairment" of the Bitcoin holdings.

We have [talked](#) about this [before](#) , and companies sometimes complained about it, because it was illogical and rather punitive: For accounting purposes, you could lose money on Bitcoin, but [never make money](#) . There was however another feature of this situation, which is:

- 1. It can't really *last*: If Bitcoin is going to become a mainstream holding of big companies, eventually the accounting has to get rationalized. And in fact, last year, the US Financial Accounting Standards Board voted to [approve a new standard](#) requiring fair-value accounting for Bitcoin.
- 2. When the accounting *is* rationalized, companies with Bitcoins will probably get big one-time gains, because they will get to mark all their Bitcoins to market all at once.

And so [Bloomberg News reports](#) :

MicroStrategy Inc. may be at an inflection point when it comes to Michael Saylor's controversial decision almost four years ago to bet the enterprise-software maker's future on Bitcoin.

Quarterly results will likely get more volatile under a recently approved accounting rule change that requires valuing the digital asset at market prices. Before the revision, MicroStrategy had to take impairment charges to write down the value of its Bitcoin when prices fell but couldn't recognize any increases. It has until 2025 to implement the change.

If Tysons Corner, Virginia-based MicroStrategy decides to adopt the revision for the fourth quarter, the Bitcoin on the company's balance sheet will surge by billions of dollars on the back of recent purchases and Bitcoin's almost 60% rally in the period.

I don't really know what that gets you. If MicroStrategy's shareholders weren't paying attention to the market value of its Bitcoin holdings, what were they paying attention to? My general view is that investors are smart enough to look past GAAP accounting when, as here, GAAP accounting is misleading. But at least now the GAAP accounting will be correct.

American Bitcoin Academy

Look, I'm sorry, but if you asked me to design an educational course about Bitcoin, it would have the following curriculum:

- 1. You send me a bunch of Bitcoins.
- 2. I steal your Bitcoins.
- 3. Then someone hacks *my* Bitcoin wallet and steals the Bitcoins from me.
- 4. You come to me and say "what the heck, man?"
- 5. I say "now you understand Bitcoin."

This service would be well worth the price you paid me (all your Bitcoins), though I would not get rich off of it (because I would lose all the Bitcoins). Anyway here is a very funny US Securities and Exchange Commission enforcement action against the founder of the American Bitcoin Academy, who did a spectacularly good job of educating his students about Bitcoin:

The Securities and Exchange Commission [Friday] announced that Brian Sewell and his company, Rockwell Capital Management, agreed to settle fraud charges in connection with a scheme that targeted students taking Sewell's online crypto trading course known as the American Bitcoin Academy. The SEC alleges that the fraudulent scheme cost 15 students \$1.2 million.

According to the SEC's complaint, from at least early 2018 to mid-2019, Sewell encouraged hundreds of his online students to invest in the Rockwell Fund, a hedge fund that he claimed he would launch, and which would use cutting-edge technologies like artificial intelligence and trading strategies involving crypto assets to generate returns for investors. The complaint alleges that Sewell, who resided in Hurricane, Utah, before relocating to Puerto Rico, received approximately \$1.2 million from 15 students but never launched the fund nor executed the trading strategies he advertised to investors, instead holding on to the invested money in bitcoin. The complaint further alleges that the bitcoin was eventually stolen when Sewell's digital wallet was hacked and looted.

A Bitcoin hack was their Yale College and their Harvard.

Things happen

Vanguard Quietly [Embraces AI](#) in \$13 Billion of Quant Stock Funds. America's Biggest Bank Is Growing the Old-Fashioned Way: Branches. Can Harvey Schwartz revive private equity pioneer Carlyle? Xi to Discuss [China Stocks](#) With Regulators as Rescue Bets Build. Wall Street [Snubs China for India](#) in a Historic Markets Shift. Ex-Credit Suisse chief Tidjane Thiam's Spac sued by Chinese partner. UK Wants Clarity on [NatWest CEO Search](#) Before Retail Share Sale. [Saudi Arabia](#) Taps Former Dell Executive to Run \$100 Billion Firm. How the Funeral Industry Got the FTC to Hide Bad Actors. Musk's X Is Flooded With Ad Spam – Stolen Credit Cards May Be Key. Jack Dorsey's [Bluesky](#) Opens Up Social Network to Everyone. Inside a [Private Jet Club](#) Where Everything Went Wrong. "You can ask me the next day who won the game, and I won't even know. But I'll know how many times Taylor Swift was shown on TV."

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- 1. There's about a \$670 million debtor-in-possession loan facility that would be rolled over into exit financing. Here is the disclosure statement for the current bankruptcy plan. (Here is the plan.) The prepetition capital structure is on page 61 (roughly \$1.6 billion of a first-lien letter-of-credit facility, \$1.2 billion of first-lien notes, \$900 million of second-lien notes, \$300 million of third-lien notes and \$180 million of unsecured notes). The DIP loan is described on page 78. Pages 4 through 6 describe proposed recoveries under the plan.
- 2. Though: "'Third Point has had only preliminary conversations with Flow and Adam Neumann about their ideas for WeWork, and has not made a commitment to participate in any transaction,' the hedge fund told CNBC." I don't know what makes this deal attractive for Neumann's potential capital providers, maybe some combination of "Adam Neumann is a very charismatic and passionate entrepreneur" and "this could be extremely funny."
- 3. From the disclosure statement: "Because many of WeWork's leases were entered into in a much more robust real estate market and are characterized by above-market rents without rent resets or lessee-friendly termination rights, WeWork lacked the necessary financial flexibility to adjust to the rapidly shifting commercial real estate market. WeWork's prepetition business model has become increasingly difficult to maintain and must be repriced to align with the current real estate market."

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Matt Levine's Money Stuff: Mark Zuckerberg Lives Dangerously

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLTdhYmMtZDUyYi1hM2FmLWZiZmUyNWlxMDAwMyIsImN0eHQiOiJTTE5XliwidXVpZCI6IiFRK3ZCN2RhdjJtN2xrUnhLZE1BNEE9PVYyNC9ucS9jQ2JQbGZ2UWx4bWIRRVe9PSIsInRpbWUiOiIxNzA3MjlxNTk2MjI4liwic2lnIjoIv0g2KzNvMjArem9HTHA3OTZqZHFiy0RmNEdzPSIsInYiOiIxIn0=

Feb. 5, 2024, 11:16 AM PST

Opinion

Matt Levine

High-risk activities

“Is jiu-jitsu securities fraud,” I asked in this column a few months ago, because that is kind of my schtick. Specifically, Mark Zuckerberg, the chief executive officer of Meta Platforms Inc., likes to do mixed martial arts, and he occasionally gets injured doing so. If he got badly injured, that might be bad for Meta’s stock price. If that were to happen, under the theory of “everything is securities fraud,” some Meta shareholders might sue the company, claiming that this risk was not sufficiently disclosed.

Again, this is my schtick, but I didn’t mean it all that seriously in this case. “I can’t *really* imagine Meta getting sued for this if Zuckerberg gets a concussion,” I wrote. But I went on:

Still, why *hasn’t* Meta added a risk factor for this? Not because it is legally required, I mean, but just because it would be fun for the lawyers? Add a sentence to the risk factors like “our CEO likes to go to gyms to get punched in the face, and if he gets punched really hard in the wrong part of his face then we may be unable to execute on our product roadmap”? Surely writing that sentence is more fun for Meta’s lawyers than whatever else they’ve got going on in their day, even if it is technically less important.

Well, Meta filed its 2023 annual report on Form 10-K last Friday and guess what:

We currently depend on the continued services and performance of our key personnel, including Mark Zuckerberg. Mr. Zuckerberg and certain other members of management participate in various high-risk activities, such as combat sports, extreme sports, and recreational aviation, which carry the risk of serious injury and death. If Mr. Zuckerberg were to become unavailable for any reason, there could be a material adverse impact on our operations.

I think my earlier analysis was correct and the lawyers would have added that, for fun, unprompted, but I would also like to think that some of them read Money Stuff and were like “oh, great idea.”

Elsewhere in Meta

Another long-running schtick around here is “people are worried about stock buybacks.” There is widespread popular dislike of stock buybacks for a number of reasons. A big one is that people think that buybacks reduce innovation: Instead of spending money on research and development, on new factories and new products, companies just give the money back to shareholders.

The counterargument is that the money, in some loose sense, *belongs* to the shareholders, and the companies *should* be careful with it. If they have really good ideas for increasing profits, sure, go ahead and spend money on them. But the natural tendency of a corporate chief executive officer is to *do more*: CEOs like to run bigger companies that do more things, and they are always tempted to invest the company’s money in some trendy new idea, *even if it is not good for the company*. Stock buybacks are a way for CEOs to signal “I am a careful steward of shareholder money; sure, I will invest money in new ideas if I think they are good and will increase profits in the long run, but I have high standards and, if I cannot find enough projects that meet those standards, I will return money to shareholders so *they* can find something better to do with it.”

Obviously one can go too far with this — the shareholders are, in a sense, paying the CEO to find good investment opportunities for them, and if the CEO is always like “nah, I got nothing, here’s your money back” then that is a failing too — but it is probably healthy for CEOs to at least consider buybacks rather than spending every dollar of shareholder money on their own ideas.

People do not generally criticize Mark Zuckerberg for having too *few* ideas for what to do with shareholder money. I mean, he renamed his company from Facebook Inc. to Meta Platforms Inc. as part of his rather unloved and expensive pivot to the metaverse. And Meta has now pivoted expensively to artificial intelligence. But it also continues to operate Facebook and Instagram, and it produces a gusher of money, and it can use that money on the metaverse and AI and whatever else Zuckerberg has cooking *and* still hand back billions of dollars to shareholders.

And so last week Meta announced a \$50 billion increase in planned stock buybacks, as well as a new 50 cent quarterly cash dividend. The point of these moves is to communicate to shareholders that Meta’s spending is rational, that there is some hurdle rate for long-term

investments, and that some projects meet it and others don't. Meta is not in the business of "take this gusher of money and find ways to spend every dollar that it generates"; its business is more selective than that. Bloomberg News reports:

After Meta fired about 21,000 people and narrowed its priorities, the stock almost tripled in 2023. The new dividend and an additional \$50 billion in share buybacks may win more patience from investors with Zuckerberg's long-term bets on artificial intelligence and the metaverse.

Ideally you have both: the buybacks and dividends, *and* the long-term bets on AI and the metaverse. You signal "I have ideas for what to do with shareholder money, but I have standards too; I give back the shareholder money I don't need, but I spend what I need to on long-term investments."

I mean, the other point is that Zuckerberg himself owns a lot of shares, and "stands to receive a payout of about \$700 million a year" from the dividend. We talked last week about Elon Musk's enormous and now judicially invalidated pay package at Tesla Inc., in which Tesla's board of directors granted him billions of dollars of stock options contingent on enormous growth in Tesla's market capitalization. It is worth contrasting Musk's pay with Zuckerberg's. Zuckerberg gets a \$1 per year base salary at Meta, with no bonuses or stock options, though Meta counts about \$27 million of spending on security and personal jet use as part of his compensation.

Mark Zuckerberg essentially does not get paid for working at Meta. But he keeps working at Meta. Presumably that is because his wealth consists mostly of Meta shares, and he believes that working at Meta will increase the value of those shares. But also it is convenient for him to have more than \$1 of cash per year to spend on things other than bodyguards and private jet travel, and so now his *ownership* of Meta will pay him \$700 million a year in cash. One dollar for being the CEO, \$700 million for being the biggest shareholder.

In striking down Musk's pay package, Delaware Chancellor Kathaleen St. J. McCormick discussed the history of stock-based executive pay:

Professor Charles Elson submitted an amicus brief in this action persuasively arguing that "[e]quity compensation for corporate executives was designed to solve a specific problem at a specific time in American corporate history." To summarize that lesson in broad strokes, the first half of the 1900s witnessed a transition from "era of the 'robber barons'" to the era of the Berle-Means corporation, where corporations were run by "professional managers with little skin in the game." The theory behind equity-linked compensation plans was that "[b]road-based equity ownership throughout the organization by management, directors, and employees" is "the most effective motivation for continuous vigilance throughout the

organization.” For that reason and due to changes in federal tax law, by the 1980s, “pressure built on companies to . . . strengthen the link between pay and performance.” Corporations began “using much more equity-based compensation.”

Equity-based compensation continues to be a powerful way to reduce agency costs and align the interests of management with those of the stockholders, as Delaware law recognizes. But where an executive has a sizeable pre-existing equity stake, there is a good argument that the executive’s interests are already aligned with those of the stockholders. There are many examples of visionaries with large pre-existing equity holdings foregoing compensation entirely: Zuckerberg, Bezos, Gates, and others so familiar to the world that no first names are required. In each instance, the CEO’s board recognized that the executive’s preexisting ownership stake provided sufficient incentive to grow the companies that they had built.

So why not here?

There are two main ways to pay CEOs of modern large public companies:

- 1. The CEO is the founder and major shareholder, you pay her \$1 a year, and she gets rich off her share ownership. Her interests are aligned with those of shareholders, because she is the biggest shareholder.
- 2. The CEO is a hired professional who comes in without much share ownership, and you load her up with stock options to make her *feel* like a founder/owner and align her interests with those of shareholders.

Zuckerberg is a classic of the first category, and the dividend is, among other things, a way to fund his lifestyle that is compatible with that approach. Musk, of course, tried to get paid *both* ways, which is what got him in trouble.

Elsewhere in high-risk activities

Tesla Inc. also filed *its* 10-K last week, and nobody at Tesla has the right combination of boldness and sense of humor to write a fun risk factor about what Elon Musk gets up to. But here’s a Wall Street Journal story about “The Money and Drugs That Tie Elon Musk to Some Tesla Directors”:

Several current or former directors at Tesla and SpaceX attend parties with him, go on exotic vacations and hang out at Burning Man, the Nevada arts and music festival. ...

At the upscale Austin Proper Hotel, Musk has attended social gatherings in recent years with Tesla board member Joe Gebbia, the Airbnb co-founder and a friend of his, where Musk took ketamine recreationally through a nasal spray bottle multiple times, according to people familiar with the drug use and the parties.

Other directors, Gracias, Jurvetson and Kimbal Musk, have consumed drugs with him, according to people who have witnessed the drug use and others with knowledge of it. ...

The volume of drug use by Musk and with board members has become concerning, some of these people said.

In the culture Musk has created around him, some friends, including directors, feel there is an expectation to consume drugs with him because they think refraining could upset the billionaire, who has made them a lot of money, some of the people said. More so, they don't want to risk losing the social capital that comes from being close to Musk, which for some feels akin to having proximity to a king.

Look, I went to high school, and I am familiar with the feeling of being expected to consume drugs with people because you think refraining could upset them. But now I am a grown-up? And so are the directors of Musk's various companies? They are quite rich successful grown-ups whose jobs in theory require them to exercise independent judgment and sometimes push back on Musk's ideas? Man, if Tesla's directors feel like it would be too awkward for them to *decline to do drugs* with Musk, imagine how awkward it would be for them to *decline to pay him \$50 billion*!

Semi-assumable mortgage

We have talked a few times about assumable mortgages, the obvious solution to the main problem in the current US housing market. The problem is that everyone who owns a home has a 3% mortgage, but if you want to buy the home you will get a 7% mortgage. They can afford to *stay* in the home and pay 3%, but you can't afford to buy the home and pay 7%. If you could buy the home and take over their 3% mortgage, you would. But you mostly can't.

You mostly can't because most mortgages in the US are not, by their terms, assumable. And this is for good reason. The normal US mortgage is a 30-year fixed-rate loan that is prepayable without penalty. If a bank lends you money at 5% and then rates go down to 3%, you will go refinance at 3% and pay back the original 5% loan: The bank won't get to keep its original, now-above-market loan. But if instead rates go up to 7%, you don't have to pay the bank back for 30 years: The bank is stuck with its original, now-below-market loan. You have an option to reprice when rates go down; the bank does not have an option to reprice when rates go up.

This is a bummer for the bank, but it is mitigated by the fact that you probably *won't* wait 30 years to pay back the loan: You'll probably *sell your house*, for some non-financial reason (you have kids and need a bigger house; your kids grow up and you don't need such a big house), and then you'll have to pay back the loan. The bank is stuck with its below-market loan, but not forever; even now, when mortgage rates are 7%, some people still go and pay off their 3% mortgages. If they didn't, things would be rough for the bank.

If mortgages were always automatically assumable, then when you sold your house you'd let the buyer assume your mortgage, and that 3% mortgage would remain outstanding for 30 years, and the bank would be stuck with it, and that would be worse for the bank, so it would have to charge you more for your mortgage to begin with.

And so US mortgages usually aren't automatically assumable. And if you call up your bank and say "hey, I know that I can't technically transfer this mortgage to anyone else, but what if you made an exception for me," they will say "absolutely not."

Meanwhile, *some* US mortgages *are*, by their terms, assumable. But everything I just said is still true of those mortgages too. So if you call up your lender and say "hey, I looked, and it turns out that my mortgage is legally assumable, and I have a buyer, so I would like to transfer my mortgage to the buyer, can you help me with that," they will say "yes, absolutely, we'd be happy to help, as is our legal obligation," and then they'll hang up on you. At the Wall Street Journal, Ben Eisen and Nicole Friedman report:

Millions of home buyers can avoid high interest rates by snapping up existing low-rate mortgages—in theory. Doing so in practice is filled with obstacles. ...

With interest rates high, these "assumptions" have emerged as a buzzy way to make buying more affordable. But buyers and sellers, and people who advise them, say the servicers that process these assumptions are bogging down the process. It can be a lengthy wait just to have an application rejected.

That lack of urgency stands in contrast to new mortgages, which lenders typically scramble to close as quickly as possible. Mortgage companies make much less money handling an assumption than they would writing a new loan.

Yes a new loan is *good* for the lender, while an assumption is *bad* for the lender, so it's slower.

Insider betting

I write about insider trading a lot around here, enough that I have become familiar with this pattern:

- 1. Guy gets hot insider tip about an upcoming merger.
- 2. Guy goes to his broker and tries to buy as many short-dated out-of-the-money call options on the target as he can.
- 3. The broker is like “you have never traded options before, please read this disclosure about options risk and answer these questions so we can be sure that you are sophisticated enough to trade options.”
- 4. Guy is like “I NEED THE OPTIONS NOW!!!!”
Often he gets the options, though some number of insider traders settle for doing less, or less leveraged, trading than they want to do because their brokers slow them down.

But in my years of writing about insider trading, I don't recall anyone saying to the broker “no, you don't understand, I'm *insider trading*, this is a sure thing, I don't need to read the options disclosure.” On the one hand, I suppose that that would satisfy the broker's immediate concern (that she might be perceived as ripping off the customer by selling him options he doesn't understand). On the other hand, it would raise several *much bigger* concerns, like (1) that the *customer* is ripping off the *broker* by buying options on inside information, or (2) that the broker probably has to report the customer to the authorities for insider trading.

Anyway in sports betting everything is weirder :

On April 28, 2023, prior to Alabama's baseball game against Louisiana State University (LSU), [Alabama coach Brad] Bohannon sent several electronic messages via the Signal encrypted messaging application to a bettor that Bohannon knew was involved in sports wagering activities. The electronic messages indicated that an Alabama baseball student-athlete (student-athlete 1), the scheduled starting pitcher for that evening's contest against LSU, would not start the contest due to an injury. ...

Shortly after receiving the electronic messages from Bohannon, the bettor attempted to place a \$100,000 wager on the LSU baseball team at the BetMGM sportsbook at the Great American Ballpark in Cincinnati but the sportsbook staff limited the bettor to a \$15,000 wager. The bettor then attempted to place additional wagers involving the April 28 Alabama vs. LSU baseball game, but the sportsbook staff declined the wagers due to suspicious activity. This suspicious activity included the bettor's insistent demeanor to get the bet placed and statements to sportsbook staff that the bet was “for sure going to win” and “if only you guys knew what I knew.” The suspicious activity also included the bettor showing sportsbook

staff messages from Bohannon and explaining that the messages were Bohannon informing better that Alabama was scratching its starting pitcher before the game and before Bohannon alerted LSU.

I love that he thought that the sportsbook staff was worried about *him*, so he told them “no, see, I’m ripping *you* off.” Not helpful!

Things happen

China Tightens Some Trading Restrictions for Domestic and Offshore Investors. China Vows Plan to Attract Investment, Offers No New Detail. ‘Uninvestable’: China’s \$2tn stock rout leaves investors scarred. Evergrande’s Collapse Followed Backroom Battle Between Bondholders and Chinese Banks. Can Elon Musk derail Delaware? Bill Gates-backed mining company discovers vast Zambian copper deposit. Morgan Stanley and Goldman Spoil Private Credit’s Record Deal. Samsung chair acquitted of stock manipulation and fraud charges. Ex-Clifford Chance Lawyer Cleared in London Insider Trading Case. Iran used Lloyds and Santander accounts to evade sanctions. “Some crypto skeptics said Wall Street’s embrace of bitcoin rang hollow, calling it a thinly disguised attempt to cash in on an emerging asset class.” Employers Want to Fire Workers Without Getting Shamed on TikTok. Can AI Unlock the Secrets of the Ancient World? Does Mark Zuckerberg have a mullet? Inert nuclear missile found in US man’s garage.

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- 1. Elsewhere in long-running schticks around here: You could make a funny, counterintuitive argument that her interests are **not** aligned with those of outside shareholders, precisely because most of her net worth is in shares of her company, while the outside shareholders are broadly diversified. The CEO will want what is best for the company, even at the expense of other companies; the outside shareholders will have more nuanced preferences. Last year a shareholder activist **sued Zuckerberg for owning too much Meta stock**, arguing that he “ignored the interests of all of [Meta’s] diversified stockholders, making decisions as if the costs that Meta imposes on such portfolios were not meaningful to stockholders.”

- 2. Though there is this: “We are highly dependent on the services of Elon Musk, Technoking of Tesla and our Chief Executive Officer. Although Mr. Musk spends significant time with Tesla and is highly active in our management, he does not devote his full time and attention to Tesla. Mr. Musk also currently serves as Chief Executive Officer and Chief Technical Officer of Space Exploration Technologies Corp., a developer and manufacturer of space launch vehicles, Chairman and Chief Technical Officer of X Corp., a social media company, and is involved in other emerging technology ventures.”
- 3. I say “the bank” for simplicity but of course mortgages are originated and held by different parties and in fact it is not really clear who has what incentives. But, broadly, mortgages would be a worse investment if they were assumable.
- 4. I mean, there are cases where the broker is in on the insider trading. But other than that.
- 5. I realize that the broker is not generally the customer’s direct counterparty on the options. But still.
- 6. The block quote is from the NCAA enforcement case against Alabama: Insider betting may not violate securities laws, but if you do it on college sports you might get in trouble with the NCAA. I found the NCAA case through Barry Petchesky’s Defector blog about this guy. I also wrote about him last year, before the full details came out.

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Opinion **The FT View**

Delaware versus Elon Musk

US state's chancery court plays a key role in balancing interests of boards and investors

THE EDITORIAL BOARD



Elon Musk reacted to the court's ruling with typical defiance: 'Never incorporate your company in the state of Delaware' © Patrick Pleul/Reuters

The editorial board 2 HOURS AGO



The Delaware court of chancery dates to the 18th century and has faced many challenges in its time. Few have been quite as boisterous as that posed by Elon Musk, founder of Tesla and SpaceX, who reacted to a ruling against him last week with typical defiance: “Never incorporate your company in the state of Delaware,” he told his 171mn followers on his social network X.

Musk was furious about a [judgment](#) by Kathaleen McCormick, the court's most senior judge, rescinding his 2018 award of options over 12 per cent of Tesla's equity. He had demanded a hefty financial incentive to grow the value of the electric-car maker, and it worked: Tesla became one of the world's most valuable companies and his options ended up being worth \$56bn.

McCormick negated the decision, deciding that several members of the eight-person board were too close to Musk (some had taken family holidays with him) and did not fulfil their duty to negotiate the chief executive's pay independently of what he desired. The package was approved by shareholders, but she ruled that their vote was not sufficiently informed.

The [chancery court](#) is one of the most influential institutions in the world's largest economy: as one study put it, "the Delaware brand is to corporate law what Google is to search engines". Companies decide in which state to incorporate legally, often separately from their head office locations; many pick Delaware because of the small court's dominance and its reputation for pragmatism and legal expertise.

Musk wants to disrupt this. He is not Tesla's chair: that job is held by Robyn Denholm, a technology investor who received \$280mn from exercising Tesla options in 2021 and 2022. But as chief executive he has [promised](#) a shareholder vote on moving Tesla's incorporation to Texas, which has [formed](#) a business court. Delaware has been accused in the past of being over-friendly to boards; it now faces a fresh judicial challenge.

The US tradition of legal competition among states is distinctive. The fact that companies choose between them, with shareholders' approval, could be an incentive to locate in a jurisdiction that tolerates misbehaviour and executive entrenchment. Criticism of Delaware reached a peak in the 1980s when it sanctioned some "poison pill" defences against hostile takeovers.

In practice, the court tries to balance the interests of investors and boards with its "business judgment" rule. If directors act in good faith, they can make decisions they believe are good for a company without being legally second guessed (investors who disagree can mount proxy challenges to replace them). It seeks to intervene only when boards fail to oversee and reward executives appropriately.

But even when it has criticised boards over executive pay, as in a case involving Walt Disney two decades ago, the court has not acted with similar force. McCormick surprised many by reversing an award that was approved by shareholders. The case was brought by lawyers on behalf of one small investor; others who gained along with Musk disagree. It is not the end of the affair: Tesla can appeal, and could propose a new pay deal, this time more carefully.

Expert as Musk is at disruption, Delaware's incumbency will be hard to dislodge. The court has more than 200 years of history, a circle of expertise in Wilmington, and a hard-earned reputation for impartiality in corporate disputes. Texas has a long way to go to match it, and the southwestern state's judges would not gain credibility if they merely did the bidding of wilful entrepreneurs. Extraordinary though Musk's achievements have been, a board must be more than a fan club.

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Why Elon Musk's 'Self-Driving' of Tesla's Board and Its Decision to Pay Him \$56B Collided with the Law – and What Happens Next

 [nakedcapitalism.com/2024/02/why-elon-musks-self-driving-of-teslas-board-and-its-decision-to-pay-him-56b-collided-with-the-law-and-what-happens-next.html](https://www.nakedcapitalism.com/2024/02/why-elon-musks-self-driving-of-teslas-board-and-its-decision-to-pay-him-56b-collided-with-the-law-and-what-happens-next.html)

By Yves Smith

February 6, 2024

Yves here. This post is a useful antidote to the generally terrible reporting on why a Delaware court overturned a Tesla compensation package that would have resulted in Elon Musk receiving an unseemly \$56 billion. It was pretty evident, if one read the coverage in the major financial outlets, that no reporter bothered running down the shareholder filing and the court's ruling, or if they had, they could not be bothered to incorporate what they said in their stories.

It is hard to work up any sympathy for Musk, even before reading the explanation for the decision below. He is still the third richest person in the world. Importantly, Delaware is a favorite jurisdiction for big company incorporation precisely because it is so executive and board friendly. But you do have to observe some minimal forms, and Musk could not be bothered to do so. Or worse, he might have had to limit his wealth extraction.

Recall this is not the first time that Musk sloppiness has cost him bigly. Recall that Musk tried to back out of his agreement to purchase Twitter and failed. Even though Twitter shares are at higher levels than they were most of last year, the total market cap, and with it, Musk's roughly 79% share, are below his \$44 billion purchase price. Remarkably, Musk's purchase agreement failed to include either due diligence rights or a breakup fee.

By Justin P. Klein, Director of the Weinberg Center for Corporate Governance, University of Delaware. Originally published at The Conversation

Delaware Chancery Court Judge Kathaleen St. Jude McCormick has blocked Elon Musk's US\$55.8 billion pay package, which Tesla's board of directors approved in 2018 through a process she found to be "deeply flawed."

No CEO of a publicly traded U.S. company has ever been paid this much for one year's work, according to Equilar, which tracks corporate leadership data. Pay for the 10 highest-paid executives, including Google's Sundar Pichai and Apple's Tim Cook, reportedly maxed out at around \$250 million in 2022.

The Conversation asked Justin P. Klein, the director of the Weinberg Center for Corporate Governance at the University of Delaware, to explain McCormick's reasoning.

Why Did the Judge Block Musk's Pay Package?

McCormick's opinion began with a good question: "Was the richest person in the world overpaid?"

She concluded, in this reference to Musk – whose fortune was estimated to be worth \$205 billion before the ruling and consists largely of his Tesla shares and stock options, along with his SpaceX stake – that he was.

This legal defeat may have knocked Musk out of his perch atop the Forbes list of the world's richest people, making him the second-wealthiest, the media outlet calculated.

McCormick ruled against Musk in *Tornetta v. Musk*, a lawsuit filed on behalf of an investor who owned only nine Tesla shares – and by extension virtually all of the company's stockholders. Ultimately, she determined that Musk's compensation plan was considered and approved by a board of directors that was not sufficiently independent or objective.

The compensation plan was subject to a vote by the rest of Tesla's shareholders. But the information they received left out key details and contained inaccurate statements.

This pay package deserved close scrutiny because of its enormity, McCormick observed. She called it the "largest potential opportunity ever observed in public markets by multiple orders of magnitude."

What Was Wrong with Tesla's Board?

McCormick concluded that many of Tesla's board members, including his brother Kimbal Musk, had close financial and social relationships with Elon Musk and that they were beholden to him due to these ties.

The board approved this compensation plan without following commonly accepted norms, according to the ruling. Further, McCormick found that the directors allowed Musk to control the process for approving the compensation plan, dictating the terms, amount and timing.

Board members apparently made no efforts to benchmark the plan as compared to compensation paid to executives of comparable companies, a critical and typical step in any situation like this.

Musk was in control of Tesla, a publicly traded company, that should have standard protocols in place regarding its compensation practices.

There was no negotiation between Musk and the compensation committee or the board regarding the amount and terms of the plan, the chancellor found. This is both inconsistent with widely accepted compensation setting practices and striking due to the scale of the pay package.

“Musk launched a self-driving process, recalibrating the speed and direction along the way as he saw fit,” McCormick wrote. “The process arrived at an unfair price. And through this litigation, the plaintiff requests a recall.”

What Factors Are Boards Supposed To Consider in Setting CEO Pay?

In deciding what CEOs should earn, boards or compensation committees should consider the company's performance under the leadership of the CEO and the executive's own personal performance. They should also review what comparable companies take into consideration when making decisions about their own CEO's compensation.

Other metrics or considerations may be taken into account, too. These may include whether the company has made progress in terms of diversity, equity and inclusion, employee retention, sustainability and environmental performance, worker safety practices, risk management and compliance with laws and regulations.

Around the time of this compensation decision, Musk was the subject of a Securities and Exchange Commission probe over alleged fraud stemming from what the SEC said were misleading statements regarding his plans to take Tesla private at \$420 per share – a part of a tweet widely regarded as a cannabis joke.

The settlement Musk reached with the SEC forced him to pay a \$20 million fine and step down as the company's chairman for at least three years. It also required the appointment of two new independent Tesla board members and a requirement that he preclear certain public statements.

The company was not taken private.

In 2023, a jury found Musk not liable for related losses by Tesla investors who sued over the incident. Tesla shares closed at \$187.91 on Feb. 2, 2024, far below that \$420 price that unleashed litigation. The company's share prices closed at \$409.97 in November 2021 – the highest point to date.

The board could have considered this incident a negative factor when making its decisions about Musk's compensation.

What Process Are Boards Supposed To Follow in Setting CEO Pay?

In setting CEO compensation, all members of boards or compensation committees should be truly independent and objective, with no interest in the outcome.

They should consider engaging compensation experts and benchmark or seek information on executive compensation at comparable companies.

These decisions require careful consideration of all components of the CEO's compensation and how the pay package should be structured. That includes how much of the pay should be provided as cash, restricted stock, which may not be sold for a period of time, and stock options, which provide the right to purchase stock at a predetermined price before a particular time in the future.

When stock prices rise a great deal, stock options soar in value. That's what happened with Musk's colossal pay package.

What Happens Now?

Musk may decide to appeal to the Supreme Court of Delaware. On the other hand, Musk could ask Tesla's board, its compensation committee – or both of them – to revisit and revise his compensation plan, taking into account the objections spelled out in the ruling.

That would include both the amount – \$55.8 billion – and the process by which it was set.

Musk, however, appears to be seeking a third option. "Tesla will move immediately to hold a shareholder vote to transfer (the) state of incorporation to Texas," he posted on X, his social media platform previously known as Twitter.

Even if Musk were to prevail and change Tesla's jurisdiction of incorporation, it would not be likely to affect this decision.

The public vote is unequivocally in favor of Texas!

Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas. <https://t.co/ParwqQvS3d>

— Elon Musk (@elonmusk) February 1, 2024

Is Delaware Particularly Tough on Corporate Leaders?

Delaware is the corporate home of more than 60% of Fortune 500 companies even though it's the country's second-smallest state.

One reason for its popularity with businesses of all kinds is that Delaware's courts are quite experienced, with a great deal of expertise in considering business matters and cases of this kind. Musk's court case was heard in its Court of Chancery, a system that primarily decides corporate legal matters.

Although Musk suggested that standards in Delaware are overly strict in another message he posted on X after the ruling, this kind of case is very rare.

One of few similar lawsuits was filed against former Disney CEO Michael D. Eisner over his \$140 million severance package. In 2005, Chancellor William B. Chandler III of the Delaware Chancery Court let it go, while acknowledging the apparent impropriety of paying an executive so much.

“Despite all the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom,” Chandler wrote, “I nonetheless conclude, after carefully considering and weighing all the evidence, that Eisner’s actions were taken in good faith.”

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Feb. 5, 2024, 12:08 PM PST

DOJ Launches Probe Into ADM Over Its Accounting Practices (2)

By Bloomberg News

Bloomberg Law News 2024-02-06T10:00:50480664207-05:00

DOJ Launches Probe Into ADM Over Its Accounting Practices (2)

By Bloomberg News2024-02-05T15:08:06933-05:00

The US Attorney's Office in Manhattan has launched an investigation into the accounting practices at Archer-Daniels-Midland Co., according to people with direct knowledge of the matter.

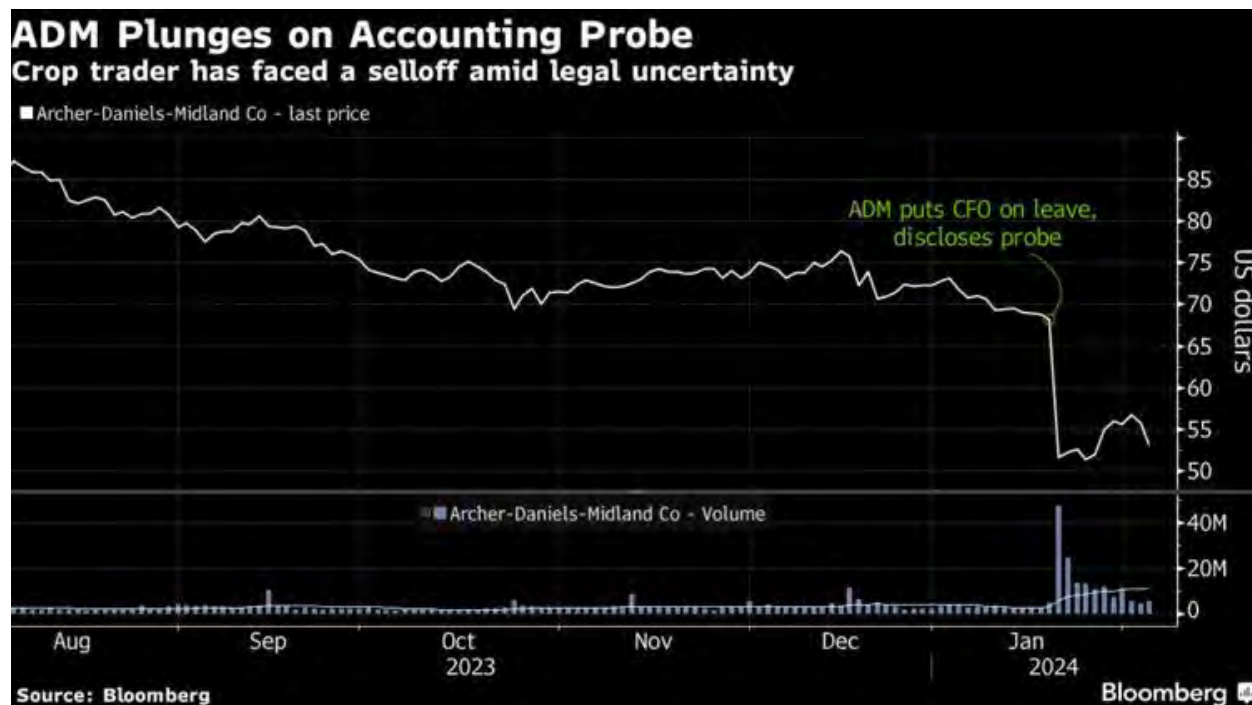
The probe is focused on the company's nutrition business, said the people, who asked not to be named discussing confidential information. Shares of the crop trader fell as much as 4.8% in New York trading.

It's the latest in the saga stemming from the nutrition unit.

ADM shook the commodity world last month after it suspended Chief Financial Officer **Vikram Luthar** and cut its earnings outlook pending an outside counsel inquiry into its accounting practices involving the troubled segment. The stock has slumped about 20% since the suspension was announced.

The company probe was prompted by a US Securities and Exchange Commission request. Now, the DOJ investigation raises the specter of potential legal consequences for ADM's reporting procedures, boosting concerns about the full impact of what has occurred internally.

An ADM spokesman declined to comment on the DOJ investigation. The DOJ declined to comment.



Read More: ADM Unit Being Probed Helped Make Leaders Over \$70 Million

The scandal has thrown the spotlight on a decade-long push, largely under the leadership of Chief Executive Officer **Juan Luciano**, to lessen ADM's dependence on its legacy agricultural commodities trading business, which is notoriously prone to volatility.

Nutrition was Luciano's bet for future growth. ADM expanded the business with its \$3 billion purchase of European natural ingredient maker Wild Flavors a decade ago, its biggest-ever acquisition. But profits have so far failed to live up to initial expectations due to weak demand, including for plant-based food.

While nutrition is still a small part of ADM's business, it played an outsized role on recent executive bonuses.

The current drama has also aggravated investors' long-time concerns that large, complex companies are more prone to the risk of undetected manipulation of crucial financial figures.

Read More: ADM Accounting Probe Centers on Dubious Footnote Investors Watch

In a memo late last month, Luciano said the company probe involves the "transfer of goods and the related financial accounting between business segments" and that the transactions under investigation wouldn't significantly impact the crop trader's earnings. Still, ADM has lost nearly \$8 billion in market value since the probe became public.

ADM has delayed the reporting of its 2023 results.

(Updates with context starting in third paragraph)

Tidjane Thiam

Ex-Credit Suisse chief Tidjane Thiam's Spac sued by Chinese partner

China Bridge Capital lawsuit underscores how quickly relations soured as Spac boom ended



The lawsuit alleges Tidjane Thiam's company 'failed and refused' to pay fees for due diligence and advisory work © Sia Kambou/AFP/Getty Images

Stephen Morris in London YESTERDAY



Former Credit Suisse chief Tidjane Thiam has been embroiled in a bitter dispute with his Spac partner Edward Zeng after the Chinese entrepreneur's firm sued Thiam's company for allegedly refusing to pay \$6mn in advisory fees.

[Thiam](#)'s special-purpose company Freedom Acquisition is in settlement talks with Zeng's company China Bridge Capital, two people with knowledge of the dispute said.

In August, China Bridge filed a lawsuit in New York that alleged Thiam's company "failed and refused" to pay the fees even though Zeng's company had introduced it to Complete Solaria — the US solar business with which it merged a month earlier — and carried out due diligence, financial modelling and advisory work.

The 61-year-old Thiam [is now active in politics in his native Ivory coast](#). He was elected leader of the main opposition group, the Democratic Party of Ivory Coast, in December.

The lawsuit, which has been reviewed by the Financial Times, underscores how quickly relations between Thiam and Zeng soured amid the dramatic rise and fall of the [Spac](#) boom.

It was filed 14 months after regulatory filings showed Thiam had parted ways with previous partner Pimco, the world's biggest bond manager. At the time, in June 2022, Thiam's company said Zeng was "[a better fit](#)" and had a "track record of creating value through Spacs".

After a series of false starts, Freedom Acquisition merged with Complete Solaria last year. However, its shares have since plunged from a \$10 float price to \$1.26, leaving the business with a market capitalisation of just \$54.4mn. China Bridge's filing said the company believed the deal valued Complete Solaria at \$225mn.

China Bridge said in its lawsuit that under an October 2022 agreement, Freedom Acquisition was obliged to pay it \$6mn if a deal was consummated and that Freedom's lawyers had told them their client had "approved and executed" the agreement.

A person familiar with Freedom Acquisition's case denied that Zeng had in his possession a formal signed letter entitling him to an advisory fee and said Zeng was told by phone and email that he would not receive one. They added that the final settlement amount would be substantially less than the \$6mn sought.

Freedom Acquisition and a lawyer for China Bridge declined to comment.

Spacs are shell companies that raise money by listing on stock exchanges and then use the proceeds to identify and buy private companies, taking them public through a reverse merger. Typically they are required to complete a deal within two years of their initial public offering or hand back the money to investors.

Freedom Acquisition listed in 2021 at the peak of a post-pandemic Spac frenzy. Its investors included French billionaire François Pinault, founder of the luxury group Kering, alongside Pimco. Since then, the boom has fizzled, as rising interest rates and tighter regulation have made the vehicles less attractive.

Thiam originally said his Spac would target fintech companies. His first target was [Mexican fintech Credijusto in August 2021](#), but co-sponsor Pimco scuppered the deal, believing the target was overvalued. Thiam then entered talks with Human Longevity — a California genomics group that claims to help prolong customers' lives using a battery of expensive tests and scans — but that also failed to get over the line.

Freedom Acquisition switched focus to Complete Solaria, a US residential solar panel installer, with bold projections that it could generate revenues of \$285mn in 2023 as it benefited from tax credits from the US Inflation Reduction Act.

The Spac was helmed by Adam Gishen, Thiam's top lieutenant at Credit Suisse, who served as chief executive. It also brought in TJ Rodgers, a venture capitalist and former head of Cypress Semiconductor who invested in the company and sits on its board as executive chair. John Doerr, chair of venture capital firm Kleiner Perkins, said last February he would put \$10mn into the company.

Thiam, who was born in the Ivory Coast and educated in France, worked as a consultant for McKinsey before taking a ministerial position in his native country.

He then returned to Europe, becoming chief executive of UK insurer Prudential and then Credit Suisse, which he ran from 2015 until he departed in 2020 following a corporate spying scandal. Three years later the bank collapsed.

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RTX receives subpoenas from SEC over engine issue

[reuters.com/business/aerospace-defense/rtx-receives-subpoenas-sec-over-engine-issue-2024-02-05](https://www.reuters.com/business/aerospace-defense/rtx-receives-subpoenas-sec-over-engine-issue-2024-02-05)

Reuters

Reuters

February 5, 2024 3:00 PM PST Updated a day ago

Pratt & Whitney logo is pictured on the GTF engine at the 54th International Paris Air Show at Le Bourget Airport near Paris, France, June 20, 2023. REUTERS/Benoit Tessier/File Photo Purchase Licensing Rights [↗](#), opens new tab

Feb 5 (Reuters) - RTX Corp (RTX.N) [↗](#), opens new tab received subpoenas from the U.S. Securities and Exchange Commission (SEC) over an investigation related to disclosures in 2023 regarding use of powder metal in engines manufactured by its subsidiary Pratt and Whitney.

The defense contractor's regulatory filing showed on Monday that it was cooperating with the SEC on the investigation.

Pratt and Whitney called for an inspection drive last year to check for potentially flawed components, related to a powder metal use, in its geared turbofan jet engines.

Reporting by Nathan Gomes in Bengaluru; Editing by Shinjini Ganguli

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Feb. 5, 2024, 2:51 PM PST

SEC Top Accountant Urges Auditor Skepticism as Quality Slips

By Nicola M. White

Bloomberg Law News 2024-02-06T10:01:43488830609-05:00

SEC Top Accountant Urges Auditor Skepticism as Quality Slips

By Nicola M. White 2024-02-05T17:51:29000-05:00

Accounting firms must empower front-line auditors to exercise professional skepticism and challenge rosy assertions from company executives as audit deficiency rates increase, the SEC's top accountant warned Monday.

"This may involve, among other things, supporting audit staff in exploring areas of heightened risk and red flags, insulating audit staff from any undue pressure to accept less than persuasive audit evidence, and refusing management requests or demands to replace audit team members," Securities and Exchange Commission Chief Accountant Paul Munter said in a statement.

Munter, who often uses his platform to remind auditors of their role in protecting investors through high-quality checks of corporate books, issued the statement as the US audit regulator flagged an uptick in audit flaws among US firms. He called the results "troubling."

- He offered several ways for auditors to improve their work, including engaging with company audit committees on events that impact financial reporting, including any red flags. They also should work with specialists and other experts to assist in auditing complex areas, he said.
- Engagement teams need to be trained on biases that can affect auditor judgment and that might undermine professional skepticism, he added.
- Munter also called out the importance of company audit committees, saying they need to monitor audit firm inspection results and evaluate whether their engagement teams have appropriate industry expertise.

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Alphabet Investors Ink \$350M Deal In Google Plus Privacy Suit

By **Katryna Perera**

Law360 (February 6, 2024, 2:42 PM EST) -- Google's parent company Alphabet and a proposed class of investors have reached a \$350 million settlement to end claims that the company deceived them about a March 2023 data breach that allegedly gave third-party app developers the ability to access the private profile data of 500,000 users of the Google Plus social media site.

Investors filed a **motion** for preliminary approval Monday, saying the deal resulted from good-faith, arm's-length negotiations after five years of litigation. The motion also notes that, if approved, the deal would represent the fourth-largest securities class action recovery in the Northern District of California.

In a phone call with Law360 Tuesday, Jason Forge of Robbins Geller Rudman & Down LLP, representing the investors, said: "Most people thought no one could recover a penny in this case, and when the first judge granted Google's motion to dismiss everything, the 'I told you so's' were deafening. But that just made [the state of Rhode Island, lead plaintiff] and us more determined."

"That determination led to a published reversal from the Ninth Circuit and what would be the largest ever post-dismissal recovery in this circuit," he added.

Counsel for Google declined to comment Tuesday.

The investors are represented by Jason A. Forge, Laura Andracchio, Michael Albert, J. Marco Janoski Gray, Ting H. Liu, Kenneth P. Dolitsky and Sarah A. Fallon of Robbins Geller Rudman & Dowd LLP.

Alphabet is represented by Mary Geraldine McNamara, Edward W. Swanson, Britt Evangelist and Carly Bittman of Swanson & McNamara LLP, Ignacio E. Salceda, Benjamin M. Crosson and Stephen B. Strain of Wilson Sonsini Goodrich & Rosati PC, and Boris Feldman, Doru Gavril, Jon Fougner and Olivia Rosen of Freshfields Bruckhaus Deringer US LLP.

The case is *In Re Alphabet Inc. Securities Litigation*, case number 3:18-cv-06245, in the U.S. District Court for the Northern District of California.

--Editing by John C. Davenport.

This is a developing story. Check back for updates.

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Norfolk Southern Slams Investors' Fraud Suit Over Derailment

By **Linda Chiem**

Law360 (February 5, 2024, 7:11 PM EST) -- Norfolk Southern has asked a New York federal court to dump proposed class allegations that it misled investors by falsely touting its commitments to safety while embarking on risky cost-cutting operational and staffing changes that ultimately led to last year's fiery derailment in East Palestine, Ohio.

Norfolk Southern Corp. said in a **motion to dismiss** Friday that lead plaintiffs Ohio Carpenters Pension Fund and the City of Pontiac Reestablished General Employees' Retirement System cannot concoct "fraud by hindsight" claims in an attempt to hold the rail giant liable for statements it made two years before the February 2023 **derailment** on the border of Ohio and Pennsylvania.

"Unable to plead the required facts, plaintiffs instead resort to impermissible hindsight pleading and rely on fundamentally flawed inferences, mischaracterizations of the company's statements, and anecdotal, primarily localized accounts of purported non-executive former employees," the railroad argued. "None establishes the existence of company-wide policies or practices showing a disregard for safety."

The investor plaintiffs allege that the value of senior notes Norfolk Southern issued in offerings from May 2021 to January 2023 have fallen "precipitously" due to material misstatements and omissions by the railroad and its top brass. They contend the railroad's offering documents "misleadingly painted the picture of sustainable cost savings under the watch of vigilant management" while failing to disclose Norfolk Southern's "unsustainable business practices and total disregard to compliance and safety in a self-admitted quest for short-term profit," according to their December amended complaint.

"In an effort to eliminate any perceived redundancy, the company's miles-long trains were being run by a single hand-count's worth of over-levered, exhausted employees — a skeleton's skeleton crew," the investor plaintiffs alleged. "Norfolk Southern abused regulatory loopholes to avoid inspecting trains mid-journey and advanced a toxic culture of mandatory corner cutting and rug sweeping. Due to this, any lauded decrease in Norfolk Southern's operating ratio, which was plastered throughout the offering documents, came with an equal, yet undisclosed increased risk of derailments and train accidents."

Norfolk Southern fired back on Friday, saying the investor plaintiffs have overreached by pointing to general and vague statements that don't rise to the level of securities fraud. The statements relate to the company's commitment to safety, its financial and operational metrics, such as operating expenses and accident data, and how Norfolk Southern implemented an operational policy called "precision scheduled railroading" in 2019.

PSR is a controversial policy adopted by many of the largest freight rail carriers, known as Class I railroads. It generally involves strictly adhering to a point-to-point schedule to move longer trains with more capacity. Railroads say it's about enhancing efficiency, but labor unions and other critics of PSR say it's an amalgam of cost-cutting measures that have resulted in slashed jobs, overburdened workers and heightened safety risks.

Norfolk Southern said in its dismissal bid that it made "robust risk disclosures" to investors about its PSR program, noting the increases in length and speed of trains and reductions in the number of workers. It also disclosed the impact those changes would have on Norfolk Southern's operational

and financial results, as well as the risk that Norfolk Southern trains could derail, and that any derailment involving hazardous materials could lead to catastrophic losses, according to the dismissal bid.

The funds' amended complaint highlighted more than two dozen allegedly misleading statements, such as Norfolk Southern's statement in its 2020 annual report that "capital spending and replacement programs are and have been designed to assure the ability to provide safe, efficient, and reliable rail transportation services," and declaring in its 2021 proxy statement, "safety is a way of life at Norfolk Southern, extending beyond our rail operations and into the communities where we live and work."

But the rail giant countered that "many of these statements are not actionable on their face because they are too general to permit a reasonable investor to rely on them."

Additionally, Norfolk Southern said it had no duty to disclose more than it did regarding accident and derailment risks, slamming the investor plaintiffs for "cherry-pick[ing] certain data that the Federal Railroad Administration published to suggest that the implementation of PSR had a negative impact on safety." In fact, the complete FRA data set shows that during the 2018 to 2022 period overall, the "number of reported derailments decreased and the number of reported train accidents did not increase appreciably after Norfolk Southern adopted PSR," according to its dismissal bid.

The funds, **represented by Labaton Keller Sucharow LLP** and AsherKelly Attorneys At Law, filed suit last May against Atlanta-based Norfolk Southern Corp., CEO Alan Shaw, former CEO James A. Squires and other top executives and board directors. Their complaint also names as defendants the underwriters of the senior notes, including BofA Securities Inc., Goldman Sachs & Co. LLC and Wells Fargo Securities LLC. The underwriters said in a separate court filing Friday that they joined Norfolk Southern's motion to dismiss all claims against them.

The funds are seeking to represent a class of all investors who bought senior notes in offerings between May 3, 2021, and Jan. 26, 2023. They allege the value of those senior notes declined after the East Palestine derailment and the ensuing reputational damage to Norfolk Southern stemming from **government investigations and mounting litigation**.

The railroad is facing a separate **securities fraud suit** from the Bucks County Employees Retirement System that was **transferred** from Ohio to Georgia federal court in September. Denmark-based AkademikerPension and New York-based Ironworkers Locals 40, 361 & 417 Union Annuity, Pension and Topping Out Fund have moved to be named lead plaintiff in that case, with Robbins Geller Rudman & Dowd LLP and Kessler Topaz Meltzer & Check LLP seeking lead counsel status, court records show.

A Norfolk Southern spokesperson said Monday that the company cannot comment on ongoing litigation. Counsel for the plaintiffs were not immediately available for comment Monday.

The lead plaintiffs are represented by Alfred L. Fatale III, Guillaume Buell, Charles Wood and Charles J. Stiene of Labaton Keller Sucharow LLP. The City of Pontiac Reestablished General Employees' Retirement System is represented by Cynthia J. Billings-Dunn of AsherKelly Attorneys At Law.

The Norfolk Southern defendants are represented by Michael G. Bongiorno, Tamar Kaplan-Marans, Jeremy T. Adler and Samuel E. Frizell of WilmerHale.

The underwriter defendants are represented by Adam S. Hakki, Agnès Dunogué, Benjamin Klebanoff and Thad Behrens of Shearman & Sterling LLP.

The case is In Re Norfolk Southern Corp. Bond/Note Securities Litigation, case number 1:23-cv-04068, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Ryan Harroff. Editing by Linda Voorhis.



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Zymergen Ch. 11 Plan Confirmed After Investor Objection

By **Ben Zigterman**

Law360 (February 5, 2024, 5:09 PM EST) -- Biotechnology company Zymergen received confirmation of its Chapter 11 plan Monday at a hearing in Delaware bankruptcy court after resolving an objection to the plan from a class of investors suing the company.



A lab at Ginkgo Bioworks, owner of insolvent biotech firm Zymergen. A Delaware bankruptcy judge on Monday confirmed Zymergen's Chapter 11 plan, under which Ginkgo will pay at least \$6.3 million to take over the debtor's liabilities and most of its assets. (Adam Glanzman/Bloomberg via Getty Images)

Curtis S. Miller of Morris Nichols Arsht & Tunnell LLP, representing Zymergen, told U.S. Bankruptcy Judge Karen B. Owens that the Chapter 11 process has been a success, both in terms of speed since **its October filing** and avoiding litigation that would limit recovery.

"I'm very happy to be standing here saying that we were very successful on both of those important points," Miller said. "And depending on the future resolution of various claims, the debtors are standing at the precipice of being able to distribute over a 90% recovery to their unsecured creditors, so we think it's an outstanding result."

Miller said Monday that Zymergen was able to reach a resolution to an objection from the securities litigation class, allowing them to continue pursuing a **lawsuit** accusing Zymergen of misleading investors about issues it was having with its flagship technology.

The plan now makes clear that it doesn't impact the class' ability to pursue their claims, but only to the

extent there is insurance coverage available, Miller said.

"In exchange, the class representative and class are agreeing to forego any distribution from the debtor's or liquidating trust at a later date if any such recovery actually becomes available," he said.

Judge Owens said at the hearing that Zymergen has "met their burden necessary to confirm their plan" and issued an order later Monday confirming the plan.

In December, Judge Owens **approved the sale** of Zymergen's assets to both Ginkgo Bioworks, its owner, and Pivot Bio Inc. Ginkgo will pay at least \$6.3 million and assume Zymergen liabilities to acquire all the debtor's assets except for nitrogen fixation technology that Pivot Bio will buy for \$2.3 million.

California-based Zymergen filed for bankruptcy protection in October, roughly two years after the company raised \$530 million in an initial public offering.

The IPO helped fund the development of Zymergen's first product, Hyaline, a planned franchise of optical films designed to be used in touch-screen phones and other devices.

But after sales of Hyaline failed to meet expectations, Zymergen disclosed that it no longer expected to generate material revenue in 2021 or 2022, causing its stock to drop about 70% and investors to sue.

In 2022, Zymergen was bought by Ginkgo, and the company shifted its business to be primarily services-based, according to its bankruptcy filings. However, Zymergen continued to lose money in the months following the acquisition.

Representatives for Zymergen and the securities litigation class did not immediately respond Monday to requests for comments.

Zymergen is represented by Derek C. Abbott, Curtis S. Miller, Matthew O. Talmo, Sophie Rogers Churchill and Austin T. Park of Morris Nichols Arsht & Tunnell LLP.

The securities litigation class is represented by Christopher P. Simon of Cross & Simon LLC, Michael S. Etkin, Andrew Behlmann and Michael Papandrea of Lowenstein Sandler LLP, and Shawn Williams and Daniel J. Pfefferbaum of Robbins Geller Rudman & Dowd LLP.

The case is In re: Zymergen Inc. et al., case number 1:23-bk-11661, in the U.S. Bankruptcy Court for the District of Delaware.

--Additional reporting by Alex Wittenberg and Renee Hickman. Editing by Philip Shea.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (February 5, 2024, 8:38 PM EST) -- Last week, Delaware's chancellor gave us 55 billion reasons to keep an eye on the First State in a case involving Tesla CEO Elon Musk's pay package, while the court of equity also took on cryptocurrency, artificial intelligence, space flight and country music.

In case you missed out on anything, here's all the latest developments from Delaware's Chancery Court.

Top News

Chancellor Kathaleen St. J. McCormick **struck down** Elon Musk's proposed \$55 billion pay package, finding disclosure failures, murky terms and Musk's own hand on the tiller warranted an order to roll it back. **Experts called the decision** a "groundbreaking" move that checks the clout of superstar celebrity CEOs and their boardroom allies, while also potentially blunting their power against shareholders.

Decisions

In a decision that could sharpen the contours of state insider-trading and unjust enrichment claims, Chancellor McCormick **refused to dismiss** a stockholder derivative suit against Coinbase Global Inc. directors and officers, who allegedly saved \$1.09 billion by selling \$2.9 billion in shares just ahead of a stock plunge.

Vice Chancellor Nathan A. Cook **tossed all claims** that Salt Lake City-based Teal Drones Inc. filed against autonomous-drone software vendor Autonodyne LLC, but left the drone maker's claims against the vendor's equity owner open for a later ruling.

Delaware's Supreme Court **reversed** and remanded a January 2023 decision from Vice Chancellor Morgan T. Zurn that invalidated "forfeiture for competition" terms in Cantor Fitzgerald LP's limited partnership agreements, unwinding a win worth \$12.5 million.

The state's high court also **undid a March 2023 decision** from Vice Chancellor J. Travis Laster that awarded roughly \$1.5 million in fees to two nonprofit organizations that successfully challenged the use of outdated tax assessments in determining funding for the state's public schools.

But it **upheld an April 2023 decision** from Vice Chancellor Lori W. Will that ended consolidated derivative litigation by Baker Hughes stockholders who alleged a series of transactions in 2018 unfairly benefited GE, finding the Court of Chancery had discretion to dismiss the case based on testimony of a one-member litigation committee.

In the Courtroom

Scant disclosures from Kirkland & Ellis LLP about its partners' potential stake in a \$1.2 billion deal — the acquisition of space infrastructure company Momentus Inc. by special-purpose acquisition company Stable Road Acquisition Corp. in August 2021 — **drew sharp scrutiny** from Vice Chancellor Paul A. Fioravanti Jr. during arguments on motions to dismiss a shareholder challenge to the deal.

In a ruling from the bench, Vice Chancellor Laster **kept alive** a stockholder challenge to the blank-check company deal that took payment platform Paysafe Group public in 2021, finding the case

raised reasonably conceivable disclosure claims about the \$1.3 billion deal.

At a **hearing on a motion to dismiss** a shareholder lawsuit accusing JPMorgan Chase & Co. of ignoring fraud complaints about peer-to-peer banking platform Zelle, an attorney for the company's directors argued the complaint cited only a few articles and a congressional hearing as "red flags" that directors allegedly missed, falling "well short" of a valid claim.

During arguments at Widener University's Delaware Law School on a case filed by T-Mobile US Inc. stockholders, Vice Chancellor Sam Glasscock III **said he was "struggling"** with shareholder arguments that tied costly data breaches to an allegedly "reckless" and hurried plan to build out data-mining architecture for artificial intelligence.

New Cases

The widow and daughter of songwriter and producer George Richey, the fifth husband of country music star Tammy Wynette, **sued** Showtime Networks Inc. over a recent series about Wynette's relationship with country singer George Jones, saying it runs afoul of a non-disparagement clause in a 2019 settlement agreement.

An investor in artificial intelligence software company LivePerson **took aim** at eight members of LivePerson's board, including its CEO John Sabino, with allegations they had implemented a so-called poison pill shareholder rights measure to prevent a near-term sale of the company in breach of their fiduciary duty to LivePerson's shareholders.

A shareholder of a real estate services platform Remine, acquired by five multiple-listing services in 2021, **sued the company's founders and directors**, alleging they structured the \$53.5 million sale for their own benefit at the expense of common stockholders.

Ongoing Disputes

Chancellor McCormick **denied a preliminary injunction bid** filed by Municipal Capital Appreciation Partners that would prevent Invesque, an Indiana-based healthcare real estate firm, from distributing funds out of an entity the companies formed to hold assets connected to a senior housing deal they inked over four years ago.

Parties in a shareholder suit that accused Netflix directors of disclosure failures and insider information **asked** to keep the Chancery case on ice pending further developments in a federal securities class action in the Northern District of California.

Settlements

First Brands Group subsidiary Carter Carburetor and manufacturer Walbro told the court in a stipulation of dismissal they had **reached an agreement** to resolve claims that Carter improperly raised prices and canceled orders after acquiring Walbro's engine management division.

Still Under Seal

Two shareholders of 3D model maker Matterport Inc. **sued** a raft of the technology company's directors, officers and investors in Delaware's Court of Chancery, asserting breach of fiduciary duty, corporate waste and unjust enrichment.

Fees, Fees, Fees

Vice Chancellor Lori W. Will **awarded** Shlansky Law Group LLP \$6.3 million for its work on an eight-year lawsuit that challenged an LLC managing member's failure to exercise warrants for Jenzabar Inc. stock, resulting in a \$25.5 million-plus payout to shareholders.

Quotable

"This grant is not 'too complex to unscramble.'" -- Chancellor McCormick, in her **201-page opinion** that rescinded Elon Musk's proposed \$55 billion Tesla pay package.



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Chancery Scuttles Skechers Stockholder Derivative Suit

By **Emily Lever**

Law360 (February 5, 2024, 7:09 PM EST) -- A Delaware Court of Chancery judge has allowed executives of comfort shoe company Skechers USA to beat feet out of a stockholder suit accusing top brass of using corporate aircraft for personal trips, at a cost to the company.

Stockholder Michael Conte failed to ask Skechers' board to put the kibosh on the executives' use of the corporate airplanes, nor did he present proof that it would have been futile to try, Vice Chancellor Morgan T. Zurn concluded in an order dismissing the suit late Friday.

Skechers founder and CEO Robert Greenberg, his son and company president Michael Greenberg, and another son and vice president Jeffrey Greenberg together control 55% of the votes on the board, according to the order. The Greenbergs and Chief Operating Officer David Weinberg racked up significant mileage on the company's two corporate airplanes, both for themselves and their friends and extended family, according to Conte's complaint.

The four execs or their families and friends used one of the airplanes for personal travel on at least 52 occasions from 2019 to 2021, accounting for over half of the aircrafts' flights and losing the company tax write-offs, according to Conte. Because use of the corporate airplanes was considered income, the executives paid taxes on the value of those flights, and were reimbursed for the taxes and flight-related expenses by Skechers to the tune of \$5.3 million in total, according to Conte.

Executives for companies in the S&P 500 received \$53,967 in similar payments on average in 2015, according to Conte.

In 2018, Skechers' compensation committee asked the company's chief financial officer to provide recommendations to curtail airplane usage, but this did not happen, according to the complaint. The committee, which included Katherine Blair, Morton Erlich and Richard Siskind, then asked the company's management in 2019 to draft an airplane usage policy for their review, which also did not materialize, according to the complaint.

Conte brought a suit derivatively on behalf of Skechers in 2022 accusing the Greenbergs and Weinberg of improper airplane use, and the board of overlooking that impropriety.

But Conte erred in not asking Skechers' board to step in to address the airplane issue, and thus to bring a derivative suit, he must prove it would have been futile to call on the board, Vice Chancellor Zurn found. While the executives clearly had an interest in maintaining the status quo, Conte had to prove that Blair, Erlich and Siskind were also compromised, and failed to do so, according to the order.

Conte failed to prove the committee acted in bad faith in addressing the airplane usage, according to the vice chancellor. The stockholder argued Skechers' management "depended on the Greenberg family for their continued employment," and thus were never going to make an honest effort to crack down on their use of the corporate jet. But the committee did not demonstrate bad faith by delegating the creation of an aircraft policy to management, because the committee still had the final say, according to the order.

The committee never did successfully establish a policy governing use of the corporate aircraft, but this does not sufficiently prove bad faith, according to the order.

The alleged improper behavior was also not pervasive enough to justify a finding of bad faith, according to Vice Chancellor Zurn.

The practice was "limited to the use of two corporate assets by a discrete group of individuals, as compared to a widespread operational deficiency," the order read. "The Company was not violating an internal policy or any regulations, which can support an inference of bad faith."

The \$5.3 million worth of corporate plane trips over two years are also small potatoes compared to Skechers' \$3 billion in profits and \$2.5 billion in operating expenses for 2021, the judge found. Nor is that sum particularly significant in comparison to the execs' total compensation, representing less than 5% of their pay, according to the order.

Personal use of company aircraft was therefore not taking place on such a massive scale that not addressing it is a clear sign of bad faith, the judge found. Nor did Conte prove the committee members were likely to face liability over the airplane usage, including on charges of waste of company resources stemming from the loss of favorable tax treatment for the airplanes, according to the order.

Conte also alleges that Siskind is not independent, arguing Siskind's company, Stage II Apparel Pty Ltd., bought several Skechers trademarks in 1999 and Robert Greenberg got Siskind a spot on Skechers' board shortly after. Siskind and the elder Greenberg also served together on Stage II's board and Greenberg served on the compensation committee at Stage II, mirroring Siskind's current position on the compensation committee at Skechers. But this does not suffice to prove Conte's claims that Siskind has an overly cozy relationship with the CEO because under Delaware law directors are assumed to be independent until proven otherwise, according to the order.

None of the parties involved responded to a request for comment Monday.

Michael Conte is represented by Thomas A. Uebler and Terisa A. Shoremoun of McCollom D'Emilio Smith Uebler LLC, Melinda A. Nicholson and Nicolas Kravitz of Kahn Swick & Foti LLC, Roger A. Sachar of Newman Ferrara LLP and Domenico Minerva of Labaton Sucharow LLP.

Skechers U.S.A. is represented by Matthew F. Davis and Tyler J. Leavengood Potter Anderson & Corroon LLP, Kenneth A. O'Brien Jr. of Sheppard Mullin Richter & Hampton LLP.

Katherine Blair, Morton Erlich, Richard Siskind, Jeffrey Greenberg, Geyer Kosinski, and Richard Rappaport are represented by A. Thompson Bayliss, E. Wade Houston, Eliezer Y. Feinstein and Daniel G. Paterno of Abrams & Bayliss LLP and Brad D. Brian, John M. Gildersleeve and Abraham B. Dyk of Munger Tolles & Olson LLP.

Robert Greenberg, Michael Greenberg and David Weinberg are represented by Kenneth J. Nachbar, Susan W. Waesco and Miranda N. Gilbert of Morris Nichols Arsht & Tunnell LLP and by Abby F. Rudzin of O'Melveny & Myers LLP.

The case is Michael Conte v. Robert Greenberg at al, case number 2022-0633, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Warner Bros. Discovery Beats Investors' \$43B Tie-Up Suit

By **Lauren Berg**

Law360 (February 5, 2024, 10:11 PM EST) -- A Manhattan federal judge tossed a proposed securities class action Monday accusing Discovery of not telling investors about the flagging performance of WarnerMedia's streaming service HBO Max prior to a \$43 billion merger of the two media giants, saying the plaintiff pension funds have not adequately alleged any actionable omissions.

U.S. District Judge Valerie Caproni granted Warner Bros. Discovery's **motion to dismiss** the consolidated case **led by** the Ohio Public Employees Retirement System and the State Teachers Retirement System of Ohio, finding the plaintiffs have not adequately pled that Discovery and WarnerMedia made omissions that are actionable under Sections 11 or 12 of the Securities Act.

For one, the investors allege documents related to the merger provided the total number of subscribers for HBO, HBO Max and Discovery, but didn't specify nonpaying subscribers who had not activated their accounts. But Judge Caproni said that's not an actionable omission because the documents were not misleading, and the investors have not disputed that the numbers reported were accurate.

"It is well settled ... that a violation of federal securities law cannot generally 'be premised upon a company's disclosure of accurate historical data,'" the judge said. "Nor is a defendant required to disclose a fact 'simply because it may be relevant or of interest to a reasonable investor.'"

"The offering documents reported subscriber numbers of the to-be-merged companies that were accurate and were accompanied by the companies' methodologies; the methodologies clearly disclosed that WarnerMedia included unactivated accounts and that Discovery included subscribers to all of its direct-to-consumer services," she added. "[The] plaintiffs have, therefore, failed adequately to allege an actionable omission."

The case stems from a proposed class action initially **filed in September 2022** by the Collinsville, Illinois, Police Pension Board claiming Discovery investors voted for the **\$43 billion merger** without knowledge of HBO Max's real subscription numbers or how much money former WarnerMedia parent AT&T was putting into the service.

The police pension fund claims the 50% drop in Warner Bros. Discovery's stock since the merger closed was related to recent revelations about HBO Max's financial performance. WarnerMedia overstated the number of subscribers by at least 10 million because some of its business came through its partnership with AT&T, which bundled HBO Max with other services, according to the suit.

Discovery told investors before the merger that some of the nearly 70 million HBO Max subscribers had bundled access and might not actually use the service, though the investors claim they were not made aware of just how many customers this was until after the merger was complete.

That suit was consolidated in November 2022 with another action filed by individual investors Tome and Violeta Todorovski. In December 2022, Judge Caproni appointed the two Ohio pension funds as lead plaintiffs, court records show.

In its April motion to dismiss, Warner Bros. Discovery argued the investors' suit is a "classic case of pleading by hindsight," saying they didn't adequately allege "Discovery's pre-closing diligence was, in fact, deficient," and instead seized new information related to an updated earnings before interest,

taxes, depreciation and amortization estimate and summarily alleged that it was a material omission.

The company argued that during an April 2022 earnings call shortly after the merger closed, it "explicitly" disclosed the company was still working through the alignment of its subscriber definitions, and that subscriber reporting would be more refined and detailed when it reported its second-quarter results.

The company said it then "harmonized" its reporting metrics across the newly merged business and updated investors during an August 2022 earnings call, "specifically" saying it was changing the way it presents its subscriber numbers going forward to align the definitions across the two businesses.

But the pension funds hit back in May, saying in their opposition that the alleged omissions are not immaterial.

Along with their claims about the companies' disclosures related to subscriber numbers, the investors argued the cancellation of CNN+ was also material, since the stock price dropped by almost 7% after it was announced.

In her order Monday, however, Judge Caproni agreed with Warner Bros. Discovery on the issue of the future of the CNN streaming service, finding there was no duty to disclose information about CNN+ in the offering documents.

While the investors allege the merging companies were obligated to provide details about CNN+ because it was the only news streaming platform between them, the judge said the shareholders didn't explain how the pre-merger plan to cancel the service "made statements about the broader content strategy of the planned merged company ... misleading."

Judge Caproni also found the investors did not adequately allege that the offering documents were misleading because they disclosed that due diligence was given to the assets of Discovery and WarnerMedia, but did not disclose that Discovery didn't scrutinize WarnerMedia's spending on content and was not given comprehensive access to WarnerMedia's financial and streaming data, among other defects, according to the order. The judge said the documents didn't represent that Discovery was given comprehensive access to WarnerMedia's non-public information.

"The offering documents stated only that, as is typical leading up to a merger, the parties had engaged in due diligence," Judge Caproni said. "[The] plaintiffs suggest in their briefing that Discovery did not engage in any due diligence ... but that assertion is belied by the amended complaint, which discusses a 'year-long due diligence process.'"

"Neither the fact that the offering documents did not disclose the details of the diligence process, nor the fact that WBD eventually revised its projected [earnings before interest, taxes, depreciation and amortization] renders [the] defendants' representations that due diligence was conducted false or misleading," she said.

The judge dismissed the case with prejudice and denied the plaintiffs' motion to file an amended complaint, finding they hadn't indicated how an amendment would fix the deficiencies.

A representative for WBD and counsel for the plaintiffs did not immediately respond to requests for comment.

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

The Ohio Public Employees Retirement System is represented by Caitlin Moyna, Cecilia Stein, Daniel Berger and Lauren Salamon of Grant & Eisenhofer PA. The State Teachers Retirement System of Ohio is represented by Daniel Berger of Grant & Eisenhofer PA.

The Collinsville Police Pension Board, on behalf of the Collinsville Police Pension Fund, is represented by Robert C. Finkel of Wolf Popper LLP.

The individual plaintiffs are represented by James LoPiano, Jeremy Lieberman and J. Alexander Hood II of Pomerantz LLP.

Warner Bros. Discovery is represented by Caroline Zalka, Jonathan D. Polkes, Josh Wesneski, Nicole E. Prunetti, Amanda Pooler, Milana Bretgoltz, Andrew Cauchi, Brigit Crosbie, Nolan DeBrowner, Daniel Lifton and Honghu Wang of Weil Gotshal & Manges LLP.

The case is Ohio Public Employees Retirement System et al. v. Discovery Inc. et al., case number 1:22-cv-08171, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Jade Martinez-Pogue and Jessica Corso. Editing by Caitlin Wolper.

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Adidas Looks To Kick Investor Suit Over Ye Contract

By **Sydney Price**

Law360 (February 5, 2024, 10:34 PM EST) -- Adidas AG is urging an Oregon federal court to drop a suit accusing it of failing to disclose the potential damage caused by its partnership with musician Ye, formerly known as Kanye West, following the artist's antisemitic comments, arguing its risk disclosures did not invoke a duty to disclose Ye's prior misconduct.

In a suit filed last May and most recently amended in December, investors argued that before Adidas ended its partnership with Ye in 2022, it ignored the risk the artist could pose to investors and failed to disclose it had considered ending the partnership, as a result of his "overtly antisemitic and other racially offensive remarks."

However, Adidas said on Friday that it was not required to reveal Ye's alleged derogatory behaviors and that its risk disclosures were sufficient.

Adidas adds that it disclosed the risks of working with creatives, such as Ye. Its business partner risk disclosures reveal its contracts generally contain clauses allowing the company to terminate partnerships in cases of improper or unethical conduct, the type of clause Adidas ultimately invoked to end its partnership with Ye, the motion states.

The company further says it never denied Ye acted inappropriately.

"Nothing in Adidas's risk disclosures states, or even implies, that Ye or any other partner had never engaged in any inappropriate or problematic conduct," the motion states. "Accordingly, those disclosures are not misleading merely because they do not specifically describe each instance of Ye's past misconduct, as plaintiff suggests."

The suit points to an article in the Wall Street Journal from November 2022 that reported Adidas management, including then-CEO Kasper Rørsted, discussed potential mitigating strategies in 2018, including terminating the partnership following Ye's antisemitic comments to staff and statements he made on TMZ suggesting slavery in the U.S. was a "choice."

Adidas continued to collaborate with Ye to reap the benefits of the Yeezy partnership, which accounted for 8% of sales, the suit states.

However, Adidas argued on Friday that Rørsted expressed on multiple occasions that although Adidas supported Ye "in many ways," it did not agree with "every statement" he made.

"Those statements accurately reflect the company's position, and plaintiff alleges nothing to the contrary," the motion states. "If anything, this public episode merely confirms that the public was well aware of any risk that Ye's conduct posed to the Adidas-Yeezy partnership."

Adidas further argues the investors do not sufficiently plead scienter. The idea that Adidas did not know in advance that Ye would take actions requiring the termination of the Adidas-Yeezy partnership is "far more compelling," the company said.

"Even assuming that Adidas was aware of those incidents, none of that implies — much less gives rise to the required 'strong inference' — that Adidas knew what would occur in the fall of 2022," Adidas said. "Plaintiff's suggestion to the contrary amounts to an assertion of 'fraud by hindsight.'"

Additionally, Adidas says the investors failed to show a causal relationship between the alleged

misrepresentations and the decline in stock price. For instance, investors point to an announcement that S&P Global, in February 2023, downgraded its outlook for Adidas following a warning the company made about the impact of ending its Yeezy partnership.

"None of the statements that plaintiff cites as allegedly causing a decline in stock price revealed any prior fraudulent activity," Adidas states.

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

The investors are represented by Phillip Kim, Laurence M. Rosen and Daniel Tyre-Karp of the Rosen Law Firm PA and Jeffrey S. Ratliff of Ransom Gilbertson Martin & Ratliff LLP.

Adidas is represented by Maeve O'Connor, Elliot Greenfield and Brandon Fetzer of Debevoise & Plimpton LLP and Matthew A. Levin, Chad M. Colton and Stanton R. Gallegos of Markowitz Herbold PC.

The case is HRSA-ILA Funds et al. v. Adidas AG et al., case number 3:23-cv-00629, in the U.S. District Court for the District of Oregon.

--Editing by Drashti Mehta.

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Biotech Co. Hit With Investor Suit Over Alzheimer's Drug Trial

By **Sydney Price**

Law360 (February 5, 2024, 6:55 PM EST) -- Biotechnology company Cassava Sciences and two of its executives were hit with a proposed class action over allegations that a co-developer of the company's Alzheimer's drug was under investigation by his employer for possible data manipulation, which Cassava concealed from the public.

According to shareholder Cassandra Baker's suit filed Friday in Illinois federal court, Cassava Sciences Inc. misled investors about its data management controls and misrepresented the efficacy of its Alzheimer's disease treatment under development, which led to sharp stock price declines when the investigation was revealed.

Cassava in March 2020 kicked-off a long-term study to evaluate the safety and tolerability of its Alzheimer's drug, but an August 2021 citizen petition asked the U.S. Food & Drug Administration to pause trials for the Alzheimer's treatment, citing data manipulation concerns, according to the suit. The company denied the concerns outlined in the petition and continued promoting the efficacy of its research and development, even as academic journals and other additional sources expressed concerns about the drug's efficacy, the complaint states.

Baker seeks to represent a class of those who purchased or otherwise acquired Cassava securities between Aug. 18, 2022, and Oct. 12, 2023. In addition to Cassava, its CEO Remi Barbier and Chief Financial Officer Eric J. Schoen are individual defendants in the suit.

The class period begins the day Cassava issued a press release denying data manipulation of its lead drug candidate known as simufilam. The company said that it was informed by an Alzheimer's medical journal that there is "no convincing evidence to support allegations of data manipulation" in a 2020 paper co-authored by Cassava researchers, according to the complaint.

Throughout the class period, Cassava continued to assure investors through its U.S. Securities and Exchange Commission filings, earnings calls and press releases that its trials were progressing successfully. For example, on Jan. 24, 2023, Cassava issued a press release touting the trial's results in its phase II study, according to the complaint.

The truth emerged, however, on Oct. 12, 2023, when peer-reviewed academic journal Science published an article stating a City University of New York researcher associated with the research program for simufilam had been subject to an investigation by university officials for possible data manipulation, according to the complaint. The report stated that the investigators "found evidence highly suggestive of deliberate scientific misconduct" from City University of New York professor Hoau-Yan Wang, who is not a defendant in the suit, according to the complaint.

On this news, Cassava's shares fell \$2.68, or about 15%, to close at \$14.86 per share on Oct. 13, the complaint said.

"Cassava had misrepresented the efficacy of its research programs and the clinical and/or commercial prospects of simufilam; all of the foregoing, once revealed, was likely to subject the company to significant financial and/or reputational harm," the suit states.

Baker accuses all the defendants of violating the Exchange Act and of acting with scienter, or actual knowledge of wrongdoing or reckless disregard. She seeks damages with prejudgment and post-

judgment interest on behalf of the proposed class.

Counsel for Baker and a representative of Cassava did not immediately respond to requests for comment on Monday.

Baker is represented by Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP.

Counsel information for Cassava and the individual defendants was not immediately available on Monday.

The case is Baker v. Cassava Sciences Inc. et al., case number 1:24-cv-00977, in the U.S. District Court for the Northern District of Illinois.

--Editing by Kristen Becker.

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Crypto Mining Co. Execs Sued Over Pre-IPO Pledges

By **Katryna Perera**

Law360 (February 5, 2024, 10:13 PM EST) -- A shareholder of cryptocurrency mining company Stronghold Digital Mining Inc. has sued the company's top brass in New York federal court, accusing them of misleading shareholders about the capacity of Stronghold's bitcoin mining operations in the run-up to its \$132.5 million initial public offering.

Glenn Bruno's Friday **complaint** names Stronghold CEO and co-chairman of the board Gregory Beard, Chief Financial Officer Ricardo Larroudé and several other directors as defendants.

Stronghold, a New York-based alternative-energy bitcoin miner, owns and operates two coal refuse power generation plants in Pennsylvania, according to the complaint.

Cryptocurrency mining, the process of verifying digital-asset transactions and minting new tokens, typically requires high energy input and specialized computing equipment.

Bruno alleges that from July 2021 to March 2022, the defendants caused the company to issue several false and misleading statements about Stronghold's expected computing power and agreements it had with suppliers, including MinerVa Semiconductor Corp., one of its biggest vendors.

The complaint says that in April 2021, Stronghold agreed with MinerVa to buy 15,000 bitcoin mining computers, or miners, that MinerVa was supposed to supply by the time Stronghold's IPO was completed in October 2021.

According to the complaint, the offering materials for Stronghold's IPO touted "superior access" to bitcoin miners, and purchase orders for the acquisition of miners were "highlighted" and "confirmed" to demonstrate Stronghold's "ability to leverage the breadth of our relationships to quickly expand our mining capacity."

However, Bruno alleges that at the time the offering materials were disseminated, the individual defendants knew there was no way the delivery schedules and quantities publicized in the materials would be met.

Bruno says leading up to and during the IPO, the defendants communicated with MinerVa every day and "knew that it was facing significant issues at its assembly facility in China, including power outages and restrictions that prevented miners from being assembled."

"MinerVa had failed even to source the necessary components to assemble a substantial number of the ordered miners," the complaint says. "Because of the complications communicated to Stronghold by MinerVa, Stronghold was aware that delivery of the ordered MV7 miners, according to the delivery schedule publicized in offering materials, was not possible."

The offering materials also misrepresented the new miners' operational capacity, as the defendants knew this advertised ability "was impractical as it has not yet been achieved in real-world conditions," the suit says.

"In actuality, however, the MinerVa MV7 miners were plagued with faults and performance issues, with one in three of the miners being defectively nonoperational and those that did function failing to perform close to even the internally anticipated rate," the complaint says.

Despite this, Stronghold went public in October 2021, raising \$132.5 million from its IPO, according

to the complaint.

In March 2022, Bruno says, Stronghold announced its fourth quarter full year 2021 financial results and reported net losses "well below" analyst's expectations.

"Specifically, Stronghold disclosed that 'MinerVa[s] deliveries have been well short of the timelines in the contract' as 'to-date we have only received approximately 3,300 out of the 15,000 miners originally ordered from MinerVa that were scheduled for delivery by December, as they have continually fallen short of contractual and communicated delivery timelines,'" the complaint says.

"The company maintained that while it 'continues to have active dialogue with MinerVa regarding its delivery schedule and operational capabilities,' and continued to be 'in near constant contact' with MinerVa, the company could not 'provide an update or a timeline on future deliveries, or if the company can expect any future deliveries' of the MinerVa miners,'" it says.

On this news, Stronghold's stock dropped \$3.28 per share, or 32%, to close at \$6.97 per share on March 30, 2022, according to Bruno.

Stronghold later revealed that by the following day it had recognized an impairment of over \$12.2 million for the rest of the miners it hadn't received from MinerVa, the complaint says.

Bruno's suit seeks damages, restitution, attorney fees, and reforms and improvements to Stronghold's corporate governance and internal procedures.

The company is also facing a **securities proposed class action** in New York federal court over the same allegations.

"The allegations in the new complaint are without merit and the defendants intend to defend the suit vigorously," a spokesperson for Stronghold said in a statement to Law360 on Monday. "The company also continues to evaluate remedies against MinerVa under the MinerVa purchase agreement."

Counsel for Bruno did not immediately respond to requests for comment Monday.

Bruno is represented by Serina M. Vash and John C. Herman of Herman Jones LLP.

Counsel information for the defendants was not immediately available.

The case is Bruno v. Beard et al., case number 1:24-cv-00798, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.



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EV Co. Fisker Brass Sued Over Production, Financial Woes

By **Katherine Smith**

Law360 (February 5, 2024, 8:11 PM EST) -- The board members of electric vehicle company Fisker are facing a stockholder derivative action in Delaware federal court claiming that the co-founders and several board members misled investors about the company's financial woes and systemic production problems.

Investor Zalmon Uvaydov filed the **complaint** Thursday against Fisker's married founders, Henrik Fisker and Geeta-Gupta Fisker, and several members of the company's board of directors, claiming that their misstatements have exposed investors to potential liability and "significant" legal defense costs in a parallel securities class action.

"The individual defendants authorized and/or permitted the false statements to be disseminated directly to the public and made available and distributed to shareholders, authorized, and/or permitted the issuance of various false and misleading statements, and are principal beneficiaries of the wrongdoing alleged herein," the complaint states.

The complaint also alleges that the California-based company, which launched its first vehicle, the Fisker Ocean, in 2023, failed to disclose in an August press release announcing its financial results for the second quarter that it had "materially deficient" internal controls regarding its financial reporting and issues with gauging certain costs.

The company also did not inform investors that the flaws of its delivery and service infrastructure were interfering with its vehicle deliveries and that it would likely have trouble filing its quarterly report on time.

Fisker's share price fell shortly after several disclosures made by the company, which included the resignations of two chief accounting officers, according to the complaint.

When Fisker announced in November that it wouldn't be able to file its financial statements due to the replacement of CAO John Finnucan, its stock dropped by 8.7% in one day, closing at just under \$4 a share, according to Uvaydov.

In the release of its third quarter financial results on Nov. 13, Fisker reported a \$91 million loss and 27 cent loss per share, according to Uvaydov. Fisker disclosed on an earnings call on the same day that its problems were the result of a "highly complex quarter," which included "very complex accounting," the complaint says.

The company also shared that it delivered only 1,097 Fisker Ocean vehicles of the 4,725 it built during the quarter, the complaint alleges, after stating in August that the company would "ramp" up production during the remainder of the year.

Additionally, Fisker disclosed in the earnings call that the company wasn't able to make the deliveries due to issues with the company's "delivery and service infrastructure," according to Uvaydov.

As a result, the complaint states that the price of Fisker's stock declined 18.7% in one day, and closed at \$3.34 per share on the next day. The price of the stock further dipped another 15% after the company announced that Florus Beuting, its new CAO, would be resigning on the same day.

The complaint states that Fisker later disclosed around \$20 million in expenses that were "incorrectly recorded" as mostly selling, general and administrative expenses in the company's preliminary earnings results, but those expenses were related to "production set-up activities."

Uvaydov claims that due to the executives' alleged misconduct, the company was hit with a securities class action in late November, leaving the shareholders open to "massive class-wide liability" as a result.

The derivative suit seeks damages, attorney fees and a jury trial.

A representative for Fisker declined to comment Monday.

Counsel for Uvaydov did not immediately respond to requests for comment Monday.

Uvaydov is represented by Seth Rigrodsky, Gina M. Serra and Herbert W. Mondros of Rigrodsky Law PA.

Counsel information for Fisker was not available on Monday.

The case is Uvaydov v. Fisker et al., case number 1:24-cv-00133, in the U.S. District Court for the District of Delaware.

--Editing by Rich Mills.

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Okta Investors Win Cert. In Cyberattack Coverup Suit

By **Emilie Ruscoe**

Law360 (February 5, 2024, 9:32 PM EST) -- Investors in identity and access management software company Okta Inc. have received certification for a class in a suit alleging the company misled them about a 2022 cyberattack.

In a Monday order, U.S. District Judge Susan Illston granted certification to a class of investors who bought Okta shares between March 3, 2022, and Aug. 31, 2022, noting the company didn't oppose the investors' proposed order. At the same time, Judge Illston designated Labaton Sucharow LLP as class counsel in the matter.

The latest version of the class certification bid was filed in November by lead plaintiff Nebraska Investment Council and additional plaintiff the North Carolina Retirement Systems, which estimated at the time that the proposed class would number at least in the thousands. The investors also estimated that Okta has about 153 million outstanding shares.

The investment council plaintiff launched the action in May 2022, alleging that Okta downplayed the January 2022 cyberattack, which allegedly affected about 366 customers, or 2.5% of Okta's clientele.

According to the investors, trading prices for Okta shares fell by about 10% after hackers calling themselves Lapsus\$ claimed they carried out the Okta hack in a blog post, drawing attention to the matter.

In a March 2022 statement, the company said it "made a mistake" by failing to acknowledge the attack sooner. The company also claimed at the time that it wasn't initially aware of the extent of the breach.

The investors also pointed to a disclosure the company made in its public filings about the risks posed to the company by cybersecurity issues — even as it failed to mention a forensic investigation of the hack that was under way.

Judge Illston trimmed certain claims from the suit in March 2023, including certain allegations aimed at the executives — but she kept alive claims related to Okta's February 2022 acquisition of software company Auth0.

Alongside the company, the suit names Okta's CEO Todd McKinnon, Chief Financial Officer Brett Tighe, and Chief Operating Officer Frederic Kerrest.

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

The Nebraska Investment Council is represented by Michael P. Canty, James T. Christie and Nicholas Manningham of Labaton Sucharow LLP and James M. Wagstaffe and Frank Busch of Coblentz Patch Duffy & Bass LLP.

Okta is represented by Brian Michael Lutz, Jason Jacob Mendro and Wesley Sze of Gibson Dunn & Crutcher LLP.

The case is In re: Okta Inc. Securities Litigation, case number 22-cv-02990-SI, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sydney Price. Editing by Kelly Duncan.



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Volta Investor Attys Denied Fees For 'Moot' Disclosure Case

By **Katryna Perera**

Law360 (February 5, 2024, 9:14 PM EST) -- A New York federal judge has declined to award fees to lawyers who represented a Volta Inc. investor who sued the electric vehicle company over allegedly inadequate disclosures related to a potential acquisition, saying the disclosures the company later provided because of the suit didn't give the investing public any new or useful information.

U.S. District Judge Jed S. Rakoff on Friday issued an **opinion and order** denying a request for attorney fees from Wohl & Fruchter LLP, which represents plaintiff David Belcher.

Belcher launched his suit in February 2023, claiming that a preliminary proxy statement Volta issued concerning a potential acquisition by Shell USA Inc. was misleading because it didn't include "specific details" about Shell's relationship with Goldman Sachs and Barclays. According to the order, Volta had asked the banks for advisory services in connection with the potential sale to Shell.

However, Volta ended up supplying the information Belcher requested in advance of the shareholder vote to approve the sale, so the case became moot. Belcher then moved for attorney fees, arguing that his suit "created a common benefit for Volta shareholders by causing Volta to provide those supplemental disclosures."

But Judge Rakoff on Friday disagreed, saying that while there is no doubt that Belcher's suit "played a substantial role in the defendant's decision to take corrective action," Belcher has not identified any false or misleading statements in the preliminary proxy statement that needed correction to begin with.

The judge added that the supplemental disclosures consisted of publicly available information and were, therefore, not material.

"It was no secret to Volta shareholders that Goldman Sachs and Barclays had banking relationships with Shell," the order stated. "The complaint alleges that the preliminary proxy statement did not additionally disclose what those specific relationships were, but Belcher has not explained how such additional disclosures 'affect the enjoyment or protection of an essential right to the stockholder's interest.'"

Volta partners with real estate and retail businesses to provide charging stations for electric vehicles at retail locations throughout the United States and Europe.

The company and its executives are also battling an investor class action in California federal court alleging they covered up flaws in the business and committed "serious" accounting violations.

Last week, a California federal judge **slashed the suit**, saying investors had failed to prove the falsity of a majority of the statements included in the complaint, along with scienter and loss causation.

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

Belcher is represented by Joshua E. Fruchter of Wohl & Fruchter LLP.

Volta is represented by Peter A. Stokes of Norton Rose Fulbright.

The case is Belcher v. Volta Inc. et al., case number 1:23-cv-01406, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.

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Hedge Fund Sues SPAC For Books On Failed Casino Deal

By **Chuck Slothower**

Law360 (February 5, 2024, 8:01 PM EST) -- A New York hedge fund on Monday sued a special purpose acquisition company for books and records related to a failed \$2.6 billion deal to take a casino public in Manila, the Philippines.

Zama Capital Master Fund LP said in a complaint filed in Delaware Chancery Court that the SPAC, 26 Capital Acquisition Fund, "has failed to provide any information necessary for Zama to evaluate whether the board and/or management have breached any duties or obligations to the company or its stockholders, including the board's and/or management's fiduciary duties."

Zama seeks a summary order compelling 26 Capital to produce books and records responsive to the complaint. The fund is represented in the action by Richards Layton & Finger PA of Wilmington, Delaware.

The dispute stems from a defunct plan to merge Universal Entertainment Corp., the Japanese parent company of casino operator Tiger Resort Leisure and Entertainment Inc., with the SPAC, bringing into the fold Okada Manila Resort and Casino, a 100-acre, 993-room property.

Zama alleged Jason Ader, CEO of 26 Capital and buyout specialist SpringOwl Asset Management LLC, used the deal to "enrich himself and address a personal problem."

The plaintiffs alleged Ader pitched an investment opportunity to the family office of billionaire investor Rimu Capital Ltd., and funneled the resulting funds to himself to buy his mother's interest in SpringOwl.

Ader withdrew \$28 million, including \$25 million invested by Rimu and a portion of Zama's prior \$4.5 million investment. He then used a portion of these funds to buy his mother out of her \$16 million investment in SpringOwl, Zama charged.

Zama said Ader "abandoned his responsibilities and looted the company." Ader was removed as the sponsor's managing member on Oct. 29.

26 Capital sued Tiger Resort and three affiliates in Chancery Court in February 2023, accusing the resort company of delays and attempts to scuttle the \$2.6 billion merger.

After a trial in July, Vice Chancellor J. Travis Laster refused to force the deal to close.

In his 72-page opinion in September, the vice chancellor found that Zama Capital, which the casino operators had hired as an adviser to help find a SPAC partner, ended up secretly working on behalf of 26 Capital.

In Monday's filing, Zama said Ader was quick to move to a settlement agreement. "While purporting to settle the company's claims for a fraction of their actual value, Ader also secured substantial releases of his own personal liability," Zama's filing asserted.

Ader owns no equity in the company and has no incentive to achieve the highest possible price for the claims, Zama said. Zama also claimed that details of the settlement agreement have not been disclosed to 26 Capital's shareholders. Furthermore, the company has not held a stockholder vote.

Zama claims 26 Capital has not paid timely franchise taxes to Delaware, has not held a stockholder meeting in at least the past 13 months and has been delisted and deregistered as a public reporting company.

Zama on Monday demanded all settlement agreements and drafts thereof, any board meeting minutes, notices, agenda and other materials, monthly financial statement, communications regarding a potential settlement of the SPAC suit and any documents showing disbursements of \$25,000 since September.

In response to demands for document inspection, 26 Capital has claimed Zama is no longer a shareholder. Zama, in turn, disputed that its shares were ever redeemed.

Zama demanded document inspection and costs and expenses, including reasonable attorney fees.

Zama's lead attorney did not respond to a message seeking comment. It is not known who is representing 26 Capital in the document request. Lawyers for 26 Capital and Ader in related litigation also did not comment.

Zama Capital Master Fund LP is represented by Matthew D. Perri, Andrew L. Milam, Elizabeth J. Freud and Alfre P. Dillione of Richards Layton & Finger PA.

The case is Zama Capital Master Fund LP v. 26 Capital Acquisition Corp., case number 2024-0095, in the Court of Chancery of the State of Delaware.

--Editing by John C. Davenport.

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SEC's SolarWinds Suit May Chill Disclosures, Ex-Officials Say

By Sarah Jarvis

Law360 (February 5, 2024, 10:24 PM EST) -- A group of 21 former government officials from both Democratic and Republican administrations has urged a New York federal court to consider the possible chilling effects of public-private information sharing on cyber incidents in the U.S. Securities and Exchange Commission's case against SolarWinds.

Former officials including an ex-U.S. attorney, former senior White House staffers and directors, and ex-senior attorneys for the U.S. Department of Justice and U.S. Department of Homeland Security on Friday signed an **amicus brief** in the SEC's lawsuit against software provider SolarWinds Corp., warning that the enforcement action "could disincentivize public-private information-sharing that is critically important to our nation's security."

The group says chief information security officers may become more cautious in weighing how their communications on cybersecurity threats might increase their potential liability.

"Cybersecurity risks are far easier to evaluate after a risk has already materialized and been eliminated," the group says. "A CISO or company concerned that the preliminary information about a cybersecurity incident or vulnerability it shares with law enforcement or industry may be treated in hindsight as something that should have been disclosed publicly may think twice before sharing that information in the first place."

Those who signed onto the amicus brief include former federal law enforcement and national security officials with expertise in cybersecurity, and the group has collectively worked for multiple administrations of both parties.

Among the amicus group is John P. Carlin, a former acting deputy attorney general and assistant attorney general for national security with the DOJ, and current co-chair of Paul Weiss Rifkind Wharton & Garrison LLP's cybersecurity and data protection practice.

The group also includes J. Michael Daniel, formerly a special assistant to the president and a cybersecurity coordinator in the Executive Office of the President from 2012 to 2017; Melinda Haag, former U.S. attorney for the Northern District of California; Chris Inglis, formerly a White House national cyber director and deputy director of the National Security Agency; and John Reed Stark, former chief of the SEC's Office of Internet Enforcement.

Among others, the group additionally includes ex-officials from the FBI and CIA.

The group underscored the strength of cyberthreats facing U.S. companies and government entities, saying "not even the most sophisticated cybersecurity defenses, public or private, can reliably protect an information system from a dedicated, sophisticated threat actor." They add that it's important for victims of cyberattacks to notify government agencies swiftly, even if all the facts aren't yet known.

"Even the shortest delay in sharing information can hamper the government's ability to effectively respond because threat actors can quickly delete evidence and move infrastructure before the government has an opportunity to seize or preserve the relevant evidence," the group says.

Carlin of Paul Weiss, who is also counsel for the former officials, said in a statement: "We believe that public disclosure is not a substitute for, and must not come at the expense of, voluntary confidential

sharing of more detailed information with the agencies tasked with combatting cyber threats, who have the right set of technical tools and legal authority to take effective action."

The SEC **sued** SolarWinds in October 2023, accusing the company of failing to tell investors about cybersecurity weaknesses prior to a Russian-linked data breach in 2020. **Experts say** the suit is the first SEC proceeding to litigate cybersecurity disclosure issues, and it marks the first time a chief information security officer — SolarWinds cyber lead Timothy Brown — has been named a defendant in this type of regulatory action.

SolarWinds **has alleged** the SEC is trying to "revictimize the victim" with the suit, arguing the company did what it was supposed to do in handling an "extraordinarily sophisticated" breach and had risk factors that were comparable to other companies.

Other groups filed amicus briefs in the case last week, including the U.S. Chamber of Commerce, which **accuses** the SEC of using a provision of the Foreign Corrupt Practices Act as a power grab for broader corporate policing authority. The software provider has garnered support from other parties, including a software industry group, and a coalition of cybersecurity organizations and chief information security officers.

Serrin Turner of Latham & Watkins LLP, counsel for SolarWinds, said in a statement on Friday that the amicus briefs "highlight that the SEC's positions in this case are not only unsupported by the law but raise serious security concerns for companies, CISOs, and the public at large."

"We remain confident that SolarWinds' disclosures at all times were appropriate, and the SEC's assertions otherwise are fundamentally flawed," Turner said.

An SEC representative didn't immediately respond to requests for comment Monday.

The former government officials are represented by John P. Carlin and Jeannie S. Rhee of Paul Weiss Rifkind Wharton & Garrison LLP.

The SEC is represented in-house by Christopher M. Bruckmann, Kristen M. Warden, W. Bradley Ney, Benjamin Brutlag, Lory Stone and John J. Todor.

SolarWinds and Brown are represented by Serrin A. Turner, Michael Clemente, Sean M. Berkowitz and Kirsten C. Lee of Latham & Watkins LLP.

Brown is additionally represented by Alec Koch, Michael J. Biles and Mateo de la Torre of King & Spalding LLP.

The case is Securities and Exchange Commission v. SolarWinds Corp. et al., case number 1:23-cv-09518, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.