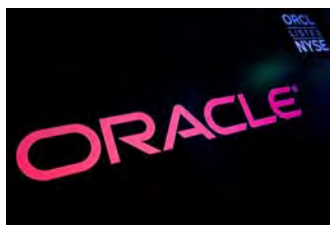


Oracle beats \$5 million fee bid by plaintiffs lawyers who lost NetSuite conflicts trial

 [reuters.com/legal/transactional/column-oracle-beats-5-million-fee-bid-by-plaintiffs-lawyers-who-lost-netsuite-2024-02-08](https://www.reuters.com/legal/transactional/column-oracle-beats-5-million-fee-bid-by-plaintiffs-lawyers-who-lost-netsuite-2024-02-08)

Alison Frankel



A screen displays the logo and trading information for Oracle Corporation on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., March 30, 2023.

REUTERS/Brendan McDermid Purchase Licensing Rights , opens new tab

Feb 8 (Reuters) - A Delaware judge refused , opens new tab on Wednesday to award fees to shareholder lawyers who failed after a 10-day trial last year to prove that Oracle (ORCL.N) , opens new tab founder Larry Ellison pushed the company to overpay for software company NetSuite in a \$9.3 billion deal in 2016.

Yes, you read that right: The shareholder firms, Robbins Geller Rudman & Dowd and Friedlander & Gorris asked , opens new tab for \$5 million in fees even though Vice Chancellor Sam Glasscock of Delaware Chancery Court ruled , opens new tab last May that Oracle's acquisition of NetSuite was not conflicted because Ellison – who had an equity stake in NetSuite – withdrew from consideration of the deal.

The plaintiffs firms, in other words, lost the case.

They fought hard for five years, surviving defense dismissal and summary judgment motions. They even convinced a special committee of Oracle's board to allow them to move forward with a case seeking billions of dollars from other Oracle directors – an exceedingly rare concession in shareholder derivative litigation. But ultimately, Robbins Geller and Friedlander & Gorris couldn't prove their claims at trial.

They nevertheless sought fees because Oracle appointed two independent directors to its board in 2018, after shareholders survived an initial motion to dismiss the derivative suit alleging conflicts in the NetSuite acquisition. The two new members rejiggered the composition of the board, creating an even split between independent board members and directors with ties to Ellison.

Robbins Geller and Friedlander & Gorris argued that their litigation prodded Oracle to beef up the ranks of independent board members -- a meaningful corporate benefit that, the plaintiffs firms said, merited a \$5 million fee award.

That argument was not as audacious as it might seem on its face. Plaintiffs lawyers pointed out, in both their initial fee motion and their reply brief [\[1\]](#), opens new tab defending the request, that a long line of Delaware precedent rewards shareholder lawyers for securing the appointment of new board members.

Even when shareholders did not ask in their complaints for new directors, the firms argued, Chancery Court judges have often awarded them fees for obtaining settlements that required companies to improve corporate governance, including the appointment of new board members.

But Oracle's lawyers at Richards, Layton & Finger argued [\[2\]](#), opens new tab that this case is different. For one thing, they said, Oracle did not appoint new directors because of the litigation. The company had been on a mission to add independent directors before the NetSuite lawsuit was even filed, Oracle said, so it would make no sense to credit plaintiffs lawyers for making the board more independent.

Moreover, Oracle said, when Delaware judges have rewarded plaintiffs lawyers for obtaining corporate governance reforms, it's been the context of settlements that resolved shareholders' cases. But in the NetSuite deal litigation, shareholders continued litigating for years after Oracle appointed new directors in 2018.

Oracle's directors, the company said, had to spend tens of millions of dollars to defend the case, far outweighing whatever corporate benefit the company derived from the appointment of new directors -- and contradicting any argument that plaintiffs lawyers are entitled to a mootness fee based on the appointment. The appointment of new directors, according to Oracle, didn't moot the case, which went on for years after the composition of the board changed. Robbins Geller and Friedlander & Gorris, Oracle said, can't receive a mootness fee for a purported benefit that didn't end the case.

Glasscock agreed. Even if Oracle did appoint new directors because of the shareholder derivative suit, the judge said, that wasn't the aim of the litigation, which sought to hold board members liable for allegedly bowing to Ellison and paying too much to acquire NetSuite.

Shareholders never asked Oracle to bolster the board's independence, the judge said. So, at best, the appointment of additional independent board members was "incidental" to their case, Glasscock said.

The judge echoed Oracle's distinction between this litigation and cases in which shareholder firms received fees for obtaining corporate governance benefits in settlements. In those cases, Glasscock said, plaintiffs compromised, trading unresolved claims for governance reforms.

Robbins Geller and Friedlander & Gorris chose not to make that trade, Glasscock said.

They opted instead for protracted litigation on their claim for money damages – and lost. To reward them after the fact for a “collateral” corporate governance benefit, the judge said, “would create an unwholesome incentive.”

“I feel sympathy for plaintiffs’ counsel here, who proceeded derivatively, in good faith and with great skill and vigor, at great cost and effort to themselves,” Glasscock said.

“Nonetheless, this is counsels’ business model: sue derivatively, on a contingency basis, accept the freight in a losing case, while seeking a multiple of a lodestar in a successful one.”

Joel Friedlander of the eponymous firm and Randall Baron of Robbins Geller declined to comment. An Oracle spokesperson and Oracle counsel from Richards Layton did not respond to my query.

One intriguing effect of Glasscock’s ruling may be that plaintiffs lawyers will start adding boilerplate demands for corporate governance reforms to derivative complaints. That way, if a company appoints new directors or otherwise tightens up its corporate governance in the course of the litigation, shareholders can argue that the reforms were tied to their demands.

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Reporting By Alison Frankel

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Alison Frankel

Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters,

Oracle Wins on Attorney Fee Award in Failed NetSuite Lawsuit

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- Oracle founder Larry Ellison won suit over 2016 deal in May
- Judge rejected attorneys fee award, costs sought by Ellison

The Delaware Court of Chancery rejected a \$5 million fee award for the attorneys for a pension fund that failed in its challenge to Oracle Corp.'s 2016 acquisition of NetSuite Inc.

Vice Chancellor Sam Glasscock III said he feels "sympathy" for the fund's attorneys who brought the case that "consumed monumental effort on the part of the some of the best in the plaintiffs' bar," according to an opinion issued late Wednesday afternoon.

"The ride was long and skillfully done, but not a winner," he said.

Glasscock ruled in May that the NetSuite deal had been negotiated at arm's length by a "fully-empowered special committee."

The pension fund that accused Oracle and its founder, Larry Ellison, of overpaying by \$3 billion for NetSuite, argued it was entitled to attorney fees in the case because the litigation pushed Oracle to appoint new, independent directors who improved corporate governance at the company.

If the fund is correct that the new directors were engaged primarily to serve on the special committee in response to the lawsuit, "that is not a benefit created by the efforts of Plaintiffs—it is merely a collateral effect of this litigation, and awarding fees in this situation would create an unwholesome incentive," Glasscock wrote.

"Upon the specific facts here, Oracle's decision to appoint the New Directors does not constitute a specific or significant corporate benefit sufficient to justify awarding Plaintiffs attorneys' fees in light of the ultimate outcome of this litigation," he said.

Ellison wanted \$34,226 in costs covered by the plaintiffs. Glasscock rejected that request in a Dec. 28 opinion.

"Unlike the typical derivative case, here Oracle is in an equitable sense the non-prevailing party. It has the responsibility to advance and indemnify the litigation costs now sought by Defendants against the derivative Plaintiffs," he wrote in that opinion. "I find that equity

dictates that Defendants' costs should repose with Oracle."

The pension fund is represented by Friedlander & Gorris PA, Robbins Geller Rudman & Dowd LLP, and Robbins LLP. Oracle is represented by Richards, Layton & Finger PA. Ellison is represented by Latham & Watkins LLP and Young Conaway Stargatt & Taylor LLP.

The case is In Re Oracle Corp. , Del. Ch., No. 2017-0337, opinion 2/7/24 .

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Next Story

Google Investors Land \$350 Million to Settle Data-Privacy Suit

Daily Journal

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Verdicts and settlements

Consumer Law

Consumer Protection

The People of the State of California v. Allergan Limited, Allergan Finance LLC, Watson Laboratories Inc., Actavis Pharma Inc., Actavis LLC, Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA Inc., Cephalon Inc.

Published: Feb. 9, 2024 | Result Date: Oct. 13, 2023 | Filing Date: Oct. 10, 2023 |

Case number: 23CV046930 Settlement – **\$2,372,972,184**

Judge

Rebekah B. Evenson

Court

Alameda County Superior Court

Attorneys

Plaintiff

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Paul J. Geller
(Robbins, Geller, Rudman & Dowd LLP)

Steven J. Skikos
(Skikos, Crawford, Skikos & Joseph LLC)

Defendant

Rebecca Fitzpatrick
(Kirkland & Ellis LLP)

Facts

Allergan Limited, formerly known as Actavis, Inc., is an Ireland-based pharmaceutical company that, among other things, makes and markets opioid drugs. In the wake of the opioid epidemic, numerous lawsuits have been filed alleging that opioid manufacturers exaggerated the benefits of such drugs while downplaying their addictive nature. In 2023, California Attorney General Rob Bonta filed suit on behalf of the People of the states of California against Allergan in Alameda County Superior Court.

Contentions

PLAINTIFF'S CONTENTIONS: The People contended that Allergan knew of but downplayed the addictive nature of its branded and generic opioid products to physicians; that this led to overprescribing of opioid drugs; that overprescribing led to addiction, overdoses, and numerous other harms for patients. Moreover, the People contended that Allegan failed to maintain effective controls to prevent diversion of opioids.

DEFENDANT'S CONTENTIONS: The defendants denied any wrongdoing or liability and all the plaintiff's material allegations.

Result

The parties reached an agreement wherein the defendant admitted no wrongdoing or liability but agreed to pay \$2.37 billion to settle all claims against it.

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Alphabet Google+ User Data Privacy-Related Securities Suit Settles for \$350 Million

K [dandodiary.com/2024/02/articles/securities-litigation/alphabet-google-user-data-privacy-related-securities-suit-settles-for-350-million](https://www.dandodiary.com/2024/02/articles/securities-litigation/alphabet-google-user-data-privacy-related-securities-suit-settles-for-350-million)

February 8, 2024

The D&O Diary

Alphabet Google+ User Data Privacy-Related Securities Suit Settles for \$350 Million



By Kevin LaCroix on February 8, 2024

Posted in Securities Litigation



In what is apparently the largest privacy and cybersecurity-related securities class action lawsuit settlement ever, the parties to the Alphabet Google+ user data securities suit have agreed to settle the action for \$350 million. As discussed below, this massive settlement, which is subject to court approval, is significant for a number of important reasons. A copy of the parties' February 5, 2024, Stipulation of Settlement can be

found [here](#). The plaintiffs' February 5, 2024, motion for preliminary settlement approval can be found [here](#).

Background

In a front page October 8, 2018 *Wall Street Journal* article entitled "Google Hid Data Breach for Months" ([here](#)), the newspaper reported that in March 2018, Google discovered a software flaw (referred to in the securities lawsuit complaint as the Three Year Bug) that between 2015 and March 2018 had allowed outside developers to access personal profile data of users of the Google+ social media site, including the data of users who had not opted to share their data publicly. In tests, the company determined that the data of nearly half of a million users had been exposed. The profile data that was exposed included full names, email addresses, birth dates, gender, profile photos, places lived, occupation and relationship status.

Following discovery of the glitch, the company's legal and policy staff drafted a memo (referred to in the complaint as the Privacy Bug Memo) for senior executives. According to the *Journal* article, among other things, the memo advised that disclosing the incident would,

in light of Congressional investigations relating to the Facebook/Cambridge Analytica matter, likely trigger “immediate regulatory interest” and perhaps draw Google into the Facebook/Cambridge Analytica spotlight. The memo also reflected internal analysis that the incident had not crossed any of the thresholds in the company’s internal guidelines for disclosure. A council of top executives tasked to oversee key decisions relating to privacy decided not to disclose the incident.

As discussed here, shortly after the *Journal* article’s publication, plaintiff shareholders filed a series of securities class action lawsuits, which were later consolidated in the Northern District of California. The complaint names as defendants Alphabet and related entities, as well as certain of the Alphabet’s directors and officers. The defendants moved to dismiss the plaintiff’s complaint. The district court granted the defendants’ motion to dismiss, and the plaintiff appealed.

The Ninth Circuit Opinion

As discussed here, in a 38-page June 16, 2021 opinion written by Judge Sandra Segal Ikuta for a unanimous three-judge panel, the Ninth Circuit reversed in part the district court’s dismissal. The appellate court concluded that, contrary to the conclusions of the district court, the complaint adequately alleged that two statements Alphabet made in its quarterly reports omitted material facts necessary to make the statements not misleading, and that the omissions were material. The appellate court also concluded that the plaintiff had adequately pled scienter with respect to the two alleged statements. The appellate court upheld the district court’s dismissal with respect to ten other alleged misstatements on which the plaintiff sought to rely.

In the company’s April 23, 2018 and June 30, 2018 10-Qs, the company made no disclosures about the Three Year Bug or the Privacy Bug, but in each of the filings, the company said “There have been no material changes to our risk factors since our Annual Report on Form 10-K for the year ended December 31, 2017.”

The appellate court said with respect to these statements in the April 10-Q that given that the filings was made “after the detection of the cybersecurity issues and after internal deliberation based on the Privacy Bug Memo, and during the growing scrutiny following the Cambridge Analytica scandal, the complaint plausibly alleges that the omission of any mention of the Three-Year Bug or the other security vulnerabilities made the statements in each of Form 10-Q materially misleading to a reasonable investor and significantly altered the total mix of information available to investors.”

The appellate court also concluded that the complaint’s allegations, taken as a whole, “raise a strong inference that [defendant Larry] Page, and therefore Alphabet, knew about the Three-Year Bug, the Privacy Bug, and the Privacy Bug Memo, and that Alphabet intentionally did not disclose this information in its 10-Q statements.” The Memo “informed senior

executive leadership at Google of the scope of the problem, warned of the consequences of its disclosure, and presented Google leadership with a clear decision on whether to disclose the problems.”

The Settlement

Following the appellate court’s ruling, the case returned to the district court and proceedings went forward. The parties also pursued mediation, which ultimately resulted in the \$350 million settlement. In the parties’ stipulation of settlement, the defendants expressly deny that the plaintiffs’ allegations and deny that they engaged in wrongdoing. The settlement is subject to court approval.

In its memorandum in support of preliminary court approval, the plaintiff states, among other things that counsel for the class will seek an attorney fee award of no more than 19% of the settlement, or roughly \$66.5 million, as well as \$1.7 million in litigation expenses.

Discussion

I have long thought that privacy-related issues represent one of the important emerging areas of D&O liability exposure. However, many of the highest profile privacy-related securities suits have struggled in the courts. For example, the securities lawsuit filed against Facebook related to the Cambridge Analytical case initially was dismissed, as was the plaintiff’s complaint in the Alphabet Google+ user data lawsuit. However, as discussed here, the Ninth Circuit reversed the dismissal in the Facebook Cambridge Analytica securities lawsuit, as the appellate court also did in the Alphabet Google+ user data securities suit.

The subsequent settlement of the Alphabet Google+ user data lawsuit for \$350 million highlights the magnitude of the potential exposures companies arguably may face with respect to privacy-related issues. The fact that the Ninth Circuit revived both the Facebook Cambridge Analytica-related securities lawsuit and the Alphabet Google+ user data lawsuit also underscores the extent of the liability exposure that companies may face with respect to privacy-related disclosure issues.

The \$350 million settlement, as massive as it is, does not even make it into the top 50 all time securities class action lawsuit settlements. Based on my review, the recent Alphabet Google+ user data securities suit settlement would rank somewhere around the 53rd all-time largest securities class action lawsuit settlement. The settlement nevertheless does represent a milestone of sorts, as, according to the plaintiff’s motion for preliminary settlement approval, the settlement, if approved, would represent the fourth-largest securities class action recovery in the Northern District of California.

There is another way to put the magnitude of this settlement into perspective, and that is by contrast to the largest cybersecurity-related securities lawsuit settlements. To be sure, privacy-related lawsuits differ at least with respect to their underlying allegations from cybersecurity-related lawsuits. Here, while there was a software bug that exposed Google+ user data, there was no cyber security breach. While a cybersecurity breach can cause privacy-related problems, as this case shows, there does not need to be a breach for a privacy incident to occur.

Plaintiffs' lawyers have pursued cybersecurity-related claims for several years now, but the results from the plaintiffs' perspective have been decidedly mixed, with many cybersecurity-related securities lawsuits dismissed. There have, however, been certain cybersecurity-related cases that have survived dismissal motion and resulted in significant settlements, the most noteworthy of which is the Equifax data breach-related case, which, as discussed here, settled in 2020 for \$149 million. The largest-ever settlement in the Equifax case of \$149 million presents an interesting contrast with the recent settlement in the Alphabet Google+ user data suit of \$350 million.

At a minimum, and as noted above, the recent Alphabet Google+ user data securities suit settlement of \$350 million highlights the extent to which privacy related exposures represent a significant corporate risk. The magnitude of the settlement, particularly by contrast to the largest-ever cybersecurity-related securities suit settlements, shows that privacy-related exposures represent risks as significant as if not greater than the exposures companies face with respect to cybersecurity-related issues. And in any event, without regard to the relative orders of magnitude, privacy-related risk exposures, along with cybersecurity-related risk exposures, are clearly among the significant corporate and securities litigation risk exposures companies face.

The appellate court also found that the plaintiff had plausibly alleged that the omission was material, noting that in Alphabet's 2017 10-K the company had warned of the harms that could follow from the detection and disclosure of security vulnerabilities," and that public statements of company executives also "demonstrated the importance of user trust and public perceptions of security and privacy practices."

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Feb. 8, 2024, 9:26 AM PST

Bitcoin Miner Hut 8, Ex-CEO Sued Over Alleged Merger Conflicts

By Ben Miller

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-00904](#)

Bloomberg Law News 2024-02-09T10:49:03554130556-05:00

Bitcoin Miner Hut 8, Ex-CEO Sued Over Alleged Merger Conflicts

By Ben Miller 2024-02-08T12:26:01000-05:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [1:24-cv-00904](#)

Hut 8 Corp., ex-CEO Jaime Leverton, and chief financial officer Shenif Visram allegedly failed to disclose conflicts and profitability issues related to a November 2023 merger with US Bitcoin Corp., a proposed shareholder class action says.

The crypto and data mining company's merger target had an "undisclosed related party" as one of its largest shareholders, as well as a Bitcoin mining facility that wasn't as profitable or functional as portrayed in disclosures ahead of the merger, according to the complaint filed Wednesday in US District Court for the Southern District of New York.

Hut 8 and the executives' alleged misrepresentations, which took place over the three months, came to light when J Capital Research published a report claiming that USBTC would have gone bankrupt without the timely merger, and that the company's value was 70% less than the approximately \$745 million Hut 8 paid for it.

The King Mountain JV crypto mining facility that Hut 8 acquired through the deal also historically failed to provide energy and high-speed internet and USBTC had failed to account for certain interest expenses at the facility, overstating the profitability of certain company assets, according to the J Capital Research report.

The report alleged a pump and dump scheme in which Hut 8's management hid its stock ownership through the undisclosed related party, possibly a company controlled by USBTC CEO Michael Ho's business partner Anna Kudrjasova, as well as "a stock promoter cabal, and a host of left-for-dead assets."

The same day the short-seller released that report, Hut 8's stock price fell more than 23% to close at \$7.12 per share on Jan. 18. That was the stock's biggest single-day drop since March 2020, according to data compiled by Bloomberg.



Leverton left his role as CEO on Wednesday after three years at the helm Hut 8, when he was replaced by Asher Genoot, former COO and president of USBTC. The J Capital Research report didn't drive the Hut 8 board's decision to name a new CEO, Genoot told Bloomberg.

The company is focused on improving efficiencies ahead of a pre-programmed event in Bitcoin's code that is expected to reduce Bitcoin mining rewards by half and narrow profit margins for miners in April, according to Genoot.

Shareholder Ryan Mayiras seeks to recover damages for a class of investors who acquired Hut 8 stock between Nov. 9 and Jan. 18, alleging that the company and executives violated the Securities Exchange Act.

Hut 8 didn't immediately respond to a request for comment.

Glancy Prongay & Murray LLP represents the plaintiff and the proposed class.

The case is Mayiras v. Hut 8 Corp. , S.D.N.Y., No. 1:24-cv-00904, complaint filed 2/7/24 .

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Alteryx Sued Over Alleged Omissions in \$4.4 Billion Merger Proxy

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Litigation

Photo: ftwitty/Getty Images

COURT: S.D.N.Y.

TRACK DOCKET: No.1:24-cv-00936

Alteryx Inc. and its directors allegedly left key details out of a proxy statement soliciting votes for a proposed \$4.4 billion sale to private equity firms Clearlake Capital Group LP and Insight Partners, a shareholder suit filed Thursday says.

The software developer's proxy statement omitted information that shareholders need in order to cast informed votes, including financial forecasts and data underlying financial adviser Qatalyst Partners LP's analysis of the deal, according to the complaint filed in the US District Court for the Southern District of New York.

Alteryx and the private equity firms reached the agreement in December, which would provide \$48.25 in cash to shareholders with Class A or Class B common stock, a 59% premium to the closing price before the news of the sale emerged, according to a press release.

The proxy filed Jan. 30 describes the take-private deal without providing metrics underlying calculations of operating income and unlevered free cash flow, as well as the company's terminal value and net debt as of Sept. 30.

A group of private credit lenders, including Apollo Global Management Inc. and Blackstone Inc., is close to finalizing a \$2 billion debt package to finance the buyout. Blue Owl Capital Inc. and Sixth Street Partners LLC are also in talks to participate in a \$1.8 billion seven-year loan, people with knowledge of the matter told Bloomberg.

The value of each transaction and projections that Qatalyst used in its analysis of precedent deals are also missing from the proxy, as well as information about the sales process and the number of fully diluted outstanding Alteryx shares as of Dec. 15, according to the complaint.

Shareholder Pete Tuls seeks to block the proposed transaction from being completed until the alleged omissions are remedied, or rescind the transaction if it is completed and recover damages for the company and directors' Securities Exchange Act violations.

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

Rowley Law PLLC represents the plaintiff.

The case is Tuls v. Alteryx Inc. , S.D.N.Y., No. 1:24-cv-00936, complaint filed 2/8/24 .

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Apple Secures Dismissal of Claims It Overpaid Executives

 [law.com/nationallawjournal/2024/02/08/apple-secures-dismissal-of-claims-it-overpaid-executives](https://www.law.com/nationallawjournal/2024/02/08/apple-secures-dismissal-of-claims-it-overpaid-executives)

By Ellen Bardash

A Southern District of New York shareholder case alleging Apple overpaid executives by underestimating the value of their equity compensation has been dismissed with prejudice, marking a win for Latham & Watkins.

U.S. District Judge Jennifer L. Rochon granted Apple's motion to dismiss claims filed by an International Brotherhood of Teamsters pension fund, represented by Barrack, Rodos & Bacine, on Feb. 7.

The allegations were based on CEO Tim Cook and other Apple executives receiving equity compensation valued at more than \$92 million in 2021 and more than \$94 million in 2022, distributed as restricted stock units.

Because a proxy statement released in January 2023 ahead of a shareholder meeting that March said the board's compensation committee had a goal of compensating each of those executives \$77.5 million, the plaintiff claimed Apple, which is incorporated in Delaware and headquartered in Silicon Valley, had made significant miscalculations, resulting in inadequate disclosures. The shareholder plaintiff took issue with a say-on-pay vote and proposal to reelect directors that were included in the proxy statement.

"As another court noted in a previous executive-compensation-related suit against Apple brought under Section 14(a), there is no SEC rule requiring that a specific method for determining executive compensation be used, so long as the chosen method is disclosed. That principle applies here," the opinion stated. "The complaint effectively admits (by pasting excerpts of Apple's disclosures in support of its claims) that Apple did precisely what Section 14(a) and SEC rules require—presented its compensation process and methods through detailed compensation tables."

Rochon wrote that the say-on-pay vote was advisory and nonbinding, and what was included in the proxy met the disclosure requirements from the U.S. Securities and Exchange Commission and under the Securities Exchange Act. She also found the pension fund couldn't proceed with its derivative claim because it hadn't given Apple's board long enough to respond after demand was served. While that window is often left open for months or years, the Apple shareholder left the board just 14 days for consideration before deciding to file a lawsuit.

The court heard oral argument on the motion the day before Rochon issued her 25-page opinion.

Attorneys for the plaintiff did not immediately respond a request for comment on the decision.

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DigitalOcean Board Resolves Shareholder Suit Over Accounting

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Litigation

A shareholder derivative suit alleging that DigitalOcean Holdings Inc.'s directors misled investors about the company's ability to assess complex tax transactions and enact accounting controls was voluntarily dismissed by a federal judge.

Kerry Flanagan alleged that the directors told investors that they had established and maintained adequate internal control over financial reporting for months, but that this was allegedly shown to be misleading when DigitalOcean's directors said Aug. 2023 that they overstated the cloud computing company's income tax expenses for Q1 2023. The announcement led to DigitalOcean's biggest stock price drop in two years, and a proposed class action that Flanagan said exposed the company to massive liability. The proposed class action has since been voluntarily dismissed.

- Flanagan and the DigitalOcean directors agreed to voluntarily dismiss the claims without prejudice, according to the stipulation approved by Judge Richard G. Andrews, of the US District Court for the District of Delaware, Wednesday
- "No payment has been made or will be paid to any party or their counsel," the stipulation said
- Counsel for the parties didn't immediately respond to a request for comment

Farnan LLP and Rosen Law Firm PA represented Flanagan. Cooley LLP and Morris Nichols Arshy & Tunnel LLP represented the defendants.

The case is Flanagan v. Spruill , D. Del., No. 1:23-cv-01424, 2/7/24 .

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Voyager Investor Suit Against Firm Shows Risk of Crypto Advice

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- Suit claims law firm aided Voyager conspiracy
- Central to complaint is McCarter 'legal opinion'

A lawsuit targeting McCarter & English over failed exchange Voyager Digital Holdings Inc. shows the risk firms face when giving advice in the fast-changing—and sometimes dizzying—world of crypto.

The New Jersey-based law firm gave a “bogus legal opinion” that Voyager’s native VGX token was not an unregistered security, investors allege in a lawsuit filed Feb. 6 in Miami. The opinion played an integral role in a fraud that led to over \$4 billion in investor losses, the suit claims.

Lawyers found themselves in “uncharted territory” as crypto’s popularity led corporate firms to launch practices, said James Cox, a Duke University law professor. Opinions on whether a crypto asset is an investment contract under federal law demand a “very big caveat” because “it’s not a settled question,” he said.

Voyager, a crypto trading platform founded in 2018, was one of many digital assets firms to go bust and file for Chapter 11 bankruptcy amid a crash in crypto prices in 2022. The exchange gained court approval last May to wind down operations and pay back customers a portion of what they’re owed. Voyager co-founder Stephen Ehrlich has faced claims of breaking derivatives rules and the Securities and Exchange Commission has alleged VGX is a security.

McCarter & English, in a statement Wednesday, said it intends to “vigorously defend the firm, which provided clear and competent advice to our clients.” The complaint includes “many factual inaccuracies that we intend to address,” the firm said Thursday.

Two McCarter & English lawyers mentioned in suit—chairman Joseph Lubertazzi Jr. and Theodore Grannatt, chair of the firm’s corporate practice—did not immediately respond to comment requests on Thursday.

The proposed class action against McCarter & English, led by the Moskowitz Law Firm, represents at least the second complaint targeting a law firm that advised a failed crypto exchange.

Fenwick & West last year faced an investor complaint alleging its work for FTX was “central” to the crypto firm’s fraud. Fenwick & West has sought to dismiss the suit, arguing it’s being targeted for routine legal services.

McCarter’s Role

McCarter & English, based in Newark, New Jersey, represented Voyager and a subsidiary trading operation from March 2021 until September 2022, according to the investor complaint. The representation allegedly included advising Voyager on a due diligence questionnaire from the NBA in which the league questioned whether a Voyager interest program was subject to scrutiny by the Securities and Exchange Commission.

The firm in May 2021 issued a legal opinion finding Voyager’s VGX token was not a security under federal law, the complaint said. The opinion lent credibility to Voyager as it sought new investors and partnerships with organizations such as the NBA’s Dallas Mavericks, the complaint, which also names the NBA as a defendant, alleges.

The McCarter & English memo, according to the complaint, relied on a 2018 speech a former SEC official gave in which he said cryptocurrencies such as Ethereum were not securities transactions, as well as two no-action letters related to utility tokens provided by the SEC.

The plaintiffs, however, allege the opinion ignored several other SEC enforcement actions, court decisions and speeches, while failing to scrutinize “absurd facts” provided by Voyager about the VGX token.

Crypto Question

The question at the heart of the suit—whether a crypto token is a security under federal law — is a hotly contested issue. A New York federal judge last year ruled that Ripple’s XRP token is not a security when sold to the general public, which the industry touted as a major victory.

A judge in a separate SEC action against Terraform Labs Pte, however, said crypto sales to the public can be securities. The SEC has moved to appeal the Ripple decision and is litigating a similar action against Coinbase, the largest exchange in the US.

Investors are pursuing claims of gross negligence and violations of the Racketeer Influenced and Corrupt Organizations Act against McCarter & English, which is likely to be a stiff test. Pursuing a law firm for RICO violations relating to its legal opinions is a “significant challenge,” said Farshad Ghodoosi, an assistant professor at Cal State University, Northridge.

“That’s even more difficult if it involves a murky area of law,” Ghodoosi said. “Recall that the crypto industry had some major wins recently in the action against Ripple.”

The case is Karnas et al v. McCarter & English , S.D. Fla., No. 1:24-cv-20480, 2/6/24

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Inside Track: Judge's Musk Pay Ruling Will Put In-House Legal Teams to Work

 [law.com/2024/02/09/inside-track-judges-musk-pay-ruling-will-put-in-house-legal-teams-to-work](https://www.law.com/2024/02/09/inside-track-judges-musk-pay-ruling-will-put-in-house-legal-teams-to-work)

By Greg Andrews

Welcome to Inside Track, a briefing from Law.com's Greg Andrews providing insights that help in-house counsel navigate their rapidly changing world. Want to be alerted to this dispatch in your inbox each week? Sign up [here](#).

Many CEOs are richer today because Tesla's board in 2018 awarded CEO Elon Musk a \$56 billion pay package, the largest in American history.

It's simple math, corporate governance expert Charles Elson noted in an amicus brief filed in 2022 in the Delaware shareholder lawsuit that challenged the propriety of that package.

Companies hire compensation consultants to help set pay, a process that starts with gathering data on a universe of companies and ends with deciding where on the spectrum a particular executive should fall. It's typically above the 50th percentile because what company wants to convey that its CEO is below average?

"Thanks to the 'Lake Wobegon' dynamic of executive compensation, Musk's unprecedented pay package soon became a baseline for CEOs of decidedly ordinary talents," Elson, the founding director of the Weinberg Center for Corporate Governance, wrote in his brief.

But now, with Delaware Court of Chancery Chancellor Kathaleen McCormick's landmark order last week voiding Musk's pay package, the executive pay landscape has changed overnight, Elson, compensation consultants and corporate lawyers say.

"This case signals a potential for increased scrutiny on CEO and executive compensation," Goodwin Procter wrote in a note to clients. "While ordinarily reviewed under the deferential business judgment standard, compensation plans for CEOs or executives with large shareholdings, deep relationships with the board, a 'celebrity' personality, or other 'X factors' may prompt an entire fairness review."

The crux of McCormick's ruling was that Musk in effect did not have to negotiate with anyone when the eight-person board approved the pay package. She found that General Counsel Todd Maron, the primary intermediary between Musk and the board, was "totally beholden" to the billionaire, as were three board members because of business dealings, friendships or family ties.

In his amicus brief, Elson noted that equity grants—the sole form of compensation in Musk's package—normally are intended for executives who don't have substantial skin in the game already and thus should be incentivized to perform.

But Musk at the time of the award owned 21% of Tesla, meaning a run-up in the stock that he already owned would add billions to his fortune, Elson noted.

Elson observed that other outsized business personalities that built business juggernauts, such as Microsoft's Bill Gates, Meta's Mark Zuckerberg, Google's Larry Brin and Sergey Page and Amazon's Jeff Bezos, all went without equity grants specifically because their interests already were aligned with shareholders.

For Musk's \$56 billion equity award to have been justified, Tesla would have needed to show that the largesse would meaningfully affect his motivations, something there was no way to demonstrate, Elson said.

McCormick's 200-page ruling left plenty for in-house legal teams to mull over as they try to assess how far compensation committees now can go without stirring up shareholder lawsuits and even having executive pay packages voided.

Attorneys say companies where the CEO has at least a 20% stake might be in the most dicey situation, since that large interest might suggest control of the business, without the normal safeguards to keep pay in check.

The ruling also suggests companies should closely scrutinize who on the board is truly independent and who is conflicted. At Tesla, conflicts involving family members, business dealings and friendships abounded.

Further muddying independence were the massive value of the director fees board members received.

In her opinion, McCormick noted, for instance, that director Robyn Denholm had profited from hundreds of millions on stock options she received as director fees, a fortune Denholm had described as "life-changing."

Milliman Target Risk 401(k) Fund Suit Gets Green Light for Trial

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Class Action

Photo: Chris Ryan/Getty Images

- Suit challenges 'untested' funds tailored to risk preference
- Judge denies summary judgment motion without written ruling

Milliman Inc. employees challenging the in-house target risk funds in the company's 401(k) plan can take their class action claims to trial, a Seattle federal judge ruled.

Judge Thomas S. Zilly on Thursday denied Milliman's motion for summary judgment, which said the challenged funds were appropriately monitored and added to the plan at the request of workers concerned about market volatility and preserving capital. Zilly announced his decision in a docket entry after hearing arguments from the parties; his ruling wasn't accompanied by a written explanation for the decision.

The 4,300-person class action takes aim at a suite of "target risk" funds from Unified Trust Co., which are sub-advised by Milliman's investment adviser affiliate, Milliman Financial Risk Management LLC. Plaintiff Joanna Mattson says the funds—which are tailored to investors with conservative, moderate, and aggressive risk preferences—had no investment track records when they were added to the plan in 2013, and they went on to perform worse than 70% to 90% of similar funds in the marketplace.

Mattson says Milliman, a risk management and benefits consulting firm, holds \$1.7 billion in its 401(k) plan, with nearly \$250 million invested in the Unified Trust funds as of 2020.

Zilly, who sits in the US District Court for the Western District of Washington, recently rejected Milliman's attempt to block expert witnesses tapped by the employees to analyze the company's retirement plan management and calculate their damages. In prior orders, he allowed the case to advance and certified it as a class action.

Sanford Heisler Sharp LLP and Byrnes Keller Cromwell LLP represent Mattson. Groom Law Group and Gordon Rees Scully Mansukhani LLP represent Milliman.

The case is *Mattson v. Milliman, Inc.*, W.D. Wash., No. 2:22-cv-00037, minute entry 2/8/24 .

US appeals court revives Mexican bondholder class action

 [reuters.com/legal/government/us-appeals-court-revives-mexican-bondholder-class-action-2024-02-09](https://www.reuters.com/legal/government/us-appeals-court-revives-mexican-bondholder-class-action-2024-02-09)

Mike Scarcella

The Thurgood Marshall courthouse is pictured in New York, New York, U.S., March 25, 2019. REUTERS/Carlo Allegri Purchase Licensing Rights , opens new tab

Feb 9 (Reuters) - A U.S. federal appeals court on Friday revived an investor class action accusing the Mexican branches of several multinational banks of manipulating the prices of billions of dollars' worth of Mexican government bonds in the United States.

The 2nd U.S. Circuit Court of Appeals said , opens new tab the banks must face the investors' claims for now, finding that the alleged price-fixing had enough connection to New York to maintain the case in the United States.

The banks "chose to take advantage of New York's market and laws," the three-judge panel ruling said. "So they can't complain."

A federal judge in Manhattan had dismissed the antitrust lawsuit in 2020, finding the price-fixing claims concerned conduct occurring solely in Mexico and therefore fell beyond the reach of U.S. courts.

Some of the banks named as defendants include Banco Santander Mexico, HSBC Mexico, Bank of America Mexico and Deutsche Bank Mexico. Representatives from the banks did not immediately respond to requests for comment or declined to comment.

Investors in the proposed class action include the Oklahoma Firefighters Pension & Retirement System and others who claimed they paid artificially inflated prices for Mexican government bonds between 2006 and 2017.

The 2018 case initially included U.S. affiliates of the banks and New York-based brokers as defendants, but the lawsuit was narrowed following an earlier ruling.

The investors argued in the appeal that their "complaint was replete with factual allegations showing that defendants intentionally fixed the prices" of Mexican government bonds in the United States.

The banks countered that the U.S. courts had no jurisdiction over an alleged price-fixing conspiracy "carried out in Mexico — by Mexican banks purportedly manipulating the market for Mexican debt securities through a handful of Mexico-based individual traders."

The case is In re: Mexican Government Bonds Litigation, 2nd U.S. Circuit Court of Appeals, No. 22-2039.

For plaintiffs: Margaret MacLean of Lowey Dannenberg

For defendants: Boris Bershteyn of Skadden, Arps, Slate, Meagher & Flom

Read more:

Banks win dismissal of U.S. lawsuit alleging rigged Mexico bond sales

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Reporting by Mike Scarcella

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HSBC, Other Big Banks Lose Bid to Keep Antitrust Suit Out of US

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Securities Law

- Appellate court vacates and remands lower court ruling
- Investor plaintiffs sued with bond price-fixing claims

HSBC Holdings Plc, Bank of America Corp., Deutsche Bank AG, and other banks targeted in a Mexican bond price-fixing suit will face antitrust claims after the the Second Circuit vacated a lower court's ruling dismissing the case.

In a Friday ruling, the US Court of Appeals for the Second Circuit said investors plausibly alleged New York as a proper forum for the case because the banks actively sold billions of dollars' worth of price-fixed bonds through their agents in New York, even though the alleged wrongdoing took place in Mexico.

The US District Court for the Southern District of New York dismissed the case in 2020 over lack of jurisdiction, siding with the defendants' argument that the underlying plaintiffs' claims happened solely in Mexico.

"In the end, defendants' theory that jurisdiction can exist only where the price-fixing occurred makes little sense," the Second Circuit stated.

"Suppose that defendants opened a sales office in New York, staffed by their own employees, and then sold the bonds out of that office to U.S. investors at prices fixed in Mexico. It could hardly be argued that defendants' New York contacts would be insufficiently related to the price-fixing to confer jurisdiction in New York," the opinion said.

The suit, brought in 2018 by US investors who purchased Mexican government bonds from the Mexican branches of multinational banks, is among a string of cases targeting financial institutions for anticompetitive conduct including rigging bids and manipulating the bond market.

JPMorgan Chase & Co. and Barclays Plc exited the case in 2021 with a \$21 million settlement.

The plaintiffs are represented by firms including Lowey Dannenberg PC. The defendants are represented by firms including Wilmer Cutler Pickering Hale & Dorr LLP, and Skadden, Arps, Slate, Meagher & Flom LLP.

The case is *In re Mexican Gov't Bonds Antitrust Litig.* , 2d Cir., No. 22-2039, 2/9/24 .

Judge: Nothing federal about New Mexico's child-danger lawsuit against Meta

 legalnewsline.com/stories/654319650-judge-nothing-federal-about-new-mexico-s-child-danger-lawsuit-against-meta

February 9, 2024

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State AG

Attorney General Raul Torrez | Attorney General Raul Torrez official website

SANTA FE, N.M. (Legal Newsline) - Rather than rule on a motion to dismiss, a New Mexico federal judge has sent the State's lawsuit against Facebook owner Meta back to state court, where it was first filed.

Judge Margaret Strickland on Feb. 5 granted state Attorney General Raul Torrez's motion to remand, after Meta had transferred the case from state to federal court. His lawsuit claims Facebook, Instagram and Whatsapp are not safe for minors because of sexual predators.

The suit alleges three violations of New Mexico's Unfair Practices Act and makes a claim for public nuisance. Meta believed the case invoked questions pertaining to federal child sex trafficking and pornography laws.

"The Court finds that a federal law issue is not necessarily raised because the State's claims do not require proof of a federal law violation," Strickland's order says.

"The amended complaint alleges several 'unfair and deceptive' or 'unconscionable' trade practices and nuisances that are not (Children's Online Privacy Protection Act) violations."

Meta and Mark Zuckerberg filed motions to dismiss the case during the brief time it was in federal court.

Many of the things New Mexico complains about, including sexual images, are prohibited under Meta's rules and represent third-party content covered by Section 230 prohibiting lawsuits against social media platforms, Meta said.

AG Torrez announced the lawsuit in December, claiming Meta's Facebook, Instagram and Whatsapp products "are not safe spaces for children but rather prime locations for predators to trade child pornography and solicit minors for sex."

New Mexico is represented by Linda Singer and David Ackerman of Motley Rice, the plaintiffs' law firm that has been paid hundreds of millions of dollars in fees representing government entities in lawsuits over opioids, tobacco and other products.

The lawsuit joins many others against social media platforms, driven in part by private lawyers working under contingency-fee contracts, that attempt to use state public nuisance and consumer protection laws to win money from Facebook, Snap and other companies.

A federal judge in San Francisco last year overseeing multidistrict litigation dismissed some claims on Section 230 and First Amendment grounds but allowed plaintiffs to proceed with claims design features that serve up content or reward users with "likes" could be grounds for a lawsuit.

The state accused Meta of violating state law by serving up ads with "problematic content" and using algorithms that are "addictive to young users" and designed to inhibit "the ability of those users to self-regulate." It said the platforms cause "an increased rate of suicide" as well as "dissociative behavior, withdrawal symptoms, social isolation, damage to body image and self-worth, increased risky behavior, exposure to predators, sexual exploitation, and other profound mental health issues."

Meta argued it is "black-letter law" that New Mexico users can't create personal jurisdiction over the company. It also cited a Ninth Circuit decision last year dismissing under Section 230 claims against Reddit that the platform allowed users to access child pornography. And it said New Mexico's public nuisance law doesn't apply to legal products, or claims that involve injuries to individuals as opposed to interference with a right held by the public at large.

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Judge Grants Final Approval to DuPont's \$1.185B PFAS Settlement

 [law.com/nationallawjournal/2024/02/08/judge-rejects-objections-grants-final-approval-to-duponts-1-185b-pfas-settlement](https://www.law.com/nationallawjournal/2024/02/08/judge-rejects-objections-grants-final-approval-to-duponts-1-185b-pfas-settlement)

What You Need to Know

- U.S. District Judge Richard Gergel, who is overseeing multidistrict litigation involving PFAS, or perfluoroalkyl and polyfluoroalkyl substances, granted approval after a Dec. 14 final approval hearing.
- Gergel, who noted that only 924 water providers opted out of the settlement, rejected objections raised by a handful of water providers in the states of New York, Washington and Texas.
- On Feb. 2, Gergel heard oral arguments at a final approval hearing involving a related \$10.5 billion settlement with 3M.

A federal judge granted final approval to one of the largest settlements involving drinking water contamination: DuPont's \$1.185 billion deal with an estimated 14,000 public water providers across the country.

Thursday's order entered by U.S. District Judge Richard Gergel, who is overseeing multidistrict litigation involving PFAS, or perfluoroalkyl and polyfluoroalkyl substances, comes after a Dec. 14 final approval hearing. Gergel, who noted that only 924 water providers opted out of the settlement, rejected objections raised by a handful of water providers in the states of New York, Washington and Texas.

"The court finds that the settlement agreement is reasonable," he ruled. "The settlement agreement provides money not only to parties already affected by PFAS, but to those which may be affected soon."

In a joint statement, class counsel Elizabeth Fegan, of FeganScott, and members of the plaintiffs' executive committee—Paul Napoli, of Napoli Shkolnik; Michael London, of Douglas and London; Joe Rice of Motley Rice; and Scott Summy of Baron & Budd—called the DuPont deal a "critical step towards accountability."

"We look forward to the next steps in the claims process and continued collaboration with the remaining defendants to expedite relief in this matter," they wrote.

'Not Just About the Water We Drink'

The approval of the deal with DuPont de Nemours Inc. comes soon after Gergel heard oral arguments at a Feb. 2 final approval hearing involving a related settlement 3M reached with water providers. That deal is worth at least \$10.5 billion but could reach \$12.5 billion depending on how many water providers participate.

"These settlements are not just about the water we drink, but about the health of our nation," Napoli said in a separate statement. "These settlements are a testament to our commitment to ensuring the well-being of every American."

The DuPont deal comes as the U.S.

Environmental Agency and other

Paul Napoli of Napoli Shkolnik. (Courtesy photo)

regulators are setting standards on

permissible amounts of PFAS and other "toxic chemicals" in the nation's drinking water.

And the settlement resolves claims of contamination relating to Teflon cookware and aqueous film-forming foam used by firefighters and U.S. military to combat dangerous fires—the primary focus of the lawsuits in the multidistrict litigation before Gergel, who is in Charleston, South Carolina.

The settlement excludes claims by certain state attorneys general, many of whom had initially raised concerns about the releases.

According to Thursday's order, 55% of the funds will go toward cities, counties and other providers that have already detected PFAS in their drinking water supplies. The remaining 45% is earmarked for those that are still testing for contamination.

Gergel shot down what he said were 25 objections, most represented by Seattle's Marten Law. Among their concerns were overbroad releases absolving DuPont from claims associated with wastewater and real property cleanup damages.

The judge, in his order, said the settlement also weighed in favor of approval because it was not tied to a set amount of attorney fees. Plaintiffs' lawyers have asked for 8% in fees for both the DuPont and 3M settlements. Those proposed fees are estimated at nearly \$1 billion, of which nearly \$95 million would relate to the DuPont settlement.

"Though the court will address an award of attorney fees at a later date, it bears noting that no party objected to class counsel's request for attorneys' fees and that the settlement agreement itself does not provide a set amount or even a range of attorneys' fees, placing the matter entirely into the court's hands for determination," he ruled.

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Authors suing OpenAI ask California court to block competing NY cases

 [reuters.com/legal/litigation/authors-suing-openai-ask-california-court-block-competing-ny-cases-2024-02-09](https://www.reuters.com/legal/litigation/authors-suing-openai-ask-california-court-block-competing-ny-cases-2024-02-09)

Blake Brittain

A keyboard is placed in front of a displayed OpenAI logo in this illustration taken February 21, 2023. REUTERS/Dado Ruvic/File Photo Purchase Licensing Rights , opens new tab

- Writers say New York lawsuits would cause inconsistency, wasted resources
- Court filing says OpenAI is 'forum shopping' for preferred NY venue

Feb 9 (Reuters) - A group of authors suing OpenAI for copyright infringement including Michael Chabon, Ta-Nehisi Coates and comedian Sarah Silverman have asked a California court to shut down related high-profile lawsuits brought by the New York Times, John Grisham and others in New York.

They said in a court filing on Thursday , opens new tab that allowing the "copycat" lawsuits — including the Times' case and an earlier one brought by the Authors Guild on behalf of Grisham, Jonathan Franzen, George R.R. Martin and other writers — would cause "inconsistent rulings in overlapping class actions" and waste the courts' time. The California plaintiffs, represented by a legal team including attorney Joseph Saveri, also argued that the New York cases allow OpenAI to engage in "forum shopping" and "procedural gamesmanship."

A lawyer for the Authors Guild declined to comment on the filing. Representatives for OpenAI, the New York Times and the authors in the California case did not immediately respond to requests for comment on Friday.

Several groups of copyright owners including writers, visual artists and music publishers have sued major tech companies like Microsoft-backed (MSFT.O) , opens new tab OpenAI over the alleged misuse of their work to train generative artificial-intelligence systems. OpenAI, Microsoft and other companies have said that their AI training is allowable under the copyright doctrine of fair use, and that the lawsuits threaten the burgeoning AI industry. The authors in the California case sued OpenAI last summer, accusing it of using their books without permission or compensation to train the AI model underlying its popular chatbot ChatGPT.

The Authors Guild filed a similar lawsuit against the company in September, which was followed by additional complaints from nonfiction authors and the Times.

The authors suing in California told the court on Thursday that the New York cases were "strikingly similar" to their own, and that OpenAI was "looking for a better deal" in New York after the California court rejected its proposed litigation schedule.

The case is OpenAI ChatGPT Litigation, U.S. District Court for the Northern District of California, No. 3:23-cv-03223.

For the authors: Joseph Saveri of the Joseph Saveri Law Firm, Bryan Clobes of Cafferty Clobes Meriweather & Sprengel; Matthew Butterick

For OpenAI: Joe Gratz of Morrison & Foerster, Andy Gass of Latham & Watkins

Read more:

Sarah Silverman sues Meta, OpenAI for copyright infringement

Lawsuit says OpenAI violated US authors' copyrights to train AI chatbot

John Grisham, other top US authors sue OpenAI over copyrights

NY Times sues OpenAI, Microsoft for infringing copyrighted works

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Apple Inc. and Google Inc. urged a California judge to reject claims stemming from a private antitrust case accusing the tech titans of an unlawful deal that thwarted competition in the search advertising market.

Judge P. Casey Pitts of the US District Court for the Northern District of California at a Thursday hearing asked whether he could infer the existence of an unlawful deal inked in 2005 in which Apple allegedly agreed to refrain from competing with Google in the search ad business in exchange for billions of dollars in profits. The plaintiff, California Crane School Inc., alleged in a proposed class action in 2021 that the conspiracy caused itself and other customers paid Google inflated advertising rates.

“Say they were right, that they were actually correct that there was a secret understanding and agreement on the terms they alleged,” Pitts said, referring to the plaintiffs. “How would they be able to plead anything more than what they’ve done to at least be allowed to see if they can find evidence of that agreement through discovery?”

The case highlights similar legal arguments made in other suits alleging anticompetitive conduct stemming from an agreement sealed nearly two decades ago that made Google Apple’s default search engine, while giving Apple as much as half of the ad revenue share Google made from searches by users of Apple’s Safari browser.

Private plaintiffs have based their allegations on the notion the agreement was illegal while a suit brought by the Justice Department accuses Google of freezing out competitors through deals like the one it has with Apple. Google was found to have paid \$26.3 billion to other companies in 2021 to ensure its search engine was the default on web browsers and mobile phones.

Pitts said at Thursday’s hearing that if there was a compelling argument Apple was being paid far more than its value to Google at the time of the deal it “seems like the kind of evidence that would get us to a plausible inference.”

Steven Sunshine, a partner with Skadden and an attorney for Apple, pushed back. Even if that hypothetical argument was true, he said, it’s not enough to allege a claim under the per se rule, which is a far less rigorous approach to antitrust law that presumes anticompetitive effects.

Further, Apple never had an interest in developing a search engine in 2005, two years before the iPhone was released, he said.

“There is nothing wrong with Apple saying to itself, ‘Google makes a great search engine, we are using it in our phones, our business takes off, we are getting some revenue back of what we are creating,’ Sunshine said. “We have no interest in spending our money and creating a search engine. We’d rather invent virtual reality goggles. We’d rather invent an Apple watch.”

The companies weren’t two horizontal competitors that operated in the same market—the deal integrated Google’s search engine with Apple’s web browser and its hardware devices such as its Mac computers, Sunshine added. “That’s an integration that is encouraged by the law,” he said.

Joseph Alioto, an attorney for the plaintiffs, contended that Apple did want to develop its own search engine that would have competed with Google and replaced Google as the default search engine on Apple devices. At one point, Apple tested its own built-in search, he said. Google feared the potential of Apple’s competition as a “code red” concern.

“They responded very simply, they paid them,” Alioto said.

The plaintiff is represented by firms including Alioto Law Firm and Nedeau Law PC.

Google is represented by Williams & Connolly LLP and Apple is represented by Skadden Arps Slate Meagher and Flom LLP.

The case is California Crane School, Inc. v. Google LLC , N.D. Cal., No. 5:21-cv-10001, 2/8/24 .

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Matt Levine's Money Stuff: Bill Ackman Wants Your MoneyBy Matt Levine
Opinion

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Matt Levine's Money Stuff: Bill Ackman Wants Your Money

By Matt Levine 2024-02-08T14:05:34824-05:00

PSUS

Bill Ackman started his current hedge fund, Pershing Square LP (PSLP), in 2004. PSLP is kind of what you think of when you think of a hedge fund : It raised lots of money from big investors, it invests in concentrated bets (largely on stocks but also credit, interest rates, other things), it has done activist long investing and also short selling, and it charges pretty close to the traditional "2 and 20" fee structure, or rather 1.5 and 20: Investors pay a 1.5% annual management fee on their assets, plus 20% of their gains.

In 2014, Ackman launched a new fund, Pershing Square Holdings (PSH). PSH is *not* a traditional hedge fund: It is a publicly traded closed-end fund. Investors could put money into PSH – they could buy shares of the fund from PSH – but they can't take money out; if they want their money back they have to sell shares on the stock exchange. This makes PSH a "permanent capital vehicle," which is useful for a hedge fund manager making big bets: If investors are dissatisfied, they can't just demand their money back. I [sometimes say](#) that the essential skill of a hedge fund manager is not picking stocks that go up but rather *continuing to run a hedge fund*, and in some sense raising a multibillion-dollar permanent capital vehicle when times are good is the very best possible thing for a hedge fund manager to do. And in 2014 Ackman did it.

As of 2024, Ackman manages about \$18 billion, of which about \$14.6 billion is in PSH, about \$2 billion is in the hedge fund and about \$1.6 billion is in a special Universal Music Group investment vehicle. So most of the money these days is in PSH. (Ackman also [has a SPARC](#) , which I love and have discussed before, but it's not really relevant here so I'm not going to mention it again.) Roughly \$4.5 billion of that money is "insider capital" from Ackman himself and his employees. In some loose sense, Ackman is less a "hedge fund manager" and more a "manager of a publicly traded investment vehicle."

Well. PSH is not a traditional hedge fund, in being closed-end and publicly traded, but in other ways it does look a lot like a hedge fund. It charges, not 2 and 20, but 1.5 and 16: a 1.5% management fee on assets and a 16% performance fee on gains. Like PSLP, PSH has made mostly concentrated bets on stocks, long and short, but it has also had some nice derivatives trades. It operates with some leverage (unlike PSLP), roughly 18% of capital. It is hedge fund-y.

Another thing that is hedge fund-y about it is that, if you are a regular investor in the US, you can't buy it. PSH is incorporated in Guernsey and listed on stock exchanges in Amsterdam and London. This is a little odd: Ackman lives and works in New York, he has a high public profile in the US, and Pershing Square's investments are largely US stocks. Why raise his public money in Europe?

The basic answer seems to be that the US regulates public investment funds more strictly than Europe does. For one thing, the US Securities and Exchange Commission rules for "registered investment companies" regulate the use of leverage, derivatives and short selling; if you are a swashbuckling hedge fund manager who wants the freedom to invest anywhere, you might find those rules too constraining. Also, though – maybe more importantly – US registered investment companies generally can't charge performance fees. If you are a hedge fund manager who wants the freedom to charge 2 and 20, or 1.5 and 16, you can't do it in a public vehicle in the US.

In 2004, Bill Ackman was a swashbuckling hedge fund manager who wanted the freedom to invest anywhere and charge 1.5 and 20, so he started a hedge fund. In 2014, Bill Ackman was a swashbuckling hedge fund manager who wanted the freedom to invest anywhere and charge 1.5 and 16, and also raise public permanent capital, so he started a European public fund.

In 2024, Bloomberg's [Annie Massa reports](#) :

Billionaire Bill Ackman is courting small-scale US investors.

His investment firm Pershing Square Capital Management plans to start a new fund called Pershing Square USA for retail investors, which would trade on the New York Stock Exchange, according to a regulatory filing Wednesday. The fund, with the ticker PSUS, will invest in one- to two-dozen large, undervalued companies in North America.

Pershing Square's "brand-name profile and broad retail following will drive substantial investor interest," according to the filing. ...

Ackman's showboating has been on display in recent months as he spouted fiery takes on a range of topics to his 1.2 million followers on X, formerly Twitter. ...

On Wednesday, he took to X to announce the new retail fund.

Here's the prospectus, and here's the tweet. Like PSH, PSUS will be a closed-end fund. What is the difference between PSUS and PSH? Well:

- 1. We don't know what PSUS will invest in, but it "expects that the substantial majority of the Fund's investment portfolio will be invested in 12 to 24 core holdings in large-capitalization, investment grade, free-cash-flow-generative North American durable growth companies." It will also "opportunistically utilize hedges to protect the portfolio against specific macroeconomic risks and capitalize on market volatility." PSH's most recent investor presentation lists 10 stocks – large North American public companies – plus an energy hedge and interest rate swaptions. So it seems reasonable to assume that PSUS and PSH will be more or less mirrors of each other in terms of their investments.
- 2. PSUS "does not intend to borrow money during its initial year of operations," but "reserves the right to borrow money," subject to US investment company rules. PSH has a bit of leverage, but not that much, about 18% of assets. It seems reasonable to assume that PSUS and PSH won't be that far off each other in terms of leverage.
- 3. Surely the big difference is fees? PSH charges a 1.5% management fee and a 16% performance fee. PSUS, as a US registered investment company, will charge only a 2% management fee, and will waive even that for the first year, for a total fee of \$0. "The Fund will not be subject to any performance fees. The Fund believes that this has the potential to meaningfully improve long-term NAV per Common Share performance," says the prospectus.

But that difference will close too: Ackman intends to credit 20% of his PSUS management fees against the PSH performance fees. In a presentation to PSH investors yesterday, Pershing Square describes the "illustrative fee reduction impact" from PSUS: If PSUS raises \$10 billion (!), it will get paid \$200 million a year in management fees (after the first year), which will reduce PSH's performance fees by \$40 million. "Assuming PSH generates 15% gross returns, the fee offset from the new fund alone will reduce PSH's performance fee percentage from 16.0% to 13.5%." (If it makes 5%, the fee will go be only 6.5%.)

The point in that paragraph is less the math and more that Ackman apparently expects to raise \$10 billion in the new fund.

I guess the question here is: Why now? Why did Ackman launch a European public fund 10 years ago, and decide now to launch a US one?

Here are two ways of thinking about it. One is that PSH has generally traded at a discount to its net asset value: It has about \$14.6 billion of assets under management, \$12.2 billion of net asset value (after subtracting leverage), but a market value of only about \$9 billion, a 26% discount. The market does not give Ackman full credit for his portfolio. And that discount has largely grown over time; it was smaller when PSH launched than it is now.

One thing that this means is that Ackman can't raise *more* money efficiently in PSH: Selling new shares at a discount to net asset value would dilute existing shareholders (including himself). Another thing it means is that *stock buybacks* are efficient: PSH can buy its own shares back for less than they're worth, which is accretive.

I don't know exactly why PSH trades at a discount, but it does seem plausible to think something like "a Bill Ackman vehicle would trade at a higher value in New York, a very liquid stock market where everyone knows Bill Ackman, than in Amsterdam." And in fact yesterday's investor presentation discusses the "strategies to address the discount" that PSH has used, including buybacks, dividends and "global marketing efforts outside of the United States." And "in 2023, we thoroughly examined the options for a U.S. listing to increase the number of investors who can own PSH," because *obviously* marketing efforts *inside* the US will go over better. But it didn't work; it was too complicated to turn PSH into a US company. So Ackman is starting a *new* US company to, I suspect, more or less clone PSH.

Presumably the expectation is that, by increasing the number of investors who can own *some* flavor of Pershing Square, Ackman will be able to raise money at less of a discount. (Maybe a premium?) Over time you raise most of your money in the US, in PSUS, where investors will pay more for the portfolio, and you do buybacks to retire shares in Europe, in PSH, where they won't. In 2014 Ackman raised his permanent capital in Europe, which worked but was kind of an odd fit for his profile; in 2024 he will shift it more toward the US, which is a better fit. He can buy back PSH low and, probably, sell PSUS high.

The other way to think about it is, look, you've got management fees and you've got performance fees. When you are a young hotshot hedge fund manager just starting out, you want those performance fees. You don't have that much money of your own (you are young), you plan to make a lot of money for your investors (you are confident), and you want to take a lot of that performance for yourself. Management fees are nice, but not that important, because you can't raise *that* much money when you're just starting out.

But when you are a mature famous hedge fund manager, the performance fees are less important. You have billions of dollars of your own money in the fund now, so if your performance is good you will make lots of money just on the appreciation of your own money. But the management fees are more attractive: You are now famous, so you can put out a tweet and expect to raise *\$10 billion* of new money, which will pay you a \$200 million fee forever. That starts to look nice.

Not that nice, now. PSH returned 26.7% to investors last year, net of fees. The rough math is that, on \$12 billion of net assets, Pershing Square probably charged PSH investors about \$180 million of management fees and more than \$400 million of performance fees. Under the PSUS fee structure, investors would have done better – Pershing Square says their net return would have been 30.6% – and Ackman would have done worse; he would have charged less than half as much in fees.

But in the long run, I mean, maybe you can't be a hotshot hedge fund manager forever. But you can manage a permanent capital vehicle forever; that's the point. Raising enthusiastic permanent capital when enthusiasm is high – and trading some fees for permanence – might be a good idea.

Block trades

We [talked last month](#) about some bad stuff that Morgan Stanley did in its block trading business. A big holder of stock – say, a private equity firm with a big stake in a company it had already taken public – would decide to sell the stock all at once. It would call Morgan Stanley at like noon and say “we want to sell all our stock in Company X, we’re going to ask you for a bid at 4:05 p.m. today, get ready, but *don’t tell anyone*.” And the holder would call a few other banks with the same message. And then Morgan Stanley was supposed to sit down and decide what price to bid on the stock, and if it was the highest bidder at 4:05 p.m. it would win the block trade, buy the stock at its bid price, and then turn around and sell the stock to hedge funds and other investors, as quickly as possible and preferably before the market opened the next day. But if it won the bid, it would be at risk: If it couldn’t sell the stock for more than it paid for it, it would lose money.

One thing that would make this process easier and less risky for Morgan Stanley would be if, between noon and 4 p.m., it were to call a bunch of hedge funds and say “hey, we got a block of Company X coming this evening, would you buy some, and if so for what price?” If it pre-sold the block before putting in a bid, it could be confident that it would be able to resell the stock to investors and make money. But the seller did not want Morgan Stanley to do that, because if word leaked out about the block, people would know that a lot of supply was coming and that the stock would go down, so they would sell the stock first, which would lower the price that the seller could get. So the seller would tell Morgan Stanley, in writing, emphatically, “don’t tell anyone about this block, don’t even drop any hints about it, don’t have even generic conversations about the sector with investors, keep this really secret.”

And Morgan Stanley would agree to those terms, and then it would go out and tell a bunch of hedge funds about the block anyway, and some of the hedge funds would short the stock and make a quick easy profit when the block trade came, and the stock would go down and the seller would get a worse price and eventually Morgan Stanley got in trouble and paid several hundred million dollars in fines.

One lingering question might be: Should the *hedge funds* get in trouble? It sort of seems like Morgan Stanley had inside information, and it tipped that information to the hedge funds, and they traded on it. Is that bad?

It’s tricky. The [traditional insider trading analysis](#) would say that it is illegal to trade on information that someone has misappropriated, if you know (or ought to know) that it was misappropriated. If your brother-in-law is an investment banker, and he tells you “hey I’m working on a deal, you should buy call options on the target,” you really ought to know that he’s not supposed to do that. And many insider tips will look like that; you will have some reason to suspect that person telling you the information really shouldn’t be.

With the block trade leaks, the charges against Morgan Stanley suggest that some of its customers might have had some idea that something a bit shady was going on:

Hedge fund investors who received confidential information from the Head of the Desk and Employee-1 about upcoming blocks recognized that this information allowed them to profit in ways they otherwise would not have. For example, an investor working at a Nevada- based hedge fund (“Investor-3”) told the Head of the Desk in an August 2021 call, “I know who my daddy is,” referring to the assistance that the Head of the Desk had provided Investor-3 in profiting from block trades.

You don’t say “I know who my daddy is” to your salesperson unless you know you are getting some sort of weird personal favor.

But I’m not sure that’s true for all of them? In general, if someone from a sales or syndicate desk at a big bank calls you and says “hey we have a bunch of Stock X coming, you want some,” you don’t necessarily have any reason to think that the salesperson is doing anything nefarious. His job is to sell you stock! If he calls you up asking if you want to buy stock, you might assume that he’s just doing his job. You might assume that he is shopping around the shares with the seller’s permission, that he is trying to drum up interest by making the sale public.

I mean, you might not, because actually with a block trade that would be kind of weird. (The salesperson *might* call you in advance with the company's permission, but ordinarily he'd "wall-cross" you first, making you agree not to trade until the sale is public.) And if you got a call from a salesperson saying "I have some Stock X to sell, you want some," and you hung up and immediately *shorted the stock yourself*, that's kind of rude. Still. Bloomberg's [Sridhar Natarajan and Katherine Burton report](#) :

When the US punished Morgan Stanley for leaking upcoming stock trades to favored clients, it kept the list of recipients secret. They include one of Wall Street's biggest players: Citadel.

A trader at Ken Griffin's giant hedge fund was among a coterie of executives described anonymously in Morgan Stanley's settlements with the government, according to people with knowledge of the matter. ...

Prosecutors haven't accused any buy-side participants that allegedly received tips of any wrongdoing. ...

Not every leak resulted in hedge fund managers trading before blocks of stock were sold. In some cases the sellers aborted their plans, which is what happened on two trades that were leaked to Citadel. Industry lawyers also argued that if firms did trade, they didn't break any laws, because they hadn't signed confidentiality pacts with the bank.

Hedge funds on the receiving end of information from a Morgan Stanley executive were "entitled to assume he was following his firm's rules," said Cristie Ford, a former Davis Polk lawyer who now teaches at the University of British Columbia. The nature of interactions is such that "some of it is based on rumors, some of it is based on hunches, and some of it is based on hypothetical questions from equity desks."

I do think that's basically right. If you meet your buddy from Morgan Stanley on the golf course and he says "hey I've got a hot tip for you, don't tell anyone," you can assume he's up to no good. If he calls you at your desk, from his desk, on a recorded line, saying "we've got a deal coming and we'd like you to be in it," I think you're allowed to assume it's fine. Even though, here, it was not.

Should index funds be illegal?

One finance hypothetical that people like to ponder is: If 90% of the stock market was held by index funds, would that be good or bad for efficiency? Would the prices of stocks better incorporate all information about those stocks, or worse? There are arguments both ways:

- 1. The negative view is that, if almost everyone indexes, there's no one around to do the fundamental research to make sure that prices are accurate. Hedge funds and other active managers won't have enough money to manage, they won't be able to invest in research and technology, and so there won't be anyone selling overvalued stocks and buying undervalued ones. It'll just be index funds blindly buying at whatever the market price is, and that price will be disconnected from fundamentals, and the stock market will no longer be good at allocating capital to its best uses. " [Passive Investing is Worse Than Marxism](#) ," in the words of a somewhat famous Sanford C. Bernstein & Co. equity research note.
- 2. The positive view is that, the more money that is indexed, the more *influence* each active manager will have on the stock. If most people index, then active management will shrink, but the best active managers will keep their jobs, and their trading with each other is what will move stocks. Index funds will free-ride on their efforts, but they will still have enough money to make those efforts worthwhile, and those efforts – not the free-riding – will determine the price.

It is kind of an empirical question, though. Here is "Indexing and the Incorporation of Exogenous Information Shocks to Stock Prices," by Randall Morck and M. Deniz Yavuz, with some negative conclusions:

Savings increasingly flow to low-cost index funds, which simply buy and hold the stocks in a major index, such as the S&P 500. Increased indexing impedes incorporation of idiosyncratic information into stock prices. We limit endogeneity bias by showing that exogenous idiosyncratic currency shocks induce smaller idiosyncratic moves in the stock prices of currency-sensitive firms in proximate time windows when in the index than when not in it. Increased indexing thus appears to be undermining the efficient markets hypothesis that supports its viability.

The basic idea is that there are some public companies whose fundamental performance is particularly sensitive to exchange rates: They do a lot of business in Europe (or wherever), and so their profits fluctuate when the euro/dollar exchange rate goes up or down. An efficient market would, arguably, reflect this: When the euro goes up, those companies' stocks would go up, or whatever. And they find that the market is more efficient for companies outside the S&P 500:

Our main tests reveal an economically and statistically significant 60% lower (-0.34 point estimate difference) in stocks' idiosyncratic currency sensitivity when in versus not in the S&P 500, whereas the magnitude of idiosyncratic currency shocks does not change significantly. The result is highly robust: It is evident in stocks added to the index, stocks dropped from the index, and both combined. It is robust across reasonable alternative ways of estimating idiosyncratic returns. Moreover, this difference in point estimate becomes more negative over time in lockstep with plausible proxies for the rising importance of indexing. These results are consistent with indexing impairing the incorporation of firm-specific information into stock prices.

Elsewhere today: "Einhorn Says Markets ' [Fundamentally Broken](#) ' By Passive, Quant Investing."

Ozempic is bad for business?

We have [talked](#) a few times before about how appetite-suppressing drugs like Ozempic are bad for the sales of snack-food companies, and how universal investors who own both the drug companies that sell those drugs, and the food companies that lose out to them, might have mixed feelings. As an amusing theoretical matter, you could imagine those universal shareholders calling up the drug-company CEOs and saying "stop selling these drugs, your profits from the drugs are not enough to offset our losses from snack foods."

As a practical matter that seems unlikely. For one thing, it's probably not true: Maybe Ozempic will suppress snack-food profits but increase, say, [airline profits](#) , enough that the universal holders are better off overall. For another thing, it's not like universal shareholders really make these calls, probably: It is theoretically interesting to imagine universal shareholders like BlackRock and Vanguard and Fidelity instructing corporate chief executive officers to maximize portfolio profits rather than their own companies' profits, but they probably don't really do that. Also it just so happens that the drug companies that make these drugs [have unusual shareholder situations](#) that somewhat insulate them from the usual universal owners of the stock market.

Still the CEOs [do talk to each other](#) :

Makers of everything from snack food to knee implants are facing a potential threat from Novo Nordisk A/S's powerful appetite-suppressing treatments. So they're calling the drugmaker for advice.

"A couple of CEOs from, say, food companies have been calling me," Novo Chief Executive Officer Lars Fruergaard Jorgensen said during a wide-ranging discussion in New York. He declined to name names, saying questions had centered on how the drugs work and how fast they would roll out. "They are scared about it."

I love the idea of Jorgensen getting calls from snack-food companies to plead with him, saying "you are putting me out of business, please just let me keep selling my potato chips."

Things happen

A 99% Bond Wipeout Hands Hedge Funds a [Harsh Lesson on China](#) . Decline of the star stockpicker: investors pull \$150bn from equity hedge funds. Saudi Arabia Lines Up Goldman, Citi for [Aramco Share Sale](#) . How Jack Dorsey's Plan to Get Elon Musk to [Save Twitter](#) Went South. After Its \$20 Billion Windfall Evaporated, a Start-Up Picks Up the Pieces. Faster US [Stock Settlement](#) Has Currency-Market Anchor Scrambling. Investors Are Almost Always Wrong About the Fed. Citigroup Weighs Cutting 10% of [Wealth Employees in London](#) . [McKinsey](#) Places 3,000 Staffers on Review as Economies Slow. Norway oil fund boss criticises ExxonMobil's 'aggressive' climate lawsuit. Loyalty Points Are [Crypto's](#) New Bait. Lagging Fertility Rate Means [Diapers Aren't Just for Babies](#) Anymore. Australians Get Right to [Ignore Office Calls](#) , Emails After Hours. American CEOs Visiting China Can't Escape It: They Have to Dance on Stage.

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- 1. I don't know what you think of. I feel like there is an old-but-not-super-old-school view of hedge funds that was like, somewhat idiosyncratic concentrated big bets put on by a celebrity manager, and Pershing Square was the face of it. Now "hedge fund" often conjures up a factor-neutral multi-manager fund.
- 2. Though Ackman "permanently retired" from activist short selling in 2022.
- 3. See e.g. pages 20 and 57 here, and the brochure here.
- 4. From the website: "PSH was incorporated with limited liability under the laws of the Bailiwick of Guernsey on February 2, 2012. It commenced operations on December 31, 2012 as a registered open-ended investment scheme, and on October 2, 2014 converted into a registered closed-ended investment scheme. Public Shares of PSH commenced trading on Euronext Amsterdam N.V. on October 13, 2014." So I count that as a 2014 launch, though in performance reporting PSH switches from PSLP to PSH in 2013 (see e.g. the first page here).
- 5. See page 26 here, with information as of two days ago. I am aggregating Pershing Square International and PSLP into "the hedge fund." See also this regulatory report of total assets under management of about \$16 billion.
- 6. See this press release and pages 15-16 of this investor deck, both from yesterday.
- 7. Also you lower the performance fees on PSH, which maybe reduces its discount.
- 8. No, it'll pay a 2% fee forever; if assets go down that will be less than \$200 million.
- 9. To take a classic recent example, the [squash buddy insider traders](#) , Akshay Niranjana and Brijesh Goel, the US Securities and Exchange Commission alleged that "Niranjana knew or was reckless in not knowing that Goel's position at the Investment Bank gave him access to information about these highly confidential transactions and that Goel was prohibited from sharing material nonpublic information about any merger or acquisition transactions in which the Investment Bank was involved."
- 10. It would be front-running, if you were a broker with a fiduciary duty to him. But you're not!
- 11. The Morck and Yavuz paper quotes Burton Malkiel saying "I think the market could function fine with just 2% or 3% of investors being active and making sure that information was reflected properly in prices."

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NY attorney general expands crypto lawsuit, sees \$3 bln fraud

 [reuters.com/technology/ny-attorney-general-expands-crypto-lawsuit-sees-3-bln-fraud-2024-02-09](https://www.reuters.com/technology/ny-attorney-general-expands-crypto-lawsuit-sees-3-bln-fraud-2024-02-09)

Jonathan Stempel, Dietrich Knauth

A representation of the virtual cryptocurrency Bitcoin is seen in this picture illustration taken October 19, 2021. REUTERS/Edgar Su Purchase Licensing Rights  , opens new tab

NEW YORK, Feb 9 (Reuters) - New York Attorney General Letitia James on Friday expanded her lawsuit against Digital Currency Group and other cryptocurrency defendants, tripling the size of their alleged fraud scheme to more than \$3 billion.

James had in October sued DCG, its Genesis Global Capital unit, and Gemini Trust, the exchange run by twin brothers Cameron and Tyler Winklevoss.

She claimed they caused more than \$1 billion of losses by misleading investors about the Gemini Earn program, which let customers lend crypto assets to Genesis in exchange for a high rate of return.

The attorney general said it had become clear as more investors came forward that "the scam perpetrated by DCG through Genesis" also ensnared investors who sent money directly to Genesis and were falsely assured their money was safe.

Many of the additional investors were retail customers, including a chiropractor and a stay-at-home father who each invested \$2 million of bitcoin with Genesis, the complaint said.

James is seeking more than \$3 billion of restitution for the more than 230,000 investors who she believes were defrauded.

"This illegal cryptocurrency scheme, and the horrific financial losses that real people have suffered, are yet another reminder of why stronger cryptocurrency regulations are needed to protect all investors," James said in a statement.

Genesis is shutting down after filing for bankruptcy in January 2023.

Late Thursday, it reached a settlement  , opens new tab with James' office, agreeing to pay on her fraud claims so long as it fully repays customers through the Chapter 11 process. That settlement requires a bankruptcy judge's approval.

Representatives for DCG and Gemini did not immediately respond to requests for comment.

Barry Silbert, who is DCG's chief executive, and Soichiro Moro, a former Genesis chief executive, are also defendants.

Genesis filed for bankruptcy two months after halting withdrawals by Gemini Earn customers following the collapse of Sam Bankman-Fried's FTX cryptocurrency exchange.

Both Genesis and Gemini were also sued by the U.S. Securities and Exchange Commission, which said they bypassed disclosure requirements meant to protect Gemini Earn customers.

Last week, Genesis agreed to pay the SEC a \$21 million fine, also contingent on its repaying customers first.

Gemini, meanwhile, has sued DCG over their failure of their crypto lending partnership.

Reporting by Jonathan Stempel and Dietrich Knauth in New York; Editing by Mark Porter, David Gregorio and David Ljunggren

The Thomson Reuters Trust Principles. [↗](#), opens new tab

Investors can use help.

Photographer: Spencer Platt/Getty Images

Special purpose acquisition companies have for too long existed in a regulatory gray area. With new rules approved last month, the Securities and Exchange Commission has provided needed clarity for these entities and their investors.

SPACs, sometimes called blank-check companies, tend to thrive in periods of market euphoria – think 2007 and 2021. Sponsors, often hedge funds or private equity companies, raise money on the public markets with a promise to use the funds to take over an as-yet-unidentified private company, typically within two years.

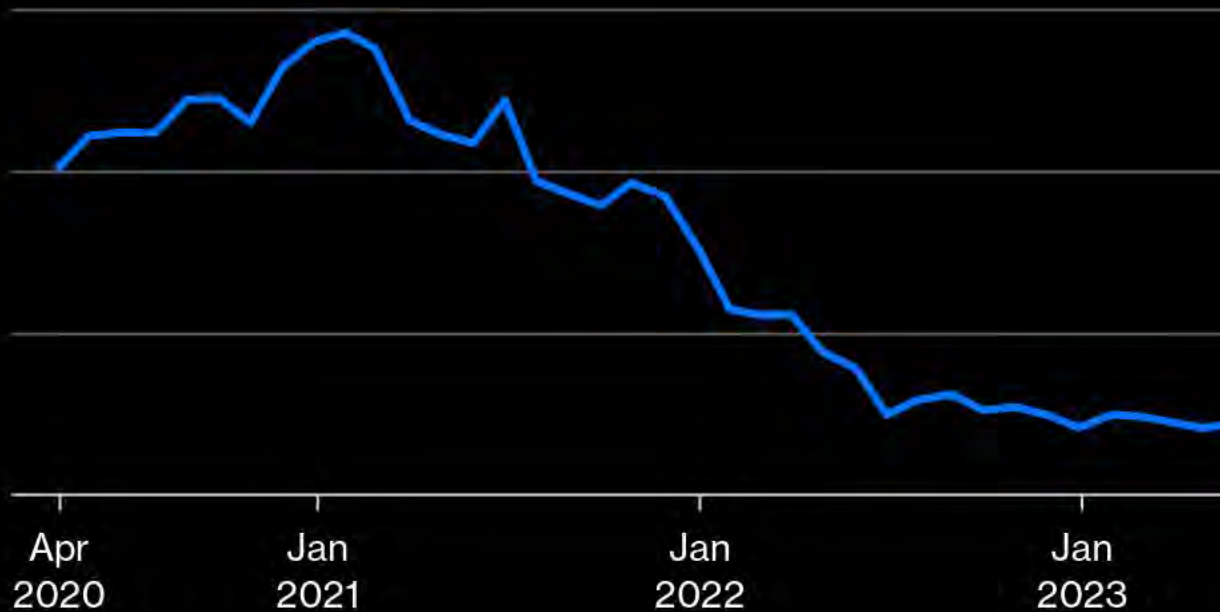
Because the eventual deal is designed as a merger instead of an initial public offering, it's not clear if target companies are required to abide by standard disclosure rules. Public offerings are one of the few exemptions from a 1995 law that gives companies "a safe harbor from liability for forward-looking statements." That means most of a company's statements about the future – say, about a merger – are protected from liability if they turn out not to be true. Not so with IPOs. SPACs have thus become a way to bring unprofitable, early-stage companies to the public market based on business projections that likely wouldn't pass muster in traditional offerings. Partly as a result, some have quickly gone bankrupt.

Companies That Merged Into SPACs See a Slump

An index that tracks companies taken over by SPACs has

traditional IPOs

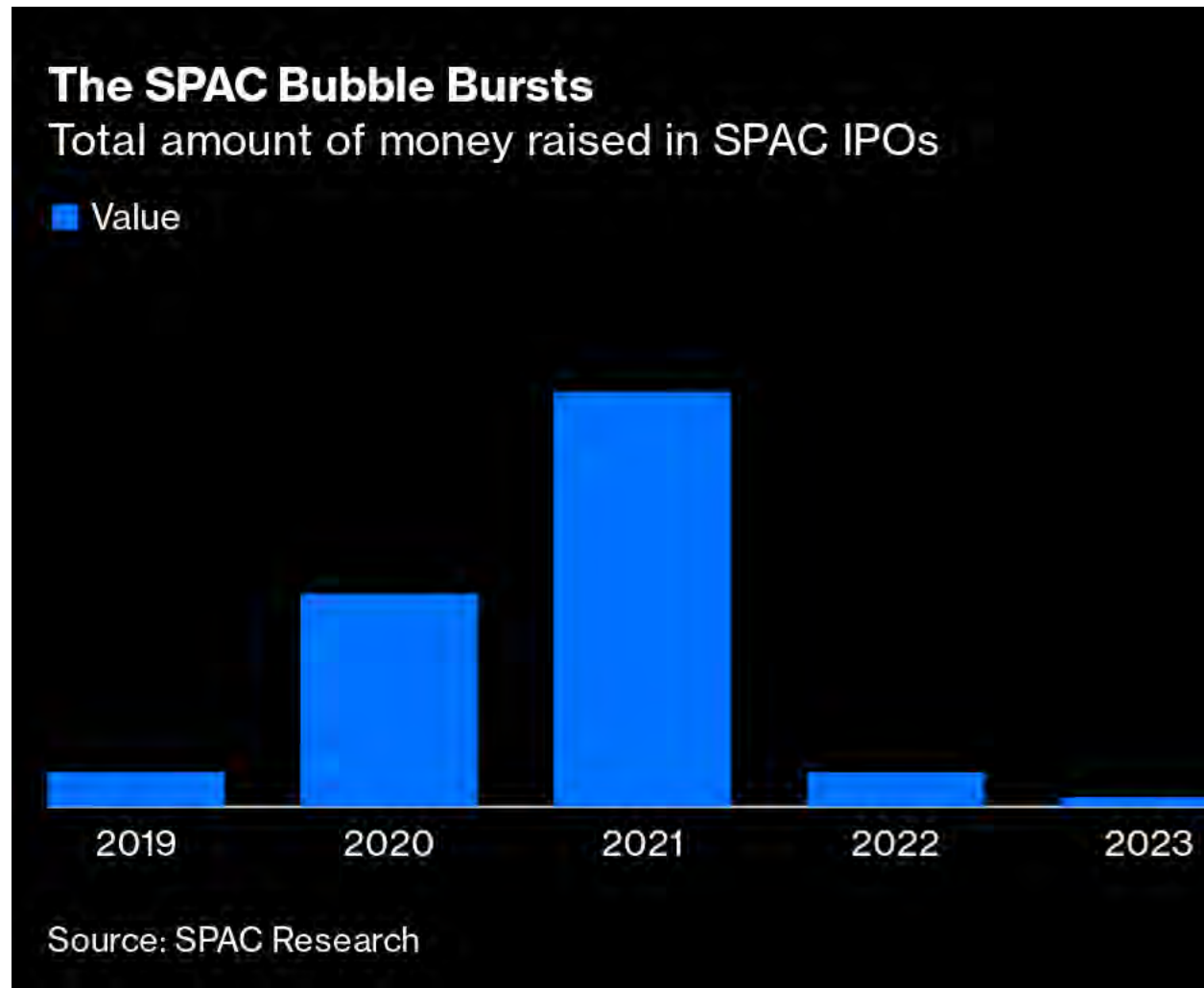
■ Last price



Sources: De-SPAC Index, Herculoid Group and Solactive; Bloomberg Data is monthly.

The new rules eliminate such regulatory arbitrage and will ensure that SPAC investors have the same safeguards as those in IPOs. Sponsors will also have to disclose more information about their compensation, conflicts of interest and shareholder dilution. Those costs add up: One study found that, for the median SPAC analyzed by the authors, sponsor compensation and other fees siphoned off about \$3.33 for every \$10 share held by investors.

Critics of the SEC's approach make two main arguments. On one hand, they say that the rules – even before they were approved – had the effect of killing SPACs and depriving retail investors of the ability to get a piece of exciting early-stage companies. On the other, they say the new rules are unnecessary because most SPAC sponsors are already disclosing information about their compensation and conflicts and aren't providing irrational projections to investors.



It's true that interest in SPACs chilled significantly after March 2022, when the SEC proposed its new rules. But that was due primarily to a changing market – a jump in benchmark interest rates and falling stocks triggered an investor exodus from risky or speculative securities. The 2008 financial crisis also crushed interest in SPACs, with no new SEC proposals to blame.

SPACs aren't evil. They've persisted over the past 20 years because they do provide a quicker way for some companies to go public. The new rules should allow investors to continue to access them while providing added clarity about their legal protections and prodding the business toward a steadier and less bubble-prone model.

Protecting investors in capital markets – ensuring they receive adequate disclosures and fair treatment – is the SEC's core mission. The commission is right to ensure that there aren't any workarounds.

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 Matt Levine's Money Stuff: Sure, Blame the Compliance Consultant
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US SEC hits more Wall Street firms with fines over record-keeping

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Chris Prentice, Doina Chiacu

The seal of the U.S. Securities and Exchange Commission (SEC) is seen at their headquarters in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly//File Photo Purchase Licensing Rights , opens new tab

NEW YORK/WASHINGTON, Feb 9 (Reuters) - A new group of Wall Street firms has agreed to pay more than \$81 million in civil penalties to settle U.S. Securities and Exchange Commission charges of record-keeping failures, the regulator said on Friday.

The settlements with broker-dealers and investment advisers, including Oppenheimer & Co. Inc and U.S. Bancorp (USB.N) , opens new tab, are the latest in a multi-year initiative by the SEC to investigate how registered financial firms handle employees' work-related communications on personal devices and apps, such as WhatsApp.

"The SEC's investigations uncovered pervasive and longstanding uses of unapproved communication methods, known as off-channel communications," the agency said in a statement.

The companies admitted that employees "communicated through personal text messages about the business of their employers" and "sent and received off-channel communications related to recommendations made or proposed to be made and advice given or proposed to be given," the SEC said.

Since 2021, the SEC has hit dozens of firms including big banks such as JPMorgan Chase & Co (JPM.N) , opens new tab and Wells Fargo & Co (WFC.N) , opens new tab with fines of \$1.7 billion over such compliance failures. Broker dealers and investment advisers, which are registered with the SEC, are subject to record-keeping requirements. The increasing use of off-channel communications has complicated companies' efforts to meet those requirements.

Northwestern Mutual Investment Services firms agreed to pay \$16.5 million; Guggenheim agreed to pay \$15 million; Oppenheimer will pay \$12 million; Cambridge Investment Research firms and Keybank entities will each pay \$10 million; Lincoln Financial Advisors will pay \$8.5 million; and U.S. Bancorp agreed to pay \$8 million, according to the SEC's orders.

Huntington Investment Company firms will pay \$1.25 million after self-reporting the issues, the SEC said.

The firms admitted the facts and have begun improving compliance policies and procedures, regulators said.

A lawyer for Guggenheim declined to comment. Counsel for the other firms did not respond to requests for comment.

Reporting by Chris Prentice in New York and Doina Chiacu in Washington; Editing by Susan Heavey, Barbara Lewis, Philippa Fletcher and Leslie Adler

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Chris Prentice reports on financial crimes, with a focus on securities enforcement matters. She previously covered commodities markets and trade policy. She has received awards for her work from the Society for Advancing Business Editing and Writing and the Newswomen's Club of New York.

Can Boeing's CLO Help It Climb Out of Latest 737 Max Spiral?

 [law.com/nationallawjournal/2024/02/09/can-boeings-clo-help-it-climb-out-of-latest-737-max-spiral/](https://www.law.com/nationallawjournal/2024/02/09/can-boeings-clo-help-it-climb-out-of-latest-737-max-spiral/)

The Jan. 5 incident aboard this Alaska Airlines 737 Max has revived concerns about Boeing's safety practices. Credit: National Transportation Safety Board via flickr

ANALYSIS

Former JetBlue Airways executive Mike Barger said one of the most valuable roles a legal chief can play is devil's advocate.

February 09, 2024 at 08:11 AM

Aerospace

Chris O'Malley

The original version of this story was published on Corporate Counsel

Boeing's chief legal officer didn't start his career in the aerospace industry. Nor did he come from the ranks of MBAs running Boeing, who critics say have become preoccupied with profit rather than product.

On paper, Brett Gerry, the Department of Justice veteran and a former deputy assistant attorney general, is just enough removed from fellow executives to bring another perspective—and to pose the tough questions—to help the company navigate out of its latest 737 Max crisis.

"They are facing one of the most difficult challenges of any executive team that I can think of," said Jason Winmill, managing partner of legal department consultancy Argopoint. "We need a wartime consigliere. We need a general counsel that can help with crisis management ... with fast-moving issues."

To what degree Boeing's legal chief is willing to confront its seemingly moribund

Brett Gerry, chief legal officer of Boeing. Courtesy photo

management team remains to be seen. But after last month's in-flight blowout of a fuselage panel on a nearly new Alaska Airlines 737 Max, few would disagree that someone needs to grab the company by the corporate lapels and get to the root of its operational problems.

Boeing declined to make the 52-year-old Gerry, who in addition to being CLO also serves as executive vice president of global compliance, available for an interview, and the Arlington, Virginia-based company wouldn't comment for this article. But in a securities filing last March justifying Gerry's \$6.2 million in pay for 2022, the board compensation committee cast him as a change-maker, writing that his work "has driven an improved compliance system and helped champion a culture of transparency."

Before last month's incident, the company had been making progress managing the legal and reputational fallout from two 737 Max crashes—Lion Air Flight 610 in October 2018 and Ethiopian Airlines Flight 302 in March 2019—that collectively killed 346 people and led to the global grounding of the aircraft from March 2019 to December 2020.

Safety investigators have tied the Alaska Airlines blowout to missing bolts, a blunder that CEO David Calhoun characterized as a "quality escape." That such a mistake happened has stirred up concerns that the incident was indicative of wider problems with production and perhaps the consequence of previous decisions made by the executive team.

In the wake of the incident, Boeing's stock price has tumbled, federal regulators are pouncing, shareholders and passengers are filing lawsuits, and key customers such as United Airlines are talking with rival Airbus about ditching the 737 Max.

Were there tradeoffs due to cost reductions, changes in labor or something else, wonders Mike Barger, a former executive of JetBlue Airways, who now teaches business students at the University of Michigan.

"Executive leadership teams can benefit greatly from a member of the senior team who can ask really tough questions about the potential consequences of key strategic decisions—both intended and unintended," Barger said. "A company's general counsel, as a leader typically somewhat removed from operational decision-making, is very well positioned to support the team in this role."

He said research has shown that leadership teams often look for facts that tend to support their decision for doing something. But they're often blind to potential worse-case scenarios and unintended consequences.

One could argue that there's no better position than the legal chief to play devil's advocate with the executive team, added Barger, a former chief instructor at the Navy Flight Weapon School, better known as Top Gun.

In the military the devil's advocate is often known as a "red team," which is tasked to contribute critical and contrarian thinking in the planning process, Barger said.

“The objective of the red team is to shoot some holes in a proposed plan to help identify where things could go terribly wrong,” Barger added. “The GC is in a great position to ask these sorts of questions in support of the team, without being perceived as a jerk or a black cloud.”

‘Profit Over Candor’

Despite Gerry’s prominent place at the table, little is known publicly about his influence on strategic decisions or to what degree he’s challenged leadership in the C-suite or boardroom.

Gerry joined the company’s legal department 16 years ago, taking on roles that included vice president and general counsel for Boeing Commercial Airplanes and chief counsel to its network and space systems business. He was also president of Boeing Japan, based in Tokyo.

Before joining Boeing, Gerry served as chief of staff to the attorney general and deputy assistant attorney general in the National Security Division of the DOJ.

That government experience no doubt was a selling point for Gerry when the company tapped him as legal chief in May 2020. At the time, Boeing had been under criminal investigation by the Justice Department for more than a year, one of the most ominous threats hanging over the company.

Boeing reached a settlement with the DOJ the following January, agreeing to pay more than \$2.5 billion to airlines and families of crash victims to resolve a criminal charge that it conspired to defraud the Federal Aviation Administration.

“Boeing’s employees chose the path of profit over candor by concealing material information ... engaging in a cover-up to conceal their deception,” the DOJ said at the time.

The crashes were attributed to design flaws in the flight control software added to the 737 Max to counter a nose-up tendency created by mounting engines higher and more forward on the wing than when the plane was first designed 60 years ago.

Boeing critics viewed the crashes as a byproduct of changes in corporate culture that occurred after Boeing bought rival McDonnell Douglas for \$14 billion in 1997. In what effectively was a reverse merger, McDonnell Douglas executives rose to leadership roles within Boeing, which long had been an engineering company known for innovative aircraft.

The Boeing rival, on the other hand, in its final years had focused more on profit and penny-pinching than on developing new commercial aircraft. Its commercial aircraft offerings consisted mostly of updated versions of planes such as the 1960s-era DC-9.

After the companies merged, Boeing management balked at developing an all-new aircraft to replace the 737, which critics pillory as a Frankenstein of a plane that has been modified over six decades to the point of being dangerous.

The spirit of McDonnell Douglas isn't the only apparition haunting Boeing. Other executives, notably CEO Calhoun, came from General Electric, known for relentless cost-cutting under the late Jack Welch that critics say precipitated that once-mighty industrial giant's fall from grace.

Path to Recovery

As CEO, Calhoun is facing the most scrutiny for Boeing's latest misstep, and many analysts think his days are numbered. But the entire executive team is under extraordinary pressure, Winmill said.

"The crew in Boeing's cockpit, which includes the general counsel, has a very short runway to fix things at Boeing. That crew is going to have pull together and perform—really perform," Winmill said.

One way Gerry could help rebuild trust is to advocate for help from third-party experts to look at problems at the company—outsiders with a fresh eye who would be viewed as unbiased and independent, said Rob Chesnut, a former general counsel of Airbnb.

Boeing took a step in that direction last month, naming retired U.S. Navy Adm. Kirkland Donald to lead a team of outside experts to pore over Boeing's quality management system and the way it oversees suppliers.

Before retiring, Donald was director of the Naval Nuclear Propulsion Program, known for its exacting standards for safety and reliability. Currently, Donald is board chair of military shipbuilding giant Huntington Ingalls Industries.

For companies that have so severely broken the trust of stakeholders, "nobody is going to believe you if you do it yourself," Chesnut said. "A general counsel plays an important role in protecting and restoring the brand."

Mohaimina Haque, who was outside counsel for the Tony Roma's restaurant chain before being appointed interim CEO last year, said that in addition to providing crisis management leadership Gerry needs to ensure the company doesn't succumb to the temptation to shift blame.

Boeing has made that mistake before. For example, after the first 737 Max crash, which occurred in Indonesia, it was criticized for suggesting the foreign pilots may have simply not been up to the task.

“Pointing fingers and blaming is just not a strategy that does well in today’s world,” she said. “It backfires.”

Rather, transparency is key in helping rebuild trust, Chesnut said.

“We live in a world where employees are more willing to speak out than ever,” he said. “The cover-ups are worse than the problem. Let’s not compound this.”

Boeing appears to be getting the message. Calhoun has told the public that safety is the company’s first priority. He has apologized and accepted responsibility, saying, “We caused the problem.”

Calhoun added: “We will earn trust back through demonstrated action and a commitment to total transparency.”



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Mich. Counties Sue Drug Giants Over Insulin Prices

By **Danielle Ferguson**

Law360 (February 8, 2024, 7:01 PM EST) -- Several Michigan counties on Wednesday accused some of the world's largest drugmakers, retailers and pharmacy benefit managers of scheming to inflate insulin prices and costing the municipalities millions of extra dollars in healthcare costs for their employees and retirees.

Leaders from Macomb, Wayne, Washtenaw and Monroe counties said Eli Lilly, Sanofi-Aventis U.S. LLC, CVS, Caremark and about 10 other companies violated racketeering, antitrust and consumer protection laws by hiking the price of insulin to pocket more profit, according to the suits filed in New Jersey federal court.

"The pharmacies and manufacturers get together. They control about 90% of the market. They talk to each other secretly, and they jack up the prices through anti-competitive means," said Melvin Butch Hollowell of The Miller Law Firm PC at a news conference Wednesday announcing the lawsuits.

The more than 140-page complaints from each county allege pharmacy benefit managers demanded large, "secret" and continuously growing rebates and other payments from manufacturers in exchange for putting insulin medications on their preferred formularies, giving them a competitive edge over other insulin medications and increasing sales. Manufacturers would raise the list prices of their insulins in tandem, taking the same price increase together, the counties alleged.

The counties said while these are the first lawsuits filed by Michigan governments, they expect more to come.

Wayne County has also been added as a plaintiff to growing multidistrict litigation in New Jersey federal court. About 25 plaintiffs are now part of the MDL, with **new cases pouring in** and awaiting transfer. **In December**, the New Jersey federal judge overseeing the MDL established three tracks for the cases: one for local governments and similar self-funded payers, another for states and their attorneys general, and a third for union groups and similar third-party players. The city of Detroit also plans to file suit, but first needs approval from the city council.

The counties said diabetes treatment has been one of the "costliest diseases" for employees and retirees since at least 2011. While the counties did not specify a loss, they said they have spent "millions of dollars" on diabetes medicine for beneficiaries. Any unnecessary increased spending has a "detrimental" effect on the counties' overall budget and negatively impacts residents, the counties said.

Wayne County Executive Warren Evans said with the county's high poverty levels, the county pays "an awful lot of money" for insulin that could be used to help aid other health issues in the county.

"To be assaulted financially like this for a period of time is unconscionable. We want that money back. We want to be able to use that money for the kinds of things that would help make health care in Wayne County an easier thing to tackle and deal with," Evans said.

Monroe County Administrator and Chief Financial Officer Mike Bosanac said money spent on the county's insulin needs could have been spent on public safety, parks and recreation or other social service needs.

"We're fine with capitalism, but the actions of the defendants here are not. As a result, Monroe

County taxpayers were shortchanged through this price-fixing scheme, and of the life-saving insulin provided to our employees and retirees," Bosanac said.

The medications at issue in the cases are Apidra, Basaglar, Humalog, Humulin N, Humulin R, Humulin R 500, Humulin 70/30, Lantus, Levemir, Novolin N, Novolin R, Novolin 70/30, Novolog, Ozempic, Soliqua, Toujeo, Tresiba, Trulicity, and Victoza, according to the complaints.

Along with reimbursement for the alleged overcharge, one of the goals of the lawsuits is to change the behavior of these companies and pharmacies, the counties said.

"Bottom line, we want to stop the bad behavior," Hollowell said.

About 1 in 6 Detroit residents have diabetes, Mayor Mike Duggan said Wednesday. According to the lawsuits, about 1 million Michiganders are diabetic. He is hoping a settlement caps insulin costs for residents.

"I'm not looking for a check for the city of Detroit. I'm looking for a settlement that allows our residents to be able to afford that treatment," he said.

A spokesperson for CVS told Law360 that pharmaceutical companies are responsible for the prices set in the market for their products.

"Nothing in our agreements prevents drug manufacturers from lowering the prices of their insulin products and we would welcome such an action. Allegations that we play any role in determining the prices charged by manufacturers for their products are false, and we intend to vigorously defend against this baseless suit," the spokesperson said.

A spokesperson for Novo Nordisk said the company believes the allegations are without merit.

"While we will not comment further about ongoing litigation, we recognize that not all patient situations are the same and we have a number of different insulin affordability offerings available through NovoCare," the company said. "Importantly, we continually review and revise our offerings as well as work with diverse stakeholders to create solutions for differing patient needs."

Sanofi said in a statement Thursday that its prices have "always complied with the law" and said the company's price for insulin has declined in recent years.

"While we will not comment on the specifics of the allegations, Sanofi's pricing practices have always complied with the law and the company is committed to helping patients access the medicine they need at the lowest possible price," the company said. "Sanofi believes that no one should struggle to pay for their insulin, regardless of their insurance status or income level, which is why we have a suite of innovative and patient-centric savings programs to help people reduce their prescription medicine costs."

A representative for Optum said, "We have long been focused on lowering the net cost of prescription drugs, including insulin. Our clients and consumers count on us to be a counterweight to the substantial market power of manufacturers, which have sole discretion in setting and raising prices for their products. This lawsuit is without merit and we will defend ourselves against these allegations."

Representatives for the other defendants did not immediately respond to requests for comment Thursday.

Counsel information for Wayne County was not immediately available.

Monroe County is represented by Mark J. Dearman, Dorothy P. Antullis, Lindsey H. Taylor and Alexander C. Cohen of Robbins Geller Rudman & Dowd LLP.

Macomb County and Washtenaw County are represented by Paul Novak, Gregory Stamatopoulos and Ellen Relkin of Weitz & Luxenberg PC, and Mark Bernstein and Matthew Aneese of The Sam Bernstein Law Firm PLLC.

The cases are Macomb County, Michigan v. Eli Lilly and Company et al., case number 2:24-cv-00719, Washtenaw County, Michigan et al. v. Eli Lilly and Company et al., case number 2:24-cv-00717, and Monroe County, Michigan v. Eli Lilly and Company et al., case number 2:24-cv-00720, all in the U.S. District Court for the District of New Jersey. The MDL is In re: Insulin Pricing Litigation, case number 2:23-md-03080, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Dan McKay. Editing by Kelly Duncan.

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Oracle Stockholders Lose Bid For \$5M 'Mootness' Fee

By **Rose Krebs**

Law360 (February 8, 2024, 3:59 PM EST) -- The Delaware Chancery Court has denied a \$5 million attorney fee request by Oracle stockholders who lost a lawsuit that alleged the software giant overpaid for its \$9.3 billion acquisition of Netsuite, rejecting the investors' contention that they deserve an award for prompting the company to appoint two new independent directors.

In a memorandum opinion issued Wednesday, Vice Chancellor Sam Glasscock III agreed with Oracle Corp. that the lead plaintiffs, Firemen's Retirement System of St. Louis and Robert Jessup, didn't show they caused a corporate benefit that warranted fee shifting.

"The appointment of the new directors did not moot any issues in the case, nor was it an aim of plaintiffs' litigation," the vice chancellor wrote. "Assuming that there was a causal relationship between the timing of the hiring of the new directors and the litigation's survival of the motion to dismiss (which I do assume, without deciding) the appointment was incidental to, not the aim of, the litigation."

Vice Chancellor Glasscock said he concurred with Oracle's assertion that a plaintiff is "entitled to fees for creating a corporate benefit" when there is a "nexus between the theory of the action and the benefit; and not ... a mere fortuity only tangentially related to the litigation."

The vice chancellor added that he has sympathy for the stockholder class attorneys as they "proceeded derivatively, in good faith and with great skill and vigor, at great cost and effort to themselves."

"Nonetheless, this is counsel's business model: sue derivatively, on a contingency basis, accept the freight in a losing case, while seeking a multiple of a lodestar in a successful one," he said. "The fact that this case consumed monumental effort on the part of some of the best in the plaintiffs' bar, like the fact of my sympathy, does not change that."

In a May post-trial decision following a 10-day trial, Vice Chancellor Glasscock concluded that Oracle founder and billionaire Larry Ellison **did not coerce the company** into paying \$3 billion too much for NetSuite Inc. in 2016, and did not mislead a special board committee that was negotiating the deal.

Ellison was a "major blockholder of both companies," Wednesday's ruling said. "Because he stood on both sides of the transaction, because he had great influence in the operation of Oracle's business, and because his interest in NetSuite was greater than his interest in Oracle, the opportunity for self-dealing was apparent."

In their complaint, the investors accused Ellison and Oracle CEO Safra Catz of causing the company to overpay for NetSuite and alleged the founder had influence over the majority of Oracle's board.

After the case survived a motion to dismiss, Oracle appointed two new independent board directors who served on a special litigation committee that "investigated and determined that it was in Oracle's best interests that the suit go forward to a resolution, under the derivative plaintiffs and their counsel," the ruling on Wednesday noted.

Vice Chancellor Glasscock found in his May ruling that Ellison did not use "his outsized influence" at Oracle to buy NetSuite at a premium and that he withdrew from the merger negotiation process in time for the special board committee to take over. He also absolved Catz of liability.

Despite the loss, the Oracle stockholders **still sought the \$5 million "mootness fee,"** citing a corporate benefit caused by the company's mid-case decision to add the two independent directors to its board.

Oracle **fired back** and asserted the investors should not be rewarded after "dragging" the company and its brass "through years of meritless litigation."

During **oral arguments** in November, the shareholders' attorneys continued to contend they should receive a fee recognizing the benefits of the litigation. But Oracle's counsel maintained that a fee award wasn't warranted, saying none of the stockholder claims were mooted by the appointment of the directors and the litigation didn't resolve anything.

In siding with Oracle, Vice Chancellor Glasscock said Wednesday the circumstances of the litigation do not justify an exception to the so-called "American Rule," under which each party bears its own costs.

"If plaintiffs are correct that the new directors were engaged primarily to serve on the [special litigation committee] in response to plaintiffs' suit, that is not a benefit created by the efforts of plaintiffs — it is merely a collateral effect of this litigation, and awarding fees in this situation would create an unwholesome incentive," the vice chancellor wrote.

Oracle's decision to appoint the directors "does not constitute a specific or significant corporate benefit sufficient to justify awarding plaintiffs attorneys' fees in light of the ultimate outcome of this litigation," the opinion read.

In a December decision, Vice Chancellor Glasscock **denied** Ellison and Catz's call to have stockholder plaintiffs pay their costs in defense of the derivative suit, finding that, despite the fact they prevailed in the dispute, fee shifting "would not serve equity in these circumstances."

Counsel for the parties didn't immediately respond Thursday to requests for comment.

Firemen's Retirement System of St. Louis and Jessup are represented by Joel Friedlander, Jeffrey M. Gorris and David M. Hahn of Friedlander & Gorris PA, Randall J. Baron, David A. Knotts, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP, and Gregory E. Del Gaizo of Robbins LLP.

Oracle is represented by Blake Rohrbacher, Susan H. Cohen, Matthew D. Perri, Daniel E. Kaprow and Kyle H. Lachmund of Richards Layton & Finger PA.

Ellison and Catz are represented by Elena C. Norman, Richard J. Thomas and Alberto E. Chávez of Young Conaway Stargatt & Taylor LLP, and Peter A. Wald and Blair Connelly of Latham & Watkins LLP.

The case is In re: Oracle Corp. Derivative Litigation, case number 2017-0337, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery, Leslie A. Pappas and Ryan Boysen. Editing by Covey Son.



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Blade Air Investor Sues KSL Capital, Others Over SPAC Deal

By **Jeff Montgomery**

Law360 (February 8, 2024, 8:31 PM EST) -- A shareholder of urban air transport venture Blade Air Mobility Inc. on Thursday filed a lawsuit in Delaware's Court of Chancery against key figures of the special-purpose acquisition company that took it public, along with the deal's sponsor KSL Capital Partners.

Although the full proposed class complaint filed by Dominic McFee had yet to be filed, a supplemental document alleged breaches of fiduciary duty by KSL Capital Partners Management V LLC as well as individuals associated with the SPAC, Experience Investment Corp.

Blade Air, founded in 2014, focuses on the booking of vertical and fixed-wing aircraft for passengers and organ transplant support in congested urban areas in the U.S., Canada and Europe, with an additional venture in India. Its most recent quarterly report in November marked its first quarter of positive free cash flow.

Shares of the company traded as high as \$18.40 in the weeks leading up to completion of its May 2021 combination with Nasdaq-listed Experience, with a roughly 60% drop between mid-February 2021 and just after closing in mid-May 2021. Its stock price has since gradually fallen to just above \$3.00 per share at market close on Thursday, after recovering from a \$2.06 low for the year.

The 2021 business combination and private placement proceeds ahead of closing generated \$365 million in gross proceeds for the business.

Although somewhat diminished lately, courts have seen a surge in class litigation over SPAC transactions and subsequent price drops in recent years. These suits routinely focus on claims that inadequate disclosures about the target business and certain conflicts left stockholders unable to make fully informed decisions about whether to hold their investment through to closing or redeem their shares for the original offering price.

While some deals see sizable exits before closing, Experience reported in May 2021 that "after giving effect to minimal redemptions" from the \$365 million in gross proceeds, the company would have an opportunity to accelerate Blade's "acquisition and route expansion strategy."

Blade has reported it neither owns nor operates aircraft and mainly relies on leased helicopter and amphibious aircraft seats and services for passenger routes, while also ranking as one of the largest organs-for-transplant transporters in the world.

It has described its emphasis on "asset-light," lease-focused operations and exclusive passenger terminals as aiming to produce a "seamless" transition to electric-powered vertical takeoff aircraft, according to the company.

At the end of the third quarter in November, the company reported having \$173 million in cash and short term investments, providing it with sufficient liquidity to fund growth without having to raise additional capital.

Neither Blade nor KSL immediately responded to a request for comment.

Dominic McFee is represented by Stephen E. Jenkins, Richard D. Heins and Tiffany Geyer Lydon of

Ashby & Geddes.

Counsel information for Blade Air Mobility Inc., KSL Capital Partners Management V LLC and the individual directors of Experience Investment Corp. was not immediately available.

The case is Domenic McFee v. Eric Affeldt et al., case number 2024-0112, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Crypto Co. Hut 8 Merged With Failing Operation, Suit Says

By **Sydney Price**

Law360 (February 8, 2024, 7:25 PM EST) -- Crypto mining company Hut 8 was hit with a proposed class action from an investor alleging the company's stock price fell following the publication of a short-seller's report that said it paid \$745 million for another company with severe financial and operational issues.

According to shareholder Ryan Mayiras' suit, filed in New York federal court Wednesday, Hut 8 concealed from investors that it overpaid to acquire crypto operation U.S. Bitcoin Corp., also known as USBTC, which was on the verge of bankruptcy. The \$745 million transaction was 70% more than USBTC was worth, the suit alleges.

Hut 8's share declined when the news was revealed in a third-party research report in January, according to the suit.

Hut 8's primary operations include bitcoin mining and hosting, which are heavily dependent on energy and high-speed internet, according to the complaint. USBTC held a 50% interest in a joint venture bitcoin mining facility in Texas, which was acquired by Hut 8 in the November 2023 merger, the suit states. However, the suit alleges, Hut 8 did not disclose to investors that the facility "historically failed to provide energy and high-speed internet," and that it was overstating the profitability of the facility in financial filings.

Mayiras seeks to represent a class of investors who purchased or otherwise acquired Hut securities between Nov. 9, 2023, and Jan. 18, 2024. In addition to Hut 8, former CEO Jaime Leverton and current Chief Financial Officer Shenif Visram are individual defendants in the suit.

The class period begins the day Hut 8 filed a merger prospectus with the U.S. Securities and Exchange Commission. In the filing, Hut 8 discloses that loss of internet connectivity is a direct threat to its business.

Over the next several weeks, Hut 8 failed to disclose adverse facts about the USBTC acquisition in operational updates, the complaint alleges.

Then, on Jan. 18, 2024, J Capital Research published a report alleging Hut 8 had overstated the profitability of its acquisition of USBTC, the suit states. The report also included details about energy and connectivity failures at the Texas facility, and that USBTC's CEO may be hiding ownership shares through his partner.

According to the complaint, the report states a source close to USBTC told J Capital Research that USBTC would have been "bankrupt within weeks" without the merger.

On this news, Hut 8's shares fell \$2.16, or about 23%, to close at \$7.12 per share on Jan. 18, according to the complaint.

Mayiras seeks damages and accuses the defendants of violating the Exchange Act and acting with scienter, or actual knowledge of wrongdoing or reckless disregard.

Counsel for Mayiras and a representative of Hut 8 did not immediately respond to requests for comment Thursday.

Mayiras is represented by Gregory B. Linkh, Rebecca Dawson, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP and Frank R. Cruz of The Law Offices of Frank R. Cruz.

Counsel information for Hut 8 and the individual defendants was not immediately available.

The case is Mayiras v. Hut 8 Corp. et al., case number 1:24-cv-00904, in the U.S. District Court for the Southern District of New York.

--Editing by Caitlin Wolper.

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Pomerantz Beats 5 Other Firms To Lead SolarEdge Investor Suit

By **Katherine Smith**

Law360 (February 8, 2024, 7:25 PM EST) -- A New York federal judge has appointed Pomerantz LLP to serve as lead counsel in a proposed shareholder class action claiming that SolarEdge Technologies Inc. failed to disclose information to investors about decreasing European sales, beating out five other firms that sought to lead the suit.

In a Wednesday order, U.S. District Judge Gregory H. Woods consolidated the related actions and appointed Pomerantz to serve as lead counsel. He also named several pension funds and Hachshara Insurance Company Ltd. to serve as co-lead plaintiffs.

The firm represents the pension funds, which are operated by Amitim Investment House, and Hachshara, which allegedly incurred total losses estimated between \$6.1 million and \$8.7 million in connection with a securities class action filed by plaintiff Daphne Shen in November in Manhattan federal court, according to Pomerantz's January motion.

The Pomerantz clients, as well as Hagens Berman Sobol Shapiro LLP client Dean Clayton, Levi & Korsinsky LLP client Ananda Investments LLC, and Glancy Prongay & Murray LLP client Lucid Alternative Fund LP initially submitted lead plaintiff proposals in January, and sought to consolidate the suit with another class action pending in New York federal court brought by Javier Alcides Cascallar.

Rosen Law client Jan-Willem ter Meulen and Keller Rohrback LLP clients Isadore Fisher and Ada Fisher also submitted lead plaintiff proposals for the claims brought by Shen.

However, Pomerantz argued in a January motion that the collective losses of the other candidates vying to serve as lead plaintiffs are "dwarfed" by the losses of the pension funds and Hachshara, and that they expended more funds and purchased and retained more shares than the other competitors, as well.

The other plaintiffs separately filed notices acknowledging that they don't appear to have "the largest financial interest" in the suit based on how the Private Securities Litigation Reform Act defines it.

Pomerantz in its motion added that its clients would also help the PSLRA's aim to increase the involvement of institutional investors in class actions, as the groups "constitute exactly the kind of small and cohesive group that the PSLRA expressly permits and courts in the Second Circuit routinely appoint to serve as lead plaintiffs in securities class actions."

Shen claimed in the complaint that SolarEdge, which sells energy storage and monitoring systems, made misrepresentations regarding how its European sales would perform, and failed to disclose the inventory issues that were affecting its European distribution channel.

As a result, trading prices for the company's shares fell around 27% the day after it revealed its revenue for the quarter would come in lower than it originally stated in its guidance, according to Shen, due to what the company said were "substantial unexpected cancellations and pushouts of existing backlog from our European distributors."

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

Mivtachim The Workers Social Insurance Fund Ltd., Keren Hgimlaot Hmerkazit Histadrut Central Pension Fund Ltd., Kerren Makefet Pension and Provident Center Cooperative Society Ltd., The Hadassah Workers Pension Fund Ltd. and Hachshara Insurance Company Ltd. are represented by Jeremy A. Lieberman, J. Alexander Hood II and James M. LoPiano of Pomerantz LLP.

Dean Clayton is represented by Nathaniel A. Tarnor of Hagens Berman Sobol Shapiro LLP.

Jan-Willem ter Meulen is represented by Phillip C. Kim of The Rosen Law Firm.

Ananda Investments LLC is represented by Adam M. Apton of Levi & Korsinsky LLP.

Lucid Alternative Fund LP and Shen are represented by Gregory Bradley Linkh of Glancy Prongay & Murray LLP.

Isadore Fisher and Ada Fisher are represented by Ron Kilgard of Keller Rohrback PLC.

The SolarEdge defendants are represented by Christopher Daniel Belelieu, Bethany Jade Saul and of Gibson Dunn & Crutcher LLP.

The case is Shen v. SolarEdge Technologies Inc. et al., case number 1:23-cv-09748, in the U.S. District Court for the Southern District of New York.

--Editing by Amy French.

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\$1B DuPont Deal Gets Final OK In Firefighting Foam MDL

By **Madeline Lyskawa**

Law360 (February 8, 2024, 7:53 PM EST) -- A South Carolina federal judge on Thursday granted final approval to a \$1.18 billion settlement involving chemical companies DuPont, Chemours and Corteva over drinking water polluted by so-called forever chemicals, dismissing objections raised by three Washington cities and the North Texas Municipal Water District, among others.

U.S. District Judge Richard Gergel granted the motion for final approval of the \$1.18 billion deal and final class certification filed by a smattering of small municipal water providers and large ones, including those serving the cities of Philadelphia and Birmingham, Alabama, and Alameda County in the San Francisco Bay Area in late December.

In his order, the judge rejected objections expressed by the Washington cities of Vancouver, DuPont and Tacoma, as well as by the North Texas Municipal Water District, amount others, which claimed the deal must be rejected because it does not compare the value of the settlement to the damages that could have been obtained at trial.

"The court rejects this argument because Fourth Circuit case law does not require a trial on the merits as a prerequisite to settlement," Judge Gergel said.

As for the objectors' claim the settlement amount is inadequate because "it pales in comparison to the PFAS-related damages that defendants have caused across the country," the judge said that argument also fails, noting the deal satisfies all the required factors related to adequacy.

Throughout the massive multidistrict litigation, public water utilities and other plaintiffs have claimed firefighting foam made by DuPont, Chemours and Corteva leached perfluoroalkyl and polyfluoroalkyl substances, or PFAS, into local drinking and bathing water. The chemicals have been dubbed forever chemicals due to their persistence in the environment and the human body.

More than 300 lawsuits have been filed over PFAS contamination since 2018, with many being consolidated in the South Carolina-based MDL focused on pollution involving the chemicals in aqueous film-forming foam used in firefighting applications.

The \$1.18 billion deal provides for the remediation of public water systems that have already detected PFAS in their water, as well as the testing of water systems that have not yet been assessed and their subsequent remediation should it be deemed necessary. The deal, which was **first announced** by the parties in early June 2023, eventually secured **preliminary approval** in late August and notably does not release any claims against the defendants for groundwater or soil contamination.

The class certified under the agreement consists of all public water systems in the country that draw or otherwise collect water from any water source that was tested or analyzed for PFAS and found to contain PFAS at any level, on or before the settlement was reached. The class also includes all public water systems in the U.S. subject to monitoring rules or required under state or federal law to test any of their water sources for PFAS.

Just weeks after announcing the \$1.18 billion agreement, the plaintiffs **reached another separate** \$12.5 billion deal with 3M Co. to end nearly identical claims over the firefighting foam, for which final approval remains pending.

In response to the judge's decision to grant final approval of the \$1.18 billion deal, the attorneys representing the plaintiffs issued a statement on Thursday saying the final approval order "signifies a critical step towards accountability and addressing PFAS-related challenges for water service providers and the communities they serve."

"We look forward to the next steps in the claims process and continued collaboration with the remaining defendants to expedite relief in this matter," the plaintiffs' legal team said.

Representatives for the companies did not immediately respond to requests for comment Thursday.

The interim co-lead class counsel for the MDL are Michael A. London of Douglas & London PC, Scott Summy of Baron Budd, Paul J. Napoli of Napoli Shkolnik and Joe Rice of Motley Rice LLC.

Dupont De Nemours Inc., The Chemours Co. and Corteva Inc. are represented by attorneys from Shook Hardy & Bacon LLP, Norris McLaughlin & Marcus PA, Hood Law Firm LLC, Wyche PA and Bartlit Beck LLP.

The multidistrict litigation is In Re: Aqueous Film-Forming Foams Products Liability Litigation, case number 2:18-mn-02873, in the U.S. District Court for the District of South Carolina.

--Additional reporting by Emily Field. Editing by Vaqas Asghar.

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Union Fund Sues Pioneer For Docs In \$59B ExxonMobil Deal

By **Emilie Ruscoe**

Law360 (February 8, 2024, 8:56 PM EST) -- Oil and natural gas company Pioneer Natural Resources has been sued for its books and records in the Delaware Court of Chancery by a pension fund alleging that the company's officers and directors breached their fiduciary duties as the company negotiated a \$59.5 billion deal to be acquired by oil giant Exxon Mobil Corp.

In a complaint filed Tuesday, the Operating Engineers Construction Industry and Miscellaneous Pension Fund, an institutional investor, said Pioneer's brass might not have gotten a fair price in the all-stock acquisition deal, which shareholders voted to approve on Wednesday.

"Based on a review of publicly available information, stockholder has a credible basis for suspecting conflicts of interest," the investor said in its suit, suggesting that the officers and directors breached their fiduciary duties to the company's stockholders by "failing to conduct a fair sale process."

If approved, the deal, which was **announced** in October, would give Pioneer shareholders 2.3234 shares of ExxonMobil for each Pioneer share and values the shares at \$253 each.

According to the pension fund, the company's former CEO, Scott Sheffield, now a special adviser to the sitting CEO, stands to receive change-in-control benefits of nearly \$29 million. The current CEO, Richard Dealy, stands to receive \$15 million in such benefits, the fund said.

The acquisition agreement also stipulates that Sheffield will be appointed to ExxonMobil's board and Dealy will be the lead representative for Pioneer on ExxonMobil's integration and transition team. Exxon also promised that for two years, it would keep Pioneer's headquarters in place in Irving, Texas, and would maintain a "comparable" office facility in Midland, Texas.

The investor described the office considerations as "pertinent to Sheffield's and Dealy's personal interests," alleging that the two "got everything they wanted" in the merger, which was otherwise unfair to the company's public shareholders.

Meanwhile, the pension fund alleges that Pioneer investors got the shorter end of the stick under circumstances Sheffield and Dealy allegedly knew about.

Specifically, the investor claimed, ExxonMobil disclosed about a month before the shareholder vote on the merger that it anticipated certain reduced asset values, or "impairments," of \$2.4 billion to \$2.6 billion associated with exploration and production.

After the impairments were announced, the pension fund said, trading prices for ExxonMobil shares fell by over 5.5%, "evaporating over \$20 billion from ExxonMobil's market capitalization."

"Pioneer stockholders, whose rights in the merger are to receive shares of ExxonMobil at a preset exchange rate, will necessarily receive less consideration at the time of the merger than they would if the impairment had been disclosed to the board prior to Oct. 10, 2023, as the impairment has now been 'priced in' to ExxonMobil's stock price," the investor argued.

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

The Operating Engineers Construction Industry and Miscellaneous Pension Fund is represented by

Christine M. Mackintosh, William G. Passannante II and Christopher J. Orrico of Grant & Eisenhofer PA.

Counsel information for Pioneer Natural Resources wasn't immediately available Thursday.

The case is Operating Engineers Construction Industry and Miscellaneous Pension Fund v. Pioneer Natural Resources Co., case number 2024-0101, in the Delaware Court of Chancery.

--Editing by Karin Roberts.

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Hudson City Investors Lose Cert. In \$3.7B M&T Merger Suit

By **Katryna Perera**

Law360 (February 8, 2024, 10:35 PM EST) -- A proposed investor class can't be certified in a suit alleging M&T Bank Corp. and Hudson City Bancorp Inc. hid regulatory problems that led to a yearslong delay of their \$3.7 billion merger over a decade ago, a federal judge said after finding his previous order to certify the class "clearly erred in applying the Third Circuit's legal standard."

U.S. Circuit Judge Evan J. Wallach, sitting by designation in the District Court of Delaware, issued an **opinion and order** on Wednesday reversing his August 2023 order that granted the investors certification, saying they have not met their burden for pleading the elements of commonality and predominance for the proposed class.

He added that the investors failed to plead loss causation and transaction causation for the dates they assert they suffered damages.

"The evidence put forward at this stage supports the conclusion that plaintiffs' dividend damages were not directly caused by the transaction at issue because they were the product of independent discretionary board decisions, not directly tied to the merger itself," the judge said.

Judge Wallach's Wednesday order follows another one he issued in November, in which he said he would review and amend his August order after finding he erroneously applied the Third Circuit's legal standard for commonality and predominance in granting certification.

The latest development comes after years of back-and-forth litigation in the suit. After the case was **tossed twice** in 2017, the investors appealed to the Third Circuit, which initially affirmed the district court's dismissal and then granted a rehearing, vacated its initial opinion and remanded the case for further proceedings in 2020.

Investors then filed their present motion for class certification in 2022.

The suit **was launched** in 2015, alleging that although the merger between M&T and Hudson City was approved in 2013, it was delayed for two and half years due to regulatory concerns from the Federal Reserve and the Consumer Financial Protection Bureau over M&T's compliance with federal bank secrecy and money laundering laws. The investors said neither issue was clearly disclosed in the 2013 deal proxy, and it ended up costing them millions in diminished dividends.

M&T eventually settled with the CFPB in October 2014, more than two years after the merger was announced in August 2012 and 18 months after the proxy materials were finalized in February 2013, according to court filings.

In a statement to Law360 on Thursday, Pat Fitzgibbons, a spokesperson for M&T said, "We are pleased with the judge's decision about this case and to have this matter behind us."

Counsel for the investors did not immediately respond to requests for comment Thursday.

The investors are represented by Francis J. Murphy Jr. and Jonathan L. Parshall of Murphy & Landon PA, and Steven M. Coren, Benjamin M. Mather and Matthew R. Williams of Coren & Ress PC.

M&T Bank is represented by Brian M. Rostocki, Anne M. Steadman and Justin M. Forcier of Reed

Smith LLP, and Jonathan K. Youngwood, Janet A. Gochman and Katherine A. Hardiman of Simpson Thacher & Bartlett LLP.

Hudson City Bancorp is represented by Kevin R. Shannon and Daniel M. Rusk IV of Potter Anderson & Corroon LLP and Tracy Richelle High and Scott A. Foltz of Sullivan & Cromwell LLP.

The case is Jaroslawicz v. M&T Bank Corp. et al., case number 1:15-cv-00897, in the U.S. District Court for the District of Delaware.

--Editing by Lakshna Mehta.

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Investors Sue In Del. For Cartesian Therapeutics Vote Hold

By **Jeff Montgomery**

Law360 (February 8, 2024, 6:18 PM EST) -- Stockholders of early-stage biotech venture Cartesian Therapeutics Inc. sought a Delaware Court of Chancery order Wednesday to enjoin a meeting on a planned post-merger stock conversion and reverse split, pending additional disclosures on equity valuations.

The action follows the November announcement of a merger of Selecta Biosciences Inc. with "old" Cartesian, along with a proposed \$60.2 million private financing.

According to the suit, immediately before the merger, Selecta had a \$148.5 million equity market capitalization. Upon closing, former Selecta stockholders "woke up" to a situation in which they were minority shareholders of an "entirely new business," the complaint said, comprising Old Cartesian and a pre-merger shell, along with contingent rights to proceeds from legacy assets.

The proposed class complaint, filed by stockholder Justin Sloan, alleged that the company's pre-announcement equity value varied by millions from pre- and post-merger equity totals reported at closing, and points to "a litany" of material information shortcomings.

"While the company was valued by the public market at \$148.5 million immediately prior to the merger, the proxy fails to specifically explain the difference between the public market valuation and the final valuation," which implied valuations of \$62.6 million for the company and \$170 million for Old Cartesian.

While the difference was, "presumably," the value of contingent value rights, "the proxy fails to disclose not only how the CVRs were valued, but who valued them," the complaint said.

The merger was structured as a stock-for-stock transaction, with all of Cartesian's outstanding equity exchanged based on a fixed ratio for 6.7 million shares of Selecta common stock and 380,000 shares of non-voting Selecta convertible preferred stock.

At the time of the merger, Selecta's work and assets had thinned to a focus on a single gout drug intended for submission to the Food and Drug Administration this year.

Cartesian brought to the deal a broader array of prospects, including therapies for myasthenia gravis, a chronic and potentially catastrophic autoimmune disorder that affects communication between nerves and muscles.

The complaint cited missing details regarding the difference between the company's public market valuation and final valuation and the basis for the figures as well as information regarding pricing of contingent value rights and fairness determinations for both the merger and the issuance of the CVRs.

According to the suit, directors breached their fiduciary duties by failing to fully disclose information needed by Cartesian stockholders before voting on the share issues.

In addition to enjoining a stockholder vote on the share issuance, the complaint seeks certification of the proposed class and an award of compensatory damages, as well as an award covering the costs and fees incurred for the litigation.

Cartesian Therapeutics did not immediately respond to a request for comment.

Justin Sloan and the proposed class are represented by Blake A. Bennett of Cooch and Taylor PA, Abbott Cooper of Abbott Cooper PLLC and D. Seamus Kaskela of Kaskela Law LLC.

Counsel information for the directors and Cartesian Therapeutics was not immediately available.

The case is Justin Sloan, et al., v. Timothy Barabe, et al., case number 2024-0105, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

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Amazon Hit With Class Action Over 'Rigged' Buying Features

By **Henrik Nilsson**

Law360 (February 8, 2024, 11:35 PM EST) -- Two consumers hit Amazon with a proposed class action Thursday in Washington federal court, alleging "hundreds of millions" of customers have overpaid for items because of Amazon rigging algorithms to boost sales of its own retail business and third-party sellers participating in its fulfillment service.

California customers Jeffrey Taylor and Robert Selway said instead of displaying the cheapest product, Amazon's so-called "Buy Box," which contains the "buy now" and "add to cart" buttons, has been set up to favor first-party retail offers or third-party sellers who participate in the company's logistics service Fulfillment By Amazon.

Third-party sellers pay "hefty fees" to participate in the service, which allows them "to store their inventory, pack their products, ship orders, handle returns, and communicate with customers," according to the complaint. Taylor and Selway allege violations of the Washington Consumer Protection Act.

"Since at least 2016, Amazon's Buy Box algorithm has been rigged in favor of offers for which Amazon fulfills and delivers the product, either because Amazon itself is the seller, or the seller is a third party that participates in [Fulfillment By Amazon]," Taylor and Selway allege. "The result is that the Buy Box frequently features offers that are more expensive than other offers for the same product on Amazon's marketplace."

Taylor and Selway seek to represent a class of potentially "hundreds of millions" of customers in the United States who purchased from the Buy Box on or after Jan. 1, 2016.

Approximately 126 million people visit Amazon on a mobile device each month, and more than 42 million access the site on a computer, Taylor and Selway claim. They note that the "chances that any class member was unharmed by one or more purchases is virtually non-existent."

For example, an FBA seller might offer a toy construction set for \$55, and Amazon will display that vendor instead of a seller that ships its own orders but sells the same toy for \$51, according to the complaint.

Citing numbers from an antitrust suit filed by the Federal Trade Commission and 17 other states targeting Amazon's practices, Taylor and Selway said that 98% of the time, consumers pick the offer displayed in the Buy Box because of the one-click convenience of the "buy now" feature.

But even if customers want to explore other options, Taylor and Selway allege that Amazon steers shoppers away from other offers by requiring them to click on a link and then scroll through a list to see other sellers on Amazon.

"The result is that consumers routinely overpay for items that are available at lower prices from other sellers on Amazon — not because consumers don't care about price, or because they're making informed purchasing decisions, but because Amazon has chosen to display the offers for which it will earn the highest fees," according to the complaint.

Only a handful of people within Amazon understand how the algorithm works, Taylor and Selway claim, saying, "Third-party sellers have no idea how they are being scored by Amazon's secret

formula, and consumers are even more in the dark."

European enforcers have also sought to rein in Amazon's practice. The European Commission settled with the company in December 2022, and Amazon agreed to address concerns related to the algorithm and data misuse investigations, according to the complaint.

However, as recently as November 2023, European regulators required Amazon to remedy the Buy Box bias again, Taylor and Selway said.

"Plaintiffs and class members have been harmed by Amazon's deception," according to the complaint. "Through willfully deceptive practices Amazon tricks consumers into paying more for goods on its site by placing more expensive offers in the Buy Box when Amazon is the logistics provider."

Thursday's suit is the latest in a series of complaints lodged against Amazon over its practices.

The FTC, joined by the attorneys general of 17 states, **filed suit** in September, taking issue with practices they say prevent third-party sellers from selling products cheaper on other platforms by punishing sellers through degraded search results on Amazon. For example, Amazon levies sanctions on sellers found to be offering discounts on other platforms, including removing them from the Buy Box at the top of the page and burying them far down in results, according to the FTC suit.

Similarly, the company has **faced scrutiny** in the United Kingdom, including a **suit filed** by two customers alleging Amazon customers suffered substantial losses because of the way Amazon selects which products are displayed in its Buy Box service.

The law firm representing the plaintiffs in the United Kingdom, Hagens Berman Sobol Shapiro LLP, is also behind Thursday's suit.

"This is our 7th class action in the U.S. challenging Amazon's business practices either under competition or consumer laws, and we were just appointed to lead a competition case in the U.K.," Steve Berman of Hagens Berman Sobol Shapiro told Law360 in an email Thursday. "The more we study Amazon the more unlawful conduct we uncover."

Representatives for Amazon did not immediately respond to requests for comment.

Taylor and Selway are represented by Steve W. Berman, Barbara Mahoney and Meredith S. Simons of Hagens Berman Sobol Shapiro LLP.

Counsel information for Amazon was not immediately available Thursday.

The case is Jeffrey Taylor et al. v. Amazon.com Inc., case number 2:24-cv-00169, in the U.S. District Court for the Western District of Washington at Seattle.

--Additional reporting by Matthew Perlman, Jared Foretek and Eddie Beaver. Editing by Jay Jackson Jr.



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Exxon Told Climate Proposal Suit Threatens Investor Rights

By **Katryna Perera**

Law360 (February 8, 2024, 8:20 PM EST) -- The Interfaith Center on Corporate Responsibility is urging Exxon to abandon a lawsuit launched against two activist investors who tried to push for a shareholder vote on a climate proposal that has since been withdrawn.

The ICCR, a coalition of over 300 institutional investors that advocates for corporate and social responsibility, sent a letter Wednesday to ExxonMobil Corp.'s board of directors, calling the suit "costly," "unnecessary" and a "serious threat to shareholder rights."

Exxon sued investment firm Arjuna Capital and Netherlands-based climate change advocacy group Follow This last month after the organizations tried to push for a vote on a climate proposal at the company's annual shareholder meeting in May. The proposal called on the company to speed up the current pace of its emissions reduction targets.

Arjuna and Follow This **withdrew** the proposal last week, but Exxon has refused to back down from the suit.

On Monday, the company urged a Texas federal court **to rule** on the applicability of two exclusions to the now-withdrawn proposal: the "ordinary business exclusion," which bars proposals relating to a company's ordinary business operations, and an exclusion barring proposals that substantially duplicate other proposals.

Exxon argued that even though the proposal has been withdrawn, Arjuna and Follow This did not concede that the proposal properly falls under either of those two exclusions.

"Ultimately, their withdrawal of the 2024 proposal does not provide ExxonMobil complete relief this year, and their promise not to resubmit the 2024 proposal in the future is meaningless because ExxonMobil has no assurance that defendants will not submit a slightly modified but substantively identical proposal," Exxon said.

In its Wednesday letter, ICCR said the continuation of the suit "sends a clear message that the company is seeking to shut down any debate by its shareholders on actions needed to address climate risk."

The ICCR also said the suit undermines the U.S. Securities and Exchange Commission's authority and established "time-honored" procedures to deal with shareholder proposals.

"If Exxon believes this particular proposal addressed substantially the same subject matter as one voted on in the past two years that did not obtain sufficient support to be refiled, it can choose to argue this to [SEC staff]," the letter states. "If the staff is convinced by Exxon's argument, Exxon could omit the proposal, obviating the need for legal action."

In taking this issue to the courts, the ICCR said Exxon is undermining a longstanding process that has proven beneficial to investors and companies.

"Absent the SEC staff as arbiter, investors would be forced to appeal to the courts to protect their rights, ushering in a new era of onerous and costly litigation," the letter states.

Others have also viewed Exxon's suit as an **indirect attack** on the SEC's increasingly permissive attitude toward shareholder proposals. Traditionally, publicly traded companies ask the SEC for permission to exclude shareholder proposals from the proxy statements that lay out the issues shareholders will be voting on.

But the agency has recently rejected corporate requests to exclude proposals on hot-button topics like climate change and abortion over the objection of business groups and conservative activists, one of which has complained to the Fifth Circuit that the agency is favoring left-leaning proposals.

However, many of those same proposals have **proven unpopular** with shareholders and have been voted down.

Exxon has argued Arjuna and Follow This' proposal deals with the company's "ordinary business operations" and attempts to "micromanage" the company.

The ICCR pushed back against this argument Wednesday: "It is well-established science that climate change poses a serious threat to companies, our economy and the future well-being of the planet, which [SEC staff] has long recognized takes proposals on the issue out of the realm of ordinary business."

In a statement, ICCR CEO Josh Zinner said Exxon's lawsuit is an attempted "end-run" around the SEC because it knows the commission will likely agree the proposal is legitimate given the systemic risk of climate change.

"This aggressive action [by Exxon] is nothing less than a 'SLAPP suit' intended to intimidate perceived opponents and silence dissenting points of view," Zinner said, referring to so-called strategic lawsuits against public participation. "The disregard Exxon shows for both the urgency of the climate crisis and the legitimate concerns of its shareholders is breathtaking."

Emily Mir, a spokesperson for Exxon, told Law360 Thursday that the company shares the same concerns as ICCR about shareholder rights, which is why it wants clarity "on a process that has become ripe for abuse."

"Proposals like this are obviously not in investors' best interests. We hope our suit motivates the SEC to go back to applying the proxy rules as they were written, not as they've been interpreting them over the last few years," Mir said.

Representatives for the SEC, Arjun and Follow This did not immediately respond to requests for comment Thursday.

Arjuna Capital is represented by Veronica Renzi and Matthew Miller of Foley Hoag LLP.

Follow This is represented by Pete Trosclair of Lovins Trosclair PLLC.

Exxon is represented by Mark Rasmussen, Jonathan Guynn, Noel Francisco, Brett Shumate and Megan Lacy Owen of Jones Day and Gregg Costa and David Woodcock of Gibson Dunn & Crutcher LLP.

The case is ExxonMobil Corp. v. Arjuna Capital LLC et al., case number 4:24-cv-00069, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Sarah Jarvis and Jessica Corso. Editing by Caitlin Wolper.



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Investor Denies Making Yacht Buy To Hide Truth Social Gains

By **Pete Brush**

Law360, New York (February 8, 2024, 5:12 PM EST) -- A Florida venture capitalist on Thursday denied laundering insider-trading proceeds via the purchase of a \$14.7 million yacht, after prosecutors alleged in Manhattan federal court that he illegally profited from a secret plan to take Donald Trump's Truth Social company public.

Michael Shvartsman, the owner of Miami-based Rocket One Capital, renewed his not guilty plea before U.S. District Judge Lewis J. Liman following a Tuesday move by the Manhattan U.S. Attorney's Office to add money laundering counts against him to a 2023 **insider trading indictment**.

"How do you plead to the superseding indictment?" Judge Liman asked.

"Absolutely not guilty," Shvartsman said.

Also charged with insider trading are Shvartsman's brother Gerald and Rocket One chief investment officer Bruce Garelick. They, too, re-entered not guilty pleas on Thursday.

The trio profited by about \$22 million trading on Digital World Acquisition Corp., a special-purpose acquisition company – or SPAC – whose shares surged in October 2021 on news that it planned to take public former President Donald Trump's social media platform Truth Social, prosecutors alleged last year.

Trump is not charged in the case, which appears to have little direct connection to the former president. Truth Social parent Trump Media & Technology Group has said it is cooperating with investigators.

The superseder added charges accusing Michael Shvartsman of laundering some \$20 million of those proceeds. He allegedly used a large chunk of that money, \$14.7 million, to buy a luxury yacht named "Provocateur."

After Thursday's arraignments Garelick, whose legal team is being funded by Michael Shvartsman's business, told the court during a so-called Curcio hearing that he was waiving any potential conflict that could arise from that arrangement.

Asked by Judge Liman if he understood that there is a "heightened risk" that his lawyers could make decisions on trial strategy or a potential pretrial disposition with another party's interests in mind as a result, Garelick said he understands.

"I'm familiar with those intricacies," Garelick said. "I understand that. I have faith in my attorneys that represent me that they also understand these conflicts."

The soup-to-nuts hearing, which extended from mid-morning into mid-afternoon, also included testimony from two law enforcement agents as the court weighed an allegation by Garelick's lawyers that their client was "tricked" by a customs agent at JFK Airport on New Year's Eve 2021 into giving his mobile phone password after he and his girlfriend had arrived on a JetBlue flight from Cancun, Mexico.

Garelick alleges that he willingly provided that information after being told by a customs agent that

he was subject to a "routine" law enforcement search, when, unbeknownst to him, the FBI intended to search the device in its insider trading investigation.

Judge Liman said in the afternoon that he would issue findings on that dispute after a round of post-testimony briefing to last into late February.

The judge heard argument on a raft of additional defense motions, including an allegation by Michael Shvartsman that the government improperly implanted an unnamed "informant" in the defendant's business dealings to make surreptitious recordings and help prosecutors investigate. Prosecutors say their investigation was conducted properly.

Shvartsman's lawyer, Tai Park, also said in court that the case includes an unnamed cooperating witness, said to be a lawyer from the United Kingdom.

Park additionally told the court that he might move to sever the money-laundering charges, which he characterized as "extraordinarily dangerous" for his client.

As a final matter, Judge Liman put off trial by two weeks, setting jury selection for April 29 in light of the superseding indictment and potential follow-on motions.

"There are new charges in the case, and it's not an unreasonable request," the judge said.

Michael Shvartsman is represented by Tai Park of Tai Park PLLC.

Gerald Shvartsman is represented by Roland Riopelle of Sercarz & Riopelle LLP.

Garelick is represented by Alexandra Shapiro, Jonathan Bach, Alice Buttrick and Julian Brod of Shapiro Arato Bach LLP.

The case is USA v. Shvartsman et al., case number 1:23-cr-00307, in the U.S. District Court for the Southern District of New York.

--Editing by Peter Rozovsky.



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What New Calif. Strike Force Means For White Collar Crimes

By **Brian Michael, William Frentzen and Emani Oakley** (February 8, 2024, 3:48 PM EST)

U.S. Attorney for the Central District of California Martin Estrada announced the formation of the Corporate and Securities Fraud Strike Force, a new section designed to "expand and prioritize complex corporate and securities fraud investigations" on Oct. 4, 2023.[1]

The strike force will prioritize criminal abuses by company insiders, corporate executives and traders, and matters that affect the U.S. financial system and trading markets.

More specifically, strike force members will address accounting fraud, insider trading and criminal violations of the Bank Secrecy Act, which is designed to combat money laundering and tax evasion.

Estrada noted that the strike force will focus its efforts on "uncovering and punishing corporate malfeasance" and send a signal to corporate criminals that their crimes will not be tolerated by his office.

The new section appears to be modeled on the Northern District of California Strike Force formed in 2019.

Much like the Northern District of California Strike Force, the new Central District Strike Force appears likely to implement additional tools like wiretaps, search warrants, criminal complaints, and undercover and source operations that can produce inculpatory evidence more quickly than a grand jury investigation, accelerate arrests and the commencement of court proceedings, and help the strike force prosecute white collar crimes more swiftly and aggressively.

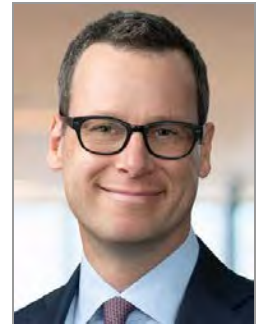
This could result in an uptick in the cases brought in the Central District as well as cause the cases to move much faster through pretrial proceedings and to resolution or trial.

If the strike force follows the path of its Northern District counterpart, then it is likely to utilize the resources frequently used in organized crime and drug prosecutions, which is not surprising given Estrada's past success in prosecuting these types of cases when he was a line federal prosecutor in the Central District.

The Northern District of California Strike Force's formation has led to a higher rate and number of white collar prosecutions compared to prior years.

The defendants ranged from directors and chief executives to hackers and doctors, and many of the investigations were conducted with the assistance of the U.S. Securities and Exchange Commission.

These cases have included charges of wire fraud,[2] bank fraud,[3] securities fraud,[4] theft of trade secrets,[5] lying to investigators,[6] tampering with witnesses,[7] bribery,[8] money laundering and unlicensed wholesale distribution of prescription drugs.[9]



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The Northern District Strike Force has successfully secured multiple convictions with prison sentences from 12 months up to as long as 12 years.[10]

Notably, the Northern District Strike Force prosecuted 30 defendants for participating in a scheme in which Amity Home Health paid kickbacks to marketers and medical professionals in exchange for patient certification or referral for home health or hospice services involving \$115 million in Medicare billings.[11]

This case was the largest cash-for-patients criminal scheme in the Northern District.[12] Five defendants have already been sentenced, and defendant Henry Geoffrey Watson is currently awaiting a sentencing hearing on Feb. 28.[13]

Given its similarities to its Northern District counterpart, the district's financial opportunities, diverse types of industry and location in the second-highest populated metro area in the country,[14] the new Central District Strike Force would be well suited, and appears poised, to pursue similar cases.

Brett A. Sagel, the longtime Central District Assistant U.S. attorney who sits in the Santa Ana office in Orange County, will lead the new strike force. Prior to joining the U.S. Attorney's Office, Sagel also served in the U.S. Department of Justice's Criminal Tax Division.

With extensive experience handling white collar cases during his long government career, Sagel has prosecuted numerous embezzlement, tax fraud and federal wire fraud cases.

One of Sagel's notable prior cases, *United States v. Avenatti* in the U.S. Court of Appeals for the Second Circuit in August 2023, was the successful prosecution of former plaintiffs lawyer — and short-lived presidential candidate — Michael Avenatti, who was convicted of wire and tax fraud related to his embezzlement of \$7.6 million from his clients and sentenced to 14 years in federal prison.[15] The case received extensive media coverage.

More recently, Sagel is leading the prosecution of Jorge Armando Contreras, the former senior director of fiscal services at an Orange County public school district.[16]

The criminal complaint alleges that Contreras embezzled more than \$14 million from the district for seven years by making unauthorized payments and using the illicitly obtained funds for personal expenses, ranging from financing a house to buying luxury items. Contreras has pled not guilty to all charges.[17]

Sagel also recently secured a guilty plea in a case against Chung Ku Sin, the owner of three auto-repair businesses, for criminal tax fraud for failing to report nearly \$3 million in income to the Internal Revenue Service over a seven-year period.[18]

The strike force is also comprised of other experienced prosecutors, including Special Assistant U.S. Attorney Ryan G. Adams and Assistant U.S. Attorney Alexander B. Schwab. Adams recently obtained a conviction against Jacques Poujade, the owner of a real estate finance business, for one count of securities fraud related to fraudulently obtaining nearly \$6.2 million raised from investors.[19]

Last year, Schwab secured a conviction for securities fraud and a statutory maximum 20-year sentence against Zachary Horwitz for orchestrating the largest-ever Hollywood Ponzi scheme, fraudulently raising more than \$650 million over more than five years from investors with bogus claims that investor money would be used to acquire licensing rights to films that HBO and Netflix purportedly had agreed to distribute abroad.[20]

Schwab recently secured an indictment of three counts of engaging in monetary transactions in property derived from specified unlawful activity, one count of tax evasion and one count of obstruction of justice against Paulinus Iheanacho Okoronkwo, a lawyer who allegedly received a \$2.1 million bribe for favorable drilling rights while working as an officer for Nigerian National Petroleum Corp., a state-owned oil company.[21]

The strike force will supplement the existing Major Frauds Section in the Central District of California, which is tasked with prosecuting various forms of fraud, embezzlement, stock manipulation, and

insider trading. The strike force will include the IRS Criminal Investigation team and the FBI and, given the strike force's mission to combat securities fraud, there is a high likelihood of future partnership with the SEC as well.

It is typical for U.S. attorney's offices and the SEC to engage in parallel proceedings in appropriate cases. Centralizing securities fraud into a specific unit may lead to a closer bond between that unit and the SEC in working together.

With the creation of the strike force, Estrada is sending a clear message that there will be an increase in criminal investigations and stringent enforcement in the future against fraud and corporate crime in the Central District of California.

This is consistent with other actions taken by Estrada signaling his interest in pushing for more aggressive investigations and prosecutions in the Central District, including his naming of Mack Jenkins as criminal chief. Jenkins is a former narcotics prosecutor with significant success bringing racketeering cases.

More recently, Jenkins was named as the chief of the Public Corruption and Civil Rights Section, the lead prosecutor in the highly successful and wide-ranging corruption prosecution of former Los Angeles City Councilmember José Huizar and numerous other public officials.

It will be interesting to observe in the coming year if the new strike force delivers similar success in a broad array of white-collar matters.

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[1] <https://www.justice.gov/usao-cdca/pr/united-states-attorney-martin-estrada-launches-corporate-and-securities-fraud-strike>.

[2] 18 U.S.C. § 1343.

[3] 18 U.S.C. § 1344.

[4] 15 U.S.C. § 78j(b).

[5] 18 U.S.C. § 1832.

[6] 18 U.S.C. § 1001.

[7] 18 U.S.C. § 1512(b)(3).

[8] 18 U.S.C. § 666(a)(2).

[9] 21 U.S.C. §§ 331(t), 333(b)(1)(D), 353(e)(1).

[10] <https://www.justice.gov/usao-ndca/united-states-v-lewis-wallach>.

[11] <https://www.justice.gov/usao-ndca/pr/bay-area-s-largest-home-health-care-agency-and-28-health-care-industry-workers-charged>.

[12] Id.

[13] <https://www.justice.gov/usao-ndca/pr/bay-area-doctor-convicted-health-care-fraud-and-kickback-scheme-referrals-medicare>.

[14] <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html>.

[15] <https://www.justice.gov/usao-cdca/pr/lawyer-michael-avenatti-sentenced-14-years-federal-prison-stealing-millions-dollars>.

[16] <https://www.justice.gov/usao-cdca/pr/former-orange-county-education-official-arrested-complaint-alleging-he-embezzled-more>.

[17] USA v. Contreras, No. 8:23-cr-00154-FWS-1 (C.D. Cal Nov. 7, 2023) (ECF No. 23).

[18] <https://www.justice.gov/usao-cdca/pr/owner-orange-county-auto-repair-businesses-pleads-guilty-filing-false-tax-returns>.

[19] <https://www.justice.gov/usao-cdca/pr/orange-county-businessman-sentenced-more-5-years-federal-prison-scamming-investors-out>.

[20] <https://www.justice.gov/usao-cdca/pr/la-man-sentenced-20-years-federal-prison-650-million-ponzi-scheme-falsely-claimed>.

[21] <https://www.justice.gov/usao-cdca/pr/koreatown-lawyer-charged-money-laundering-tax-evasion-and-obstructing-probe-21-million>.

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