

Samsung Gets Some Claims Trimmed in 'Black Stainless Steel' Suit

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Samsung Electronics America Inc. successfully challenged several claims in a class action alleging it violated various state consumer laws by advertising that its appliances had a “black stainless steel” finish, when the color was actually a thin plastic coat that peeled and flaked off—but most of the claims may proceed.

The plaintiffs brought their claims under Texas, Nevada, Massachusetts, California, New York, Florida, and South Carolina law, and a common law unjust enrichment claim. Samsung moved to dismiss the suit.

Samsung allegedly misrepresented its product in the name, itself, Judge Keith P. Ellison of the US District Court for the Southern District of Texas said. That’s in contrast to defendants intentionally misrepresenting the efficacy of a product, Ellison said, citing a 2023 Fifth Circuit ruling in *Elson v. Black*, which Samsung relied on for its defense

“The alleged misrepresentation or nondisclosure is embedded in the name of the finish: black stainless steel,” Ellison said, “which every Plaintiff at the very least alleges they encountered when purchasing their appliances and paying a premium for that specific finish.”

The plaintiffs alleged fraud under state consumer protection laws, which all share core elements, including misrepresentation or omission; a duty to disclose; materiality; and reliance or causation, Ellison said. To prove reliance or causation under Federal Rule of Civil Procedure 9(b), a plaintiff “must state with particularity the circumstances constituting fraud or mistake,” he noted.

Samsung said that the plaintiffs’ complaint wasn’t sufficiently specific. “Plaintiffs’ pleadings do not explicitly state that ‘X Plaintiff saw X misrepresentation/omission on X date on X website,’” Ellison said. But they “do provide their dates of purchase and include citations to

and screenshots and quotes of Defendant's alleged misrepresentation on various websites," he said. They sufficiently put Samsung "on notice of the nature of the fraud claim and demonstrate that they have a factual basis for their allegations," he said.

The plaintiffs also sufficiently alleged that Samsung had a duty to disclose the plastic coating under California, Texas, New York, and Florida law, Ellison said. But South Carolina law required a fiduciary relationship between Samsung and the plaintiff, Howard Roscoe, and the complaint didn't sufficiently plead one, he said, dismissing Roscoe's fraud-based omission claim.

The fraud-based omission claim by Nevada plaintiff, Kimberly Einiger, was also dismissed. Nevada law doesn't recognize a duty to disclose in a "straightforward vendor-vendee relationship," Ellison said.

But plaintiff Anastasia Danilova satisfied Massachusetts law by pleading Samsung had a duty to exercise reasonable care to disclose that the black material wasn't steel, Ellison said.

Ellison also said that Roscoe's, Einiger's, and Danilova's claims based on affirmative misrepresentations by Samsung may proceed.

The plaintiffs also adequately pleaded their claims for unjust enrichment and unfair practices under California, Florida, Massachusetts, and South Carolina law, Ellison said.

Ellison rejected Samsung's argument that some of the plaintiffs' unjust enrichment claims under California, Texas, and Massachusetts law were time-barred. It's "plausible that the fact that Plaintiffs' appliances were coated in black plastic and not made of black stainless steel was unlikely to be discovered within the prescribed limitations period, despite Plaintiffs' due diligence," he said.

Robbins Geller Rudman & Dowd LLP and Greenwald Davidson Radbil PLLC represented the plaintiffs. Arnold & Porter Kaye Scholer LLP represented Samsung.

The case is *Lee v. Samsung Elecs. Am., Inc.*, 2024 BL 46737, S.D. Tex., No. 4:21-CV-01321, 2/13/24.

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Ex-Maxim Shareholder Urges Second Look at Analog Deal Challenge

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- Delaware Chancery Court sided with Maxim, Analog boards
- Ex-shareholder challenged Maxim's \$21 billion sale to Analog

By Jennifer Kay

(Bloomberg Law) --

A former Maxim Integrated Products Inc. shareholder asked Delaware's highest court on Wednesday to revive a challenge to the circuit maker's \$21 billion sale to Analog Devices Inc.

Court of Chancery Vice Chancellor Morgan Zurn, in ruling last May, granted a motion to dismiss the ex-shareholder's lawsuit alleging Maxim's sale to Analog, a semiconductor company, wrongly suspended \$500 million in dividends to pressure investors into quickly approving the deal.

Nothing in the information available to Maxim's stockholders about the deal properly disclosed the relationship between the dividend suspensions and potential post-acquisition tax liability for income from Maxim's offshore subsidiaries, said Ryan's attorney, Christopher Loizides of Loizides PA, the attorney representing former Maxim shareholder Walter Ryan Jr. and Ryan Asset Management LLC.

A "reasonable shareholder" would want to know about the link between the tax risk and the suspension before a shareholder vote, Loizides said.

"What I find troubling here is that the board went to such great lengths to keep the information from shareholders," he said during oral argument before the Delaware Supreme Court. "Even the internal board communications put into the complaint show the board wanted to keep a lid on this."

But Loizides appeared to struggle to answer some questions from Justice Abigail LeGrow, who asked him to clarify his arguments regarding actions Tunc Doluca took as Maxim's CEO, as opposed to Doluca's actions in his capacity as a Maxim board director.

"I think at this point, our view is that Mr. Doluca, as a board member, isn't really held to any different standard than the other board members because what we're talking about essentially is a breach of the duty of loyalty," Loizides replied.

“Are you then dropping your claim as to Mr. Doluca in his capacity as CEO?” LeGrow asked him.

Loizides said he wasn’t authorized to waive any claim regarding Doluca, and Ryan’s arguments focused on the board directors’ violations of their duty of disclosure.

‘No Material Misstatements’

Rachelle Silverberg of Wachtell, Lipton, Rosen & Katz, representing Maxim and Analog board members, argued the Chancery Court’s opinion should be affirmed.

There was no reason to include additional information such as “the how and why of the dividend suspension” in the documents cited by Ryan, she said.

Zurn correctly found that there were “no material misstatements or omissions,” she said.

The high court also should affirm Zurn’s dismissal of disclosure claims against Doluca because there’s no “legally significant connection” between the dividend suspension and the potential tax issue, and Ryan “had not pled that Doluca was grossly negligent in failing to disclose any supposed connection,” Silverberg said.

Ryan is represented by Loizides PA and Krislov & Associates Ltd. The Maxim and Analog board members are represented by Ross Aronstam & Moritz LLP and Wachtell, Lipton, Rosen & Katz.

The case is *Ryan v. Accardi*, Del., No. 224, 2023, oral argument 2/14/24.

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Karuna Draws Suit Over \$14 Billion Bristol Meyers Squibb Buyout

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Karuna Therapeutics Inc. and its directors allegedly filed an incomplete proxy statement describing Bristol Meyers Squibb's \$14 billion proposed buyout of the company, says a shareholder suit seeking to block the merger.

The schizophrenia treatment drug-maker's shareholders would receive \$330 for each of their shares, but Karuna didn't disclose key details including financial forecasts, potential conflicts of interest, or the data that adviser Goldman Sachs & Co LLC used to assess the deal's fairness, according to the complaint filed Tuesday in US District Court for the District of Delaware.

Shareholders can't cast informed votes to approve or deny the buyout based on the Feb. 5 proxy statement, which is missing Karuna's forecasted profit and cash flow metrics, as well as the transactions that Goldman Sachs compared to Bristol Meyers Squibb's offer, the complaint says.

The proxy also allegedly omits whether Karuna insiders discussed management retention with the acquiring pharma giant, or participation in the equity of the combined company once the deal closes. Shareholders are also unaware of the deal's background, since the proxy fails to detail another undisclosed party's interest and subsequent proposal to buy Karuna, according to the complaint.

The \$330 per share payment was 53% more than Karuna's closing price on Dec. 21, the day before the deal was announced. The transaction is expected to close in the first half of this year, according to a press release.

Shareholder Shannon Jenkins, alleging that the company and its directors violated the Securities Exchange Act, seeks a court order blocking the transaction until the omitted details are disclosed, or forcing its rescission and awarding damages if it closes. She also seeks legal fees, the complaint says.

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

Long Law LLC represents the plaintiff.

The case is Jenkins v. Karuna Therapeutics Inc. , D. Del., No. 1:24-cv-00197, complaint filed 2/13/24 .

Paratek's \$462 Million Novo-Gurnet Deal Hit With Legal Challenge

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0111

By Mike Leonard

(Bloomberg Law) --

Paratek Pharmaceuticals Inc. ex-investors are challenging its \$462 million sale to Novo Holdings A/S and Gurnet Point Capital LLC, saying its leaders took a lower price to increase incentive payments for themselves.

The lawsuit, made public Tuesday, targets five former Paratek board members, including its current CEO. They spurned higher offers and delayed the transaction to maximize payments tied to certain performance goals, sacrificing at least \$85 million in overall deal value, according to the proposed class action filed in Delaware's Chancery Court.

"Once the board decided to sell the company, its members had a duty to act as honest auctioneers," the suit says. "Defendants misused their outsized influence on the sale process to select when and to whom the company was sold, regardless of the better offers on the table."

The sale—for \$2.15 a share in cash, plus \$0.85 a share in contingent value rights—closed in September. Paratek's top executives rejected bids as high as \$4.50 a share in 2021 and 2022, when their payouts would have been smaller, engineering a deal only after the company's bargaining position had weakened, according to the complaint.

A Paratek representative didn't immediately respond to a request for comment Wednesday. Novo and Gurnet aren't named as defendants.

The lawsuit was filed by eight ex-investors that say they were among Paratek's largest before the sale, including a Texas compounding pharmacy and several Highland Capital Partners affiliates. The former shareholders say they owned nearly 12% of the drug company.

'Machinations'

The incentive payments that drove the deal were tied to revenue targets for Nuzyra, an antibiotic developed to treat drug-resistant bacteria responsible for certain skin infections and strains of pneumonia, according to the shareholder complaint. The payments would be

accelerated by any change in control based partly on the extent to which each target had been hit, the suit says.

Paratek CEO Evan Loh and executive chairman Michael Bigham doubled their incentive payments—from around \$5 million each to more than \$10 million—by waiting to arrange the sale until the Nuzyra milestones were a virtual lock, according to the complaint. The other board members, who received \$3.3 million to \$5.8 million, allegedly saw their payouts rise by a similar percentage.

But the company's public investors "were deprived by defendants' machinations of value-maximizing auction that would have generated the best available price for their Paratek stock," the lawsuit says. "Moreover, the extent to which defendants' personal financial interests dictated the sale process was not adequately disclosed."

The complaint was originally filed under seal Feb. 8 under court rules that give the parties five days to black out confidential information.

Other investors previously sued Paratek for internal files under a Delaware law that gives shareholders broad access to corporate records if they credibly suspect self-dealing. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The investors are represented by Heyman Enerio Gattuso & Hirzel LLP and Rolnick Kramer Sadighi LLP. The former board members haven't yet made a court appearance.

The case is *DrugCrafters LP v. Loh*, Del. Ch., No. 2024-0111, complaint filed 2/13/24.

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Feb. 14, 2024, 11:31AM PST
FibroGen's \$28.5 Million Deal With Investors Gets First Approval

- Investors alleged drugmaker changed clinical trial data
- Court cites risk of more litigation in giving green light

By Martina Barash

(Bloomberg Law) --

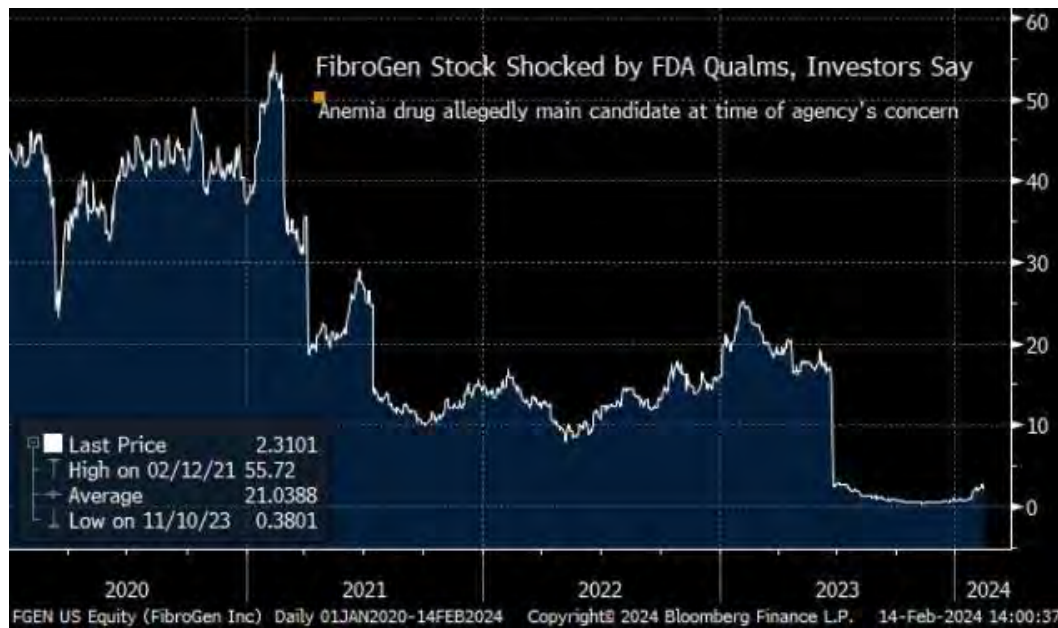
FibroGen Inc.'s agreement to pay a class of shareholders \$28.5 million to settle a stock-drop suit over an anemia drug merits preliminary approval, a federal court ruled.

The funding for the financially strapped drugmaker's settlement primarily comes from directors' and officers' insurance, according to the US District Court for the Northern District of California's order Tuesday. That factor weighs in favor of the settlement because the insurance pays FibroGen's legal fees, leaving less for the class as litigation proceeds, according to the order, which was prepared in December by class counsel and signed by Judge Edward M. Chen.

The case presents "a particularly acute risk that Plaintiffs will not be able to recover at all if litigation continues," the order said. FibroGen doesn't have another major drug in development, it said.

The investors said in their complaint that FibroGen and top executives misrepresented the safety and efficacy of its drug candidate Roxadustat and manipulated clinical trial data. As Food and Drug Administration approval came into doubt for the drug, intended to treat anemia in patients with kidney disease, the stock price fell about 32% on March 1, 2021, they said.

"FibroGen's share price was cut virtually in half in just two trading days" in April 2021 after the FDA cited "post-hoc changes" to data, according to the complaint. It closed at \$18.81 on April 8, 2021. And after a unanimous FDA advisory committee vote against the drug in July 2021, the stock price lost another 42%, they said.



The settlement fund would equal about 3.4% to 6.4% of the maximum damages, according to Chen's order. That range "exceeds the median percentage of similar damages ranges for class action settlements in 2022, which is 1.7% to 4.3%," the order said.

Chen certified a settlement class of those who acquired FibroGen securities, including options, from Dec. 20, 2018 through July 15, 2021, inclusive.

The European Union approved Roxadustat in August 2021, according to Bloomberg News.

The stock sank sharply again on June 26, 2023 after a different FibroGen drug missed its primary endpoint in a Phase 3 study, Bloomberg News reported. It rose 28% to close at \$1.20 on Jan. 29 following the company's announcement of a cancer drug study's completion.

Saxena White PA is lead counsel for the class. Cooley LLP represents FibroGen and the individual defendants.

The case is *In re FibroGen, Inc. Sec. Litig.*, 2024 BL 47345, N.D. Cal., No. 3:21-CV-02623, 2/13/24.

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Qihoo 360 Reaches \$29 Million Settlement in Relisting Plan Suit

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- Shareholders alleged Qihoo misled them about relisting
- Deal would end four-year litigation, revived once on appeal

Qihoo 360 Technology Co. Ltd. will pay \$29.8 million to settle shareholder allegations that the Chinese web company made misleading statements related to a transaction to take the company private.

The proposed settlement represents approximately 2.45% of the total damages sought by shareholders who sold Qihoo securities between Dec. 18, 2015 when a buyout to take the company private was announced and July 15, 2016 when it closed, according to a motion for preliminary approval of the deal filed in the US District Court for the Southern District of New York on Feb. 12.

Qihoo listed a spin-off of one of its company's units on the Shanghai Stock Exchange in 2018, despite assurances it had no such plans before going private in 2016, according to the shareholder class action. A consortium of Qihoo shareholders, including founder and CEO Zhou Hongyi, led the buyout.

Qihoo was previously listed on the New York Stock Exchange. The shareholder lawsuit was consolidated from a number of individual claims filed by former holders of the New York-traded company's American depository shares, alleging fraud.

Qihoo got a judge's approval to toss all the claims in 2020, but the Second Circuit revived them the following year. The appeals court found that the shareholders adequately alleged that Qihoo made material misstatements and omissions about its relisting plans ahead of a shareholder vote to take the company private.

The settlement will apply to shareholders who sold their Qihoo shares on the open market and didn't take a payout when the company was bought out. Other former members of the lawsuit, shareholders who tendered their shares in return for the payout, were dismissed from the class action in a separate motion after the appeal. The court said the excluded shareholders couldn't prove they suffered losses.

Pomerantz LLP and Labaton Keller Sucharow LLP represent the class. Latham & Watkins LLP, Orrick Herrington & Sutcliffe LLP and Dechert LLP represent Qihoo.

The case is Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co. Ltd. , S.D.N.Y., No. 1:19-cv-10067, motion filed 2/12/24 .

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Ex-VW Chief Sticks to 7-Year-Old Denial in Diesel Scandal

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Feb. 14, 2024, 2:39 AM PST

Karin Matussek

Bloomberg Editorial

- Former company leader testifies in German investor lawsuit
- Winterkorn's own criminal trial could start later this year

By Karin Matussek

(Bloomberg) --

For seven years, the German public hasn't seen much of former Volkswagen AG Chief Executive Officer Martin Winterkorn, aside from his occasional appearance at a home game for the Bayern München soccer team.

On Wednesday, the ex-VW head broke his silence in a court in the town of Braunschweig, speaking in public for the first time since 2017 about his role in one of the biggest corporate scandals in German history.

But just like seven years ago, he rejected any blame for a scam in which the company utilized a so-called defeat device to undermine carbon emission testing.

While his persona has "always been closely associated with the events surrounding the diesel scandal" this was "only true to a limited extent," Winterkorn told the court. "I wasn't involved in the development and use of the switch function," he insisted, referring to the name VW gave the device.

Winterkorn said he didn't know the device was implemented and later, when the US authorities were probing the issue, he didn't know they would react in such a harsh manner that required an immediate information of the markets. He assumed VW would promptly produce a legally and technically flawless solution to dispel the concerns. That's what his engineers told him, he said.

"Had everything been explained to me correctly, I wouldn't have hesitated to take the right steps," he said. "I would have traveled to the USA myself to negotiate with the authorities."

Winterkorn is testifying as part of a €9 billion (\$9.7 billion) investor suit over the diesel affair, which sparked global outrage and triggered his hasty departure from the company in September 2015. VW has now paid more than €30 billion in penalties and related costs because of the scandal.

In his last public appearance at a parliamentary inquiry into the scam, he already denied any responsibility.

The former CEO is the latest of the 86 witnesses testifying in the class action-style lawsuit. Ex-VW leaders Martin Diess and Michael Müller have already taken the stand. The suit was brought by investors claiming that VW took too long to inform them about misconduct in the diesel scandal, causing losses in the value of their securities.

While Diess and Müller were called on by VW to defend the company, both the carmaker and investors nominated Winterkorn as a witness for their respective cases. VW is trying to prove that company leadership had no early knowledge about the defeat device, and investors are trying to prove the opposite.

The 76-year-old's willingness to testify at all has come as a surprise as he still faces two indictments over the diesel scandal and could have therefore claimed a suspect's privilege to remain silent. Given these probes, Winterkorn told the judges in Wednesday that he won't say anything about events from July 27, 2015 until Sept. 23, 2015, the crucial time frame when Volkswagen was under pressure but the scam wasn't yet disclosed.

Along with four others, Winterkorn was charged in 2019 with fraud for allegedly having VW vehicles equipped with the deceptive software. While Winterkorn's charges were separated from the group due to a health issue that made him unfit to stand trial, that case has been ongoing since 2021, and no end is in sight.

The other indictment alleged that Winterkorn, Diess and VW chairman Hans Dieter Pötsch informed markets too late about the diesel-emission rigging, mirroring the investor allegation of market manipulation in the current civil suit. Diess and Pötsch agreed to settle the charges in 2020, and the criminal case against Winterkorn was dropped the following year on the grounds that prosecutors wanted to prioritize the fraud trial, which would potentially result in a much higher sentence.

That strategy must have changed recently, as the court, acting at the request of prosecutors, decided to revive the market-manipulation indictment a day after the Christmas holidays. A medical expert who examined Winterkorn concluded that the former CEO will be fit to stand trial by September. That's the soonest his criminal trial could begin, and the court could hear both charges at once.

Wednesday's investor suit is Deka Investment GmbH v. Volkswagen AG and Porsche Automobil Holding SE (3 Kap 1/16).

(Updates with Winterkorn testimony throughout)

--With assistance from Elisabeth Behrmann.

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United Airlines Says Greenwashing Suit Is Blocked by Federal Law

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United Airlines Inc. urged a federal court to dismiss a suit brought by a Maryland customer who claimed the company made misleading statements about its environmental initiatives.

The airline's statements about using sustainable fuel were misleading because biofuels only account for one million of the four billion gallons of fuel United uses each year, Alexander Zajac told the US District Court for the District of Maryland in November.

Moreover, biofuel may emit less carbon dioxide when it's burned, but its creation requires transportation, refining, and other emitting activities, said Zajac, who seeks to represent a class of United customers.

United told the court Feb. 12 that the lawsuit is preempted by the Airline Deregulation Act, which bars state law claims related to an airline's rates, routes, or services.

Zajac's claims fall into these categories because he said he wouldn't have paid higher prices for United tickets if he didn't believe in the promoted environmental benefits, United said.

Similarly, the claims also relate to the airline's services, the company said, because Zajac alleged that he and other customers chose to purchase United tickets based on the belief that the airline provided air transportation services in a sustainable way.

The complaint didn't provide factual support for his allegations of fraud and Maryland Consumer Protection Act violations, United said.

Zajac didn't include specific details describing what representations he saw, when or how he saw them, or how they misled him, the airline argued.

In addition, paying a premium price based on deception isn't a cognizable injury under the MCPA, United said.

The airline is asking the court to dismiss the case with prejudice.

Delta Air Lines Inc. also invoked the the Airline Deregulation Act when seeking to dismiss a proposed class case that claimed the company misrepresented it was carbon-neutral.

The plaintiff in that case said Delta based its assertions on its participation in carbon offsetting, which is when companies invest in green projects in exchange for credits, and that the offset market has "foundational issues."

Judge Paula Xinis will hear the United case.

Zajac is represented by Sheehan & Associates PC. United is represented by Budow & Noble PC and Riley Safer Holmes & Cancila LLP.

The case is Zajac v. United Airlines Inc. , D. Md., No. 8:23-cv-03145, motion filed 2/12/24 .

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Bill Lerach on Litigating Corporate Wrongdoing: "The System Is Set Up to Defeat Deterrence"

 [nakedcapitalism.com/2024/02/bill-lerach-on-litigating-corporate-wrongdoing-the-system-is-set-up-to-defeat-deterrence.html](https://www.nakedcapitalism.com/2024/02/bill-lerach-on-litigating-corporate-wrongdoing-the-system-is-set-up-to-defeat-deterrence.html)

By Yves Smith

February 15, 2024

We hope we aren't stepping on any toes in posting a very informative interview with the one-time scourge of Corporate America, Bill Lerach. As you'll see from the short bio below, Lerach was an enormously effective attorney until he was successfully prosecuted for sharing legal fees with some of the plaintiffs on his suits and disbarred after serving two years in prison¹ As the Financial Times recounted in 2018, Lerach has returned to pursuing financial fraud by setting up a consulting firm that regularly works with his wife, the formidable Michelle Ciccarelli Lerach and the team of lawyers at her firm. We've followed Lerach and her partner's tenacious efforts to recover on behalf of the Kentucky Retirement System for misrepresented low risk/high return hedge funds products sold by the likes of KKR, Blackstone, and PAAMCO. We've also discussed a series of suits out of Lerach's and her partners' firms seeking to recover for horrific corporate conduct of European behemoths like Bayer, Volkswagen, Credit Suisse and Deutsche Bank, (grossly oversimplifying the legal theories) using New York requirements they agreed to as a condition of listing their shares here to force them to live up to shareholder commitments in their home countries...which are very investor-favorable but effectively not enforceable there because reasons.

UC San Diego gives a bit more detail about his career:

For over 30 years William S. Lerach was one of the nation's leading securities lawyers, heading up the prosecution of hundreds of class actions which resulted in billions of dollars of recoveries for defrauded shareholders. He was involved in many of the largest and highest profile suits in recent years, including Enron, Dynegy, Qwest, WorldCom and AOLTW. He also pursued numerous high-profile human rights litigations, including suits for laborers in Saipan's garment factories, American WWII POWs forced to work in Japanese weapons factories, and victims of the European Holocaust. The \$7 billion recovery he obtained for the Enron stockholders is the largest stockholder recovery in U.S. history.

A major theme of this exchange is why corporate malfeasance is so deeply entrenched and why lawsuits at best provide a measure of recompense but don't represent enough of a threat to serve as a deterrent. It explains how not just corporate practices but also the posture of judges and the need for plaintiffs to get on with them also constrain private enforcement. One big constraint is the degree to which judges defer to corporate requests to keep records sealed, when exposing them could do enough deserved reputational damage to shake things up, and the willingness to protect CEOs from going on the stand.

I hope you read this informative talk in full.

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CORPORATE CRIME REPORTER

INTERVIEW WITH WILLIAM LERACH, LA JOLLA, CALIFORNIA

William Lerach was called the knee-capper of corporate America.

He sued the big names in corporate America – and few were immune from his class action securities litigation.

Over three decades of practice, he and his partners at the law firm Milberg Weiss recovered more than \$40 billion in fraud judgments for shareholders.

Then in 1995, corporate America organized to get Bill Lerach. They drafted and passed a bill through Congress called the Private Securities Litigation Reform Act (PSLRA). The insiders in Congress knew it as The Get Lerach Act.

We interviewed Lerach on January 22, 2024.

CCR: Give us William Lerach in a nutshell – where you grew up, went to school and your professional life.

LERACH: I went to public school in Pittsburgh, Pennsylvania. I grew up in an ordinary family. I was lucky to go to the University of Pittsburgh at a time where you didn't have to borrow money for college. I didn't do very well at the University of Pittsburgh, but I got into the law school. The law school let me in more as an act of grace. They gave me a scholarship and I did very well in law school. It is what I apparently wanted to do.

I then worked for five years at Reed Smith Shaw and McClay, a fantastic white shoe defense firm in Pittsburgh. I learned the craft and the trade. I did both corporate finance and litigation. And I was very well mentored.

But I did not like that environment and ultimately I met Mel Weiss, who was developing a new, aggressive and successful class action practice in New York City.

I was the youngest partner ever made at Reed Smith. And then I had the duty to go and tell them I was going to leave.

I went with Mel Weiss. Mel wanted me to go to New York. I wanted to go to California. I went to California. Nature took its course. Timing was everything. We were there when the high tech thing and modern securities litigation exploded. And we obviously had a long and successful adventure with that.

Along the way, because we became high profile and were Democrats, the Republicans insisted upon trying to constantly tort reform and cripple us, we became very active in politics. We gave a lot of money and did a lot of work to support progressive candidates. And frankly, we were just destroyed in that political fight. We did not have the money or the power to resist the combined forces of the accounting industry, the high tech executives, the banks and the Chamber of Commerce. And they ultimately, in my humble opinion, brought sufficient political power in Washington to cripple private litigation. That's the nutshell.

CCR: Literally minutes before I picked up the phone to interview you, I reached up to my bookshelf and pulled down this book titled – *Circle of Greed: the Spectacular Rise and Fall of the Lawyer Who Brought Corporate America to Its Knees* by Patrick Dillon and Carl Cannon (Broadway Books, 2010).

"He was the knee-capper of corporate America," they write. "For three decades, a fearless, abrasive and brilliant attorney named William S. Lerach sued the Who's Who of the Fortune 500 list. No one was immune – not Disney, Citibank, Hewlett-Packard, Apple Computer, R.J. Reynolds, Arthur Andersen, WorldCom or Enron – not Michael Milken, Charles Keating, Roy Disney, Al Dunlap, Michael Ovitz, Ken Lay, or, by way of implication, Dick Cheney. During his reign of terror, Bill Lerach and the firm Milberg Weiss Bershad Hynes & Lerach, returned more than \$45 billion in fraud judgments or settlements to millions of shareholders, small and large."

You weren't just an ordinary trial lawyer. You were the cream of the crop, the person who when you asked, who is fighting corporate crime in America, people might say Ralph Nader, or they might say Bill Lerach.

LERACH: And I would add Mel Weiss. The success of our firm and my own success was in

large part due to his mentorship and training. We had a fantastic nationwide partnership. We built a law firm from a dozen people up to, I don't know, we must have had 350 lawyers at some point.

In a sense, the way the business evolved, was the epitome of the way the private attorney general model was supposed to operate. You are entrepreneurial, you take your risks, and when you win, you get a reward. Clients are passive beneficiaries. And the fees and the behaviors are controlled by the federal and state judiciaries. I don't see what's wrong with that model. But I guess if you were on the receiving end, it didn't look as attractive.

CCR: The corporate counterattack was vicious. They in fact passed a federal law. It was called the Private Securities Litigation Reform Act (PSLRA). And they passed it to slow you down – would you agree that was its purpose?

LERACH: Yes. In fact, it was dubbed – The Get Lerach Act. I remember having dinner with a lobbyist from the accounting industry in Washington, D.C. It was the middle of that fight. I don't recall his name. But he was effective. He looked me right in the eye and said – Bill, you are too prominent and we are going to get you.

CCR: And they did get you. How did you end up being prosecuted and sent to prison?

LERACH: The private securities bar, like many businesses, had a certain number of warts and blemishes. No business is perfect. A practice developed in splitting fees with referring attorneys. And it turned out that the referring attorneys shared that money in many instances with the plaintiffs in the cases. It's an inducement and reward for them to undergo the strain and the service and the attacks they get from the defense bar.

Everybody knew it was going on, but nobody would talk about it for obvious reasons. As sometimes happens, somebody within a web got in trouble for conduct that none of us had anything to do with or knew about.

And he got in big trouble. And when the prosecutors got him in a box, he did what people do. And he told on us. It generated a six year, \$35 million criminal investigation from the Department of Justice. And it was a tough go, because we had to prosecute our cases and run our business while we were defending ourselves.

CCR: The PSLRA law was known as The Get Lerach Act. Was it your sense that the criminal

prosecution against you and Weiss was part of the corporate campaign to get you?

LERACH: There is simply no question about it. And remember, a prosecution of lawyers, especially lawyers of our status and notoriety, had to be approved by the Attorney General himself. All of our files were seized. Prosecutors literally went through millions and millions of documents.

We simply were not able to survive that degree of scrutiny in that political climate. I'm not resentful about it. I'm okay. It's just simply part of the process.

CCR: What did this PSLRA do? And what impact did it have on the practice?

LERACH: I was there. I spoke with our adversaries. And I know what they were up to. They created a heightened pleading standard so rigorous as to give any district court judge unlimited license to throw the case out on the grounds that it was insufficiently particular or failed to allege a strong enough inference of scienter or knowledge.

It was a terrible rule and took predictability out of the situation because the judge could do whatever they wanted. As part of that, they created the ability for a class certification order to be appealed immediately to delay the case for years and allow hostile appellate courts to get their hands on a trial court ruling in contravention of the final judgment rule. It also limited damages.

And of course, it created a safe harbor, which is a license to lie in forward looking statements. It has completely debased corporate disclosures.

You look at a press release today, the disclaimers are longer than the press release, which some wizard from Harvard Law School thinks up to try and think of every imaginable event. So, it has crippled enforcement.

Yes, the cases still get brought. Yes, the good cases get settled because they are so good that even the law and the judges can't stop them. But you are not getting appropriate recoveries for the victims.

That's what that law did.

It also created the lead plaintiff provision, the largest loser, as we call it. That was meant to take the cases away from us, the private bar, and allow institutional investors to intervene and stop the lawsuits.

That was Stanford Law Professor Joseph Grundfest's little gem and it completely backfired. In 1995, a law review article was published titled – *Let the Money Do the Monitoring*. It raised the

MONDAY JANUARY 29, 2024 CORPORATE CRIME REPORTER 13

prospect of how institutional investors could control large class action lawsuits so as to get rid of what the corporations viewed as frivolous lawsuits.

The idea was picked up, adopted and advanced by Professor Grundfest, who saw it as a way for institutional investors to come forward and use the lead plaintiff mechanism to seize control of cases that the corporate community viewed as frivolous and have them dismissed.

Grundfest brought together a group of institutional investors at a conference at Stanford Law School to try and rile up the community, to use the PSLRA to take control of these cases which we were bringing against tech companies, and get what they viewed as these horrible, frivolous cases dismissed. We showed up at the conference and made our case in and one such case – we laid out the facts. And we effectively won over the institutional investors based on our arguments.

So in short, they wanted to use the lead plaintiff provision to destroy the ability of the traditional plaintiffs' bar to bring these cases, and that completely failed. In fact, over time it has led to a greatly increased litigation presence and activity by institutional investors that in many instances has led to larger recoveries.

I used to say – you know, they told everybody we had horns and a tail. But when these institutional investors actually met us and looked at what was being done to them, they were furious. And today, who are the plaintiffs in the cases? The institutional investors who were supposed to come in and stop these cases. It is the ultimate example of the law of unintended consequences. And it's probably why private securities litigation survives today.

CCR: When you were practicing, did you have a sense that the law was actually working in controlling and deterring corporate wrongdoing?

LERACH: One simple way would be to compare the amount of corporate and accounting wrongdoing today to the way it was twenty-five years ago. I don't think it's materially less.

But I never bought the idea that private litigation was an effective deterrent. It was more of a punishment, an exposure and a penalty. The system is set up to defeat deterrence. The corporations indemnify the corporations. The wrongdoers use corporate money to buy huge insurance policies. You can't get their insider trading proceeds.

So, yes, there's a big lawsuit. It's inconvenient.

And they bellyache about it. But at the end of the day, it doesn't cost them any money. And you certainly can't say the accounting industry has been deterred by what happened to them – even the destruction of Arthur Andersen. The media today is filled with articles about how horrible corporate accounting is all over the world, despite what we went through.

I'm in favor of private enforcement. It's good for the lawyers who bring the cases. It gets some money back to the victims. And it calls wrongdoers to account. But I don't think you can deter corporate wrongdoing. The incentives are too strong. All you can do is try to tap it back.

CCR: How does the class action bar today compare to back when you were practicing?

LERACH: It's more of an oligopoly. More concentrated. Fewer firms. The lawyers who do it are smart and experienced. But remember – they are operating in an incredibly hostile environment.

CCR: The defense lawyers are better equipped, better paid and there are more of them?

LERACH: They have it great except that they have to live with themselves for what they do for a living.

CCR: Let's talk about mass tort law. It seems as if very few cases go to trial. It's a settlement practice where plaintiffs' lawyers and defense lawyers are, if not on the same page, working together to get to settlement.

LERACH: I'm obviously devoted to plaintiff actions and helping victims. But I must say that the industrial strength mass tort litigation leaves me a bit unsatisfied. I know the lawyers work very hard and the defendants have a lot of money and power. But these cases become formulaic. Big problem, big disaster nationwide, and somehow a devoted group of lawyers assemble those cases, they hire the contract lawyers, they gin up the hours, they run the machine, and at the end of the day inevitably there has to be a settlement.

People watch television. And what do they see? Ads from trial lawyers for lead paint, Camp LeJeune, asbestos. And it reinforces a negative image of plaintiffs' lawyers. I just wonder who benefits from those cases. Defendants get worldwide permanent relief on day one. The lawyers get paid for all of that time. I'm not sure that is all that effective.

CCR: Let's look at the Boeing case where 347 people died in two plane crashes. Even in an egregious case like that, all of the Boeing cases have

been settled. Not one of the Boeing cases has gone to trial – and the two-thirds of them have been settled already. You would think that a trial would deter future corporate crime – there would be depositions of the CEOs, there would be public attention to the trial. Instead, the imperative is to settle, settle, settle.

Doesn't that undermine justice?

LERACH: It would depend on the amount of settlement. What happens there is that it is a highly specialized aviation bar. They know all of the defense lawyers. It's what you were alluding to. It's not collusive and it's not wrong. But there is a protocol almost. The event has occurred. The plaintiffs lawyers assemble the case. And ultimately, you know there is going to be several billions of dollars changing hands. And it's going to change hands because no one is ever going to get to depose the CEO of Boeing or show those horrible documents. They won't permit it.

You want to talk about something that's wrong in litigation? It's secrecy – secrecy of pre-trial documents. It's outrageous. It's terrible. And the plaintiffs' lawyers are to blame for that too. When I was practicing, we would fight that. We fought it in Enron. And the judge ruled in our favor. There is no reason for this kind of evidence to be kept secret. That undermines the real worth of litigation. The real worth of litigation is exposure. And it undermines deterrence.

CCR: What is stopping a judge from lifting these gag orders or secrecy orders on pre-trial documents?

LERACH: It's discretionary. Most judges want lawyers to be compliant and agreeable and not create big fights in front of them. Most judges figure – okay, it's a big litigation. The plaintiffs are going to win someday. They'll get paid. We don't need to have a big controversy here about these documents. The defendants are insisting that they be sealed. In many cases, there is almost a presumption in favor of secrecy. I just really hope the plaintiffs' lawyers will fight harder on that. The law is mixed. It's not as good as you would want it to be.

CCR: The plaintiffs lawyers are reluctant to anger a judge. If a judge wants to accelerate the case toward settlement, and the plaintiff lawyer says – I want to make this information public and go to trial – that's going to anger the judge.

Why are judges biased toward settlement and not toward transparency and openness?

LERACH: Because transparency and openness

require hard work – running trials, allowing for contested arguments by skillful lawyers. Your life as a judge is just easier if you go along.

And look, there are a lot of wonderful judges. Please don't misconstrue my remarks. But judges are human beings.

And where do federal judges mostly come from? They are former assistant U.S. Attorneys who are politically benign. And as prosecutors, they can get confirmed. Where else do they come from? Out of big law firms, where people have been seasoned as partners. They may not be the best partners. And they may not want to work six or seven days a week as people do in big firms. And they get placed onto the federal bench.

When that becomes the core of the federal judiciary, that's not necessarily a favorable situation for plaintiff lawyers.

CCR: Then let's look at the plaintiffs' bar. Clearly, in the vast majority of these cases, the plaintiffs' lawyers are also biased toward settlement for the same reason. They don't want to go to trial because their payday is secured with these settlements. To prepare for trial and offend the judge and move the judge off the ball –

LERACH: You have put your finger on the essential economic dynamic that drives this litigation. And it's not necessarily bad. You can't try every case. If you did, the judiciary would collapse. There has to be settlements. There has to be processing.

When we were active, we had 300 to 400 cases. Some of those cases are going to simply be – process, settle, pay the bills. The skill for you as a manager is – can you identify within that universe the eight, nine, ten, twelve, fifteen cases that have the right mix of merit, judge, venue where you invest your effort, your time and risk to try and do good for that case, but also to benefit the practice and the overall litigation? You simply can't prosecute every single case without restraint.

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MONDAY JANUARY 29, 2024 CORPORATE CRIME REPORTER 15

Bill Lerach on How the Justice System Is Set up to Defeat Deterrence of Corporate Crime

CCR [corporatecrimereporter.com/news/200/bill-lerach-on-how-the-justice-system-is-set-up-to-defeat-deterrence-of-corporate-crime](https://www.corporatecrimereporter.com/news/200/bill-lerach-on-how-the-justice-system-is-set-up-to-defeat-deterrence-of-corporate-crime)

February 14, 2024

William Lerach was called the knee-capper of corporate America.



He sued the big names in corporate America – and few were immune from his class action securities litigation.

Over three decades of practice, he and his partners at the law firm Milberg Weiss recovered more than \$40 billion in fraud judgments for shareholders.

Then in 1995, corporate America organized to get Bill Lerach.

They drafted and passed a bill through Congress called the Private Securities Litigation Reform Act (PSLRA).

The insiders in Congress knew it as The Get Lerach Act.

“I remember having dinner with a lobbyist from the accounting industry in Washington, D.C.,” Lerach told *Corporate Crime Reporter* in an interview last week. “It was the middle of that fight. I don’t recall his name. But he was effective. He looked me right in the eye and said – Bill, you are too prominent and we are going to get you.”

And they did get you. How did you end up being prosecuted and sent to prison?

“The private securities bar, like many businesses, had a certain number of warts and blemishes,” Lerach said. “No business is perfect. A practice developed in splitting fees with referring attorneys. And it turned out that the referring attorneys shared that money in many instances with the plaintiffs in the cases. It’s an inducement and reward for them to undergo the strain and the service and the attacks they get from the defense bar.”

“Everybody knew it was going on, but nobody would talk about it for obvious reasons. As sometimes happens, somebody within a web got in trouble for conduct that none of us had anything to do with or knew about. And he got in big trouble. And when the prosecutors got

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The PSLRA law was known as The Get Lerach Act. Was it your sense that the criminal prosecution against you and Mel Weiss was part of the corporate campaign to get you?

“There is simply no question about it. And remember, a prosecution of lawyers, especially lawyers of our status and notoriety, had to be approved by the Attorney General himself. All of our files were seized. Prosecutors literally went through millions and millions of documents.” “We simply were not able to survive that degree of scrutiny in that political climate. I’m not resentful about it. I’m okay. It’s just simply part of the process.”

What did this PSLRA do? And what impact did it have on the practice?

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It's a question of power. I can tell the size of the defendant based on the settlement. If it's a plea agreement and the defendant is not being represented by a major law firm, then it's a smaller company.

If it's a deferred or non prosecution agreement with a major corporate law firm, it's a major United States company or a major foreign multinational.

"The Democratic administration – because politically they are dependent on corporate money, Wall Street money, the accounting firm money, corporate community money – they have become soft on prosecuting big corporate cases."

"On the other hand, these cases are hard to prosecute. These corporate executives are smart. They are surrounded by lawyers and experts. They get opinions. They insulate themselves. To us, we might say – the conduct there is so bad they ought to be prosecuted. But when you get into it, proving criminal intent can be difficult."

"So what are the results? A system whereby deferred prosecution agreements and big fines paid with corporate shareholder money, not the individual wrongdoers money, create headlines, create statistics for the prosecutors and a perfectly acceptable world for the corporate criminals where they can just go on with their conduct paying for it with the shareholders' money. Now that's not a good system."

[For the complete q/a format Interview with William Lerach, see 38 Corporate Crime Reporter 5(12), January 29, 2024, print edition only.]

FirstFT World

FirstFT: Investment chief of Calstrs says private equity must 'share the wealth'

Also in today's newsletter, Putin backs Biden for president, and Citi tracks private banker calls



Christopher Ailman, the outgoing investment chief at Calstrs © Bloomberg

Gordon Smith 7 HOURS AGO



Good morning.

Private equity executives need to “share the wealth” they create with workers at the companies they buy, according to the investment head of Calstrs, the giant US pension fund that is one of the world’s biggest investors in the sector.

The comments from Christopher Ailman, outgoing investment chief at the \$327bn fund, come after a decade of rapid growth in the buyout industry in which many dealmakers have made large fortunes from the hefty fees they have charged investors such as Calstrs.

The founders and top executives at firms like Blackstone, KKR and Apollo Global Management have enjoyed a more than \$40bn increase in the value of their shares since the beginning of last year, as the assets they manage continue to swell.

Ailman, who has been chief investment officer at Calstrs since 2000, is preparing to hand over to a successor after announcing his retirement last month. [Read the full interview.](#)

And here's what I'm keeping tabs on today:

- **Donald Trump:** The former president is set to appear in a Manhattan court in the prosecution over his alleged hush-money payments to a porn star. The judge in the trial will decide whether Trump should face a criminal trial as soon as March 25.
- **Economic data:** US retail sales are expected to have declined in January after rising in December. Initial US jobless claims, a proxy for lay-offs, are forecast to have held relatively steady last week and the National Association of Home Builders will release its confidence index which is expected to tick up.
- **Earnings:** Deere and Hyatt will report their latest quarterly earnings before Wall Street's opening bell. DraftKings, Coinbase and Roku will report after the market closes.
- **Nato:** The military alliance's defence ministers meet today in Brussels as it prepares for more Russian aggression and the possible election of critic Donald Trump. Defence spending by member countries [is growing](#) after criticism from the former US president.

Five more top stories

1. The UK entered a technical recession at the end of 2023, official figures released today show. Gross domestic product contracted by 0.3 per cent in the final three months of last year, following a 0.1 per cent decline in the third quarter. The data will come as a blow to prime minister Rishi Sunak at the start of what is expected to be an election year. [Here's the full story.](#)

- **More economic news:** Japan's economy also contracted for the second straight quarter, [putting pressure on the Bank of Japan](#) as it considers raising interest rates for the first time since 2007.

2. Citigroup has started tracking the calls its private bankers make to clients, people familiar with the matter have said, as the US lender tries to jump-start its struggling wealth management business. Citi's private bankers must now turn in call reports to record each conversation they have with a client and also what was discussed, the people said. [Here's how staff have reacted to the measures.](#)

- **More US bank news:** JPMorgan is being sued by the founder and chief executive of a Greek payments company it co-owns [over what he claims are tactics to suppress his company's growth.](#)

3. Vladimir Putin has said Joe Biden would be a better US president for Russia than Donald Trump and dismissed concerns over his counterpart's age and acuity for the role. In his first foray into this year's US presidential election, Russia's leader said his American counterpart was "more experienced, predictable, an old-school politician". [Here's more from his remarks.](#)

- **Russian threat:** The US has shared intelligence with Congress and European allies about a new Russian nuclear capability that [could be used in space](#), according to people familiar with the matter.

4. Israel has warned that hostage talks will not advance until Hamas changes its position, in a sign that talks brokered by the US, Qatar and Egypt have struggled to secure a breakthrough. In a statement released a day after Israeli spy chiefs held talks with CIA director Bill Burns in Cairo, Israeli Prime Minister Benjamin Netanyahu reiterated that he would not give in "[to Hamas's delusional demands](#)".

- **Cross-border fire:** Several Lebanese civilians were killed yesterday when Israel [retaliated with air strikes](#) for a suspected Hizbollah rocket barrage that had earlier killed an Israeli soldier and injured several others.

5. Thousands of Porsche, Bentley and Audi cars have been impounded in US ports after a supplier to parent group Volkswagen found a Chinese subcomponent in the vehicles suspected of breaching the Uyghur Forced Labor Prevention Act of 2021. According to two people with knowledge of the matter, the carmaker has delayed delivery of the vehicles until as late as the end of March. [Here's more on the delays.](#)

- **Go deeper:** Volkswagen has announced talks with its Chinese joint venture partner SAIC over [“the future direction of business”](#) in the region of Xinjiang.

The Big Read



OpenAI CEO Sam Altman, left, and Brad Lightcap, the company's COO © FT montage/Reuters/AFP via Getty Images

OpenAI's revenues surpassed \$2bn on an annualised basis in December, making it one of the fastest-growing technology companies in history. Since the launch of its viral chatbot ChatGPT in late 2022, OpenAI has become one of only a handful of Silicon Valley companies, including Google and Meta, to post revenues of \$1bn within a decade of being founded. But the [long-term viability of its revenue stream](#) is under question.

We're also reading ...

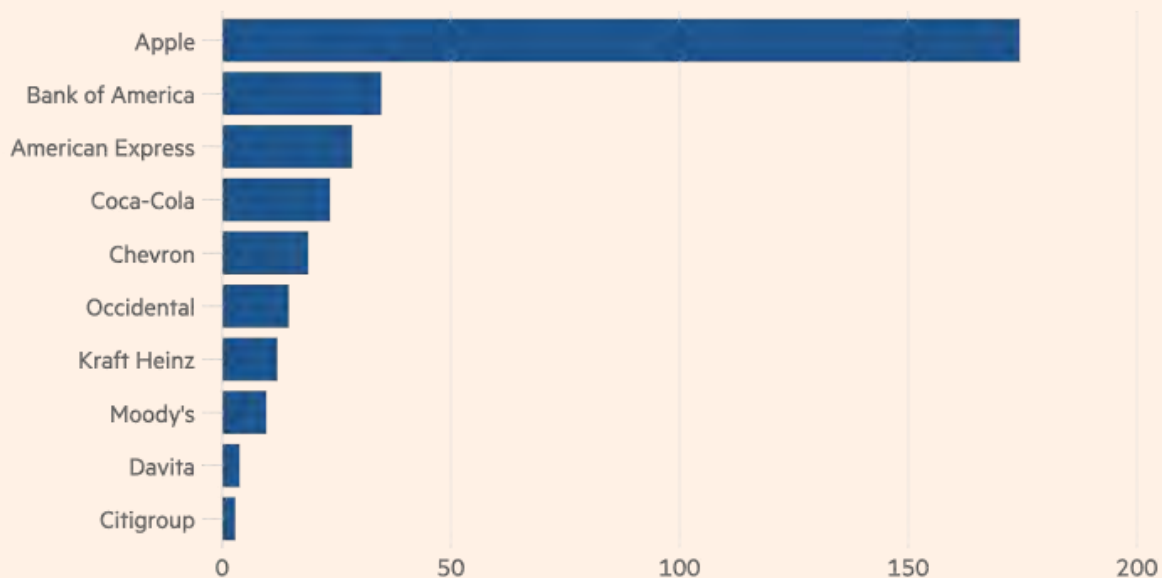
- **US politics:** Joe Biden is no frail outlier in Congress but the gerontocratic norm, writes Edward Luce. And, he says, it is no accident that millennials and generation Z [are the least pro-democratic generations in US history](#).

- **War in Ukraine:** Russian forces closing in on the town of Avdiivka are an early test for [Kyiv's new top general](#), as well as for an army running short of supplies and men.
- **Long Covid:** With millions unwell, scientists fear that the condition's range of symptoms and link to chronic diseases will have a [lasting impact](#) on health systems.

Chart of the day

Berkshire Hathaway's largest US publicly traded investments

Value (\$bn)



Company filings

© FT

Warren Buffett's Berkshire Hathaway yesterday said it sold 10mn Apple shares in the last three months of 2023. Apple has become a critical holding for Berkshire and now accounts for roughly a fifth of its market value. In 2021, Buffett described an earlier decision to cut his Apple stake as "probably a mistake". [Here's more on the Oracle of Omaha's latest Apple share sale.](#)

Take a break from the news

Fastelavn used to mark the beginning of the Lent period of fasting in Denmark. Catholicism did not stick, but the holiday did, as did *fastelavnsbolle*, the sweet treat associated with the festival. FT Magazine's Imogen West-Knights explores how the normally poised residents of Copenhagen [go mad for the cream-filled buns](#) every February.



Fastelavnsboller have been a fixture of Danish cuisine for centuries, but have recently become something of a craze © Minh Ngọc Nguyễn

Additional contributions from Tee Zhuo and Benjamin Wilhelm

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Quinn Emanuel team secures a victory in the Delaware Supreme Court for Special Litigation Committee

 legalnewsline.com/stories/654732406-quinn-emanuel-team-secures-a-victory-in-the-delaware-supreme-court-for-special-litigation-committee

February 15, 2024

Quinn Emanuel is pleased to report the successful conclusion of its representation of a Special Litigation Committee (SLC) of the Baker Hughes Board after the Delaware Supreme Court affirmed last week a Court of Chancery order dismissing a derivative suit against GE and certain Baker Hughes Directors. Addressing for the first time the propriety and treatment of live testimony at a hearing on an SLC's motion to terminate derivative litigation, the Delaware Supreme Court concluded that the Court of Chancery properly relied on its assessment of a live witness's credibility in deciding to dismiss the case. Houston Partner Karl Stern and Of Counsel Liz Devaney represented the SLC in its nine-month investigation of the derivative claims and in the court proceedings on the SLC's motion to terminate, along with co-counsel Tom Bayliss and Matt Miller with Abrams & Bayliss in Delaware.

Congratulations Karl and Liz!

Original source can be found [here](https://legalnewsline.com/stories/654732406-quinn-emanuel-team-secures-a-victory-in-the-delaware-supreme-court-for-special-litigation-committee).

Is the M&A boys club waning? A new study says yes.

 [reuters.com/legal/transactional/column-is-ma-boys-club-waning-new-study-says-yes-2024-02-14](https://www.reuters.com/legal/transactional/column-is-ma-boys-club-waning-new-study-says-yes-2024-02-14)

Jenna Greene

Women in high heels walk at a business district. Picture taken on June 4, 2019.

REUTERS/Kim Kyung-Hoon/File Photo Purchase Licensing Rights , opens new tab

Feb 14 (Reuters) - It's easy to take a glass-half-empty approach when writing about women in Big Law. After all, the top-line statistics are depressingly familiar: Only about one in four partners , opens new tab are women, and those who do make partner earn on average one-third less , opens new tab than their male counterparts.

But a new study , opens new tab offers another way to gauge the power of women within law firms, with what strikes me as surprisingly encouraging results.

A trio of law professors looked at more than 10,000 deals at six firms over the past 10 years, analyzing the composition of the legal teams that handled the transactions.

In 2013, 42% of the deals they reviewed included at least one woman among the top five lawyers at the table.

By 2023, that number had jumped to 78% at the sample firms: Cravath, Swaine & Moore; Hunton Andrews Kurth; Paul Weiss; Shearman & Sterling; Sullivan & Cromwell; and White & Case. (More on why they got picked below.)

Is this an indication that the M&A boys' club is finally receding?

I'd like to think so.

Because who gets put on deal teams matters. At top-tier law firms, deals tend to be the most profitable and prestigious matters, and the lawyers who work on them "have the most power within firms," the professors wrote in their paper, which was published last week by the University of Virginia School of Law and has not been previously reported.

The sharp increase in the number of women on deal teams in the last decade is "reason for optimism," Tracey George of Vanderbilt Law School, who co-authored the paper with UVA's Mitu Gulati and Albert Yoon of the University of Toronto Faculty of Law, told me. "Women are moving up."

Of course, it's not as if the M&A practices are now matriarchal utopias.

"It's mostly still men at the top of deals," Gulati said. In 80% of the transactions that he and his co-authors reviewed, the teams were led by men, with women lawyers in secondary roles – though the professors posit such experience can also serve as stepping stones to landing

the top spot down the road.

Male lawyers were also more likely to work on higher dollar-value deals than women, their analysis showed.

Their methodology, while not exactly scientific, strikes me as creative.

Rather than using data from U.S. Securities and Exchange Commission merger filings, as several prior studies on women lawyers and deals have done, they mined press releases issued by the law firms.

Doing so allowed them to capture a bigger universe of transactions, the authors said. The press releases included deals involving privately held companies outside the SEC's purview, as well as transactions by mega-companies that, while objectively large, were nonetheless not SEC-reportable because they were not "material" to the company.

They also noted not all deals merited press releases, but figure the most significant would have been publicized.

"Press releases reveal more detail about the otherwise opaque workings of law firms than other publicly available sources," the authors stated.

I can't say that's always been my experience – and it's certainly possible firms might go out of their way to promote deal teams with women, even if their roles were minor. Still, as a longtime legal journalist, I get it. You work with the information that you've got.

"Our process of selecting these firms was simple," the professors wrote. "We started with a list of top U.S. firms and then looked for which of these firms made their press releases available and reported participants on the deals in a hierarchical manner," adding that they "randomly" selected some of the firms to study.

I reached out to the firms for their take on the report. Four didn't respond, but Shearman & Sterling global managing partner Doreen Lilienfeld in an email said that creating "an inclusive environment for our people is a priority for us."

White & Case partner and executive committee member Carina Radford also via email said that the firm views competency and talent as "the fundamental considerations for allocating opportunity, regardless of gender."

It's notable to me that the sample firms, while all among the 100 top grossing in the U.S., cover a broad swath of the legal marketplace in terms of client base and profits per partner. The study authors don't break down results by firm, but said the trend – adding more women lawyers to deal teams – occurred across the board.

Curious how the findings strike other lawyers in the M&A space, I reached out to Eva Davis, who chairs Winston & Strawn's 500-lawyer transactions department.

The report "tracks fairly consistently with my experience," she said.

When she first started practicing law 30 years ago, Davis told me, she "rarely saw a woman on the other side at any level."

That started to change 20 years ago, but it was still "notable" to encounter another woman as opposing counsel on a deal, she said.

In the last five to 10 years, though, she said, she's worked on multiple deals where "on both sides the teams are all women."

She credits not just the increased number of women entering the legal profession – women law students began outnumbering men [↗](#), opens new tab in 2016 -- but also points to the Mansfield Rule [↗](#), opens new tab aimed at increasing inclusivity and diversity in law firms, mentoring and other firm initiatives, and promoting women to leadership roles within the firms.

"Frankly, representation matters," Davis said. When up-and-coming lawyers see women in senior positions, they "see what's possible."

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Reporting by Jenna Greene

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Jenna Greene

Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

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Research Finds Surprise in Women Lawyers' Deal Work: Progress

By Roy Strom

Column

Bloomberg Law News 2024-02-15T09:54:18633571159-05:00

Research Finds Surprise in Women Lawyers' Deal Work: Progress

By Roy Strom 2024-02-15T05:32:05000-05:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at a new paper that studied women's roles on law firm deal teams. Sign up to receive this column in your Inbox on Thursday mornings. Programming Note: Big Law Business will be off next week.

A trio of legal academics have optimistic news about the state of women in Big Law: Their research suggests women are on track to match men's roles on large deals over the next decade.

That's one takeaway from a new paper that studied law firm press releases on 10,000 deals from 2013 to 2023 to analyze the number of women announced on deal teams. While women still lag men in how frequently they lead deals (19% of the time), they show up in more significant and growing numbers on the broader deal teams.

The study reports 78% of deal leadership teams announced in 2023 included at least one woman, up from 42% in 2013. Overall, women made up 31% of deal teams in 2023 compared to 19% a decade earlier.

The numbers don't show women are close to men in deal team representation, but they indicate women are getting an equal or better shot at working on deal teams relative to their representation inside law firms.

The deal team figures roughly match the progress women have made in partnership ranks at law firms over the same period—increasing from 20% in 2013 to nearly 28% last year, according to the National Association for Law Placement.

"My big takeaway is that women are succeeding and the next generation of women lawyers is going to significantly surpass the current generation," said Tracey George, a co-author of the paper, who is vice provost for faculty affairs and professional education at Vanderbilt University Law School. "We should expect to see women in equal numbers to men at the top of deals within 10 years."

The math from the paper works like this: Women's representation on deal leadership teams increased by 63% over the decade from 2013 to 2023. If that same trajectory holds through 2033, women would account for just over 50% of deal leadership teams.

George said it's possible that progress slows as women get closer to parity, meaning it could take 15 years to reach that level.

Women's Progress in Law Firms and on Deal Teams

A new paper indicates women are getting an equal or better shot at working on deal teams relative to their representation inside law firms.

■ Women as % of Deal Teams ■ Women as % of Law Firm Partners



Sources: National Association for Law Placement, "The Power Five: The Making of Newsworthy Deal Teams," by Tracey E. George, Mitu Gulati, and Albert H. Yoon.

Bloomberg Law

Women no doubt still face challenges in Big Law. A report from the American Bar Association last fall said there was an "urgent need" to better support women with children in the legal profession. In that study, mothers were more than twice as likely as fathers to report feeling that having children had a negative impact on their legal career.

The new paper, and its optimistic tone, represents a change of tune from the academics, who include University of Virginia School of Law's Mitu Gulati and Albert Yoon from the University of Toronto Faculty of Law.

The trio in 2021 analyzed US Securities and Exchange filings to report women accounted for less than 10% of lead lawyers on major corporate transactions. The study was portrayed in news articles as another data point to a familiar story: Women were not being given chances to progress inside elite law firms.

The authors heard pushback from women inside those firms, Gulati said in an interview. The SEC data they relied upon was telling a very small story since it only included one or two top lawyers and only included M&A deals. Leading a deal team was not the only barometer of success inside law firms, and women were making progress being part of deal teams.

To broaden their view, they chose to look at press releases from six law firms: Cravath, Swaine & Moore; Hunton Andrews Kurth; Paul, Weiss, Rifkind, Wharton & Garrison; Shearman & Sterling; Sullivan & Cromwell; and White & Case.

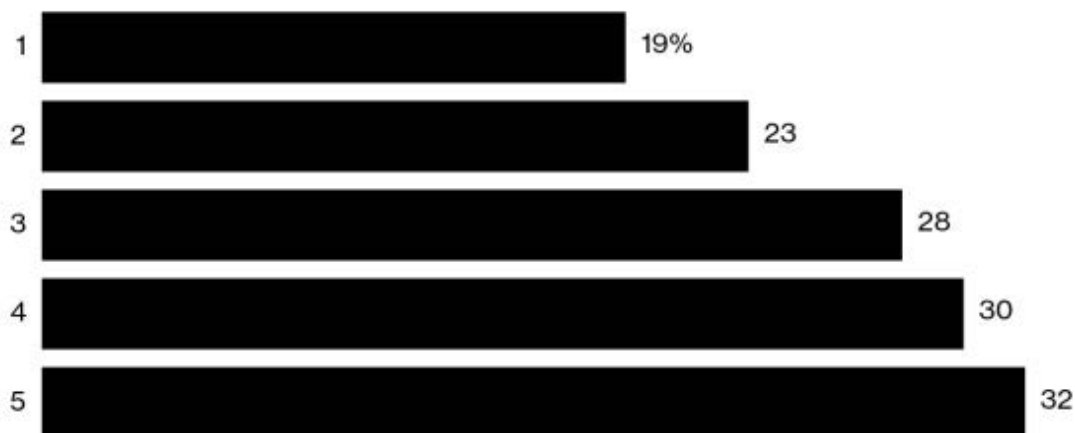
The firms were chosen in part because their press releases were available for the reporting period and the firms listed deal teams in a hierarchical manner. The data includes four primary types of announcements: Capital markets, M&A, litigation, and pro bono work. The vast majority (75%) of the releases were for capital markets and M&A deals.

The new paper is the first to look at where women stand in the hierarchy of deal teams. The data show women are more likely to appear as the third, fourth or fifth lawyer mentioned on a deal team.

Where Women Rank on Deals

Women lag men in leading deals, but they have better representation among the third, fourth, and fifth lawyers listed on a deal team.

■ Women's share by deal position



Source: "The Power Five: The Making of Newsworthy Deal Teams," by Tracey E. George, Mitu Gulati, and Albert H. Yoon

Note: Deal position is the order of names listed in law firm press releases. Data from 2013-2023.

Bloomberg Law

The authors question whether that is evidence of a “glass ceiling” for women—they can get positions on the team, but they can’t progress to the top. But they argue that’s not the case. Instead, the data suggest women are climbing the hierarchy ladder and are likely to lead more deal teams in the future as women partners become more senior.

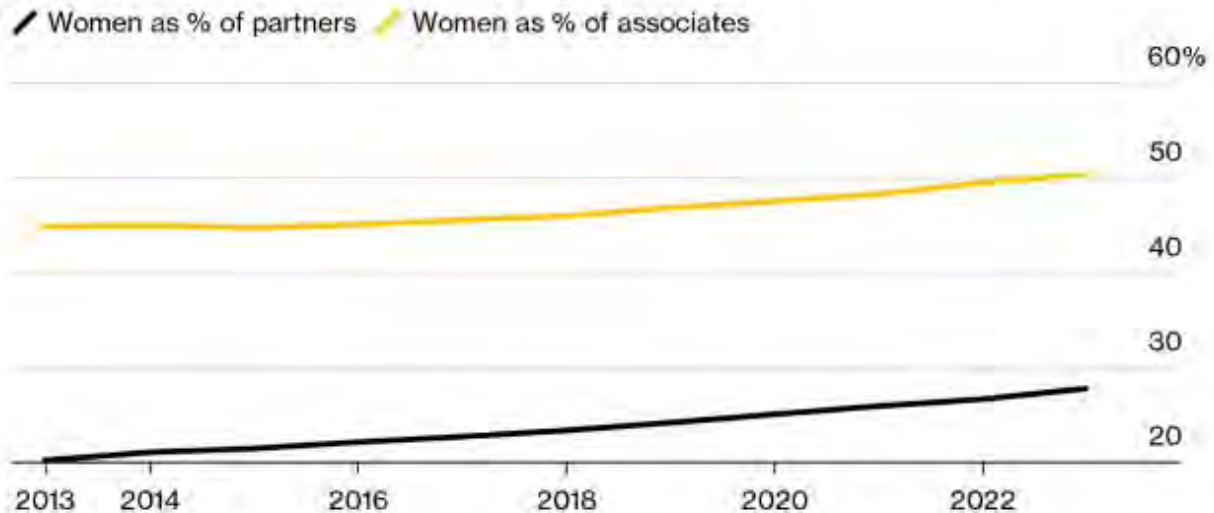
That’s because women who did lead deals were not a small handful of “exceptional” women. Instead, they are represented in roughly equal numbers to their positions at the firm. For instance, 25% of the 1,447 lawyers who appeared as deal leaders were women, roughly in line with their ranks in law firm partnerships.

“There is a superstar effect for men and there is a superstar effect for women, and it doesn’t seem to be that different for either category,” Gulati said.

Women also did not make up a disproportionate number of the lawyers listed in the third through fifth slots—something the authors would expect to see if women were being “shunted down” to lower positions. Instead, they found women associates were more likely than men associates to land a spot on deal teams.

Women's Roles at Law Firms

Women accounted for nearly 28% of law firm partners in 2023, and more than 50% of associates.



Source: National Association for Law Placement, Inc.

Bloomberg Law

The authors concluded that women are making progress in their status at law firms commensurate with their titles. Combined with the increases women have made as law firm associates and partners, George sees evidence they will continue to make strides at firms even as diversity, equity and inclusion programs face legal challenges.

"I'm not a Pollyanna. We came into this thinking we'd find more data for the negative story in our last piece," George said. "But we had to acknowledge that's not what's happening. And indeed, I'd say at this point we found evidence that the motion is such that without the support from DEI programs, this progress will continue. We've reached the point where it is self-sustaining progress."

While the report on women was optimistic, the authors also provided a preliminary analysis of Black lawyers' representation on deal teams. The results were "dismal," they said. Black lawyers made up less than 3% of deal team leaders, and their representation decreased in spots two through five.

"There is no indication of climbing up the ladder," the paper says.

The authors plan to continue research into Black lawyers' roles on deal teams and are also analyzing similar data from six English firms for their next project.

Worth Your Time

On Big Law Layoffs: Fenwick & West is laying off nearly 10% of its associates and staff as demand for legal work continues to drag, Meghan Tribe reports.

On Litigation Funding: A federal judge's decision to stop plaintiff Sysco Corp. from handing off its claims in ongoing price-fixing lawsuits to litigation funder Burford Capital Ltd. deals a setback to the funder and puts the opaque litigation financing industry in an increasingly glaring spotlight, Emily Siegel and Katie Arcieri report.

On Legal Briefs and AI: A Missouri business owner must pay \$10,000 in sanctions for writing legal briefs containing almost two dozen fake case citations generated by artificial intelligence, Isaiah Poritz reports.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

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Oracle to settle female employees' equal pay case for \$25 mln

 [reuters.com/legal/litigation/oracle-settle-female-employees-equal-pay-case-25-mln-2024-02-14](https://www.reuters.com/legal/litigation/oracle-settle-female-employees-equal-pay-case-25-mln-2024-02-14)

Brendan Pierson

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/File Photo Purchase Licensing Rights , opens new tab

- Settlement would also include outside expert to advise company on practices
- Company does not admit wrongdoing

Feb 14 (Reuters) - Oracle America has agreed to pay \$25 million to settle a long-running class action accusing it of underpaying about 4,000 female employees in California compared to men performing the same work.

In a motion filed Tuesday , opens new tab in San Mateo County Superior Court, plaintiffs' lawyers urged Judge Raymond Swope to approve the agreement, saying it was fair and reasonable. A hearing is scheduled for April 8 on preliminary approval, which if granted would allow notice to be sent to potential class members to give them a chance to object before final approval.

In addition to payment, the settlement , opens new tab also provides for an independent expert to review Oracle's practices and ensure that they comply with anti-discrimination law. Oracle, which did not admit wrongdoing under the deal, and its attorney did not immediately respond to requests for comment.

The 2017 lawsuit claimed that, since at least 2013, the California-based tech company had paid men in information technology, product development and support positions up to \$13,000 more per year to perform the same kind of work as their female colleagues, violating the California Equal Pay Act.

Swope certified a class in May 2020.

Oracle was hit with a separate administrative case in 2017 by the U.S. Department of Labor's Office of Federal Contract Compliance Programs, claiming it had underpaid women and minorities by \$400 million over a four-year period. The company prevailed in the administrative proceeding in 2020, and OFCCP did not appeal.

The case is Jewett v. Oracle America Inc, California Superior Court, San Mateo County, No. 17-civ-02669.

For the plaintiffs: James Finberg of Altshuler Berzon

For Oracle: Gary Siniscalco of Orrick Herrington & Sutcliffe

Read more:

Judge certifies class of 4,000 Oracle workers in major equal pay case

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Reporting By Brendan Pierson in New York

Brendan Pierson reports on product liability litigation and on all areas of health care law. He can be reached at brendan.pierson@thomsonreuters.com.

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Roundup Trials in Four States? Monsanto Faces Four Trials This Month



law.com/nationallawjournal/2024/02/14/roundup-trials-in-four-states-monsanto-could-face-four-trials-this-month

Garden supply store shelf with containers of RoundUp weed killer. Credit: Sheila Fitzgerald/Shutterstock.com

NEWS

Roundup Trials in Four States? Monsanto Could Face Four Trials This Month

Roundup trials are scheduled to start in the coming week in California, Pennsylvania and Arkansas. A fourth trial began earlier this month in Delaware.

February 14, 2024 at 06:30 PM

Toxic Torts

Amanda Bronstad
staff reporter

The original version of this story was published on Law.com

What You Need to Know

- A trial in the Philadelphia Court of Common Pleas, where juries already have awarded massive Roundup verdicts, is set to begin Feb. 15.
- Another trial in California, the first in Sonoma County Superior Court, is set to begin this month.
- A third trial is scheduled to start Feb. 15 in Conway County Circuit Court in Arkansas, a new state in the battle over Roundup.

At least three Roundup trials are set to start in the coming days in Pennsylvania, California and Arkansas.

The trials come on the heels of nearly \$4 billion in jury awards and 10 defense verdicts in Roundup trials since the COVID-19 pandemic's courthouse shutdowns. Another trial, in Delaware, opened earlier this month.

"He used a type of Roundup that he mixed himself," said Grace Hooten, of Houston's Clark, Love & Hutson, who represents Carl Kline, the plaintiff in a trial set to begin with jury selection on Feb. 15. Kline worked for the U.S. Postal Service for 36 years and will celebrate his 52th wedding anniversary this October, she said.

"Just a great guy, largely healthy, and then he comes down with this cancer because of pain in his back," she said. "Just a complete shock, and he has an aggressive cancer."

She and Scott Love, also of Clark, Love & Hutson, won a \$332 million Roundup verdict on Oct. 31 in San Diego County Superior Court. For Kline's case, which is the fourth Roundup trial in the Philadelphia Court of Common Pleas, they teamed up with Rosemary Pinto, of Philadelphia's Feldman & Pinto.

Juries in the three previous trials have awarded \$175 million, \$3.5 million and \$2.25 billion, though this month's case is before a new judge: Philadelphia Court of Common Pleas Judge Ann Butchart.

Representing Bayer's Monsanto are Tarek Ismail and Shayna Cook, both Chicago partners at Goldman Ismail Tomaselli Brennan & Baum.

'Inflaming the Jury's Emotions and Sympathies'

Another trial is set to begin in the next week in California's Sonoma County Superior Court. Although there have been seven previous Roundup trials in California, none was in Sonoma County.

Bobbie and Michael Meyer are represented at trial by Brian Glasser at Bailey & Glasser in Charleston, West Virginia; David Wool of Denver's Wool Trial Law; and Behram Parekh of Rueb Stoller Daniel in Los Angeles.

Manuel Cachan of Skadden. Courtesy photo

They're up against a defense team headed by Manuel Cachán, a Los Angeles partner at Skadden, Arps, Slate, Meagher & Flom, and Sidley Austin's Jennifer Saulino in Washington, D.C. Cachán handled the Philadelphia case that ended in a \$175 million verdict, but, in 2022, both he and Saulino scored a defense verdict in Missouri's St. Louis County Circuit Court in a rare Roundup trial involving three plaintiffs.

A third Roundup trial in Conway County Circuit Court is set to begin Feb. 15 in Morrilton, Arkansas. Plaintiff Robert Cody, filing on behalf of his wife, Wanda Cody, who died from non-Hodgkin lymphoma, has a legal team that includes Andrew Kirkendall and Kelley Owens of Kirkendall Dwyer in Dallas; Timothy Myers of Taylor Law Partners in Fayetteville, Arkansas; and Melody Piazza of Trammell Piazza in Little Rock, Arkansas.

DLA Piper partner Lyn Pruitt, in Dallas, and Lee Mickus, of Evans Fears Schuttert McNulty Mickus in Denver, represent Monsanto.

Among the numerous pretrial motions, Monsanto sought to prevent plaintiffs' lawyers from using "inflammatory" remarks to the jury, such as telling them to "send a message," or showing them images of other sick patients.

"Based on conduct by plaintiffs' counsel in prior trials, Monsanto anticipates that plaintiff may seek to introduce similar evidence, such as photographs or images of other people who have NHL or other types of cancer or injuries for the sole purpose of inflaming the jury's emotions and sympathies," its lawyers wrote in a Jan. 18 motion.

They added: "While it may appear obvious that such evidence and argument should be strictly forbidden at trial, due to plaintiffs' improper use of such evidence and argument in previous roundup trials, Monsanto is obliged to make this formal motion."

Plaintiffs' lawyers countered that the motion doesn't address evidence, but rather techniques for handling trials.

"Defendants attempt to anticipate and prejudge counsel's questions and arguments on liability and safety is nothing more than an attempt to stifle counsel's trial advocacy on behalf of their clients," they wrote in a Feb. 1 response.

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3M earplug settlement to meet participation threshold, led by controversial attorney Christopher Seeger

 legalnewsline.com/stories/654785764-3m-earplug-settlement-to-meet-participation-threshold-led-by-controversial-attorney-christopher-seeger

February 14, 2024

3M CEO Mike Roman (left) and attorney Christopher Seeger (right) | linkedin.com/mike-roman, seegerweiss.com

3M, the multinational conglomerate, has announced that it expects to surpass the 98% claimant participation threshold in the class action settlement over its Combat Arms Earplugs ahead of the March 25 deadline. The \$6 billion settlement was secured by plaintiffs led by Christopher Seeger, a founding partner at Seeger Weiss.

According to Forbes, the lawsuit against 3M over defective military-issued earplugs is one of the largest mass tort cases in American history. U.S. military members who used these earplugs between 2003 and 2015 alleged that 3M concealed design flaws, which resulted in some users sustaining hearing loss. Seeger stated that more than 240,000 individuals were eligible to participate in the \$6.01 billion settlement. This agreement required at least a 98% claimant participation rate; otherwise, 3M could withdraw from the deal. Although not admitting liability, 3M agreed to pay the settlement.

Seeger's actions have been criticized in another major class action lawsuit he led on behalf of plaintiffs. As reported by Advocacy for Fairness in Sports in 2018, Seeger represented former NFL players who had developed brain damage or dementia as a result of concussions and appeared to prioritize the NFL's interests over those of his clients. The report claimed that Seeger began negotiating with the NFL in 2010 before any lawsuit over brain injuries had been filed. It also stated that original plaintiffs recruited by Seeger for this class action suit felt misled by his promises, with one plaintiff expressing feeling like a pawn in Seeger's game. Advocacy for Fairness in Sports reported that Seeger attempted to "coerce and silence" attorneys who disagreed with him throughout this case.

A January 31 report from The Washington Post titled "The broken promises of the NFL concussion settlement" revealed that Seeger admitted the NFL settlement's definition of dementia was more stringent than the definition commonly used in American medicine. This stricter definition resulted in over 1,000 players who believed they were eligible for the lawsuit being told they were not, despite some having previously received a diagnosis of dementia. Two lead plaintiffs in the case, who had assisted Seeger in recruiting more participants, claimed that Seeger never informed them about this different definition of

dementia. Shawn Wooden, a former safety and class representative in the lawsuit, stated, "Hell no, I didn't know anything about this. And I would not have been cool with it if he had told me."

An article from Chief Executive suggests that a group of "lawyer-kings," including Seeger, exploit the legal system to enrich themselves at the expense of businesses they sue and ultimately U.S. consumers. The publication asserts that these attorneys spend "hundreds of millions of dollars" on advertising campaigns to recruit more plaintiffs for class action suits over common products. Chief Executive claims that even federal judges have suggested some class action lawsuits rely on "junk science." However, with thousands of plaintiffs involved, the plaintiffs' attorneys are still likely to secure large settlements.

Seeger is a founding partner at Seeger Weiss and is known for leading large class action lawsuits concerning issues such as drug injury and product liability, as per the law firm's website. In addition to the 3M earplug and NFL concussion cases, he has led high-profile cases including Volkswagen "Clean Diesel" litigation and national prescription opiate litigation. Publications such as The New York Times, The Wall Street Journal, The Washington Post, and The Los Angeles Times have quoted Seeger.

Slashed \$366 Million Bias Verdict Shows Damage Cap Downsides

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- Damages for plaintiff who sued FedEx now under \$250,000
- Attorneys say workers should win more cash under Title VII

A recent decision cutting a former FedEx executive's massive \$366 million jury award to about \$249,000 displays in stark terms how plaintiff payouts are hindered by a decades-old damages cap for a major civil rights law as well as contracts limiting when workers can sue.

The US Court of Appeals for the Fifth Circuit this month undid what may be the largest-ever jury verdict won by a worker suing for racial bias, awarded to a Black former executive of FedEx Corporate Services Inc. who sued the company for retaliation under Title VII of the 1964 Civil Rights Act and Section 1981 of the 1866 Civil Rights Act.

The court decided that Jennifer Harris wasn't entitled to \$365 million in punitive damages, as FedEx made a "good faith" effort to comply with the law. But her \$1.16 million in compensatory damages were also gutted as the panel said a provision in her employment contract barred a claim under Section 1981, which unlike Title VII, has no damages cap.

The proper proportion of damage awards in bias suits remains a point of debate, but Title VII's \$300,000 limit for large companies should be raised, employment attorneys said. Recently, the cap has also faced pointed criticism from the Equal Employment Opportunity Commission's top lawyer, Karla Gilbride, a key federal civil rights enforcer.

"Right now for a lot of companies discriminating, it's just a cost of business," said Katy Youker, the director for the Economic Justice Project at a nonprofit advocacy organization, Lawyers Committee for Civil Rights under the Law. "They will pay whatever judgment because the damages are relatively low to their net worth, so they're not really feeling the pain and taking measures to correct the discrimination in the future."

FedEx in its brief to the Fifth Circuit slammed the "breathtaking and disproportionate punitive-damages awards" in a case that the company said "should never have never reached trial in the first place, as the plaintiff's core claim is time-barred."

Capped Out

The Fifth Circuit left Harris with only the potential to collect Title VII damages, as the panel disagreed with a Texas federal court's determination that her Section 1981 claim was still viable because her contract with FedEx "cut against public policy."

The agreement required her to file any legal actions against FedEx within six months of an inciting incident, but Harris made her Section 1981 claim 16 months after her firing.

The \$300,000 damages cap under Title VII for companies with more than 500 employees was established in 1991 by Congress and hasn't been increased since. If that amount were adjusted for inflation, it would now be over \$670,000.

"The value of \$300,000 in 2024 is much less than it was in 1991," said David Lopez, co-dean of Rutgers School of Law and former EEOC general counsel during the Obama administration. "When I was at the EEOC, I used to actually do the calculations every time we would have one of our cases reduced under the caps. Because it's a little bit of a pebble in the shoe, to be honest."

Gilbride, the commission's current general counsel, spoke out on damages caps on Jan. 12, following a Nebraska federal court's reduction of a \$36 million jury verdict for a deaf truck driver to just \$335,682. The verdict was cut as the Americans with Disabilities Act of 1990, which prohibits disability discrimination, uses the same limits as Title VII.

"These caps, which were set by Congress decades ago, take away juries' power to deter large employers from engaging in intentional discrimination against workers," Gilbride said in a statement. "Juries who have heard the evidence should be able to punish employers who knowingly or recklessly break the nation's workplace civil rights laws without constraints from outdated caps on damages."

The Title VII cap also led an Oklahoma federal court in late 2020 to cut an award for a transgender professor, whom a jury found was fired because of her gender identity. Her \$1.2 million award of compensatory damages was slashed to only \$300,000.

The ability to proceed under Section 1981 is important in large part because the statute lacks a damages cap, according to Deborah Widiss, an employment law professor at the Maurer School of Law at Indiana University Bloomington.

Plaintiffs will often bring these claims in place of or alongside those filed under Title VII.

Depending on which state they are in and whether that state has damages caps, plaintiffs may also have better luck pursuing their employment discrimination claims under state, rather than federal law, according to Lopez. For instance, he said, New Jersey's civil rights law is "stronger than federal law on several counts and one of those is that you don't have capped damages."

Contract Restrictions

Similar to damages caps, contractual limitations on the timing of filing lawsuits, like those found in the FedEx employment agreement, have been met with pushback.

The Fifth Circuit rejected Harris's counterarguments that she was unaware of the time-barring provision when signing her contract, and that a six-month limitation period on Section 1981 claims is inherently unreasonable.

The Sixth and Seventh circuits, as well as the US District Court for the District of Columbia, have ruled that Section 1981 time limits in contracts are permissible. The Fifth Circuit's decision cited the DC federal court's 2016 opinion in *Njang v. Whitestone*, which said a six-month limitation on claims under Section 1981 is reasonable since "there are no time-consuming procedural prerequisites" like Title VII has.

FedEx in its brief pointed out that Section 1981 contains "no express limitation clause," meaning a federal four-year "catch-all" statute of limitations may apply. However, it's "well-established" through case law that a contractual provision can shorten the prescribed period of a general statute of limitations "if the shorter period is itself 'reasonable,'" the company argued.

"Courts outside of Texas also routinely conclude that contractual limitation agreements of the precise kind Harris signed do not violate law or public policy," the brief said.

Once filed with the EEOC, it takes roughly 10 months for the agency to investigate a Title VII charge, according to its website. The agency can then bring a suit itself or issue workers a "right to sue" letter .

Widiss said the terms of the FedEx contract set an employee like Harris up to be in a situation where she would need to file a Section 1981 complaint while waiting for a response from the EEOC on a Title VII charge in order to remain compliant with the contract.

"Terms like this take advantage of the fact that there is a bargaining disparity between large companies and job applicants and employees," said Adam Pulver, a worker-side administrative law attorney at Public Citizen Litigation Group. "These contracts are designed to minimize liability for the company and serve no purpose to help the employees in any way."

Generally state laws determine whether the terms of an employment contract are enforceable, Pulver said. Harris's arguments that Texas state law made her contract unenforceable were not taken up by the Fifth Circuit in its decision.

“I think it’s particularly galling with respect to 1981, because 1981 is not just an employment statute. In fact, it’s aimed at preventing discrimination in the formation of contracts,” Adam Herzog, a worker-side attorney at Katz Banks Kumin LLP, said of the court’s decision.

Herzog said he fears that with cases such as Harris’s, “what they’ll actually accomplish is letting companies and employers know that they absolutely should include these [provisions] in their employment agreement language.”

The case is *Harris v. FedEx Corp. Servs., Inc.*, 5th Cir., No. 23-20035, opinion 2/1/24 .

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Pfizer agrees to pay \$93 mln to settle Lipitor antitrust lawsuit

 [reuters.com/business/healthcare-pharmaceuticals/pfizer-agrees-pay-93-mln-settle-lipitor-antitrust-lawsuit-2024-02-15](https://www.reuters.com/business/healthcare-pharmaceuticals/pfizer-agrees-pay-93-mln-settle-lipitor-antitrust-lawsuit-2024-02-15)

Mike Scarcella

A person walks past the Pfizer building in Manhattan, New York City, U.S., March 2, 2021. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights , opens new tab

Feb 14 (Reuters) - Pfizer (PFE.N) , opens new tab has agreed to pay \$93 million to settle antitrust claims by wholesale drug distributors that accused it of conspiring with India's Ranbaxy Laboratories to delay sales of less expensive, generic versions of the cholesterol drug Lipitor.

Attorneys for Lipitor purchasers including Rochester Drug Co-Operative Inc and Puerto Rico's Drogueria Betances LLC disclosed the agreement in a filing on Wednesday in U.S. court in Trenton, New Jersey.

The distributors' case will continue against Ranbaxy, the attorneys filing said.

The proposed settlement, which requires a judge's approval, comes after more than a decade of litigation. Pfizer did not admit liability.

Pfizer in a statement called the allegations "factually and legally without merit." It said the settlement was "fair, reasonable and the best way to resolve this litigation."

A representative for Sun Pharma (SUN.NS) , opens new tab, which acquired Ranbaxy in 2014, did not immediately respond to a request for comment.

Pfizer introduced Lipitor in 1997, and the drug drove more than \$130 billion in sales during its first 14 years on the market.

The pharma distributors claimed Pfizer fraudulently sought to extend its patent rights over Lipitor. They accused the company of paying Ranbaxy to delay introducing a generic version of Lipitor and engaging in sham litigation with Ranbaxy over the drug.

Lawyers for the plaintiffs said the settlement provides "immediate economic relief" to class members and avoids the risk of continued litigation, potential appeals and no recovery. They said they will seek up to about \$31 million in legal fees from the settlement fund.

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The case is In re: Lipitor Antitrust Litigation, U.S. District Court, District of New Jersey, No. 3:12-cv-02389-PGS-JBD.

Pfizer Settles Lipitor Antitrust Lawsuit With \$93 Million Payout

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Class Action

Feb. 15, 2024, 7:03 AM PST

Danielle Kaye

Reporter

- Distributors allege Pfizer delayed sales of generic Lipitor
- Pfizer denies wrongdoing but agrees to settle lawsuit

Pfizer Inc. has agreed to pay \$93 million to settle an antitrust lawsuit accusing the pharmaceutical giant of conspiring to delay sales of generic versions of the blockbuster cholesterol drug Lipitor.

The class settlement, announced in a motion filed Wednesday, is the culmination of more than a decade of multidistrict litigation brought by drug distributors in US District Court for the District of New Jersey. The distributors, including Burlington Drug Co. Inc. and Rochester Drug Co-Operative Inc., claimed Pfizer illegally paid pharmaceutical company Ranbaxy Laboratories to delay marketing generic versions of Lipitor and engaged in fraud when attempting to extend its Lipitor patent rights.

Despite agreeing to the settlement, a Pfizer spokesperson said the company denies wrongdoing, calling the allegations “factually and legally without merit.”

“As this case has already gone on for over twelve years, considerations led the company to determine that the proposed class settlement in this case is fair, reasonable and the best way to resolve this litigation,” the spokesperson said in a statement.

In the settlement filing, lawyers for the drug distributors said it’s in the best interest of the plaintiffs to enter into a settlement and “avoid the uncertainties of litigation.” The \$93 million deal still awaits a judge’s approval.

The distributors’ case against Ranbaxy is ongoing.

The cholesterol-lowering drug, patented in 1997, was highly profitable for Pfizer, generating more than \$130 billion in sales. The Supreme Court rejected appeals by Pfizer in 2018 to block lawsuits over its Lipitor patent settlements, arguing the allegations were plausible enough to proceed in federal trial courts.

The case is Burlington Drug Co. Inc. v. Pfizer Inc. , D.N.J., No. 12-cv-02389, 2/14/24 .

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Challenge so-far successful to Ohio social media access law

 legalnewsline.com/stories/654779399-challenge-so-far-successful-to-ohio-social-media-access-law

February 15, 2024

Attorney General Dave Yost | Attorney General Dave Yost Official Website

COLUMBUS, Ohio (Legal Newsline) - A federal judge has put a stop to a new Ohio law requiring parental consent for minors to access social media websites.

NetChoice, an internet trade association, challenged the Parental Notification by Social Media Operators Act in Ohio federal court on Jan. 5, claiming it infringes upon minors' First Amendment Rights.

The act requires websites to secure verifiable parental consent before allowing minors under 16 years old to create accounts or access services. Judge Algenon Marbley granted a motion for preliminary injunction on Feb. 12 that prevents the State from enforcing the law against NetChoice and its member organizations.

"Foreclosing minors under 16 from accessing all content on websites that the Act purports to cover, absent affirmative parental consent, is a breathtakingly blunt instrument for reducing social media's harm to children," Judge Marbley wrote.

Marbley likened Ohio's law to one in California that was struck down by the U.S. Supreme Court. The law at issue kept minors from buying violent video games.

"Such laws do not enforce parental authority over children's speech and religion: they impose governmental authority, subject only to a parental veto," the Supreme Court ruled.

Marbley wrote: "The Act appears to be exactly that sort of law."

The complaint mentions that some of NetChoice' members operate popular websites such as Dreamwidth, Facebook, Instagram, Nextdoor, Pinterest, Threads, X (formerly Twitter), and YouTube - all regulated by the act.

It argues that these platforms allow users to engage in a wealth of protected speech and should be free from governmental restraint.

NetChoice is seeking a declaration that the Act is unconstitutional and a permanent injunction preventing state Attorney General Dave Yost from enforcing it. Many attorneys represent NetChoice, including Matthew Rice of Sperling & Slater.

Starz defends mass arbitration tactics, blasts plaintiffs firm for 'cynical' lawsuit

 [reuters.com/legal/litigation/column-starz-defends-mass-arbitration-tactics-blasts-plaintiffs-firm-cynical-2024-02-14](https://www.reuters.com/legal/litigation/column-starz-defends-mass-arbitration-tactics-blasts-plaintiffs-firm-cynical-2024-02-14)

Alison Frankel

A boardroom is seen in an office building in Manhattan, New York City, New York, U.S., May 24, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

Feb 14 (Reuters) - A couple of weeks ago, when I told you about a petition , opens new tab to compel arbitration by a customer of the pay-television service Starz Entertainment, I focused on what seemed to be an unusual tactic to fend off thousands of demands for arbitration: requiring customers to pony up thousands of dollars in mediation fees before they can launch formal arbitration cases.

But in a new motion to dismiss , opens new tab the petition, Starz argued that the mediation fee issue has actually been solved – and that Keller Postman, the law firm for Starz customers who have demanded arbitration, refuses to accept the solution because it's trying to force Starz into an unwarranted settlement by making the mass arbitration too expensive to defend.

A caveat before you read on: The Starz case is one of the most procedurally complicated mass arbitration disputes I've encountered in several years of writing about this ever-developing practice area. In a way, though, the complexity makes the case all the more important, since Starz and Keller Postman are both raising issues that are likely to recur in future mass arbitration cases.

So here's the background. Keller Postman, a mass arbitration pioneer, signed up tens of thousands of Starz customers who contend that the company violated video privacy laws by sharing their viewing data without their consent. The plaintiffs firm notified Starz about the looming mass of claims in January 2023. Soon thereafter, Keller Postman launched arbitration demands at JAMS for about 7,300 clients.

Starz said that under the terms of its customer contracts, the claimants were required to mediate with a JAMS mediator before they could proceed to arbitration.

That led to a showdown between Keller Postman and Starz counsel from DLA Piper.

The two sides could not agree on who was required to pay for mediation, which can cost as much as \$12,000 per day. Keller Postman said its clients should not have to pay more than \$250, which is the maximum fee for consumers in JAMS arbitrations. Starz said the rules for arbitration didn't apply to mediation. It demanded that Keller Postman's clients split mediation costs with the company. Keller Postman countered that such fee-splitting – as a prerequisite for arbitration -- is unconscionable.

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Much wrangling ensued between Starz, Keller Postman and JAMS. Ultimately, JAMS agreed with Keller Postman that an arbitrator must decide the threshold issue of who bears the cost of the requisite pre-arbitration mediation.

But the arbitration forum agreed with Starz that the threshold mediation fee issue could be decided in a consolidated proceeding before a single arbitrator, rather than in 7,300 individual arbitrations, as Keller Postman requested.

The matter of fees lurked beneath all of this procedural skirmishing. As you know, mass arbitration critics contend that plaintiffs lawyers use the cost of arbitration – typically more than \$1000 per case for companies facing consumer claims – as a lever to force companies into unwarranted settlements.

If JAMS had required Starz to pay fees for 7,300 individual arbitrations, the total cost would have topped \$12 million. (And remember, those 7,300 claimants were only a fraction of the tens of thousands of Starz customers allegedly represented by Keller Postman.) But because JAMS ordered a consolidated proceeding before a single arbitrator, Starz was on the hook for only \$1,750 in fees.

JAMS appointed an arbitrator for the consolidated proceeding. More than 7,000 of Keller Postman's clients called for her disqualification. Starz then asked JAMS to appoint a new arbitrator to oversee the entire consolidated arbitration. Keller Postman said the appointment of a new arbitrator would improperly interfere with the rights of the handful of its clients who were willing to proceed before the original arbitrator.

Keller Postman then filed a petition in federal court in Riverside, California, to compel arbitration on behalf of one of those clients. Its argument, in brief: Starz forced customers to agree to individualized arbitration, but when thousands of customers actually demanded arbitration, the company threw up improper obstacles and ultimately forced them into a consolidated proceeding that is contrary to its own contract.

In the dismissal motion filed on Tuesday, Starz offered a different interpretation. The company, which disputes the merits of customers' video privacy claims, said its handling of the case at JAMS proves that it is ready and willing to move ahead with arbitration.

Starz said it has abided by JAMS' procedures at every turn. It also said there's nothing inconsistent about its call for a consolidated arbitration even though it bars customers from suing as a class: In the consolidated arbitration, it said, every customer is still asserting an individual claim.

Starz said Keller Postman's "cynical" petition to compel arbitration is the culmination of six months of obstruction by the plaintiffs firm in the wake of JAMS' decision to consolidate the arbitration and charge Starz just \$1,750.

"Keller's ultimate goal is purely one of litigation strategy -- to seek this court's help in overruling JAMS's arbitration decisions in order to try to make it too expensive for STARZ to defend itself on the merits at arbitration and force an early settlement payday," the motion said.

Starz said there's no reason for U.S. District Judge Kenly Kato to entertain Keller Postman's petition, since the parties are already in arbitration at JAMS, which is contractually empowered to resolve any procedural questions.

And finally, according to Starz, the principle of judicial estoppel bars Keller Postman from asking the court to rule on the mediation fee dispute because the firm has already told JAMS that an arbitrator must decide that question.

Starz declined to comment on its new motion. Keller Postman sent me an email statement on the filing, asserting that it is Starz, not the plaintiffs firm, that has behaved cynically.

The company, Keller Postman asserted, "is trying to have it both ways by denying consumers the fair and efficient path of a class action, but also denying them their contractual right to individual arbitration."

Starz has requested a March 14 hearing.

Read more:

Wells Fargo nemesis sues over American Arbitration Association's rules for mass disputes
New Starz suit reveals latest mass arbitration defense: Make customers pay for mediation
Epson's unusual mass arbitration defense: Sue your (alleged) customers

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Reporting By Alison Frankel

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Alison Frankel

Thomson Reuters

Biogen Under Scrutiny

 fcpaprofessor.com/biogen-under-scrutiny

February 15, 2024

In September 2022, Pharmaceutical company Biogen Inc. agreed to pay \$900 million to resolve allegations that it caused the submission of false claims to Medicare and Medicaid by paying kickbacks to physicians to induce them to prescribe Biogen drugs.

As stated in the DOJ release: “Biogen offered and paid remuneration, including in the form of speaker honoraria, speaker training fees, consulting fees and meals, to health care professionals who spoke at or attended Biogen’s speaker programs, speaker training meetings or consultant programs to induce them to prescribe the drugs Avonex, Tysabri and Tecfidera, in violation of the Anti-Kickback Statute.”

Yesterday in its annual report, Biogen disclosed:

“The Company has received a subpoena from the DOJ seeking information relating to our business operations in several foreign countries. The Company is also providing information relating to our business operations in several foreign countries to the SEC.”

As highlighted here, numerous Foreign Corrupt Practices Act enforcement actions have been based, in whole or in part, on the enforcement theory that various foreign health care professionals are “foreign officials” under the FCPA.

DeWine on former PUCO chair Sam Randazzo: "I wish we hadn't appointed him"

[wosu.org/2024-02-14/dewine-on-former-puco-chair-sam-randazzo-i-wish-we-hadnt-appointed-him](https://www.wosu.org/2024-02-14/dewine-on-former-puco-chair-sam-randazzo-i-wish-we-hadnt-appointed-him)

February 15, 2024

Politics & Government



Daniel Konik

/

Statehouse News Bureau

Gov. Mike DeWine takes questions from reporters on Feb. 13, 2024.

Two former FirstEnergy executives and the former head of the state's utility regulator have pleaded not guilty to 27 state criminal charges in the \$60 million bribery scheme involving House Bill 6. The indictment suggests FirstEnergy tried to make sure Gov. Mike DeWine

didn't know about the deals involving the energy law that featured a billion dollar nuclear plant bailout.

And DeWine said he didn't.

"I believe in the criminal justice system. We're going to see what happens," DeWine said on Tuesday, adding that he assumes there will be a trial in Summit County on bribery, theft and other corruption charges for former execs Chuck Jones and Michael Dowling and former Public Utilities Commission chair Sam Randazzo, who DeWine appointed to that position in 2019.

Randazzo is also facing federal charges. But these are the first criminal charges filed against Jones and Dowling.

Listen: The Power Grab Podcast covers the nuclear bailout scandal

Randazzo became PUCO chair in April 2019, three months before House Bill 6 was signed into law. Jones and Dowling are charged with paying Randazzo a \$4.3 million bribe for Randazzo's work for FirstEnergy. The indictment says that includes writing part of House Bill 6.



Summit County Sheriff

Mug shots of Charles "Chuck" Jones, Michael Dowling and Sam Randazzo, released by the Summit County Sheriff's office after they appeared in court on Feb. 12, 2024.

DeWine has said before that he knew Randazzo had worked for FirstEnergy. But he added, "What we did not know, of course, is as far as there's payment, and, of course, the allegation is that the payment was, in fact, a bribe. We obviously did not know that."

On Wednesday, DeWine took questions from reporters again, saying he'd picked Randazzo to chair the PUCO because Randazzo is an expert on utilities. DeWine said he wasn't concerned that Randazzo had worked for FirstEnergy, but said he didn't know the utility had paid Randazzo so much money.

"I've said that if I knew that piece of information, you know, we would not have appointed him, you know, if we if we knew that that amount of money," DeWine said. "You go with the information that you go with. Is that something that I wish we hadn't done? Well, sure. I wish we hadn't appointed him. We did not know all of those facts. I did not know all those facts at that time."

According to the indictment, DeWine's chief of staff knew FirstEnergy had paid Randazzo \$4.3 million, which Randazzo claimed closed a consulting agreement. In a July 2021 plea agreement, FirstEnergy admitted to bribing Randazzo and Republican former Ohio House Speaker Larry Householder.

Randazzo pleaded not guilty to federal bribery and corruption charges in December, in the case that prosecutors have called the largest corruption scandal in Ohio history.

Householder and former Ohio Republican Party chair Matt Borges were convicted in 2023 of federal racketeering charges for their roles in the scheme. Householder is doing 20 years in prison; Borges is doing five years. Three other people were arrested in the case. Lobbyist Juan Cespedes and Householder aide Jeff Longstreth have cooperated with investigators. Lobbyist Neil Clark died by suicide in March 2021.

Angry FirstEnergy customers: 'Give me my money'

[news5cleveland.com/news/politics/ohio-politics/give-me-my-money-firstenergy-customers-furious-as-former-ceo-vp-plead-not-guilty-in-bribery-scandal](https://www.news5cleveland.com/news/politics/ohio-politics/give-me-my-money-firstenergy-customers-furious-as-former-ceo-vp-plead-not-guilty-in-bribery-scandal)

Morgan Trau

February 13, 2024

COLUMBUS, Ohio — FirstEnergy customers remain furious at the former utility company executives who raised their bills to allegedly fund the largest bribery scheme in Ohio history — especially as the men pleaded not guilty on Tuesday.

Former FirstEnergy CEO Chuck Jones, former FirstEnergy Senior Vice President Michael Dowling and former chairman of the Public Utilities Commission of Ohio Sam Randazzo all pleaded not guilty during their arraignment in Akron. They are accused of masterminding the corruption scheme — and faced a Summit County judge for the first time.

RELATED: 3 charged in HB6 scandal plead not guilty

They have been charged with a "combined 27 counts of felony violations, including engaging in a corrupt activity, all related to their joint enterprise to hijack Ohio's regulatory structure for the benefit of First Energy Corporation and for themselves," Attorney General Dave Yost stated in the indictment.

FirstEnergy as a company has already admitted to bribing public officials in Ohio, including a \$4.3 million bribe to Randazzo. Jones and Dowling allegedly paid this to him.

The two former executives face a dozen charges each, including engaging in a pattern of corrupt activity, bribery and fraud.

[Click here to read each of their specific charges.](#)

Randazzo has already been charged with federal racketeering, which he pleaded not guilty to in December. The state added 22 felony counts, including engaging in a pattern of corrupt activity, bribery and money laundering.

Summit County Court of Common Pleas Judge Susan Baker Ross is presiding over the case; she spent an hour with the defendants in the afternoon going over bond. As expected, each attorney fought for the least amount of restrictions for their client.

"The man is 74, 75," Randazzo's attorney Richard Blake said. "He's not going anywhere."

Matthew Meyer, principal assistant attorney with the attorney general's office, disagreed.

"Our concern is risk of flight," Meyer said. "Mr. Randazzo... faces charges that if convicted and sentenced, could send him to prison for decades, the rest of his natural life."

The federal charges Randazzo is facing, alone, could be 20 years if convicted. That doesn't even include the state charges.

His lawyer argues that if he is forced to wear the monitor, it would be "just downright unnecessary punishment," and also "mean."

Baker Ross ordered Randazzo to have a GPS ankle bracelet and said he can travel throughout the state. He was given a \$100,000 bond.

Dowling's bond was also set at \$100,000. He will be required to wear a GPS ankle monitor and cannot leave the state.

The hearing was relatively straightforward until Jones' attorney asked that the former CEO be able to return to his home in Naples, Florida before the trial. The government had a major problem with this.

"That's a relatively short boat ride to a country with no extradition jurisdiction to the United States," said Matthew Meyer, principal assistant attorney with the attorney general's office. "The prospect of decades in an Ohio state penitentiary makes the risk go up."

Although Jones' attorney, Carole S. Rendon, adamantly denied he was a flight risk, the judge agreed with the state. Jones is not allowed to return to Florida and has to stay in Ohio. A property asset freeze, as well as a \$100,000 bond, was issued for Jones. He also has a GPS tracker.

They are expected back in court in April. The three men continue to claim innocence. Meyer, once again, disagreed — citing the enormous surplus of evidence the indictment had in it, in addition to their own private information and evidence that came out from the FBI in the recent federal trial involving former Ohio House Speaker Larry Householder.

"We do not believe this is a \$4.3 million coincidence," Meyer said.

RELATED: 'They deserve it' — FirstEnergy scandal whistleblower cheers new indictments in bribery scheme

Fast facts

Back in 2019, Householder took a \$61 million bribe in exchange for legislation to give FirstEnergy a \$1 billion bailout, named H.B. 6, all at the expense of the taxpayers.

The scheme was revealed in three main ways — two separate whistleblowers and a phone wiretap.

Fast forwarding to March 2023, a jury found that Householder and former GOP leader Matt Borges, beyond a reasonable doubt, participated in the largest public corruption case in state history, a racketeering scheme that left four men guilty and another dead by suicide.

In late June that year, federal judge Timothy Black sentenced Householder to 20 years in prison. Borges got 5 years. The two surviving defendants took plea agreements early on, helping the FBI, and are still awaiting their sentencing. The feds are asking for 0 to 6 months for them.

Until 2024, only federal indictments had been handed out.

This bribery scandal has been covered extensively by News 5's Morgan Trau, who followed the legislation all the way through the Statehouse, the arrests, trial, conviction and sentencing of Householder and former GOP leader Matt Borges. She continues to follow it as the next group are indicted federally and by the state.

RELATED: Former Ohio House Speaker Householder sentenced to 20 years in prison for state's largest bribery scheme

Now

FirstEnergy customer John Makley says it's about time.

"Give me my money back!" he said.

News 5 has been talking to Makley since the summer, when he was part of the class action lawsuit against FirstEnergy. Although the consumers won, he only got \$7 back.

He's mad because he continues to pay. Since the Householder trial, dozens and dozens of News 5 viewers have reached out to share the same feelings as Makley.

"How do you feel that the people who raised your bills are now getting in trouble for it?" Statehouse reporter Morgan Trau asked.

"Well, I feel there's at least some justice happening to them, so that we feel better about that," Makley responded. "But it doesn't help our pocketbooks in the long run."

H.B. 6 isn't completely off the books.

The corrupt legislation mainly benefited FirstEnergy's struggling nuclear power plants, but those provisions were later repealed. There are aspects of the bill still in place.

The Ohio Valley Electric Corporation (OVEC) got a handout from the scheme. It expanded a bailout of the OVEC plants and required Ohioans to pay for two 1950s-era coal plants— one in the Southern area of the state and the other in Indiana. The main beneficiaries of this are

American Electric Power Company (AEP), Duke Energy and AES Ohio.

RELATED: Following legal scandal, Ohio utility companies try to raise costs — again

Despite this scandal becoming public years ago, ethics laws in the state have not changed to prevent schemes like this from happening.

There are numerous bipartisan efforts to repeal H.B. 6 totally and to put forward ethics laws. None are going anywhere, it seems.

Makley's bill has also continued to increase. There is only one way the industry could rebuild his trust, he said.

"Try to be transparent is one thing that would at least provide a little more confidence that you're doing the right thing for the consumer," he added.

He hopes the three men take responsibility eventually, he said. Just in the past day, Trau has received over 20 messages from viewers and readers wishing for the same thing.

"It just boils my blood," Makley added. "Just being open and honest."

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Feb. 15, 2024, 7:40 AM PST

Hindenburg's Bond Whale Target Caught Up in Market-Rigging Probe

By Nariman Gizitdinov

- Kazakh regulator fines Freedom units over alleged manipulation
- Freedom denies wrongdoing, dismissed Hindenburg's allegations

Bloomberg Law News 2024-02-15T11:22:58891664999-05:00

Hindenburg's Bond Whale Target Caught Up in Market-Rigging Probe

By Nariman Gizitdinov2024-02-15T10:40:14520-05:00

Kazakh regulator fines Freedom units over alleged manipulation

Freedom denies wrongdoing, dismissed Hindenburg's allegations

Kazakhstan is seeking to curb alleged manipulation by billionaire **Timur Turlov's** Freedom Holding Corp . – a group **targeted** by US short-seller Hindenburg Research last year – in the country's local-currency sovereign debt market.

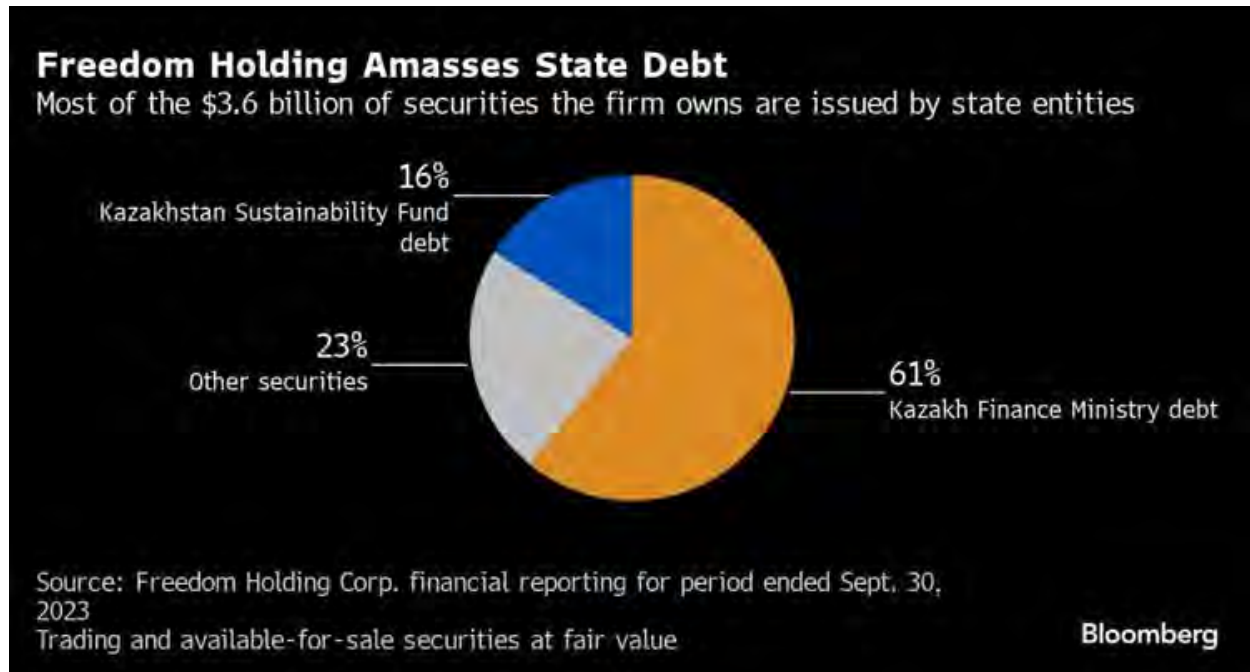
The watchdog took an initial step in November by providing brokers with a list of 13 limited partnerships that are no longer allowed to conduct deals with certain securities, according to people familiar with the matter. The decision, they said, takes aim at companies not directly affiliated with Freedom but suspected of being involved with it in what authorities have alleged amounts to manipulation.

Local authorities also plan to restrict the ability of the Nasdaq-listed firm to deploy its units as buyers and sellers in what the regulator says helps the company to rig trades, according to the people, who requested anonymity to speak about deliberations that aren't public. Their effort is focusing on repurchase operations, in which securities are sold with an agreement to buy them back later.

Freedom Holding Corp. is the parent of Kazakhstan-based brokers Freedom Global Plc and Freedom Finance JSC , which in turn owns a local bank and two insurance companies. The group has become a whale in the local debt market by amassing more than 6% of all outstanding tenge-denominated securities issued by the Finance Ministry , according to Bloomberg calculations.

The country's financial regulator, officially known as the Agency for Regulation and Development of Financial Market, confirmed that last year it fined Freedom Finance and its units for transactions "committed for the purpose of manipulation." It's brought no cases against them in 2024, according to an emailed reply to questions.

Freedom Holding said it couldn't challenge the decisions directly with the regulator after procedural changes in late 2022 made the criteria used to detect market manipulation less clear. The firm's units repeatedly denied any wrongdoing during court hearings held in Kazakhstan. Last year, Freedom **dismissed** Hindenburg's claims as " **speculation and a set of unsubstantiated facts** ."



Freedom, based in Almaty, built a regional financial powerhouse by providing retail investors access to equities and initial public offerings abroad. The company's shares rose as much as 1% in early trading in New York on Thursday.

After long facing outside criticism – which included assessments from S&P Global Ratings – for its proprietary trading of local stocks, the firm in recent years started to take on a bigger presence in the less risky market for government debt and quasi-sovereign securities such as those issued by Kazakhstan Sustainability Fund JSC, a state entity controlled by the central bank.

An external [review](#) commissioned by the independent members of Freedom's board of directors and published in January said the sustainability fund's bonds are "held as part of a deliberate and legitimate trading strategy" which the company expects to become profitable as a result of changes it anticipates in interest rates.

Questionable Deals

Potentially suspect trades by Freedom's units drove up the prices of some local sovereign bonds, according to court filings viewed by Bloomberg. Freedom Finance was the most active trader of government notes last year.

Bidding up the price of debt would have a double significance for Freedom, contributing to its profits and enabling it to borrow more money by putting up the securities as collateral.

Freedom identifies and tries to enter illiquid segments of the market where it can sway prices, in part by attempting to gain ownership of a majority of traded securities, the people said.



Timur Turlov

Photographer: Valery Ayapov/Freedom Holding

The previously unreported legal cases last year resulted in several fines levied on Freedom's brokerages and its banking and insurance units between February and August 2023, according to Almaty court filings.

The insurers are the subject of a draft order, published in December, that aims to cut their capacity to engage in repurchase operations by about two-thirds, the people said. The directive is currently under discussion by the financial markets regulator and could still undergo changes.

Turlov, who controls about 71% of Freedom, criticized the initiative as an "extremely exotic way" to control interest-rate risk, telling Bloomberg that it's not in line with international practices including the latest Basel regulatory standards.

Stiffer oversight of Freedom at its home base follows Hindenburg's report on Aug. 15 that included accusations that ranged from fraud and market manipulation to circumventing sanctions.

The latest Kazakh investigations in 2023 determined Turlov's companies were in fact using certain trades to book profit by revaluing the debt they still held on their balance sheet, according to the people. That followed a [probe](#) by the regulator early last year into suspected manipulation of local bond prices by some of Turlov's firms.

At the time, Freedom told Bloomberg it had received no complaints from the regulator over yields on securities issued by the sustainability fund. The company denied that any of its transactions – which it said are routinely audited – amounted to manipulation.

In 2023, Kazakh judges have upheld some of the fines given for manipulating the market after Freedom contested them in court. Freedom lost most of the appeals but some cases might still be pending or unresolved.

Turlov said fines across the group amounted to less than \$50,000 last year and were not a "material" factor for his company.

In July, the country's watchdog fined Freedom Finance, the holding's Almaty-based brokerage, for manipulating Kazakhstan Sustainability Fund's bonds in February, according to later filings with Almaty's administrative court. Freedom Finance denied any wrongdoing in the lower court and the court of appeal, which both ruled against it.

The regulator also fined Astana-based Freedom Finance Global in July for manipulating the fund's debt. The brokerage denied the accusations but lost the case both in the lower court and the court of appeals.

Some of the verdicts appear to contradict the conclusions reached in Freedom's external review of allegations made by Hindenburg. The audit found "there was no evidence identified" that the company "has engaged in market manipulation" of securities including the sustainability fund's debt.

Repo Funding

Freedom Holding's securities portfolio expanded by 3.5 times over the 18 months ended Sept. 30, according to S&P. It holds the assets "mostly on the balance sheet" of the Kazakh bank owned by Freedom Finance, with about 75%-80% of the book funded by repurchase deals, Annette Ess, S&P's credit analyst in Frankfurt, said by email.

"The group takes a considerable amount of market risk - that is, the risk of price volatility," she said.

Turlov's group is operating in a debt market that's drawn the interest of major international fund managers but isn't yet included in global indexes.

As part of their effort to attract greater inflows, the Kazakh authorities are planning to introduce the practice of primary dealership, which enables several financial institutions to buy debt directly from the government and should help make pricing more transparent.

The Kazakh Finance Ministry's bonds made up nearly two-thirds of the total \$3.6 billion in debt held by Freedom as of Sept. 30, according to its consolidated report. Bonds issued by Kazakhstan Sustainability Fund accounted for another \$612 million.



The Kazakh city of Almaty is Freedom Finance's home base.

Source: TASS

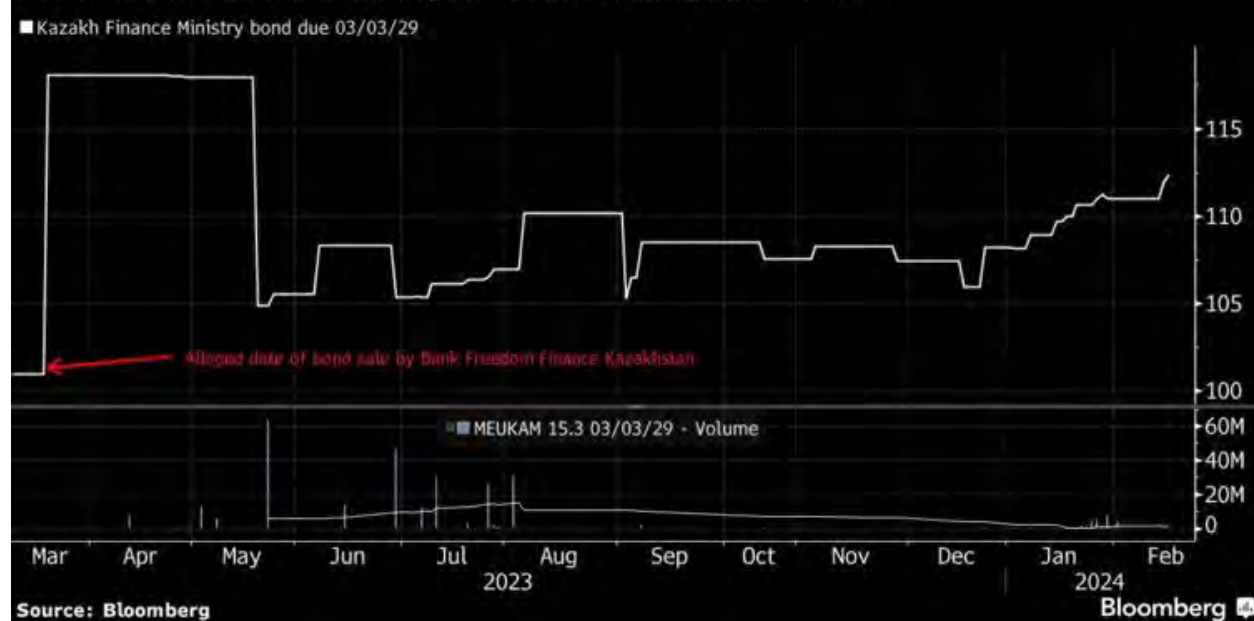
As early as in 2017, Freedom drew regulatory ire for its [reliance](#) on equity repo agreements to borrow short-term money and then use it to buy more stocks.

Freedom's activities in the local debt market follow a similar approach. Court filings in Kazakhstan offer a fuller view of such transactions by Freedom's units.

According to a November case filed with the Almaty administrative court, Bank Freedom Finance Kazakhstan in March bought 2029 securities issued by the Finance Ministry in the primary market.

Just over two weeks later, it sold some of them at a markup, in what the regulator called "a deal to manipulate the securities market." The bank's representative told the court there was no proof of any wrongdoing and denied the accusations, which resulted in a fine.

Kazakh Regulators Scrutinize Transactions by Freedom's Units Freedom Finance bank's alleged 'deal to manipulate' market



The investigations in 2023 prompted the Kazakh regulator to fine Freedom Finance itself and one of its insurers. It penalized another insurance unit, Freedom Finance Life, twice in February that year and Freedom Finance Bank three times between February and August, according to the watchdog's website.

Concerns over Freedom's practices and its buildup of investment in government and quasi-sovereign bonds prompted the regulator to try to limit the credit risk it allows insurers engaging in repurchase operations, the people said.

The order under discussion is designed to sharply cut the value of securities pledged as repo collateral for the purposes of calculating insurers' liquid assets, a decision that directly affects Freedom Finance's units.

Freedom's accumulation of tenge securities was effectively a bet that Kazakh interest rates would decline, said S&P's Ess.

Instead, local borrowing costs stayed elevated after [going up](#) sharply after the Russian invasion of Ukraine in February 2022. Even with monetary easing that [started](#) last August, rates remain higher than the pre-war level.

Far tighter policy after the start of the war resulted in a "large-scale mispricing of sovereign debt," Turlov said. The central bank-run pension fund played a de-facto market maker role at the time, conducting operations that led to a flat yield curve and caused longer-term securities to drop sharply in value, he said.

Yields at the time of bond issuance "differed significantly" from those in the secondary market, and "the deviation in prices itself was recognized as a fact of market manipulation," Turlov said.

(Updates with share price in seventh paragraph.)

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Someone Bought The Children's Place

By Matt Levine

(Bloomberg Opinion) --

Children's Place

If you want to take over a US public company, the normal way to do it is by calling up the company's chief executive officer and proposing a merger. You talk to the CEO, you work out a deal, the board approves, they submit it to a shareholder vote, the shareholders approve, and then you buy all of the company's stock for the price you agreed on.

A less common approach is the hostile tender offer: You call up the CEO, you propose a merger, she says "absolutely not," you decide to do it anyway, so you make a public offer to the company's shareholders to buy all their stock at some fixed price. If a majority of the shareholders tender their shares to you, then you control the company and get to replace the board and do more or less what you want. ¹

The weirdest approach would be to just go to the stock exchange and keep buying stock until you own a majority of the shares, and then say "Surprise! I own the company now." I'm sure someone has done this before, but it is very much not normal practice. For one thing, it's not like every share is *available* on the stock exchange: Lots of stock will be owned by insiders, index funds, loyal investors, etc., who have no interest in selling; if more than 50% of the stock is owned by those sorts of long-term holders, you'll never be able to buy it on the exchange.

Also, even if you can get above 50%, it'll take forever: Most stocks' daily trading volume is a small fraction of the shares outstanding, so even if you buy *all* of the shares each day, it will take you days to get a majority. And if you are buying all the shares, you are going to be pushing the price up, making all of this uneconomical. Also, if you do this over several days, you will have to disclose your giant stake – and perhaps your intentions – and then people will know that you're buying and will demand even higher prices.

Also, just, I mean, you're buying a whole company? Don't you want to *talk* to the CEO first? It's possible that you'll call the CEO and she'll say "get lost, we're fine here without you," and you'll disagree and decide to buy up the stock anyway and fire her, but don't you at least want to know that first? The friendly merger and the hostile tender offer are traditional ways to start a process that ends with you in charge of the company, and they are ways for you to understand what you are getting into. Just buying stock on the exchange until you stumble into control of the company is weird.

Nevertheless, Semafor's Liz Hoffman reports:

Since The Children's Place – once a defining feature of American malls – said last week that it was running out of cash, more than half of its stock has been snapped up by the Al-Rajhi family, the founders of Saudi Arabia's largest private bank.

Mithaq Capital, which invests some of the Al-Rajhi family fortune, bought 46% of the retailer's shares on Friday and Monday, and another 8% on Tuesday, corporate filings show, and plans to replace the board. Semafor reported the hostile approach Wednesday.

All in, Mithaq spent at least \$80 million to buy control of a public company in three trading sessions – an unheard-of blitz for even the most aggressive of hostile bidders and corporate agitators.

Here is a Mithaq filing reporting that, on Friday, it acquired more than 10% of the stock and was thus required to file ownership reports. Here is another filing reporting that it bought another 1.8 million shares later on Friday, taking it up to 3.1 million shares, or about a quarter of the company. Here is another filing reporting that it bought a further 2.7 million shares on Monday, bringing it up to 46%. ² And apparently it got to 54% on Tuesday, because here's an announcement from the company:

On February 14, 2024, The Children's Place, Inc. (the "Company") received correspondence from Mithaq Capital SPC ("Mithaq") notifying the Company that they own approximately 54% of the Company's outstanding shares of common stock. The Company had previously received notice from Mithaq and its related parties of their intent to nominate 11 director candidates to stand for election to the Company's Board of Directors at the Company's 2024 Annual Meeting of Shareholders. The Company intends to accept Mithaq's request to enter into discussions regarding the provision of financing to assist with the Company's liquidity needs.

Mithaq just ... bought the company in the open market over the course of three days? Wild stuff.

What's even better is that Mithaq's purchase price was at a deep *discount* to the stock's trading price before it started buying. The Children's Place's stock closed at \$19.75 last Thursday; Mithaq bought all of its shares for \$17.10 or less. To be fair, there were reasons for this; Yet Another Value Blog notes:

Things changed last Friday (Feb. 9). The company put out a press release on their Q4 results. The Q4 results were, to put it lightly, an abject disaster. Sales came in below the company's expectations, but the real killer is operating margins were coming in at negative 8-9% versus the company's prior expectations of positive 2-3%.

The combination sent PLCE 3 into a liquidity crunch. ... One of the few analysts who covered the company instantly took their rating from neutral to sell and their [price target] from \$19 to \$4 while noting a real chance the company couldn't make it through the current liquidity crunch.

The Children's Place was a popular stock, it put out terrible results, the shareholders rushed to sell, and Mithaq swooped in to buy. Most of the shareholders wanted to sell, so it could get the stock cheap, and they wanted to sell *immediately*, so it could get the stock fast. Now it owns the company. Maybe it can fix it? It will be a weird ride for the holders of the other 46%.

There is one immediate problem, which is that by buying a majority of the stock Mithaq has triggered a default on the company's credit agreement. "As a result of Mithaq's share ownership position of the Company, Mithaq has triggered a Change of Control thereby causing an Event of Default under the Company's Amended and Restated Credit Agreement," says the company, which "is in discussions with its lenders to seek a waiver of the Event of Default." Presumably that will cost something, but also, presumably the lenders are happier today than they were after the earnings release: The company is more likely to pay them back now, with its deep-pocketed new owner, than it was immediately after announcing terrible earnings.

Nvidia 13F

"SoundHound Inc., known for its music recognition app, raised \$75 million to compete with the likes of Amazon.com Inc. and Google to build artificial intelligence that helps machines understand human voices," reported Bloomberg News. "Investors in this round of fundraising included Samsung Electronics Co.'s Catalyst Fund and graphics chip-maker Nvidia Corp.," reported Bloomberg. "New Investors Include NVIDIA, Samsung Catalyst Fund, and Other Strategic Investors to Accelerate Globalization and Distribution of Houndify AI Platform," said SoundHound's press release.

I should clarify that I am quoting a Bloomberg story and a press release from seven years ago. Nvidia put some money into a private fundraising round for SoundHound in 2017. Since then, Nvidia has been on a good run; its market value has soared to \$1.8 trillion because of its central place in the artificial intelligence business.

Meanwhile, SoundHound went public in 2022 by merging with a special purpose acquisition company. Its investor presentation touted that it was "Backed by Leading Strategic and Financial Investors," with a list of names including Nvidia. If you were paying close attention to SoundHound, or to Nvidia's investment portfolio, you probably knew that Nvidia had a stake in SoundHound, because SoundHound has repeatedly mentioned it over the years.

US Securities and Exchange Commission rules require US corporations that own more than \$100 million of publicly traded stock to file Form 13F, a public quarterly report listing their holdings of public stocks. Nvidia is *also* an investor in Arm Holdings Plc, another chipmaker, which had an initial public offering in September. Nvidia's stake in Arm is worth about \$147 million, and Arm's IPO put Nvidia over that \$100 million threshold and triggered its obligation to file a 13F. Yesterday, the deadline for that filing, Nvidia filed a 13F disclosing the Arm stake and a few others. One was \$379,856 worth of Nano-X Imaging Ltd., a small medical imaging company. Another was a \$3.7 million stake in SoundHound. Naturally:

Shares of SoundHound AI and Nano-X Imaging jumped Thursday after chip giant Nvidia disclosed stakes in the companies.

SoundHound, which specializes in voice-enabled artificial intelligence, was recently up 50%. Shares of Nano-X, an Israel-based medical imaging company, were up more than 65%.

Is it news that Nvidia owns about 0.8% of SoundHound? No, in the sense that Nvidia bought those shares in 2017, and it was disclosed at the time, and then it was disclosed again in 2022 when SoundHound went public. But it is news in the sense that (1) people are paying a lot of attention to Nvidia now as a sort of artificial intelligence kingmaker, (2) people love to pay attention to *13Fs in particular*, and to buy stocks that smart hedge fund managers (or Nvidia!) bought last quarter and (3) Nvidia has never filed a 13F before, but had to this quarter, for reasons unrelated to SoundHound. So if you are a 13F reader who has recently started paying attention to Nvidia, that SoundHound stake is news. So the stock was up more than 50% this morning.

This is mostly a fun story about market inefficiency and the limits of investor attention. Also though I hope someone in Nvidia's legal department bought a ton of short-dated SoundHound call options yesterday! What a fun insider trading case *that* would be. If you knew that Nvidia was about to *re-disclose* its stake in SoundHound, was that material nonpublic information? It was kind of public already. And yet it moved the stock.

OpenAI

Here is my rough understanding of the thinking behind OpenAI's goofy corporate structure:

1. OpenAI wants to lead the world in the development of artificial general intelligence (AGI), a somewhat vague concept that we can roughly understand to mean "a computer that can think like a human but much better." Done right, AGI will usher humanity into a paradise of leisure and plenty. Done wrong, AGI will impoverish or enslave or murder all of humanity. Very important to get it right!
2. Therefore, in developing AGI, OpenAI's decisions must be made by people who are pure of heart. They can never let short-term commercial considerations override their commitment to the good of humanity, because what they are doing is too important.
3. Developing AGI – buying processors, training models – will be extraordinarily expensive, costing perhaps literally trillions of dollars. So OpenAI will need to raise a lot of money from investors.
4. Developing AGI will also require hiring the best researchers (and fundraisers!) in a hotly competitive market, so OpenAI will need to be able to pay and motivate them.
5. Done *the wrong way*, AGI could be enormously lucrative for the company that develops it 4: You could raise trillions of dollars by promising investors a share of the spoils of AGI, and you could motivate researchers by giving them options on those spoils.
6. But OpenAI is committed to doing it the right way, so that's out. Its mission is to develop AGI for the benefit of humanity, not to enrich its employees or investors.
7. On the other hand, OpenAI is not, like, launching AGI tomorrow. And *along the way* to AGI, there will be plenty of ways to get rich off of the artificial intelligence industry. Large language model chatbots have obvious commercial uses now, and OpenAI isn't committed to distributing *those* for the benefit of humanity; *those* it can charge for. Those trillions of dollars of chips that will be needed to build AGI? Someone's gonna make a profit on those chips, and maybe OpenAI can get some of that.
8. All that ancillary stuff – all the money that will slosh around the artificial intelligence business while OpenAI methodically works toward its goal of building AGI – can be carved up and used to attract investors and motivate employees.
9. OpenAI, at its core, doesn't need any of that. It's not motivated by money, as an entity; it's motivated by the good of humanity.
10. So there's a trade: OpenAI can raise money (and attract employees) for its grand project by distributing the intermediate spoils to investors and employees. OpenAI doesn't want those spoils. It just wants the ultimate goal, the AGI, which it will use benevolently to usher in a golden age for humanity.

I am exaggerating in places, and I am not saying that any of this is *correct*. I am just saying that, from the outside, this model seems to explain a lot of OpenAI's choices. We have talked about many of them:

OpenAI is officially a nonprofit organization with no shareholders at all.

But it has raised billions of dollars from investors, led by Microsoft Corp., through its for-profit subsidiary.

But that subsidiary is actually a "capped-profit" company: Investors can make a profit on their investment, but not an infinite one; once they've gotten enough profit to make their investment worth their while, OpenAI no longer has to try to make profits for them, and can focus on humanity.

Similarly OpenAI's employees get capped-profit quasi-shares, to motivate them to build AI, but not to motivate them to put their dreams of dynastic wealth above the good of humanity.

But OpenAI's *board of directors*, who are ultimately in charge of making sure it benefits rather than enslaves humanity, *don't* get stock (or options, or quasi-stock): Their motives are pure. Even Sam Altman, OpenAI's founder and chief executive officer, doesn't own any stock. 5

OpenAI also has a commercial partnership with Microsoft giving it access to OpenAI's models *up to* (but not including) AGI. Once OpenAI builds AGI, that's for humanity, not for Microsoft.

Here's another one that Axios's Dan Primack reported today:

OpenAI Startup Fund was launched in late 2021 to invest in other AI startups and projects.

By last May it reported \$175 million in total commitments, and a portfolio that included video editor Descript and legal tool Harvey.

It always had outside limited partners, including major OpenAI partner Microsoft, which is unusual for corporate VC funds but not unique.

What set OpenAI Startup Fund apart, however, was that it wasn't (and isn't) owned by OpenAI. Nor even by its affiliated nonprofit foundation. Instead, it's legally owned by Altman. ...

"We wanted to get started quickly and the easiest way to do that due to our structure was to put it in Sam's name," an OpenAI spokesperson tells Axios. "We have always intended for this to be temporary."

"Temporary" has been well over a year and it's a significant risk. For example, what might have happened had Altman remained fired by OpenAI. Could he have kept the fund? Was there anything contractual to prevent it?

Maybe? It's fine? Sam Altman runs one of the biggest and hottest startups in the world, but he doesn't own any of its stock, because of its unique concern with purity. But he wants to get paid like he runs one of the biggest and hottest startups in the world. So why shouldn't he get to own some of its ancillary spinoff projects? He can get rich off the video editor and the legal tool, and Microsoft can get rich off ChatGPT, and SoftBank can get rich investing in chipmakers, and everyone can get rich off of something as long as no one gets rich off of AGI. That has to be kept pure, for humanity.

I don't know, this is all a little absurd, but if you take the first premise seriously – that OpenAI wants to build AGI, and that building AGI the correct way is existentially important for humanity – then it sort of makes sense. It would normally be conventional wisdom to say that it's a *conflict of interest* for the CEO of a big company to own its venture arm personally: What if he takes a corporate opportunity that ought to belong to the company? But OpenAI is not, fundamentally, in the business of business; it's not in the business of seizing commercial opportunities to make money for its shareholders. Oh sure it *does* that, but only as a tool to achieve its real goal, of making AGI. Letting its celebrity CEO profit from the venture arm, but not from the main product, somehow *aligns* everyone's interests.

Of course the actual conflict of interest is, what if one of the venture investments builds AGI first? In the bad way? What if Sam Altman looks around and is like "man, someone could get rich building AGI, but I can't get rich if I build it at OpenAI due to its purity, so I'd better fund someone else who'll do it in the commercial way"?

Continuation

The weird story in private equity these days is that private equity firms have two, as far as I can tell, exactly offsetting problems:

1. They have investors who have given them a lot of money recently and want them to spend it buying companies.
2. They have investors who gave them a lot of money years ago, which they used to buy companies, and now those investors would like them to sell those companies and give them the money back.

As the Financial Times put it last month, they have "record amounts of unspent investor cash and an unprecedented stockpile of ageing deals that firms must sell in coming years." I wrote: "Doesn't it seem like this should be a solvable problem?" What you do is, you take the money that the investors want you to spend on buying companies, and you use it to buy the companies that the investors want you to sell, so you can give the money back to those investors. 6

Obviously there are details to work out, but if every private equity firm is in this situation, I have confidence that they can work out those details. I use my new fund to buy a company you own in your old fund, you use your new fund to buy a company that I own in my old fund, everybody's happy. This just does not seem like the most challenging problem of financial engineering that the private equity industry has ever faced.

Anyway here are KKR and Veritas, handling it:

KKR & Co. has agreed to acquire a stake in Cotiviti from private-equity manager Veritas Capital in a deal valuing the healthcare-technology business at around \$11 billion.

The transaction would give the two New York-based firms equal ownership stakes in Cotiviti, according to an announcement planned for Wednesday. The Wall Street Journal reported in December that the firms were in discussions.

The deal would rank among the largest recent private-equity transactions. Buyout firms slowed dealmaking after the Federal Reserve began raising interest rates in 2022, with the debt used to finance acquisitions getting more expensive and harder to obtain.

The deal would also represent a significant payday for Veritas, which took Cotiviti private for about \$4.16 billion in 2018. The firm specializes in buyouts of companies at the intersection of technology and government. ...

Veritas plans to invest new capital in Cotiviti alongside KKR's commitment to help fund the company's growth. ...

KKR's investment in Cotiviti comes from KKR North America Fund XIII, a \$19 billion vehicle closed in 2022, and Veritas's new investment comes from Veritas Fund VIII, a \$10.65 billion pool that closed the same year.

Right, if you bought a company in your old fund in 2018, it's time to cash that fund out. So you invest in that company from your new fund, which (1) helps you deploy that new fund (which the new fund's investors want) and (2) helps you cash out the old fund (which the old fund's investors want). There are questions about valuation – you don't want to overpay (hurting the new fund) or underpay (hurting the old fund) – but if you get an outside investor (KKR) that kind of answers those questions; presumably KKR negotiated a market price. And of course KKR needs to deploy its new fund too. Plus opening up the market for big secondary deals probably helps KKR if it too needs to cash out its old funds.

Private banking

If you are a bank with a private banking business for wealthy clients, the two main things that you want from your private bankers are:

1. You want them to serve their clients' needs, put the clients first and make the clients feel well taken care of, so the clients stick with your bank, add more assets to the relationship, and recommend your services to their friends.
2. You want them to extract more *revenue* from the clients, by upselling and cross-selling them on new products that earn money for your bank.

Are these goals in conflict with each other? Oh, sure, absolutely, a lot of the time: Often the best way to take care of clients is *not* by putting them into a lot of high-fee products that are good for the bank. But there really is a lot of overlap. Often the clients *do* want a loan, or a fancy private investment vehicle, and setting them up with one is both good client service and good revenue generation. A good private banker will do both things seamlessly; the clients will happily pay the bank lots of money, because they feel like they're getting good value.

If you are a really *big* bank with a private banking business, you will hire hundreds of private bankers and let them loose on thousands of clients and *tell* them to do those things, but you will have a hard time *measuring* them. Good customer service can be approximated with anecdotal feedback, surveys, data on churn, etc., but you won't have perfect visibility into how good each banker is at customer service. Revenue is easier to measure, but also somewhat random – some bankers will have clients who inherit fortunes and need more products, through no effort of the banker – and it's harder to measure who is good at *trying* to generate revenue.

And so you might implement some incredibly crude metric to decide which bankers are doing a good job of serving customers and pitching products:

Citigroup has started tracking how many calls its private bankers are making to clients as the US lender tries to jump-start its struggling wealth management business, according to people familiar with the matter.

Citi's private bankers must now turn in call reports to record each conversation they have with a client – whose net worth typically has to be at least \$10mn to qualify for the private bank – and also what was discussed, the people said.

They have also been encouraged to contact each of their clients at least once every 90 days, the people added. ...

The requirement had been badly received by some employees, who felt it was not a productive use of their time, the people familiar with the matter said. It also comes as Citi is cutting thousands of jobs as part of big reorganisation.

A Citi spokesperson said: "Enhancing client experience is our number-one focus. Documenting and sharing client feedback is one way to ensure we're delivering for them, and is a standard practice within Citi and across the industry."

Do the clients want that? At what frequency do the calls shift from good customer service to pestering? They should have two tiers of private wealth. At \$10 million your private bankers call you at least once every 90 days. At \$100 million they *don't*.

Things happen

Private Credit Cuts Pricing to Fend Off Wall Street Deal Grab. Dozens of Banks Rapidly Piled Up Commercial Property Loans. Late Mortgage Payments Pile Up for Giant Apartment Lender. Private equity should share more wealth with workers, says US pension giant. JPMorgan sued by chief executive of fintech it co-owns. Deutsche Bank Told by Regulator to Fix Controls, Once Again. Drug Shortages Trigger FTC Probe. Warren Buffett's Berkshire Hathaway Trims Its Massive Stake in Apple. The Stanford Professor Taking on Racism in the \$4 Trillion Muni-Bond Market. The China Conundrum Facing Wall Street Banks. What a Viral Post on Giraffes Says About China's Fed-Up Investors. BlackRock Alum Launches Fund Focused on 'Weird and Wonderful' Assets. Squishmallows vs. Skoosherz. "Lacking change and not knowing the going rate for baby teeth, he left the equivalent of \$64 under their child's pillow, Singh says, adding: 'It was an utter failure by the deputy tooth fairy.'" Lyft's CEO Says 'My Bad' on Margin Error, 'It Was One Zero.'

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1. I am simplifying in many respects in these two paragraphs. You can negotiate a friendly tender offer (generally followed by a back-end merger). You can do a hostile merger (generally with a proxy fight). You can combine these approaches: Threaten a hostile tender and use that threat to negotiate a quasi-friendly merger. If you get a majority of shares in the tender offer but **don't** do a back-end merger, you have obligations to the minority shareholders and can't do **whatever** you want with it. And of course the board can try to block your hostile tender with a poison pill.
2. Some of these shares came from buying and exercising call options on the same day, why not.
3. PLCE is The Children's Place's ticker symbol.
4. Until we are all enslaved by robots I guess. But there's a "wrong way" that is like "almost all humans are reduced to working for the people who own the superintelligent robots," rather than "all humans are reduced to working for the robots directly." There's a bad way to build AGI that still creates human winners.
5. Well: "The board remains majority independent. Independent directors do not hold equity in OpenAI. Even OpenAI's CEO, Sam Altman, does not hold equity directly. His only interest is indirectly through a Y Combinator investment fund that made a small investment in OpenAI before he was full-time."
6. The investors who want their money back, and the investors who want you to deploy their money, may or may not be different investors.

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Space Exploration Technologies Corp

Elon Musk to make another break with Delaware by moving SpaceX to Texas

Billionaire to shift a second business away from the state where his \$56bn Tesla pay package was struck down



SpaceX is one of the world's most valuable private companies © Cristobal Herrera/EPA-EFE/Shutterstock

George Hammond in San Francisco and **Sujeet Indap** in San Diego YESTERDAY



Elon Musk is to shift the incorporation of SpaceX from Delaware to Texas, seeking to further limit exposure to the state after a judge there shot down his \$56bn pay package from Tesla last month.

Musk, the world's richest man, [switched](#) the incorporation of his brain-implant company Neuralink from Delaware to Nevada last week. SpaceX is a far larger business — a valuation of almost \$200bn makes it one of the most valuable private companies in the world.

"If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible," [Musk](#) wrote on X on Wednesday.

SpaceX, whose corporate headquarters are in southern California, is the latest of Musk's half-dozen companies planning to split from Delaware, the small eastern state that has long been the favoured domicile for large corporations thanks in part to a transparent corporate law regime, years of legal precedent and a community of lawyers.

The moves come after a judge in Delaware, Kathaleen McCormick, [voided](#) a planned \$56bn pay award from Tesla, the electric-car company he runs, late last month. McCormick ruled that Musk had exerted undue control over the company's board despite owning a minority of Tesla. He was the "paradigmatic 'Superstar CEO'", she wrote in the ruling.

Following McCormick's decision, Musk said other founders should incorporate their companies "in Nevada or Texas if you prefer shareholders to decide matters" in a post on X, the social media platform which he also owns. Musk has also pledged to hold a vote for Tesla shareholders on switching the carmaker's incorporation to Texas, a process that is likely to be more complex given Tesla is a public company.

Texas has recently sought to position itself as a rival to Delaware's business-friendly reputation. The state passed legislation signed by the governor to create a new Texas business court that will hear corporate disputes with specialised judges. Officials in the state have been actively marketing the new court to companies domiciled elsewhere as sophisticated and efficient even as the details of the body and how it will operate are still being finalised.

Two other Musk companies — X and xAI, the artificial intelligence start-up for which he is seeking to raise billions of dollars — are incorporated in Nevada.

SpaceX's move was first reported by Bloomberg News.

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@annmlipton@esq.social
@AnnMLipton

okay so it is interesting to me that he sent neuralink to nevada and spacex to texas:

If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible.



8:24 PM · Feb 14, 2024 · 6,317 Views



8



8



33



4



@annmlipton@esq.social @AnnMLipton · 14h

Knowing nothing else about it and based on pure speculation, my suspicion is that SpaceX has more for real outside investment and Nevada's explicit blessing of insider self-dealing was a bridge too far. If that's right, it means there really are investor-driven constraints -



2



2



19



965



@annmlipton@esq.social @AnnMLipton · 14h

which is always something of a debate in corporate (i.e. how much do investors demand a protective corporate law)



1



1



13



1.1K



Minotaur Stock @MinotaurStock · 6h

If you have a heavy base in California, Nevada probably makes more sense. If you're already based in Texas you don't need an additional states laws on top



78



- **Joseph Bella**  @jbella · 3h ...
- He also moved Boring Company to Nevada
-  35  
- **Motorhead** @BradMunchen · 14h ...
- Neuralink breaks more laws so better to be in Nevada?
-  14  430  
- **Aladdin Kumar** @AladinKumar1 · 13h ...
- Said elsewhere, but I'm suspecting it's due to TC Heartland, but frankly I'm not sure why he is registering anything in Texas.
-  199  
- **ml8_ml8** @ml8_ml8 · 14h ...
- Probably more space industry in Texas.
-  259  

More replies

- **James95113983** @James95113983 · 4h ...
- These are not public companies yet. Questioning Elon's motive on sound legal ground is futile. He clearly overrules any legal advices when he sweets. He just implied if you are drunk, you should use FSD to keep your drive safe, and his fans are cheering.
-  1  9  
- **jmacgroup** @jmacgroup1 · 3h ...
- Hopefully the TX Legislature doesn't decide one day to pass law banning any divorced person or anyone fathering bastard children out of wedlock from owning or being CEO of TX-based Corp. Lol. But probably worth it to roll the dice for a meme and some clicks. Wen tsla follow lol?
-  6  

Trio Arrested as UK Probes Gang Links to Insider Trading (1)

B [bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X7CRSHSS000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X7CRSHSS000000)

Securities Law

Feb. 14, 2024, 4:14 AM PST

Jonathan Browning

Bloomberg News

- FCA says it conducted a ‘major operation’ alongside police
- Digital devices were also seized from London residences

UK finance investigators arrested three London-based individuals on suspicion of insider dealing and money laundering, ramping up investigations into possible links to organized crime.

The

said Wednesday it conducted a “major operation” alongside police over two days in February and interviewed four suspects, one of whom wasn’t arrested. The regulator said digital devices were seized from London residences.

The announcement came at the same time as the FCA warned in a separate notice that trading by organized crime forms a “significant component” of the suspicious trading activity it sees in equity markets.

“Insider dealing poses a significant threat to the integrity of financial markets both in the UK and overseas. The FCA is committed to combating organized criminal networks involved in this threat,” said Steve Smart, the FCA’s new enforcement director. Smart previously worked at the National Crime Agency, which assisted the FCA with the operation.

In the notice, the FCA warned that mergers and acquisitions advisory firms should be alert to dealmakers being approached by members of gangs. The watchdog warned that it was “likely” that junior members of staff were being targeted and that firms should limit their social media references around deals.

The FCA said it considered suspicious trading in equity

betting and contracts-for-difference around deals to be characteristic of the activity of organized crime groups. (Updates with detail from FCA’s notice in final paragraph.)

U.S. regulators clear Trump's media firm deal with Digital World

 [reuters.com/markets/deals/digital-world-shares-surge-us-regulators-clear-way-merger-with-trumps-media-firm-2024-02-15](https://www.reuters.com/markets/deals/digital-world-shares-surge-us-regulators-clear-way-merger-with-trumps-media-firm-2024-02-15)

Helen Coster, Sruthi Shankar

The Truth social network logo is seen displayed behind a woman holding a smartphone in this picture illustration taken February 21, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Feb 15 (Reuters) - The U.S. Securities and Exchange Commission on Thursday cleared the way for blank-check acquisition company Digital World Acquisition Corp's (DWAC.O) , opens new tab merger with former U.S. President Donald Trump's media and technology company.

Digital World said , opens new tab a registration statement for its proposed merger with Trump Media & Technology Group (TMTG), the operator of social media platform Truth Social, was declared effective by the SEC.

The closing of the deal would be a major boost for Trump, who will hold a stake of about 58% in the newly-formed company.

DWAC shares soared nearly 30% on Thursday morning, and were last trading up 20% at \$52.16, having touched a session high of \$56.30. Shares of video-sharing platform Rumble (RUM.O) , opens new tab, which is popular with conservatives, rose nearly 11%, while software developer Phunware (PHUN.O) , opens new tab, hired by Trump's 2020 presidential re-election campaign to build a phone app, rose 1%.

Phunware was one of the most traded stocks across all major U.S. exchanges.

Digital World said it expects to announce the date of a special meeting of its stockholders to vote on the approval of the merger within two business days. Representatives for DWAC did not immediately respond to a request for comment.

The stock has surged more than 150% since Jan. 15, when Trump won the Iowa caucus in his push as a Republican nominee for this year's presidential election.

TMTG's founders launched the company as a way for Trump to connect with his followers after he was cut off from major social media platforms following the Jan. 6, 2021, attack on the U.S. Capitol by his supporters.

Trump, who is frontrunner for the Republican party's presidential nomination, has 6.61 million followers on Truth Social, compared to the more than 88 million followers he had on Twitter when the platform permanently suspended him, and the 87.4 million followers he currently has on that platform, now called X.

On Nov. 19 the San Francisco-based app reversed its position under billionaire Elon Musk, the self-proclaimed “free speech absolutist” who bought Twitter on Oct. 2.

Digital World has faced several challenges since its October 2021 deal with TMTG. It has been the target of investigations by the U.S. Department of Justice and the SEC, ousted its chief executive, and shook up its board.

Those investigations have contributed to the deal’s delay. In July 2023 DWAC reached an \$18 million settlement with the SEC, which had charged DWAC with making material misrepresentations in filings to the SEC as part of DWAC’s initial public offering and proposed merger with TMTG.

The SEC found DWAC misled investors and the SEC by failing to disclose that it had formulated a plan to acquire and was pursuing the acquisition of TMTG prior to DWAC’s initial public offering, in violation of federal securities laws.

In August, Trump broke a pledge to stick exclusively with Truth Social, and posted on X his mug shot from his booking at Fulton County Jail in Georgia. He has not posted on X since, using Truth Social as his primary platform to reach voters.

Reporting by Sruthi Shankar in Bengaluru and Helen Coster in New York; Editing by Sriraj Kalluvila, Anirban Sen and Daniel Wallis

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Helen Coster
Thomson Reuters

Helen Coster is a Media Correspondent at Reuters, where she writes a mix of spot news, enterprise and analysis stories. She was previously a Senior Editor on Reuters' Commentary team, where she assigned, edited and wrote analysis pieces. Prior to joining Reuters, Coster worked as a senior writer at Forbes, where she wrote magazine and web stories and a blog about the intersection of business and social issues. A graduate of Princeton University, she has reported from six countries, including Pakistan, India, and Greece.

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Prudential Inks \$35M Deal Over Investor's Stock-Drop Suit

By **Henrik Nilsson**

Law360 (February 14, 2024, 10:08 PM EST) -- A Prudential Financial Inc. investor asked a New Jersey federal judge on Wednesday to sign off on a \$35 million deal to settle allegations the insurer hid mortality trends and understated its life insurance reserves, causing its stock to trade at inflated prices.

Lead plaintiff City of Warren Police and Fire Retirement System told U.S. District Judge Stanley R. Chesler that Prudential has agreed to pay \$35 million in cash to resolve the securities class action, saying the proposed deal "is an excellent result for the settlement class."

According to the **motion for preliminary approval**, the proposed settlement would end more than four years of litigation and is adequate considering the risk and costs associated with prolonging the case. Prudential is denying any wrongdoing or liability, the investors said.

In exchange for payment, investors will release Prudential from all misstatement claims related to the purchase of Prudential common stock between June 5, 2019, and Aug. 2, 2019.

The suit, originally filed in November 2019, alleged the company overstated its earnings and understated its liabilities. At the heart of the suit was the approximately 700,000 life insurance policies that Prudential bought from Hartford in 2013 for \$615 million.

Investors **alleged** Prudential hid that Hartford's life policies were poorly underwritten, not priced to cover their mortality risk and that mortality rates were hurting its finances.

Meanwhile, the company's executives boasted about growth prospects, causing Prudential's stock to trade at artificially inflated prices, according to the complaint.

The alleged misstatements came to light after Prudential announced in 2019 that it had to institute a one-time reserve increase of \$208 million to cover expenses associated with the expected decrease in the life expectancy of its policyholders, the investors alleged.

In addition, the company said its earnings would be reduced by \$25 million per quarter for the foreseeable future due to the revised mortality assumptions.

Following the announcements, the company's stock price dropped more than 12% over a two-day period, according to the complaint.

Prudential was granted a motion to dismiss in December 2020. But the Third Circuit **revived** the lawsuit in June 2023, saying statements the chief financial officer made weeks before the company announced the related \$208 million liability may have been false.

However, the Third Circuit said the district court properly discounted three other company statements the investors said were deceptive.

According to Wednesday's motion, lead counsel Robbins Geller Rudman & Dowd LLP will seek 25% of the settlement amount for attorney fees and no more than \$200,000 in litigation expenses. Class members are entitled to at least \$10 each, and the motion states that payments will be distributed on a pro-rata basis.

Counsel and representatives for the parties did not immediately return a request for comment.

The investors are represented by Shawn A. Williams, Daniel J. Pfefferbaum, Hadiya K. Deshmukh and Ellen Gusikoff Stewart of Robbins Geller Rudman & Dowd LLP, Thomas C. Michaud of VanOverbeke Michaud & Timmony PC, Peter S. Pearlman of Cohn Lifland Pearman Herrmann & Knopf LLP, and by Christopher A. Seeger of Seeger Weiss LLP.

Prudential is represented by Tricia B. O'Reilly and David D. Cramer of Walsh Pizzi O'Reilly Falanga LLP, and Maeve L. O'Connor and Susan R. Gittes of Debevoise & Plimpton LLP.

The case is In re Prudential Financial Inc. Securities Litigation, case number 2:19-cv-20839, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jessica Corso. Editing by Michael Watanabe.

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Fox News' Sorrento Report Takes Center Stage At 9th Circ.

By **Craig Clough**

Law360 (February 14, 2024, 5:28 PM EST) -- Counsel for Sorrento Therapeutics Inc. investors urged the Ninth Circuit on Wednesday to revive a securities suit alleging executives made misleading statements to Fox News about its COVID-19 research, prompting one judge to ask whether "you have to take things you hear on Fox News with a grain of salt."

Steven Hubachek of Robbins Geller Rudman & Dowd LLP, who represents the proposed class of investors, told the panel that a lower court was wrong to dismiss the suit alleging Sorrento leaders' May 2020 interview with Fox left "the impression" that an antibody they were researching was a "cure" for COVID-19, and that they knew the statement was false.

The accuracy of the statements reported in an online Fox News article was a frequent topic during oral arguments livestreaming from Pasadena, California, as Edward Han of Paul Hastings LLP — who represents Sorrento and the other defendants — said the statements were taken out of context by the media organization.

One of the judges on the panel also wondered how much an investor can properly rely on statements reported by Fox News, noting that Sorrento did not make the statements directly to investors in a prospectus.

"What about the fact that this is Fox News?" U.S. District Judge Robert S. Lasnik of the Western District of Washington, who sat on the panel by designation, asked Hubachek. "It's not like they published something for investors, or went 'here's our prospectus' and said things like that. Don't you have to take things you hear on Fox News with a grain of salt?"

Hubachek answered, "We are talking about statements from a major media provider and they are set out as quotations, so that's what we're relying upon. There are plenty of other things in that article we could have cited, and we relied upon the things that are actually quotes. Now, I know that [Sorrento CEO Henry Ji] said at some point that 'I didn't say that,' but that's a factual issue and that's something for a jury. It's not for a motion to dismiss."

Lead plaintiff Andrew Zenoff's 2020 **lawsuit** alleging the biopharmaceutical company's stock was artificially inflated on May 15 after its leaders announced to Fox News the discovery of an antibody that "demonstrated 100% inhibition of SARS-CoV-2 virus infection," even though they were still in preclinical testing stages and had not received approval to begin Phase I clinical trials.

That same day, as Sorrento's stock price shot above its 12-month high, company founder and CEO Henry Ji "misleadingly referred to Sorrento's research as a 'cure' in a statement to Fox News," the suit alleged, adding that the article stated Ji "told Fox News" that "[w]e want to emphasize there is a cure. There is a solution that works 100 percent."

Sorrento initiated an at-the-market offering around this time, netting proceeds of approximately \$62.7 million, according to the proposed class.

But Ji insisted a week later that he had not called the breakthrough a cure in response to a May 20, 2020, Hindenburg Research report that called Sorrento's claims "sensational," "nonsense" and "too good to be true," according to the suit.

The proposed class also argued co-defendant Mark R. Brunswick, a Sorrento vice president, told Fox that "[a]s soon as it is infused, that patient is now immune to the disease ... For the length of time, the antibody is in that system. So, if we were approved [by the FDA] today, everyone who gets that antibody can go back to work and have no fear of catching COVID-19."

After Ji disavowed the Fox report, Sorrento's shares fell to \$5.70 per share, or 43% lower than the class period high, the suit alleged.

U.S. District Judge Anthony J. Battaglia dismissed an amended complaint in 2022 for failure to plead falsity and scienter under Federal Rules Civil Procedure 12(b)(6), finding the statements to Fox were "generalized assertions of corporate optimism" and that the proposed class did not offer enough evidence to suggest Sorrento's leaders knew the statements were false.

In its appellate brief, the proposed class said Ji refuted the Fox report on May 22, 2020, in comments to BioSpace, but he "offered no explanation as to why Fox News's quotations were purportedly so wildly inaccurate."

After the Biospace article, Sorrento's stock price fell from a daily \$5.35 per share to a daily low of \$4.67 per share, or a 12.7% decline, according to the proposed class' appellate brief.

On Wednesday, Hubachek said Fox News is "one of the most prominent news media outlets in the world. They didn't just immediately say, 'Whoa, wait a minute, we didn't say that, we don't want to have anybody be misled.' Instead, they let their stock price go way up while they were doing an at-the-market offering in which they had substantial financial need."

Han told the panel the defendants also issued a press release on May 15, 2020, that accurately stated "everything" the defendants were doing with their COVID-19 research, but that the proposed class barely acknowledged it in the complaint and appellate briefs. There were also other accurate media reports that day about Sorrento the proposed class does not cite, he said.

If the defendants were trying to pull off a stock scam, Han asked why the false statements only appeared in one article. The plaintiffs instead "focus on a couple of statements made in the Fox News article that are taken out of context, completely taken out of context."

The proposed class is represented by Steven Hubachek, Nicole Quaid Gilliland and Trig Smith of Robbins Geller Rudman & Dowd LLP.

The defendants are represented by Edward Han, Sean D. Unger and Timothy D. Reynolds of Paul Hastings LLP.

The case is Andrew Zenoff v. Sorrento Therapeutics Inc. et al., case number 22-55641, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Vaqas Asghar.



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NYCB Faces Another Class Action Over CRE Challenges

By **Brent Godwin**

Law360 (February 14, 2024, 5:03 PM EST) -- A New York Community Bank investor has brought a proposed class action alleging that executives falsely boasted of the bank's financial condition after making two large acquisitions, when the deals in fact weighed down its balance sheet and led to a significant dividend reduction.

In a complaint filed Tuesday, investor Dale Miskey said New York Community Bancorp Inc. made misleading statements regarding its financial position after it bought Signature Bank in March 2023.

Miskey seeks to represent a class of NYCB investors whose shares dropped more than 50% after the company disclosed on Jan. 31 that it recorded \$252 million in losses for 2023 and that it would reduce its quarterly dividend by \$0.12 per share.

This came, according to Miskey, in spite of NYCB's promises that the acquisitions would "significantly strengthen" its deposit base and funding profile.

"When discussing the Signature Bank acquisition, Defendants misrepresented that it would be immediately accretive to the company and failed to warn investors of the detrimental impact the acquisition would have on its balance sheet and financial condition," Miskey said in the complaint.

A separate putative class action lawsuit **was filed against NYCB on Feb. 7**, also stemming from the market turmoil created in the aftermath of the Signature Bank deal.

The suit names NYCB's president and CEO, Thomas R. Cangemi; and CFO John J. Pinto as defendants. Miskey asserts that NYCB, Cangemi, and Pinto made additional false and misleading statements throughout 2023 via filings with the U.S. Securities and Exchange Commission and company press releases.

Miskey said NYCB began to expand into commercial banking in 2022 after operating primarily as a maker of multifamily and commercial loans. NYCB acquired Flagstar Bancorp on Dec. 1, 2022, bringing its total assets to \$90.1 billion from \$63 billion the previous quarter. But Miskey also says NYCB's SEC filings show the Flagstar deal increased its non-performing assets from \$41 million to \$153 million, as of Dec. 31, 2022.

Then, in March 2023, Miskey said, NYCB acquired \$38.4 billion in assets from Signature Bank, which had just been placed into receivership **after failing**. Just before the acquisition, NYCB had described its commercial lending facility as "strong," according to the suit.

A March 20, 2023, press release portrayed the Signature Bank acquisition as "expected to be significantly accretive to both earnings per share and tangible book value." The company's common stock increased to \$8.61 per share at the close of the market on March 20, Miskey noted in the complaint. But Miskey points to the company's allowance for credit losses increasing from \$390 million on Dec. 31, 2022, to \$550 million on March 31, 2023.

A proxy statement in April 2023, its Form 10-Q in May, a July press release, and an August Form 10-Q, among others, also included misrepresentations, Miskey said in the complaint.

"Plaintiff and the Class have suffered damages in that, in reliance on the integrity of the market, they

paid artificially inflated prices for NYCB common stock," Miskey said in the complaint. "Plaintiff and the Class would not have purchased NYCB common stock at the prices they paid, or at all, if they had been aware that the market prices had been artificially and falsely inflated by these defendants' misleading statements."

After trading ended Jan. 31, 2024, Miskey said, Moody's Investors Service had "placed all of NYCB's corporate debt ratings, including the bank's long-term issuer rating of Baa3 –the lowest investment-grade level – on review for possible downgrade to junk status."

Then, following a news report on Feb. 5 about internal conflict at NYCB, its stock closed at \$4.20 per share, and Moody's deemed its corporate debt ratings as of junk status, Miskey said.

Counsel for Miskey and a representative of NYCB did not immediately respond to requests for comment Wednesday.

Miskey is represented by Samuel H. Rudman, Evan J. Kaufman and Mary K. Blasy of Robbins Geller Rudman & Dowd LLP and Ralph M. Stone of Johnson Fistel LLP.

Counsel information for NYCB was not immediately available.

The case is Miskey v. New York Community Bancorp et al., case number 1:24-cv-01118, in the U.S. District Court for the Eastern District of New York.

--Editing by Peter Rozovsky.

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Visa Says \$5B Swipe Fee Deal Blocks Intuit, Square Claims

By **Jared Foretek**

Law360 (February 14, 2024, 11:08 PM EST) -- Visa and Mastercard have asked a New York federal court to throw out antitrust claims brought by Intuit and Square, arguing that their claims were released as part of the \$5.6 billion class action settlement the credit card companies finalized with merchants last year.

According to the credit card giants, merchants that didn't opt out of the settlement agreed to release not only their claims, but also those of their "agents," and that the payment processors should be considered among those agents.

"Intuit's and Square's own contracts with merchant customers specify that they act as the merchant's 'payment agent,' ... or 'agent for payment processing,'" the credit card companies wrote in Jan. 31 memorandum originally filed under seal. "Accordingly, the merchant class members released their own claims and those of Intuit and Square with respect to the transactions facilitated by those agents."

Intuit brought its antitrust suit in 2021, and Block, which owns Square, followed last year. The companies claim that Visa and Mastercard illegally fix interchange rates paid by merchants to accept their cards. According to the payment processing companies, Visa and Mastercard use an "Honor All Cards" policy, which dictates that in order to accept any card in Visa and Mastercard networks, merchants must accept them all, regardless of their issuing banks.

As a result, the plaintiffs say, banks have no incentive to compete for merchants' business and simply agree to the standard rates set by the credit card companies.

But Visa and Mastercard told the Eastern District of New York that enforcing the massive settlement they reached with merchants last year should entail dismissing Intuit's and Square's claims.

According to the credit card companies, class counsel never attempted to represent payment facilitators or processors like Intuit and Square because "those entities were not injured by the challenged practices." But the merchants served by them were, and the class members released the claims of their agents.

On top of that, the card companies say, the third-party processors should still be considered indirect purchasers for whom damages should be barred under federal law. And if the claims from Square and Intuit are allowed to proceed, Visa and Mastercard say that their client merchants' inclusion in the class settlement could be jeopardized.

"Intuit's and Square's claims based on transactions in which they served as payment facilitator agents have been released under the class settlement agreement and should be dismissed," the card companies wrote. "Enforcing the class settlement agreement will uphold the settling parties' bargain, while also removing any doubt that the millions of small merchants serviced by Intuit and Square are entitled to participate in the class settlement."

Intuit has asked for a partial summary judgment ruling that it has antitrust standing on its claims as a payment facilitator. In a reply in support of its motion filed in January but unsealed Wednesday, the company says it's actually the "most direct payor" of the card companies' interchange fees. It also argues that the class settlement was never limited only to merchants, and that it opted out of the

settlement to preserve its individual claims against the companies.

"Defendants do not dispute the facts showing that Intuit is the direct payor of interchange fees and 'merchant of record' on all [facilitator] transactions, and never assigned away its claims based on the direct payment of interchange fees," Intuit wrote. "Thus, according to the interpretation of the settlement class member definition defendants previously urged, Intuit could never be subject to the settlement agreement's release due to its timely opt out."

Counsel for the parties did not return requests for comment Wednesday.

Intuit is represented by Adam B. Wolfson, Kevin Y. Teruya and Claire D. Hausman of Quinn Emanuel Urquhart & Sullivan LLP.

Block is represented by Marc L. Greenwald, Manisha M. Sheth and Justin T. Reinheimer of Quinn Emanuel Urquhart & Sullivan LLP.

Visa is represented by Matthew A. Eisenstein, Anne P. Davis, Rosemary Szanyi and Robert J. Vizas of Arnold & Porter, and Michael S. Shuster, Demian A. Ordway and Blair E. Kaminsky of Holwell Shuster & Goldberg LLP.

Mastercard is represented by Gary R. Carney, Brette Tannenbaum, Kenneth A. Gallo and Donna M. Ioffredo of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In: re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Editing by Adam LoBelia.

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BREAKING: Vice Chancellor Sam Glasscock Retiring From Del. Chancery

By **Leslie A. Pappas**

Law360 (February 15, 2024, 11:28 AM EST) -- Delaware Vice Chancellor Sam Glasscock III will retire from Delaware's Court of Chancery by the end of the year, Delaware Supreme Court Chief Justice Collins J. Seitz Jr. told the state's legislature during a budget presentation Thursday.

The high court's chief justice mentioned the upcoming retirement during a presentation to the Joint Financial Committee Meeting of the Delaware General Assembly, during which he also expressed concerns about the increasing caseload on Chancery Court judges and the impact on their well-being.

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Del. Justices Mull Reviving \$500M Maxim Merger Suit

By **Jeff Montgomery**

Law360 (February 14, 2024, 8:12 PM EST) -- Former shareholders of circuit maker Maxim Integrated Products Inc. told Delaware's top court Wednesday the investors weren't fully informed when they approved a \$21 billion merger with Analog Devices Inc. that also cut off a \$500 million, four-quarter string of dividends.

Arguing before a three-justice panel, counsel for the investors, who are appealing a Chancery Court decision, said the "shareholders never understood the connection" between Maxim's pre-transaction agreement to suspend the payments and Analog's assertion of potential — but never realized — tax liability risks from the deal.

Analog received a private letter ruling three months before closing the deal that eliminated the possible tax risk, yet Maxim took the combination to closing without restoring the dividends or invoking shareholder consent rights, Christopher D. Loizides of Loizides PA, an attorney for the investors, said Wednesday.

"What they deprived shareholders of is the ability to make that evaluation themselves, and that is precisely what they were doing in asking for shareholder consent," Loizides told the justices.

In May, the Delaware Chancery Court's Vice Chancellor Morgan T. Zurn **dismissed** a claim that Maxim directors breached their fiduciary duties by failing to pursue the dividends after the tax liability was ruled out. In her decision, Vice Chancellor Zurn concluded the lawsuit failed to show conflicts or bad faith behind Maxim's actions or that the claims could overcome liability shields for directors in Maxim's charter.

The Court of Chancery also tossed a count accusing ex-Maxim CEO Tunc Doluca of breaching his fiduciary duty by failing to ensure the deal proxy fully disclosed uncertainty regarding the need for the holdback and the chance that no liability would be found, as well as the investors' claims against Analog.

Analog, a multinational producer of semiconductors, completed its acquisition of Maxim in August 2021, issuing Maxim shareholders 0.63 shares of Analog for each Maxim stock. The exchange ratio still valued Maxim at \$78.44 per share, a premium of about 22% over the closing price on the last trading day before the deal was announced.

Counsel for Analog and Maxim, Rachelle Silverberg of Wachtell Lipton Rosen & Katz, told the justices Wednesday the case failed to show that Maxim directors were conflicted in their decision. Neither did the now-dismissed complaint successfully challenge the merger premium, Silverberg noted, adding that "their only complaint is the shareholders had to forgo up to four quarterly dividends" to get the merger value.

"The stockholders had all the information necessary for the vote. They knew if they wanted the benefit of the merger, they had to forgo certain dividends," while other details were "not material" to the decision, the attorney said.

In a Delaware Supreme Court brief, Maxim's directors and Analog pointed out that the dividend suspension was a contract term agreed to by both parties.

"It would not have been reasonable, much less obligatory, for Maxim to request — or for Analog to permit — resumption of dividend payments once the tax dispute was resolved. That was not the

deal," the Maxim camp wrote. "The parties could have agreed that dividends would resume if the tax matter was satisfactorily resolved, but they did not."

Loizides argued Wednesday that Maxim's board negotiated pre-signing improvements to the stock-for-stock merger that boosted the exchange rate, then bargained them away by accepting the dividend suspension.

"They traded away the value that they created," he said before the justices, noting the negotiated exchange rate gain amounted to about \$520 million and roughly canceled out by the dividend losses.

During the arguments, Justice Abigail M. LeGrow asked Loizides to discuss the disclosure claims against Doluca and whether the appeal asserted breaches against him both as an officer and director.

"I think the Chancery Court focused on the fact that our allegations in general went to the duty of care, rather than duty of loyalty," Loizides said. "We fundamentally disagree."

Where duties of disclosure are violated knowingly and intentionally, that implicates the duty of loyalty rather than the duty of care, he reasoned. Corporations are unable to shield or exculpate officers or directors from personal liability for loyalty breach claims.

Justice LeGrow also pressed Loizides on whether the stockholders were dropping claims against Doluca in his capacity as CEO. Loizides responded by explaining that his arguments focused on duty of loyalty claims and underscored that the state high court tightly limits time for argument: Each side has 20 minutes before a three-justice panel and 25 when the full five-member court turns out.

In addition, the investors' attorney argued, "Our allegation is basically that [Analog] participated in Maxim's effort to keep the shareholders in the dark about the connection between the dividend suspension on the one hand and the tax issue, and therefore they acted knowingly and willfully, making the whole issue of exculpability a red herring."

Silverberg contended that Vice Chancellor Zurn "found correctly that plaintiffs did not respond" to the defense's arguments and "did not plead any interest in the transaction."

"They still do not identify any direct conflict, and they still do not point to any allegation of bad faith in the complaint, nor could they," Silverberg told the justices, adding that "all they have pled is a conclusory argument that director conduct is a non-exculpable duty of loyalty," without addressing the conduct of each director.

Justices LeGrow, Gary F. Traynor and N. Christopher Griffiths took the arguments under advisement.

Walter E. Ryan Jr., Ryan Asset Management LLC and the stockholders are represented by Christopher D. Loizides of Loizides PA and Clinton A. Krislov, Kenneth T. Goldstein and Matthew G. Norgard of Krislov & Associates Ltd.

Maxim's directors and CEO and Analog are represented by S. Michael Sirkin and Elizabeth M. Taylor of Ross Aronstam & Moritz LLP, and Rachelle Silverberg and Yosef G. Schaffel of Wachtell Lipton Rosen & Katz.

The case is Ryan et al. v. Accardi et al., case number 224,2023, in the Supreme Court of the State of Delaware.

--Editing by Covey Son.



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Drug Co. Paratek's Officers Sued In Del. Over \$462M Sale

By **Jeff Montgomery**

Law360 (February 14, 2024, 6:22 PM EST) -- Former stockholders of drug developer Paratek Pharmaceuticals Inc. have sued five directors and officers in Delaware's Court of Chancery, accusing those named of slow-walking company sale efforts and snubbing up to 50% higher offers in favor of a \$462 million deal that allegedly assured the directors and officers maximum benefits.

The suit, filed late Tuesday by a group of fund investors who held 11.7% of Paratek's stock, accused the company's pre- and post-deal CEO and others of working to protect a collective \$36 million worth of insider performance milestone incentive payments, sacrificing up to \$85 million in better offers for stockholders.

According to the complaint, which alleges breaches of fiduciary duties, two private investment fund buyers — Gurnet Point and Novo Holdings — agreed to make all payments under the executive incentive packages if they were the eventual buyers, regardless of time-based milestone triggers set by the company.

Three of the Paratek officials named, all top officers, were also assured continued post-deal employment.

The time-based milestone payments — originally stretching to 2026 and 2027 — initially created an incentive to stretch out the sale process, the suit alleged, "despite superior offers from another bidder that would have provided stockholders with significantly greater up-front compensation."

Paratek's flagship drug, the suit said, is Nuzyra, a tetracycline-class antibiotic used for treatment of community-acquired bacterial pneumonia and acute bacterial skin and skin-related infections. Its prospects initially led the company to adopt a position that it would reject offers of less than \$5.50 or \$6 per share.

By mid-2021, looming convertible debt maturities had ramped up pressure among company officials to sell the company, according to the complaint. But the sale process was controlled by Loh and the other allegedly conflicted insiders, with private negotiations launched about a year before the board formed a transaction committee of purportedly independent directors.

Although offers for the company ranged from \$3.75 to as high as \$4.50 per share in 2022, those named in the suit allegedly "took advantage of their influential roles to slow-roll and ultimately sabotage superior offers from other potential buyers" to protect their incentive gains.

When business conditions further soured, the five individuals were accused of pivoting to the all-in \$3 per share offer from Gurnet and Novo. The LPs also allegedly assured CEO Evan Loh, former company president Adam Woodrow, and chief development and regulatory officer Randy Brenner of post-deal employment.

"Defendants jumped into action, reviving then-dormant discussions with Gurnet Point and steering the transaction" its way after putting off superior offers for stockholders "because those offers were contingent on reductions" in the officer and director revenue and performance-based awards.

Also accused of benefiting from the Gurnet-Novato deal were former CEO and board executive chairman Michael F. Bigham and former chief legal officer Randy Brenner.

Bigham, the complaint said, explicitly told the transaction committee in January 2023 after its appointment that those named in the suit would not agree to amend incentive awards to support a deal, even if it were superior to the Gurnet Point-Novovo plan.

Loh and Bigham received \$10.4 million each in accelerated incentive payments as a result of the insiders' hard line, the complaint said. Woodrow received \$5.8 million, and Brenner and Haskel \$3.3 million each.

Payments would have been limited to a range of \$5 million at the top to \$1.6 million under an unconflicted process, according to the complaint.

Plaintiffs and the class, on the other hand, "were deprived by defendants' machinations of a value-maximizing auction that would have generated the best available price for their Paratek stock," the complaint said. It asserted that those named had a duty to act as "honest auctioneers" pursuing the best reasonably available price for stockholders — and to disclose conflicts.

Paratek and counsel for the stockholders did not immediately respond to requests for comment.

The stockholders are represented by Samuel T. Hirzel and Brendan Patrick McDonnell of Heyman Enerio Gattuso & Hirzel LLP and Lawrence M. Rolnick, Steven M. Hecht and Jeffrey A. Ritholtz of Rolnick Kramer Sadighi LLP.

Counsel information for those named in the suit was not immediately available.

The case is DrugCrafters LP et al., v. Evan Loh et al., case number 2024-0111, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Glancy Prongay To Lead Wood Pellet Co. Dividend Suit

By **Sydney Price**

Law360 (February 14, 2024, 5:44 PM EST) -- Glancy Prongay & Murray LLP has been appointed lead counsel in an investor suit alleging wood pellet manufacturer Enviva misled investors about the financial health of the company and its ability to pay dividends.

U.S. District Judge Matthew J. Maddox determined that Andrew Davis' alleged losses of over \$3 million were the largest in the proposed class and appointed him lead plaintiff, according to a **memorandum** in Maryland federal court signed Tuesday.

Davis and his counsel from Glancy Prongay beat out two competing bids from Wolf Popper LLP and Bottini & Bottini Inc., whose clients both alleged losses of approximately \$1.5 million.

Judge Maddox said Davis advances claims typical of the proposed class and can be expected to fairly and adequately protect class interests.

Shareholder Taje Dhatt launched the suit in September. The complaint alleges that Enviva misstated the financial stability of the company during the proposed class period, and that the truth was revealed when it cut its guidance and eliminated dividends in May 2023, citing inflationary and productivity challenges.

The proposed class period begins on Nov. 3, 2022, the day Enviva announced its third-quarter 2022 financial results. Even though Enviva told investors it had hit its "stride" as a corporation, it failed to disclose that its stressed financial position would impact the company's ability to continue paying dividends in 2023, the suit alleges.

Over the next several months, Enviva continued to reaffirm its guidance for 2023, touting a "stable and secure dividend" and "increasing cash flow stability," according to the complaint.

But on May 3, 2023, when Enviva lowered its full-year 2023 guidance and suspended dividend payments going forward, its shares declined \$14.34, or about 67.2%, to close at \$7.01 on May 4, according to the suit.

The suit's individual defendants include Enviva president Thomas Meth and former executives John Keppler, Shai S. Even and Michael A. Johnson. The investors seek damages and accuse the defendants of violating the Exchange Act.

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

Davis is represented by Robert V. Prongay, Charles H. Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP and Stephen A. Weisbrod and William E. Jacobs of Weisbrod Matteis & Copley PLLC.

Enviva and the individual defendants are represented by Ronald J. Tenpas, Jeffrey S. Johnston and Robert P. Ritchie of Vinson & Elkins LLP.

The case is Dhatt v. Enviva Inc. et al., case number 8:23-cv-02474, in the U.S. District Court for the District of Maryland.

--Editing by Daniel King.



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Karuna Faces Investor Suit Over \$14B Bristol Myers Buyout

By **Katryna Perera**

Law360 (February 14, 2024, 9:39 PM EST) -- A Karuna Therapeutics Inc. shareholder has filed suit against the Boston-based biotechnology company alleging a proxy statement related to a proposed \$14 billion buyout deal between Karuna and Bristol Myers Squibb contained false and misleading information and omitted key facts.

Shannon Jenkins filed a **complaint** on Tuesday in Delaware federal court against Karuna, its President and CEO Bill Meury and several company directors.

Karuna and Bristol announced in December that they had entered into a merger agreement under which Bristol **would acquire** Karuna and obtain its lead asset, KarXT, an antipsychotic drug that is under review by the U.S. Food and Drug Administration and could be used to treat schizophrenia and Alzheimer's disease, as well as its promising early-stage and pre-clinical drug pipeline.

If the deal closes, Bristol Myers will acquire all outstanding shares of Karuna common stock for \$330 per share in cash. Following the December announcement, Karuna's stock jumped more than 47% in pre-market trading.

Karuna stockholders will soon vote to approve the transaction, and Jenkins argues that all allegedly omitted information from the deal's proxy statement must be disclosed so that the shareholders "can properly exercise their corporate suffrage rights, among other things."

Jenkins says the proxy statement, filed on Feb. 4 with the U.S. Securities and Exchange Commission, contains misleading information about Karuna's financial forecasts, including non-risk adjusted forecasts and line items about the company's gross profit, net operating profit after taxes and unlevered free cash flow.

According to Jenkins, the proxy statement also fails to disclose material information from the financial analyses provided by Karuna's financial advisor, Goldman Sachs & Co., and potential conflicts of interest involving Karuna insiders, such as retention-related discussions and employment negotiations that have already occurred.

Finally, Jenkins says the proxy statement does not disclose certain details about the background of the deal, including the value of proposals from other parties.

Jenkins is asking the court to enjoin the defendants from taking any steps to close the proposed deal until the alleged omitted information is disclosed. And if the deal does close, Jenkins seeks to recover damages. She also wants attorney fees and a jury trial, according to the complaint.

Earlier this week, Ambrx Biopharma Inc. was hit with **two similar suits** from shareholders over its proposed \$2 billion deal with Johnson & Johnson.

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

Jenkins is represented by Brian D. Long of Long Law LLC.

Counsel information for the defendants was not immediately available.

The case is Jenkins v. Karuna Therapeutics Inc. et al., case number 1:24-cv-00197, in the U.S. District Court for the District of Delaware.

--Editing by Jeremy Abrams.

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Westell, Shareholders Reach \$2.2M Deal In Stock-Split Suit

By **Katryna Perera**

Law360 (February 14, 2024, 7:42 PM EST) -- Westell Technologies Inc. shareholders challenging a type of stock split engineered by the company told Delaware's Court of Chancery that they have agreed to settle their claims for \$2.2 million and plan to request attorney fees of no more than \$550,000.

Lead plaintiff Pankaj Sharma and Westell filed a joint stipulation and settlement agreement on Tuesday, stating they have reached a deal on the suit's breach of fiduciary duty claims and aiding and abetting breach of fiduciary duty related to the company's decision to deploy a so-called reverse stock split, immediately followed by a forward stock split in 2020.

Reverse and forward stock splits are a type of corporate action that change the number of outstanding shares and their prices. In a reverse stock split, the number of existing shares is decreased or consolidated into higher-priced shares, whereas a forward stock split increases the number of shares and reduces the price.

A reverse and forward stock split is often used by companies looking to get rid of shareholders who hold less than a specified number of shares by cashing them out and recapitalizing their shares.

If approved, the settlement would be paid out to a certified class of Westell shareholders who held fewer than 1,000 shares of Westell common stock immediately before the transaction and received cash in exchange for their shares of Westell common stock in the amount of \$1.48 per share as a result of the transaction.

The filing states Sharma and class counsel feel the \$2.2 million deal is fair, reasonable, adequate and in the best interest of class members.

In addition to the requested attorney fees, the filing states class counsel from Rigrodsky Law PA and Rowley Law PLLC plans to ask the court for no more than \$125,000 in litigation expenses and a maximum \$2,000 incentive award for Sharma.

The litigation centered on a 2020 Westell transaction that called for a 1-for-1,000 Class A stock split and a \$1.48-per-share buyout of those left with fewer than 1,000 shares. A 1,000-for-1 forward split followed for the relatively few remaining Class A shares, with the resulting diminished Class A population dropping Westell below the number requiring continuation as a public reporting company.

Westell argued it wanted to delist its public shares because the cost of complying with Nasdaq Stock Market reporting mandates had reached \$900,000 annually, despite years of company losses.

However, the involuntary cash-out for holders with fewer than 1,000 shares prompted suits claiming Westell — which was already controlled by a few big stockholders — unfairly jettisoned small investors for the benefit of controllers in breach of company and board fiduciary duties.

Sharma was the first to sue in January 2022, followed by Steven Busch and Lindsey LaBate in April 2022. Last March, a Delaware Vice Chancellor **consolidated the suits** while dismissing certain direct claims asserted on behalf of a subclass of stockholders in the Busch/LaBate suit for procedural reasons.

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

Sharma and the class are represented by Seth D. Rigrotsky, Gina M. Serra and Herbert W. Mondros of Rigrotsky Law PA and by Shane Rowley and Danielle Rowland Lindahl of Rowley Law PLLC.

Westell is represented by Brock E. Czeschin and Andrew L. Milam of Richards Layton & Finger PA.

The case is In re Westell Technologies Inc. Stockholder Litigation, case number 2022-0090, in the Court of Chancery of the State of Delaware.

--Additional reporting by Rose Krebs. Editing by Drashti Mehta.

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2nd Circ. Backs Goldman's Victory In 401(k) Self-Dealing Suit

By **Kellie Mejdrich**

Law360 (February 14, 2024, 4:40 PM EST) -- The Second Circuit upheld Goldman Sachs' win in a class action from 29,000 employee 401(k) plan participants who said the banking giant violated federal benefits law by including underperforming proprietary investment funds in their investment roster, citing evidence Wednesday of a "robust process" to manage potential conflicts.



The Second Circuit said Goldman Sachs, which has its world headquarters in New York, rightly won summary judgment on workers' claims that the proprietary funds that Goldman eventually withdrew from offering in the plan constituted a breach of the fiduciary duty of loyalty or prudence under ERISA. (AP Photo/Peter Morgan)

In a nonprecedential summary order, a three-judge panel affirmed a New York federal court's September 2022 decision granting The Goldman Sachs Group Inc. and the Goldman Sachs 401(k) Plan Retirement Committee summary judgment in the Employee Retirement Income Security Act suit. The class of participants in Goldman's \$7.5 billion retirement plan, led by former employee Leonid Falberg, **first sued in October 2019**, alleging the bank breached ERISA's fiduciary duties by giving preferential treatment to its own company-managed investment funds.

The panel said Wednesday that the lower court was right to grant summary judgment to Goldman on workers' claims that the proprietary funds Goldman eventually withdrew from offering in the plan constituted a breach of the fiduciary duty of loyalty or prudence under ERISA. The panel said the district court also properly shut down claims Goldman engaged in prohibited transactions or failed to adequately

monitor the plan with respect to the retention of proprietary funds managed by Goldman Sachs Asset Management, or GSAM.

"Falberg's conclusory assertions that defendants gave GSAM funds preferential treatment are unsupported by the record," the panel said.

The panel said that as an overarching matter, Falberg hadn't proved with evidence at the summary judgment stage that Goldman retained challenged funds in the plan for self-interested purposes, and that "evidence in the record suggests otherwise."

Specifically regarding allegations that Goldman breached its ERISA fiduciary duty of loyalty by retaining the fund, the panel said "there was evidence that defendants employed a robust process to manage potential conflicts of interest."

That included offering retirement plan committee training sessions — "which is not a standard market practice," the panel said, as well as retaining an investment consultant to act as an independent adviser. The panel also sharply rejected the contention that Goldman's ultimate decision to remove the in-house funds after they demonstrated sustained underperformance was somehow evidence of a fiduciary breach: "at best, Falberg takes issue with the timeliness of removal," the order said.

"But a fiduciary does not breach its duty of loyalty by choosing to retain an investment that, in the fiduciary's reasonable assessment, may perform well in the long term despite short-term underperformance," the panel said.

Attorneys have been closely watching the Goldman case as similar suits against large employers are pending nationwide over allegations that employers' offering of in-house funds breached ERISA's fiduciary duties of loyalty and prudence and constituted transactions that were prohibited under federal benefits law. But few cases challenging proprietary investments have reached the summary judgment stage, much less seen an appellate level decision on the issue.

The Second Circuit's ruling affirming an end to the case comes after a different Second Circuit panel rejected an attempt **by Goldman to decertify** the class of more than 29,000 retirement plan participants in June 2022.

Counsel for Goldman and the class didn't immediately respond to a request for comment Wednesday. A Goldman Sachs spokesperson didn't immediately respond to a comment request.

U.S. Circuit Judges Gerard E. Lynch, William J. Nardini and Sarah A.L. Merriam sat on the panel for the Second Circuit.

The class is represented by Ben J. Bauer, Brock J. Specht and Paul J. Lukas of Nichols Kaster PLLP and by Adam W. Hansen of Apollo Law LLC.

Goldman Sachs is represented by Richard C. Pepperman II and Thomas C. White of Sullivan & Cromwell LLP.

The case is Leonid Falberg v. The Goldman Sachs Group Inc. et al., case number 22-2689, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Nick Petruncio.



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Juul Gets More Antitrust Claims To Arbitration

By **Jared Foretek**

Law360 (February 14, 2024, 5:25 PM EST) -- A California federal judge has sent two more claims against Juul to arbitration and dismissed a request for an injunction to block Altria's already-unwound investment in the company.

In his ruling issued Tuesday, U.S. District Judge William H. Orrick held the two plaintiffs in the multidistrict litigation — Jake Sieber and Robert Thompson — were given sufficient notice of the company's terms and conditions, which included Juul's arbitration clause.

The plaintiffs argued they hadn't bought anything from the company's website since it began requiring buyers to affirmatively check off a terms and conditions box to make a purchase. And as returning visitors to Juul's website, they said they had no incentive to visit the company's updated terms and conditions link when they signed in to make purchases.

But Judge Orrick, pointing to circuit court rulings on terms and conditions disclosures from several companies like Ticketmaster and Intuit, as well as his two previous arbitration orders for different plaintiffs in the Juul MDL, held the website was clear enough in directing users to the T&C page that its arbitration clause should be enforced.

"The only real distinction between the sign in page seen by Sieber and Thompson and the one I found adequate in JUUL II is the placement of the disclosure language with the hyperlinked Terms and Conditions immediately below the sign in button," he wrote. "Considering the totality of the design of the sign in page at issue, there are no material differences from the ones in [the earlier orders]."

A third named plaintiff in the third amended complaint, which was filed last September, was not included in Juul's **motion to compel arbitration**, and the other claims regarding the previous agreement between the companies will proceed.

A group of Juul buyers first brought their suit in 2020, requesting an injunction to block Altria's \$12.8 billion investment in Juul from 2018 on competition grounds.

But in March 2023, Altria sold the entirety of its minority stake in Juul, prompting the Federal Trade Commission to drop its ongoing challenge to the deal.

Juul, as well as investors Nicholas Pritzker and Riaz Valani, claimed in its October motion that the plaintiffs in the newest complaint lacked standing for their injunction request now that the deal was fully unwound.

The buyers responded that even though the 2018 investment was sold, there's nothing to stop the two companies from recombining in the future. They maintained the court should issue a permanent injunction "from continuing and maintaining the conspiracy or agreements" alleged in their complaint.

Judge Orrick said the issue had been settled and there was no need to move forward with any injunctive relief, especially given that Altria subsequently made a \$2.75 billion investment in one of Juul's competitors, NJOY. But he said his dismissal was without prejudice, leaving the door open for refiling if Juul and Altria enter into a partnership again.

"In light of the judicially noticeable and uncontested showing regarding both the unwinding of the challenged 2018 agreement and that Altria has an interest in a JUUL competitor, the risk of future

combination is too implausible to establish standing," he wrote. "The dismissal, however, is without prejudice. If evidence comes to light regarding changed circumstances between the parties or otherwise makes a potential re-combination plausible, the claim for injunctive relief may be alleged with leave of the court."

The plaintiff's and defendants' counsel did not immediately respond to requests for comment.

The plaintiffs are represented by John D. Radice of Radice Law Firm PC, Catherine Smith of Gustafson Gluek PLLC, W. Joseph Bruckner of Lockridge Grindal Nauen PLLP, J. Barton Goplerud of Shindler Anderson Goplerud & Weese PC, Michael Buchman of Motley Rice LLC, Stephanie M. Beige of Bernstein Liebhard LLP, John Alden Meade of Meade Young LLC, Joshua Grabar of Grabar Law Offices, Terry Gross of Gross & Belsky PC, David Cates of Cates Mahoney LLC and Joseph Saveri of the Joseph Saveri Law Firm LLP.

Juul Labs is represented by David I. Gelfand, Jeremy J. Calsyn and Nowell D. Bamberger of Cleary Gottlieb Steen & Hamilton LLP.

Nicholas Pritzker and Riaz Valani are represented by Mark C. Hansen, Michael J. Guzman and David L. Schwarz of Kellogg Hansen Todd Figel & Frederick PLLC.

The case is In re Juul Labs Inc. Antitrust Litigation, case number 3:20-cv-02345, in the U.S. District Court for the Northern District of California.

--Editing by Caitlin Wolper.

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Pfizer Reaches \$93M Deal With Lipitor Buyers In Antitrust MDL

By **Hailey Konnath**

Law360 (February 14, 2024, 11:21 PM EST) -- Pfizer Inc. has agreed to shell out \$93 million to put to rest Lipitor buyers' claims in sprawling antitrust multidistrict litigation over the cholesterol medication that stretches back more than a decade, according to a motion filed Wednesday in New Jersey federal court.

The proposed settlement involves direct purchasers of Lipitor, such as pharmaceutical wholesalers and distributors, who accused Pfizer of conspiring with Ranbaxy Laboratories Ltd. to delay the release of a cheaper generic version of Lipitor and monopolize the market.

The settlement class includes all persons or entities in the United States and its territories who purchased Lipitor or generic products directly from Pfizer or its affiliates between June 2011 and May 2012.

The purchasers asked the court to appoint their attorneys with Berger Montague, Garwin Gerstein & Fisher LLP and Hagens Berman Sobol Shapiro LLP as lead class counsel. They plan to seek attorney fees of up to a third of the settlement amount, according to the motion.

They also want named plaintiffs Drogueria Betances LLC, Professional Drug Co. Inc., Rochester Drug Co-Operative Inc., Stephen L. LaFrance Holdings Inc. and Value Drug Co. to be appointed class representatives.

The settlement agreement was signed on Feb. 7, and the deal was reached "by arm's-length negotiations by highly experienced counsel after years of litigation and a mediation," the purchasers said.

Pfizer said in a statement Wednesday that it "firmly believes that all claims that have been or are asserted against Pfizer in this case are factually and legally without merit."

"As this case has already gone on for over 12 years, considerations led the company to determine that the proposed class settlement in this case is fair, reasonable and the best way to resolve this litigation."

"Under the proposed agreement, Pfizer does not admit to any liability or wrongdoing," it said.

The **MDL centers on** an agreement Pfizer reached with Ranbaxy resolving claims that Ranbaxy's attempt to make a generic version of the blockbuster cholesterol drug would infringe its patent. The buyers claim the two companies anti-competitively agreed to delay the entry of a generic challenger onto the market.

Among other plaintiffs in the litigation are **consumers and health benefit plans**, or end payers.

Counsel for the direct purchasers didn't immediately respond to a request for comment late Wednesday.

The direct purchaser plaintiffs are represented by Cohn Lifland Pearlman Herrmann & Knopf LLP, Carella Byrne Cecchi Olstein Brody & Agnello PC, Berger Montague, Garwin Gerstein & Fisher LLP, Hagens Berman Sobol Shapiro LLP, Odom & Des Roches LLP, Smith Segura Raphael & Leger LLP,

Faruqi & Faruqi LLP and Heim Payne & Chorush.

Pfizer is represented by Liza M. Walsh and Jessica K. Formichella of Walsh Pizzi O'Reilly Falanga LLP and Robert A. Milne, Raj Gandesha, Edward Thrasher, Sean Murray, Seok Ho Kang and Kathy Hong of White & Case LLP.

The case is In re: Lipitor Antitrust Litigation, case number 3:12-cv-02389, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Kelly Lienhard. Editing by Linda Voorhis.

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