

Investors accuse Amplitude execs of improperly selling off stocks after IPO, tanking value

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February 20, 2024

Civil Lawsuits



Shawn Williams | Robbins Geller Rudman & Dowd

Data analysis firm Amplitude has been accused in a class action lawsuit of allegedly tanking its own stock through a mass sell-off of stocks held by company executives shortly after the company went public.

The investors allege that the executives improperly sold off stocks after the initial public offering, causing a significant decrease in value.

According to the complaint, Amplitude's stock opened at \$50 a share on Sept. 28, 2021, and increased to \$90 a share by the end of 2021. However, the lawsuit alleges company leadership sold off \$275 million in stock at "artificially inflated prices," and by February 2022, the stock price had dropped 80% from its peak, costing other investors millions.

Named plaintiff Daniel Fagan filed the suit in San Francisco federal court on Feb. 14.

Fagan seeks to expand the lawsuit include all those who purchased or acquired Amplitude stock between September 21, 2021 and February 16, 2022. Fagan alleges that the defendants violated the federal Securities Exchange Act and SEC Rule 10b-5.

The plaintiffs are represented by attorneys Shawn A. Williams and Brian E. Cochran, of the firm of Robbins Geller Rudman & Dowd, of San Francisco and San Diego.

ORGANIZATIONS IN THIS STORY

U.S. Attorney for the Northern District of California

Xponential Fitness tells HCM it will vigorously defend itself as class action lawsuit is filed in California

[healthclubmanagement.co.uk/health-club-management-news/Xponential-says-it-will-vigorously-defend-itself-in-upcoming-court-case-that-is-without-merit-Anthony-Geisler/352714](https://www.healthclubmanagement.co.uk/health-club-management-news/Xponential-says-it-will-vigorously-defend-itself-in-upcoming-court-case-that-is-without-merit-Anthony-Geisler/352714)

By Kath Hudson

Xponential Fitness has told *HCM* it will vigorously defend itself against claims made in a class action lawsuit being brought against the company for financial damages.

The lawsuit – City of Taylor General Employees Retirement System v Xponential Fitness Inc – was filed on 9 February in the state of California by the lead plaintiff.

Fifteen American law firms, including Robbins Geller Rudman & Dowd and Levi & Korsinsky, are now speculatively seeking engagement with complainants in a bid to gather a substantial enough cohort to represent Xponential Fitness shareholders in the case in a bid to recover funds. The deadline for them to come forward to participate in the legal action is 9 April.

It's understood some of the law firms have up to 70 participants.

The court action states that certain executive officers of the company violated the Securities Exchange Act between 26 July 2021 and 7 December 2023.

The allegations are that:

False and/or misleading statements were made relating to the closure of 30 Xponential Fitness franchise locations.

Xponential's reported same-store sales and average unit volume metrics had been exaggerated by the company excluding details about underperforming stores.

Eight out of 10 of Xponential's brands at that point in time were losing money each month and more than 50 per cent did not make a positive financial return overall.

More than 60 per cent of the company's revenue was one-time and non-recurring.

More than 100 franchises were for sale at a price that was at least 75 per cent less than their initial cost.

The court action will also contend that Xponential misled some franchisees into taking on franchises by misrepresenting the financial profile and profitability of existing studios, as well as the expected rate of return for new openings.

As a result, court papers contend that some franchisees are substantially in debt, suffering high attrition rates and running non-viable studios that have no realistic path to profitability.

An Xponential spokesperson told *HCM*: “We believe these claims are without merit, and we will vigorously defend ourselves against them. Beyond that, we don’t comment on litigation.”

FOOTNOTE

On 26 June 2023, short-only fund, Fuzzy Panda Research, published a report which raised a number of the same issues as the court action and alleged Xponential CEO, Anthony Geisler, has a history of misleading investors. This led to Xponential’s common stock falling by more than 37 per cent, however, the company and Geisler fought back strongly with the support of its investors and board and the shares recovered.

Samsung Galaxy info promises must be arbitrated, decide orders

 tech-gate.org/2024/02/22/samsung-galaxy-info-promises-must-be-arbitrated-decide-orders

bourbiza mohamed

February 22, 2024

(Photograph Credit history: H_Ko/Shutterstock)

Samsung biometric details overview:

- **Who:** U.S. District Judge Harry D. Leinenweber requested Samsung to arbitrate problems from 806 men and women.
- **Why:** The plaintiffs signed agreements to arbitrate all disputes when they ordered Samsung Galaxy phones.
- **Where:** The Samsung Galaxy info lawsuit was filed in federal courtroom in Illinois.

A federal judge in Illinois has purchased Samsung to arbitrate 806 Samsung Galaxy data grievances.

Samsung was accused of amassing biometric data from selfies taken by Galaxy cellphone customers, in violation of Illinois' **Biometric Information Privacy Act** (BIPA).

Samsung argued that BIPA does not apply to the Gallery App. Samsung Galaxy end users tried out to arbitrate their statements that Samsung was breaking the law, but Samsung refused, in accordance to a lawsuit the customers afterwards filed.

The Samsung Galaxy knowledge buyers signed arbitration agreements when they acquired the telephones and attempted arbitration, but Samsung allegedly refused to pay back its portion of the arbitration costs, the lawsuit explained.

"Samsung merely assaults the sufficiency of petitioners' pleading and flips the evidentiary burden on its head, demanding petitioners' pleading as 'bare' and 'conclusory,'" U.S. District Judge Harry D. Leinenweber wrote in his Samsung Galaxy info ruling.

Samsung biometric facts promises must be arbitrated now, decide orders

Leinenweber taken off 240 petitioners from the scenario who overlap with a **very similar circumstance** in the identical court docket involving 50,000 Samsung Galaxy cellular product users.

“After just about two decades of movement observe, it is time for petitioners to have their claims arbitrated,” Leinenweber wrote.

Neither party disputed that the arbitration settlement utilized, Leinenweber wrote.

Do you have a complaint more than Samsung biometric info collection? Enable us know in the responses.

The plaintiff is represented by Stuart A. Davidson, Mark Dearman, Lindsey H. Taylor and Alexander C. Cohen of Robbins Geller Rudman and Dowd LLP along with Gary M. Klinger and Jonathan B. Cohen of Milberg Coleman Bryson Phillips Grossman PLLC.

The defendant is represented by Randall W. Edwards and Matthew D. Powers of O’Melveny and Myers LLP, alongside with Michael W. McTigue Jr., Meredith C. Slawe, Kurt Wm. Hemr and Colm P. McInerney of Skadden Arps Slate Meagher and Flom LLP and Mark H. Boyle of Donohue Brown Mathewson and Smyth LLC, and James L. Kopecky of Kopecky Schumacher Rosenberg LLC.

The **Samsung biometric information lawsuit** is Hoeg, et al. v. Samsung Electronics of The usa Inc., et al., Case No. 1:23-cv-01951, in the U.S. District Courtroom for the Northern District of Illinois.

This Week in Chancery Court: Snap Settlement, Larry Ellison

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A settlement that aims to end shareholder litigation over changes to the control structure at Snap Inc. appears to be back on track at the Delaware Court of Chancery, with an amended proposal that seeks to answer questions about the class members raised last year by the judge overseeing the lawsuit.

More from the court's calendar this week:

Monday: Greater PA Carpenter's Pension Fund v. Snap Inc., Del. Ch., No. 2022-0679, settlement hearing 2/26/24.

At issue: An amended settlement proposal aims to address concerns raised by Vice Chancellor Paul Fioravanti Jr., who had questioned whether the class definition was too broad in a previous proposal to end investor litigation alleging Snap Inc. pushed to allow its co-founders to keep perpetual control of the company. Fioravanti also had questioned whether some stockholders failed to receive notice in time to file an objection with the court. The amended settlement proposal, which was filed Dec. 15, includes a request for up to \$6.6 million in attorneys' fees and expenses for the lawyers representing the pension fund behind the litigation.

Court action: Oral arguments on the settlement proposal will be heard in Wilmington, Del.

Snap Settlement Delayed as Delaware Judge Seeks More Details (1)

Wednesday: Cal. Safe Soil LLC v. KDC Agribusiness LLC, Del. Ch., No. 2021-0498, trial 2/28/24.

At issue: California Safe Soil LLC, which uses "breakthrough technology" to make fertilizer and pet food out of supermarket waste, sued a rival company in 2021 seeking damages over claims that KDC Agribusiness LLC used bogus deal negotiations to steal its trade secrets. KDC's former leaders "engaged in self-help, dishonesty, and theft" instead of working to scale CSS's technology, CSS said in a pre-trial brief. CSS claims for \$160 million in damages are "highly speculative and *not* based on actual sales," KDC's former principals said in their own pre-trial brief. KDC invested millions in CSS only to learn it was using "common food processing equipment and techniques" while the market for its fertilizer "was not what was represented," the firm said.

Court action: A seven-day trial opens Wednesday in Wilmington, Del.

Food Waste Recycler Seeks \$300 Million in Trade Secrets Lawsuit

Wednesday: Wear v. Ellison, Del. Ch., No. 2021-0839, settlement hearing, 2/28/24.

At issue: Autonomous Medical Devices Inc. investors sued its board and majority owner—billionaire Oracle Corp. founder Larry Ellison, one of the world’s richest people—in 2021 to challenge the terms of the medical diagnostic startup’s “series B” financing. Under the terms of a proposed \$6 million settlement, attorneys for the investors seek a \$750,000 fee award. The settlement also would require the addition of an independent director to ADMI’s board.

Court action: Oral arguments on the settlement proposal will be heard in Georgetown, Del.

Larry Ellison Sued Over Diagnostic Startup’s Series B Financing

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Compare and Contrast

 10b5daily.com/2024/02/26/compare-and-contrast-8

February 26, 2024

NERA Economic Consulting and Cornerstone Research have released their respective 2023 annual reports on federal securities class action filings. As usual, the different methodologies employed by the two organizations have led to slightly different numbers, although they both identify the same general trends.

The findings for 2022 include:

(1) The reports agree that there was a slight increase in overall filings. NERA finds that there were 228 filings (compared with 206 filings in 2022), while Cornerstone finds that there were 215 filings (compared with 208 filings in 2022). Although the overall numbers remain steady, both NERA and Cornerstone note that filings involving *only* Section 10(b)/Rule 10b-5 claims for securities fraud are an increasing percentage of the overall filings. For example, NERA found that 184 of the 228 filings fit this description, an increase of 34% from 2022.

(2) The number of M&A filings, filings alleging Section 11 claims for misstatements in registration statements, and state 1933 Act filings continues to drop. NERA found that there were only seven merger-objection suits in 2023, a ten-year low. Cornerstone found that the number of federal Section 11 and state 1933 Act filings decreased from 50 filings in 2022 to 19 filings in 2023 (a 62% decline).

(3) According to Cornerstone, the Ninth Circuit was the busiest circuit for core filings in 2023 with 67 new filings (32% of the national total). Core filings exclude M&A filings.

(4) NERA found that when excluding settlements of \$1 billion or higher, the average settlement value was \$34 million in 2023, a decrease of 12% from the \$39 million inflation-adjusted amount in 2022. There was an aggregate settlement value of \$3.9 billion and plaintiffs' attorneys' fees and expenses comprised 24.9% of that number.

The NERA report can be found [here](#). The Cornerstone report can be found [here](#).

Barclays Fails to Get Suit Over Unregistered Securities Tossed

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- Judge denies Barclays' motion to dismiss shareholder claims
- Bank agreed to pay \$361 million SEC fine over issue in 2022

Barclays Plc must face a proposed class action by shareholders over the bank's inadvertent sale of \$17.7 billion in unregistered securities, a judge in New York ruled.

Investors led by the 34,000-member Boston Retirement System sued in 2022, after the UK-based bank disclosed that, due to internal control failures, it had exceeded a regulatory cap on securities registrations. That meant that billions of dollars in securities Barclays issued in previous years were not registered with the Securities and Exchange Commission.

US District Judge Katherine Polk Failla on Friday ruled that shareholders had sufficiently alleged Barclays misled them about its failure to set up internal controls. She also said they could go forward with claims that executives had been reckless in reassuring investors about the bank's compliance with securities laws.

Barclays didn't immediately respond to an email seeking comment.

The bank agreed in 2022 to pay \$361 million to resolve civil claims by the SEC over the matter. The shareholders, who are seeking to represent all buyers of Barclays' American Depositary Receipts from February 2021 to February 2023, claim the matter resulted in a drop in the stock price.

Wall Street banks often use "well-known seasoned issuer" shelf registrations with the SEC that make securities offerings less onerous and time consuming. But Barclays lost such privileges after an earlier settlement with the SEC in 2017 and was required to quantify anticipated offerings and pay registration fees.

The ruling means the investors' claims are strong enough to allow both sides to go forward with pre-trial evidence gathering, a process that can take months or even years. Failla did remove from the case claims over statements made after Barclays' disclosure of the error, calling them a "stretch too far."

The case is *In re Barclays Plc Securities Litigation*, 22-cv-8172, US District Court, Southern District of New York (Manhattan).

Developer C3.ai Trims Stockholder Claims, Baker Hughes Beats All

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- One Section 11 Securities Act claim against C3 greenlighted
- Shareholders given three weeks to file amended complaint

Artificial intelligence software company C3.ai Inc. won the dismissal of most claims in a shareholder derivative action alleging its board misrepresented their sales force capacity ahead of an initial public offering, while oil field service company Baker Hughes won the dismissal of claims that it exercised control over C3 as a minority investor in the company.

The US District Court for the Northern District of California, however, granted the plaintiffs leave to file an amended complaint within 21 days.

The class action complaint alleges that C3.ai wasn't profitable at the time of its IPO in December 2020, through December 2021, and the company's registration statement with the US Securities and Exchange Commission contained misleading statements recognizing revenue brought in by Baker Hughes—"the exclusive seller" for C3's products within the oil and gas industry.

Judge Haywood S. Gilliam Jr. dismissed two of the plaintiffs' claims against C3 under Section 11 of the Securities Act of 1933, which provides that issuers are liable for misrepresentations or omissions of material information in their registration statement.

A statement that C3 "vastly expanded" its global reach is not actionable because it's "unquantifiable," Gilliam said. And a statement referencing the size of Baker Hughes isn't actionable because it didn't create an impression that the full 12,000-person Baker Hughes salesforce was engaged with C3, he said.

The plaintiffs alleged that although "C3 Defendants made statements (both in C3's SEC filings and in public statements) during the class period suggesting that BH's 12,000-person sales team was in engaged in selling C3's AI software, C3 'did not have Baker Hughes' entire [12,000-person] salesforce at its disposal," Gilliam said. Instead, the plaintiffs claimed, a separate unit of salespeople who lacked industry experience handled selling C3 products.

But the plaintiffs may go forward with a Section 11 claim under the Securities Act based on C3's statement that "During the fiscal year ended April 30, 2020, we recognized as revenue the full value of the first year of the direct subscription agreement and the value of deals

brought in by Baker Hughes through the reseller arrangement.”

“While it is something of a close question,” Gilliam said, the plaintiffs “have plausibly alleged” that the statement “was misleading for suggesting that the Baker Hughes arrangement closed deals by the close of the fiscal year ending April 30, 2020.”

The court dismissed claims that the registration statement violated Items 303 and 105 of SEC Regulation S-K, which imposes affirmative duties on SEC registrants. The defendants’ disclosures “satisfied any duty to disclose they had under Rule 303,” Gilliam said. And “ [w]ithout more specific allegations about the risks that the structure of the Baker Hughes salesforce presented at the time of the IPO, the Court concludes that Plaintiffs’ assertions under Item 105 also fail,” he said.

Gilliam denied the individual defendants’ motion to dismiss the plaintiffs’ claims under Section 15 of the Securities Act of 1933 as “control persons,” as it relates to C3 CEO Thomas Siebel, C3 Chief Financial Officer David Barter, and director on C3’s board Lorenzo Simonelli, but granted the motion as it relates to C3 President Edward Abbo.

The court also granted the defendants’ motion to dismiss the C3 defendants’ claims under Section 10(b) of the Securities Exchange Act of 1934 and implementing Rule 10b-5, which impose liability for any misstatement or omission of a material fact in connection with the purchase or sale of securities. The plaintiffs failed to adequately allege scienter—that the defendants acted with a guilty mind—necessary to pursue these claims, Gilliam said.

Gilliam also dismissed the claims of control person liability and unlawful insider trading under the Exchange Act against C3 and Baker Hughes. Because the plaintiffs didn’t establish a primary violation of federal securities laws under 10(b), they failed to plead a predicate necessary to support these claims, he said.

Hagens Berman Sobol Shapiro LLP is lead counsel for the plaintiffs. Quinn Emanuel Urquhart & Sullivan LLP represents C3. Gibson, Dunn & Crutcher LLP represents Baker Hughes.

The case is *Reckstin Fam. Trust v. C3.Ai Inc.*, 2024 BL 58034, N.D. Cal., No. 22-cv-01413, 2/22/24 .

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QuantumScape Execs Overstated EV Battery Potential, Suit Alleges

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- **COURT:** D. Del.
- **TRACK DOCKET:** 1:24-cv-00237

QuantumScape Corp.'s directors and executives exaggerated to investors that the company's battery technology could be adapted for use in electric vehicles, a shareholder suit alleges.

The San Jose, Calif.-based company made several public statements and disclosures that artificially inflated the company's stock price by giving investors the false impression that its solid-state battery technology could compete with lithium-ion batteries that are widely used in the EV market, according to the complaint filed Thursday in US District Court for the District of Delaware.

In reality, QuantumScape's battery technology suffered from a number of technical obstacles, including a defect that caused batteries to short-circuit, the complaint said.

Investors allegedly lost money after the design flaws were brought to light in a Seeking Alpha report authored by physics Ph.D. and Soteria Battery Innovation Group CEO Dr. Brian Morin on Jan. 4, 2021. QuantumScape's stock price fell more than 41% to close at \$49.96 per share the day Morin's report was published, according to the complaint. The drop was the biggest single-day decline of all time for QuantumScape shares, according to data compiled by Bloomberg.

Morin's report said solid-state batteries were "completely unacceptable" for use in EVs and QuantumScape's claims to the contrary were "unproven." QuantumScape's batteries had never been tested outside a laboratory, the report said.

Shares also fell more than 24% after Scorpion Capital published a report on April 15, 2021 which claimed the short-seller fund obtained information showing that QuantumScape relied on compromised battery testing methods, the complaint said.

Three lawsuits were also filed against the company in the days after Morin's report was published. The suits have since been consolidated into a single class action that is pending in the Northern District of California and was granted class certification in December 2022.

QuantumScape has received investments from Bill Gates and Volkswagen AG and runs a US manufacturing facility with the German car maker.

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

Morris Kandinov LLP and Meluney Alleman & Spence LLC represent the plaintiff.

The case is Jones v. Singh , D. Del., No. 1:24-cv-00237, complaint filed 2/22/24 .

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Investigation Underway: Dick's Sporting Goods Faces Legal Scrutiny Over Alleged Securities Violations

 bnnbreaking.com/sports/investigation-underway-dicks-sporting-goods-faces-legal-scrutiny-over-alleged-securities-violations

Investigation Underway: Dick's Sporting Goods Faces Legal Scrutiny Over Alleged Securities Violations

As the sun rises over the sprawling urban landscape, a story unfolds that captures the essence of corporate America's tumultuous dance with transparency and accountability. At the heart of this narrative is Dick's Sporting Goods, Inc., a titan in the retail sector, now finding itself under the forensic gaze of legal scrutiny. This is not just a tale of financial figures and stock prices; it's a story about trust, the expectations of investors, and the thin line that separates ambitious marketing from misleading statements.

The Allegations: A Cloud Over Corporate Claims

Recent developments have cast a long shadow over Dick's Sporting Goods, with **Faruqi & Faruqi, LLP** spearheading an investigation into potential claims against the company for allegedly violating federal securities laws. Central to these allegations are claims that the company issued misleading statements and omissions concerning the demand for products in its Outdoor segment. These statements purportedly led to an accumulation of excess inventory, subsequently denting the company's profitability.

What followed were analyst reports from **TD Cowen** and **Telsey Advisory Group**, which painted a bleak picture of the company's financial health, lowering sales and earnings estimates. The market reacted swiftly, with Dick's Sporting Goods' stock price tumbling nearly 7%. Yet, the real shock came later when the company reported significantly lower profitability for Q2 2023 than anticipated, triggering a more than 24% nosedive in its stock price.

Investor Reaction and Legal Repercussions

The fallout from these revelations has been palpable. Investors, many of whom had placed their trust and capital in the hands of Dick's Sporting Goods, were left to grapple with substantial losses. In response, legal firms such as **Robbins Geller Rudman & Dowd LLP** and **Bronstein, Gewirtz & Grossman LLC** have stepped into the fray, filing class action lawsuits against the company. These legal actions aim to recover damages for alleged violations of federal securities laws, asserting that the company's leadership failed to accurately represent the state of its business operations.

With an April 22, 2024, deadline looming for investors to seek the role of lead plaintiff, the legal battles are set to intensify. These lawsuits not only seek justice for those financially impacted but also underscore the critical importance of corporate transparency and accountability.

Looking Beyond the Legal Drama

While the legal proceedings against Dick's Sporting Goods will unfold in the courts, the implications of this saga extend far beyond the confines of legal documents and courtroom arguments. This story sheds light on the broader challenges facing corporate America in an era where investor trust is both a precious commodity and a fragile asset.

For Dick's Sporting Goods, the road ahead will be fraught with challenges as it seeks to navigate the legal storm while restoring faith in its brand and operations. For the retail industry at large, this episode serves as a stark reminder of the perils of overstepping the boundary between ambitious marketing and misleading shareholders.

As this story continues to develop, it will undoubtedly provide valuable lessons on the importance of integrity in corporate communication and the unyielding demand for businesses to uphold their fiduciary duties to their investors. In the end, it is not just the financial health of a corporation that is at stake, but the very trust that sustains the delicate ecosystem of the market.

Moelis, Pension Fund Get Split Ruling in Corporate Control Bout

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWE5NjgtZGU0My1hNWVklWJkZWQ5MmY4MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IkNDT1krSDIOWVArTnpnem1PUk9oMVE9PVFyVHNFc0JibIZvc3cvb0wyb2dGUHc9PSIsInRpbWUiOiIxNzA4OTQ5Njk1Njkyliwic2lnIjo1SndWTWFYMWtFbTFldDIRTkNvZU5xMFZNMFA0PSIsInYiOiXln0=

- Lawsuit challenges pact between company, billionaire founder
- Case part of a wave over veto rights held by founders, backers

Moelis & Co. partially lost its latest bid to end litigation challenging a web of contract clauses that give its billionaire founder control over its choice of CEO and other key decisions.

A Delaware judge, Vice Chancellor J. Travis Laster, in a split ruling on Friday granted summary judgment in favor of an institutional investor challenging a raft of items for which the company's board must obtain chairman Ken Moelis's prior written approval before taking action, as well as other corporate stockholder agreement provisions relating to board size and the filling of vacancies.

"When market practice meets a statute, the statute prevails," the judge said near the end of his 132-page ruling. "Market participants must conform their conduct to legal requirements, not the other way around."

At the same time, Laster granted summary judgment in favor of Moelis & Co., and against the West Palm Beach Firefighters' Pension Fund, rejecting its challenges to clauses related to designation rights, and nomination and efforts requirements, finding those to be facially valid.

The decision comes less than two weeks after the chancery judge denied Moelis' earlier effort to end the litigation. The parties have 10 days to tell the court how they wish to proceed in the wake of the rulings, Laster said for the Delaware Court of Chancery.

The fund's proposed class action is part of a wave of investor suits challenging similar pacts. It takes aim at provisions of the stockholder agreement giving entities affiliated with Moelis a veto over the financial firm's leadership, litigation strategy, budgets, business plans, and charter so long as he owns at least a roughly 7% stake. The affiliates can also allegedly veto stock issuances and dividend payments.

The court's ruling confronted an issue never before resolved by a Delaware judge: the extent to which the state's laws permit a corporation to delegate board authority to a stockholder through private contracts in ways that couldn't be legally accomplished through its charter or bylaws.

At the heart of the matter is section 141(a) of the Delaware General Corporation Law, which states that the business and affairs of every corporation organized under that chapter “shall be managed by or under the direction of a board of directors, except as may otherwise be provided” in the chapter or the certificate of incorporation.

A 1957 chancery court ruling, *Abercrombie v. Davies*, held that governance restrictions violate that section when they effectively remove from directors “in a very substantial way” their duty to use their own best judgment on matters of management, Laster noted.

***Abercrombie* Applied**

“The question then becomes whether the challenged provisions violate the *Abercrombie* test,” he said. The preapproval requirements do, facially violating §141(a) Laster said. So too does the vacancy requirement.

The judge sided with Moelis on the fund’s challenge to his right to specify individuals as potential candidates for director.

“The Designation Right, standing alone, only gives Moelis the ability to propose a specific number of designees,” but doesn’t force the board or company to do anything with them, Laster said. “Viewed in isolation, the Designation Right does not impose any restriction on the Board that could violate Section 141(a). It is not invalid.”

He also upheld a so-called “efforts” requirement, one obligating the company to take “all reasonable actions” within its control to cause Moelis’ designees to be elected, or maintained, on the board.

But Laster struck down a committee composition provision as violating two different GCL statutes.

That provision “violates the *Abercrombie* test by removing from the directors in a very substantial way their duty to use their own best judgment on a management matter, viz., who should serve on a committee,” the judge said.

Ripple Effects

The ruling will likely ripple across the other ongoing disputes that echo the Moelis litigation. They include a trio of lawsuits targeting General Atlantic LP, which allegedly has broad contractual veto rights affecting several businesses it invests in: payments firm EngageSmart Inc., medical logistics business Alignment Healthcare Inc., and HireRight Holdings Corp., an employment-related background check company.

Some of the other cases have involved Petco Health & Wellness Co.—backed by the Canada Pension Investment Board and a Luxembourg-based private equity firm—and IT services company N-able Inc., which has a parallel deal with Silver Lake Group LLC and Thoma Bravo LP. One similar suit, filed in December, concerns a pact between Driven Brands Holding Co. and Roark Capital Group Inc.

Ascension Health Alliance and TowerBrook Capital Partners LP, meanwhile, agreed last year to shoulder nearly \$40 million of a roughly \$46 million settlement resolving shareholder litigation over an allegedly lopsided financing round at R1 RCM Inc. that gave them certain parallel veto rights.

Laster's prior decision, issued Feb. 12, denied the company's initial bid to end the case. In that ruling, the judge rejected the argument that the pension fund should have either challenged the stockholder agreement soon after it was adopted or waited until the company actually wields it unfairly.

"The plaintiff has not sued too late," he said Feb. 12. "Nor has the plaintiff sued too early."

West Palm Beach Firefighters' Pension Fund is represented by Saxena White PA. The company is represented by Morris, Nichols, Arsht & Tunnell LLP and Wachtell, Lipton, Rosen & Katz.

The case is W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., Del. Ch., No. 2023-0309, 2/26/24 .

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Blackstone's liability to University of California doubles on property fund losses

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Antoine Gara

February 26, 2024



Blackstone offered the University of California an 11.25% annual return to secure its \$4.5bn investment in the struggling Breit © Ben Margot/AP

Antoine Gara in New York

13

Blackstone owes the University of California twice as much as it did last quarter as part of a complex transaction to shore up its flagship real estate fund.

The world's largest alternative asset manager promised UC an 11.25 per cent annual return from the property fund, called Blackstone Real Estate Income Trust, or Breit, as part of a deal to draw \$4.5bn in new investment. But as the fund lost value last year, Blackstone's liability to UC has grown to \$560mn.

It underscores the financial risk Blackstone assumed to draw UC's investment by promising high returns on property investments hit by rising interest rates.

In late December 2022 and January 2023, Blackstone received a \$4.5bn investment from UC that helped Breit meet a spate of redemption requests from other investors and shore up its liquidity. The new cash helped Breit avert a fire sale to meet the requests.

To entice UC, Blackstone made a promise that Breit would achieve 11.25 per cent annualised returns over six years. The US private capital group pledged \$1.1bn in Breit shares it owned to guarantee some of those returns. Since the UC investment, Breit's redemption requests have dropped by about 80 per cent.

But Blackstone has had to record a liability to UC based on how far Breit has fallen below its return promises. In the fourth quarter, Blackstone more than doubled its liability to UC, raising it from \$260mn at the end of the third quarter to \$560mn by the end of 2023, according to a securities filing.

Breit recorded a 0.5 per cent loss in 2023, its first annual loss since its launch in 2017, putting Blackstone significantly behind on its promised return. Breit's value fell as Blackstone marked down some property investments. In addition, some interest rate hedges that had gained substantially in value lost ground amid rising expectations of interest rate cuts from the US Federal Reserve.

The annual losses in turn caused Blackstone's liability to UC to increase. Though it is an accounting entry and no cash or assets are changing hands, the liability reflects the increased risk Blackstone may eventually have to forfeit some Breit shares it owns to the California-based endowment. If Breit's performance soars in coming years, the liability could reverse or even turn into an asset.

Blackstone Group LP

Stephen Schwarzman's income at Blackstone falls 30% to below \$1bn

"Since inception seven years ago, Breit has delivered an 11 per cent annualised net return . . . outperforming non-traded Reit peers by [about] 6 percentage points in 2023, making it one of the best performing Reit investments through the pandemic and a period of rising rates," Blackstone said in a statement.

Blackstone president Jonathan Gray has said he expects property valuations to soon hit bottom as real estate markets absorb the impact of higher rates.

"We really see real estate bottoming from a valuation standpoint," Gray told the Financial Times last month. "The declining cost of capital with rates coming down and spreads coming down for real estate borrowing is very helpful."

On a conference call with analysts in January, Gray said Breit had "weathered the storm" in real estate markets, but he warned that Blackstone did not expect to see a "V-sharped recovery" in property values.

Firms picked to lead class action over Boost Glucose Control drinks

 legalnewsline.com/stories/655001281-firms-picked-to-lead-class-action-over-boost-glucose-control-drinks

February 26, 2024

Laurence King of Kaplan Fox | <https://www.kaplanfox.com/>

OAKLAND, Calif. (Legal Newsline) - Lawyers at Milberg Coleman and Kaplan Fox will lead consolidated litigation against Nestle that claims diabetic customers are tricked into thinking Boost Glucose Control drinks will help manage their condition.

Judge Phyllis Hamilton granted the motion by those firms on Feb. 15 in U.S. District Court for the Northern District of California. Milberg Coleman filed its case in December 2021 in Hamilton's court, while Kaplan Fox filed its in New Jersey in May 2022.

Nestle's motion to dismiss was granted in the California case but the U.S. Court of Appeals for the Ninth Circuit reversed, while a similar motion in New Jersey was pending when the case was transferred to California.

"Based on their experience in other similarly sized class and mass actions, Co-Lead Counsel understand and are ready to commit the substantial resources, including personnel, time, facilities, and funding, needed to litigate these cases from start to finish," the motion says.

"Milberg Coleman and Kaplan Fox... have decades of experience between them and specifically have vast knowledge of consumer protection statutes and related claims."

Steven Owen, the New Jersey plaintiff, is a diagnosed diabetic who purchased the defendant's Boost Glucose Control from Amazon in April of 2022. He claims the over-the-counter Boost Glucose Control products are falsely labeled as "designed for people with diabetes" and sold as "nutritional drinks."

Specifically, Owen claims that by his "own clinical trial," the products were found to only cause a "merely" lesser rise in glucose levels as compared to another nutritional drink. He claims the products do not control glucose but only "produce a slightly favorable response to glucose levels despite Nestle implying the drinks help in the prevention and control of diabetes, which is deceptive.

He alleges the drink's label stating the product "helps manage blood sugar" leads customers to reasonably believe the product will control blood sugar levels.

BMW Airbag Death Suit Can Go to Trial on Strict Liability Claim

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Litigation

The BMW logo on the hood of a vehicle inside a showroom in Frankfurt on Aug. 4, 2020.

Photographer: Peter Juelich/Bloomberg

Feb. 26, 2024, 6:53 AM PST

Tre'Vaughn Howard



- Expert's affidavit shows that genuine factual disputes exist
- Alternative design was available, plaintiff's expert said

BMW lost its bid to stop a lawsuit alleging that it's strictly liable for a fatal airbag defect, with a ruling by the District of Arizona.

BMW of North America LLC argued it couldn't be liable because the alleged defect didn't develop until after the company sold the vehicle. The US District Court for the District of Arizona disagreed, denying the company's motion for summary judgment, which allows the case to proceed to trial.

Maria Griego and Robert Romero—parents of the deceased Roberto Griego-Romero—sued BMW over an allegedly defective airbag in their son's 2004 BMW 325i that deployed and shot metal shrapnel into his abdomen when he collided with another car.

BMW said the plaintiffs' own expert testified that the vehicle's airbag wasn't defective at the time of sale. The expert said the airbag inflators would “eventually develop the failure” but “would meet initial testing before sale,” the court said.

However, other parts of the expert's affidavit showed that genuine disputes of material fact existed, Judge Diane J. Humetewa said.

The expert testified that the car “failed to perform as safely as an ordinary consumer would expect when used in an intended” way and that “an alternate design, such as a pressure relief device, would have eliminated the defect.”

BMW didn't show it qualified for an exception from strict liability under Arizona law, the court said. The company controls BMW vehicle distribution in North America “and initiated a recall due to this defect,” the court said.

BMW also argued the car's safety measures met "state of the art" designs at the time it was manufactured and sold. However, the court rejected this argument since the expert's stated opinion regarding an alternative design that would have eliminated the alleged defect contradicted BMW's assertion.

Slavik Law Firm LLC and Skousen Gulbrandsen & Patience PLC represent Griego.

Bowman and Brooke LLP represent BMW.

The case is Griego v. BMW of N. Am. LLC , D. Ariz., No. 2:22-cv-01281, 2/22/24 .

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Why a Big Range Roundup Verdicts? It Depends on What Juries Hear About EPA

LAW [law.com/2024/02/26/why-the-wide-range-of-roundup-verdicts-it-might-depend-on-what-juries-hear-about-the-epa](https://www.law.com/2024/02/26/why-the-wide-range-of-roundup-verdicts-it-might-depend-on-what-juries-hear-about-the-epa)

By Aleeza Furman | Amanda Bronstad



San Diego County Superior Court Judge Kevin Enright on Aug. 20, 2019. Photo: John Gibbins/ The San Diego Union-Tribune

NEWS

Why the Wide Range of Roundup Verdicts? It Might Depend on What Juries Hear About the EPA

The wide range of Roundup verdicts, from defense wins for Monsanto to a \$2.25 billion award, could be due to what jurors hear at trial about the EPA and foreign regulatory agencies.

February 26, 2024 at 12:15 PM

8 minute read

Litigation

Amanda Bronstad 
staff reporter

What You Need to Know

- The EPA's position on Roundup's key ingredient, glyphosate, is among the primary fights playing out in Roundup trials.
- Monsanto has fought to tell jurors about regulatory agencies in other countries that have vouched for glyphosate's safety.
- Monsanto has insisted that plaintiffs' lawyers have misinterpreted a 2022 decision by the U.S. Court of Appeals for the Ninth Circuit that addressed the EPA's position on glyphosate.

In his Oct. 9 opening statement in a Roundup trial in San Diego, plaintiffs attorney Scott Love told jurors the U.S. Environmental Protection Agency's conclusion that the pesticide's key ingredient was safe had been vacated.

"This is super important. You're the first jury to ever see that," Love, of Houston's Clark, Love & Hutson, said, according to a trial transcript. "The EPA doesn't really like it. They had their hand slapped. Their conclusion was vacated."

After the opening, Monsanto attorney Lee Mickus moved for a mistrial. He said Love had mischaracterized the EPA's position, which has found that the ingredient, glyphosate, is not carcinogenic.

"So the jury is now left with the impression from counsel's argument that there is no basis from EPA for glyphosate to be registered; there is no finding that it fulfills its scientific mandate," Mickus, a Denver partner at Evan Fears Schuttart McNulty & Mickus, said, according to the transcript. "All of which is 100% factually inaccurate, as the court well knows."

San Diego County Superior Court Judge Kevin Enright denied the mistrial and, on Oct. 31, the jury hit Monsanto with a \$322 million verdict.

The EPA debate is now one of the key arguments in Monsanto's appeal—and not just in San Diego. The EPA's position, and a 2022 ruling by the U.S. Court of Appeals for the Ninth Circuit that plaintiffs' lawyers have insisted "vacated" that holding, is among the primary fights playing out in Roundup trials across the country in the past six months.

And the EPA isn't the only regulatory agency at issue. To counter plaintiffs' reliance on a 2015 decision from the World Health Organization's International Agency for Research on Cancer, or IARC, which found glyphosate was a probable carcinogenic, Monsanto has fought to tell jurors about agencies in other countries that have vouched for its safety.

When Monsanto has been able to introduce that evidence, in addition to limiting plaintiffs' challenges to the EPA, juries have returned defense verdicts. But, if not, the results have been devastating for Monsanto.

So far, juries in Pennsylvania, California and Missouri have awarded more than \$4 billion in verdicts in six trials since courthouses reopened following the COVID-19 pandemic shutdowns. They have also come out with 10 defense verdicts, including ones in Oregon and Illinois.

Bayer, which owns Monsanto, said in a statement: "When the scientific consensus reached by EPA, other worldwide regulatory bodies, and their scientists that glyphosate is safe and not carcinogenic is presented to juries, the company has consistently prevailed at trial. Conversely, when this evidence is grossly misrepresented by plaintiffs or unfairly excluded by courts, as in some recent cases, juries have sided with plaintiffs."

Three more trials began this month in Pennsylvania, Delaware and Arkansas, and a fourth is set to start Feb. 27 in California.

'A Developing and Somewhat Complicated Regulatory History'

To be sure, other factors have influenced the outcomes of Roundup trials: different judges, state laws and experts on other topics, such as whether glyphosate causes non-Hodgkin lymphoma. There are also fights over whether to tell jurors about additional ingredients in Roundup or evidence of Monsanto's corporate conduct, which has led many juries to award punitive damages. Plus, there are different facts about the individual plaintiffs.

But a Law.com review of the records in many of the trials shows the regulatory debate has made a big impact.

"Both here at home, and abroad, there is a developing and somewhat complicated regulatory history that relates to glyphosate," Emily Acosta, a partner at Wagstaff Law Firm in Denver, told Law.com. "So, essentially, what courts are having to weigh is the value of telling that story in its entirety versus the possibility of confusion or misleading the jury."

At the most recent Roundup trial, for instance, Monsanto's lawyers were not allowed to reference the findings of foreign regulatory agencies on glyphosate. During the testimony of Monsanto scientist Donna Farmer, defense attorney Anthony Upshaw instead attempted to introduce evidence that scientists around the world found glyphosate was not carcinogenic.



Anthony Upshaw of McDermott Will & Emery. Courtesy photo

Farmer was aware that scientists in Canada, Australia, New Zealand and Japan had looked at glyphosate, but when Upshaw, a Miami partner at McDermott Will & Emery, asked what they had concluded, plaintiffs attorney Tom Kline, of Philadelphia's Kline & Specter, objected. Philadelphia Court of Common Pleas Judge Susan Schulman sustained the objection.

On Jan. 26, the jury hit Monsanto with a \$2.25 billion verdict, the largest Roundup award on record.

"As a result, the jury was given a completely one-sided presentation about the conclusions of foreign scientists, which was plain error," wrote Philadelphia attorney Chanda Miller, of Barnes & Thornburg in Monsanto's post-trial motion.

Plaintiffs' lawyers have called the regulatory decisions in other countries irrelevant. They've also increasingly attacked the EPA's determination that glyphosate isn't carcinogenic, relying on the Ninth Circuit's 2022 ruling that ordered the EPA to reevaluate its denial of a Natural Resources Defense Council's petition to cancel its glyphosate registration.

Monsanto's lawyers have insisted that the EPA's conclusions on glyphosate "remain the same," but plaintiffs' lawyers, armed with experts, have convinced some jurors otherwise.

"We tried to peel the onion on that a bit and not take for granted what Monsanto says, which is what lawyers are starting to do now," said T. Roe Frazer, of Frazer PLC in Nashville, Tennessee.

Frazer won a groundbreaking \$1.25 million jury award on Oct. 20 in St. Louis after losing a defense verdict in 2022 in Kansas City, Missouri.

"Once you understand the regulatory issue, and put them on their heels on that, it's not a good issue for them," Frazer said.

In Missouri, St. Louis County Circuit Judge Brian May in 2022 and 2023 oversaw four Roundup trials, all of which ended in defense verdicts. But the trial that ended in a \$1.56 billion verdict on Nov. 17 was in Jefferson City, Missouri, before Cole Circuit Court Judge Daniel Green. And, according to Monsanto's motion for a new trial in that case, Green had very different rulings.

"Over Monsanto's repeated objections (both before and during trial), the court permitted plaintiffs to do something that had never previously been permitted in a Missouri Roundup trial: it allowed plaintiffs to infect the trial with a technical, administrative, legal decision" from the Ninth Circuit, wrote Samuel Hofmeier, of Bryan Cave Leighton Paisner, in Kansas City, Missouri. In at least five other Missouri trials, including the ones before May, that evidence was excluded, according to a footnote in the motion.

'The Best Playground Taunts'

Monsanto has insisted that plaintiffs' lawyers are manipulating the EPA's decision on glyphosate.

In a Roundup trial in Conway County Circuit Court, in Arkansas, which opened on Feb. 15, Monsanto sought to exclude references from plaintiffs' lawyers to the EPA as "corrupt, incompetent, or otherwise untrustworthy."

Judges in three Roundup trials in Missouri, all of which ended in defense verdicts, had excluded such evidence, which "will result in a windfall to whomever can simply deal out the best playground taunts," wrote DLA Piper David Koehler, a partner in Little Rock, Arkansas, in a pretrial motion.

The plaintiffs' lawyer in the Arkansas case, Kelley Owens, of Kirkendall Dwyer in Dallas, countered in court papers: "Simply put, knowing that Monsanto will rely on the EPA as its primary defense, evidence of EPA's failure, susceptibility to political influence and improper relationships with Monsanto should be admissible."

Some judges have sided with Monsanto, leading to defense verdicts.

In many of the Missouri trials, Monsanto was allowed to introduce witnesses who told jurors glyphosate wasn't banned in other countries, like Australia and Canada, while the plaintiffs were prohibited from mentioning the Ninth Circuit's decision involving the EPA.

That made it hard to counteract Monsanto's insistence that the EPA was right, said Motley Rice's Michael Pendell.



Scott Love, of Clark Love Hutson.

“They do it in opening and in trial and witnesses and closing and say the EPA says we can use Roundup and it doesn’t cause cancer and everything’s fine and good and all the regulatory agencies in the world have said the same thing,” he said. “Not being able to present evidence to undermine that, and contradict that, it’s a difficult argument to overcome.”

Pendell said he wasn’t able to introduce that evidence last year in his own Missouri trial, in which the jury found for Monsanto.

“It did make a difference,” he said. “It would matter to me as a jury.”

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- Latest
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Who Is Kathaleen McCormick, the Delaware Judge Not Taking Elon Musk's Nonsense?

observer.com/2024/02/kathaleen-mccormick-delaware-judge-elon-musk-pay-package

Shreyas Sinha

February 26, 2024



Kathaleen McCormick (left) and Elon Musk. Wikimedia Commons/Getty Images

Kathaleen McCormick, who made headlines after negating Elon Musk's \$56 billion Tesla pay package last month, is the person who keeps every corporate board room on their toes. As chancellor of the Delaware Court of Chancery, tasked with hearing shareholder disputes and corporate governance litigation for companies registered in the state, McCormick plays a pivotal role in shaping the nation's approach to governing large companies and reigning in their CEOs. Two-thirds of Fortune 500 companies and 93 percent of IPOs are registered in Delaware. Musk is not the first to face McCormick's no-nonsense approach, and he certainly won't be the last.

McCormick, 44, took her current role of chancellor in May 2021, after serving as a vice chancellor for the court for two years. Born in Dover, Del., and growing up in the nearby town of Smyrna, which boasts a population of just over 13,000 today, she is the first woman to rise to the role in the state's history. A daughter of two public school teachers, McCormick attended Harvard University as a philosophy major and later received a law degree from the University of Notre Dame in Indiana.

After graduation, McCormick returned to Delaware to join the Community Legal Aid Society, a local organization assisting low-income people in civil cases who have no access to an attorney. Later she joined the Young Conaway Stargatt & Taylor, the state's second-largest law firm.

In 2018, McCormick was appointed to be a vice chancellor to the Court of Chancery by Democratic Governor John Carney and was confirmed by the Delaware Senate. In 2021, after then-Chancellor Andre Bouchard's resignation, McCormick was nominated for the top job and sworn in in May, starting her 12-year term.

A reputation for protecting shareholder interests

McCormick has a reputation for consistently delivering decisions that prioritize fair corporate governance and protect the interests of shareholders. In 2022, she made a first-of-its-kind ruling in a merger and acquisition case where the CEO of Mindbody, a software maker, and its private equity acquirer Vista, were jointly liable for flaws in a \$1.9 billion transaction. McCormick argued the then-CEO of Mindbody had failed to do what was best for the company's shareholders by offering an artificially reduced price to his favored buyer, Vista.

In another merger and acquisition case in 2021, McCormick ruled that the private equity firm Snow Phipps Group had to follow through with an agreement to purchase DecoPac, the owner of a cake decoration company. This was one of the many "busted deal" cases where buyers attempted to backpedal deals negatively impacted by the Covid-19 pandemic.

While Delaware has a long-standing reputation for corporate friendliness, Musk recently complained on X, "Never incorporate your company in the state of Delaware," after McCormick voided his giant Tesla (TSLA) pay package (He has the option to appeal the case at a higher court). Since then, Musk has moved the registrations of two of his companies, SpaceX and Neuralink, from Delaware to Texas. He has pledged to do the same with Tesla, though the decision will be subject to a shareholder vote, given Tesla's public status.

Musk has not always felt Delaware's courts were against him. In 2016, the Court of Chancery sided with Musk when shareholders sued Tesla for overpaying in the acquisition of SolarCity, a solar energy company founded by Musk's cousins.

It's a different story after McCormick took charge. In 2022, the judge played a crucial role in thwarting Musk's attempt to back out of buying Twitter, compelling him to honor the \$44 billion deal. This decision showcased her firm stance against reneging on contractual obligations and protecting the interests of then-Twitter's shareholders.

Elon Musk Las Vegas Loop Tunnel Has Construction Safety Issues

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Feb. 26, 2024, 5:50 AM PST

By Max Chafkin and Sarah McBride

(Bloomberg Businessweek) --

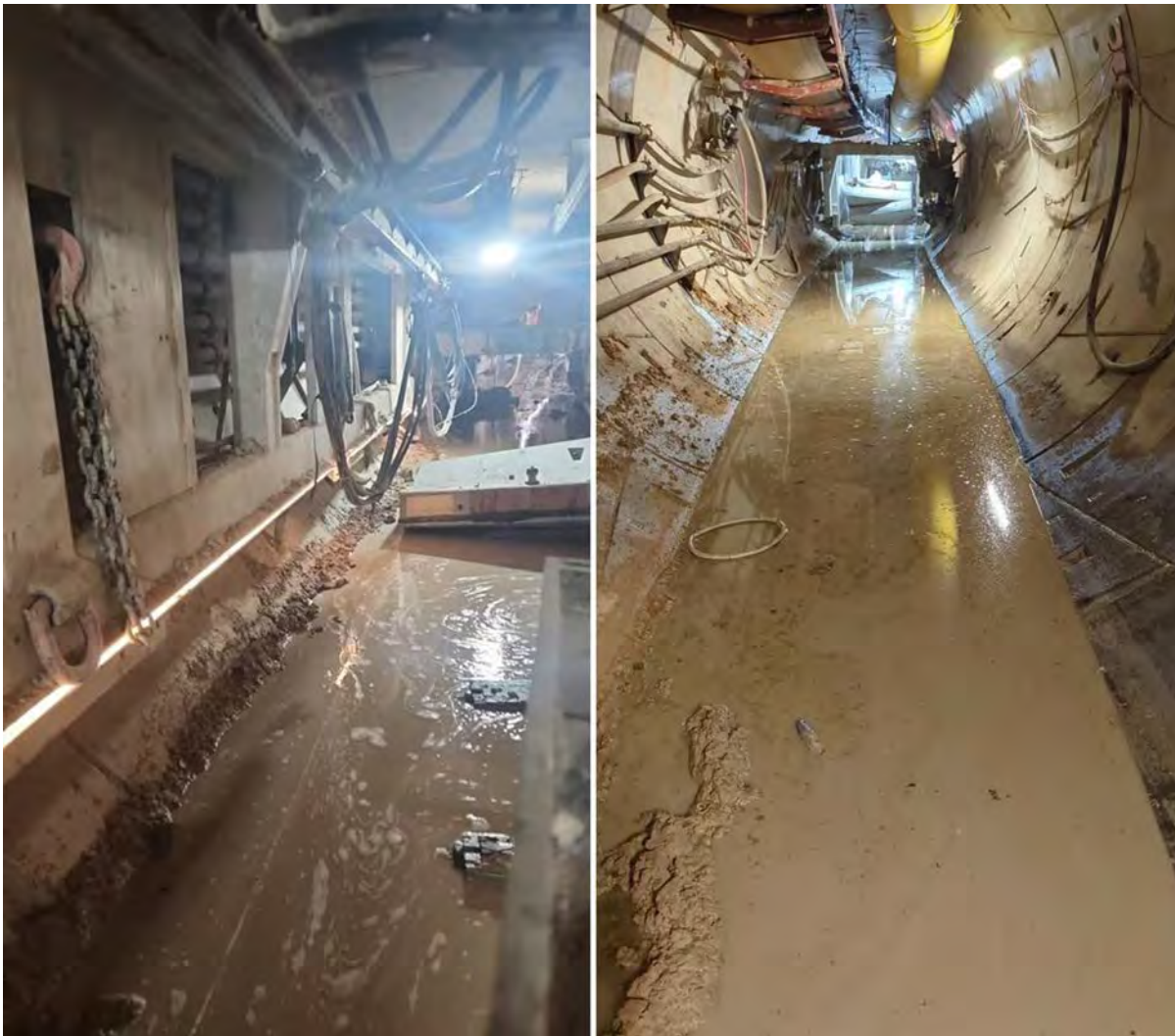


Elon Musk at a 2018 unveiling-event for the Boring Co.'s first completed test tunnel in Hawthorne, California.

Photographer: Robyn Beck/Bloomberg

The muck pooling in the tunnel at the north end of the Las Vegas Strip had the consistency of a milkshake and, in some places, sat at least two feet deep. The tunnel-to-be, which would eventually stretch about half a mile, was part of a system intended to connect two hotels, the Encore Las Vegas and the Westgate, with the enormous Las Vegas Convention Center. Workers doing the digging later said they had to wade through the mud every day. It splashed up over their boots, hit their arms and faces and soaked through their clothes. At first, it merely felt damp. But in addition to the water, sand and silt—the natural byproducts of any dig—the workers understood that it was full of chemicals known as accelerants.

The accelerants cure the grout that seals the tunnel's concrete supports, helping the grout set properly and protecting the work against cracks and other deterioration. They also seriously burn exposed human skin. At the Encore dig site, such burns became almost routine, workers there told Nevada's Occupational Safety and Health Administration. An investigation by the state OSHA, which *Bloomberg Businessweek* has obtained via a freedom of information request, describes workers being scarred permanently on their arms and legs. According to the investigation, at least one employee took a direct hit to the face. In an interview with *Businessweek*, one of the tunnel workers recalls the feeling of exposure to the chemicals: "You'd be like, 'Why am I on fire?'"



Boring tunnel workers say they had to wade through deep puddles of toxic muck.

Source: Nevada Occupational Safety and Health Administration

Like others interviewed for this story, the tunnel worker spoke on condition of anonymity, fearing reprisals from the billionaire who operates it: Elon Musk. For nearly a decade, Musk's tunneling venture, the Boring Company, has made grand pronouncements about building an underground mass-transit system he calls "the hyperloop." Musk once described this technology as a system of futuristic pods capable of ferrying people between major cities at

the speed of sound. He suggested that a hyperloop would allow people to commute between New York City and Washington, DC, or between San Francisco and Los Angeles, in about half an hour.

That these boasts were taken seriously enough for Boring to raise about \$800 million in outside capital, with its most recent valuation reaching \$6 billion, speaks to the mythology surrounding Musk. These days, however, his luster has dimmed somewhat. His takeover of Twitter has been marked by huge losses and reports that board members are concerned about his mental health and drug use. Musk has laughed these off. His car company, Tesla, is stagnating. As Musk put it, optimistically, on an earnings call, the company is “between two major growth waves.” In January, a federal judge voided the \$55 billion pay package that Tesla had awarded Musk, calling it “unfathomable” and concluding that the automaker’s board was too friendly to its CEO. The latest controversy: On Feb. 24 Forbes reported that the chair of the House China committee had accused Musk’s satellite internet service, Starlink, of possibly breaching a government contract by withholding services to Taiwan. Musk has yet to respond to that claim.

Through all of this, Musk has said relatively little about the Boring Company, perhaps because of the gaping distance between his promises and execution. After more than seven years in business, the company’s only commercial project amounts to a drastically scaled-down shuttle bus system for the Vegas convention center. Mostly, it takes passengers from one side of the convention center to the other. There’s also a spur that takes guests between the convention center and the Resorts World hotel, which sits on the far side of Las Vegas Boulevard. The system operates only during conventions, and attendees ride in Tesla sedans limited to 40 miles per hour. The company has said the system can handle more than 4,500 passengers hourly.

The Encore and Westgate tunnels are extensions, part of a theoretical project to widen coverage to most of the Strip and downtown Las Vegas. But progress has been slow—so slow that Las Vegas Mayor Carolyn Goodman says she doubts it’ll ever happen. “It’s impractical,” says Goodman, who is claustrophobic and has yet to ride in any of the tunnels. “I pray that it works, but I see these stumbling blocks.” Among them, she says, are issues of capacity and safety.

Although no one has been killed at a Boring Company worksite in Las Vegas, the OSHA report shows some very close calls. Last summer, according to employees interviewed by the investigators, an intern was nearly crushed when a bin made out of two-ton concrete blocks collapsed. It had been overloaded with muck, the employees said, and the metal brackets holding it together gave way, sending the intern running. (The intern didn’t respond to inquiries for this story.) Altogether, OSHA found eight violations it categorized as “serious” and fined the Boring Company a total of \$112,504 last fall.

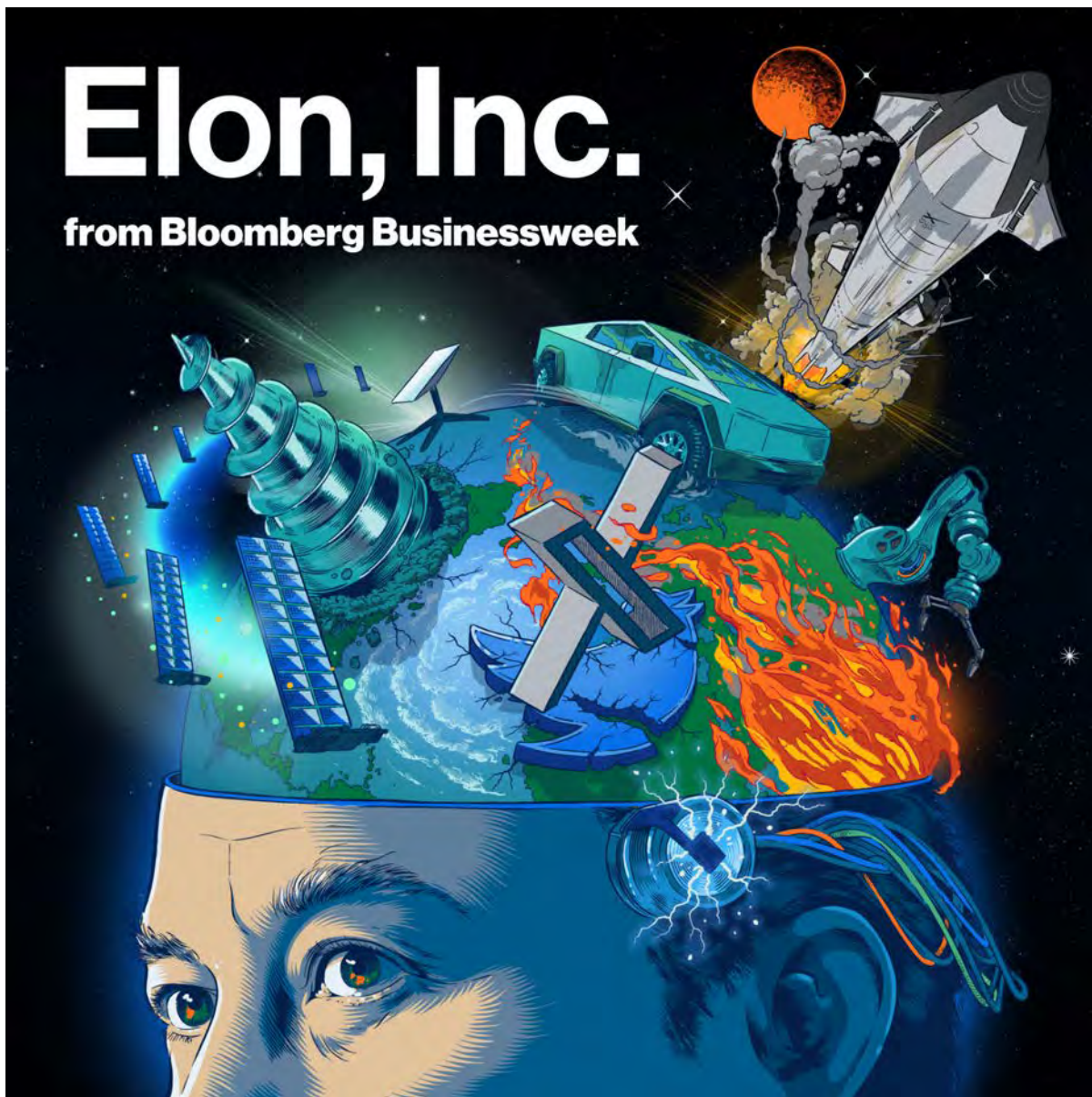


The collapsed muck bin, before (left) and after.

Source: Nevada Occupational Safety and Health Administration

The company, which didn't immediately respond to requests for comment from *Businessweek*, is contesting the findings. "Nevada OSHA has failed to establish that the alleged violations occurred," Boring's outside counsel wrote in a Nov. 21 letter to the agency, which *Businessweek* also obtained through its freedom-of-information request. "TBC contests all of the citations' classifications, required abatement, abatement deadlines, proposed penalties, and every other matter subject to contest."

The injuries and near misses described in the OSHA documents call into question the company's claims about its innovative tunneling processes, which Musk has long said would make large-scale industrial projects cheaper and faster. Several former staffers say this is bunk—that what mainly distinguishes the Boring Company's efforts is a willingness to put workers in danger. "It was a serious situation," says one former employee. "I will never, ever drive in one of those tunnels."



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Musk unveiled the Boring Company in late 2016, using a playbook he has since honed into an absurdist form of corporate performance art. "Traffic is driving me nuts," he tweeted in December 2016, posting mid-commute somewhere in LA. "Am going to build a tunnel boring machine and just start digging." In early 2017, Musk invited a *Businessweek* reporter to join him and Steve Davis, a longtime deputy who would become Boring's president, on a trip down into a nearby dig site, as they went shopping for a used tunnel-boring machine. In an interview that day, he swung wildly between low-key determination and loopy mania. He joked that the company would create "a trillion jobs" and suggested that the Boring Company might start a trademark beef with either AT&T or Toys "R" Us, the bankrupt retailer.



Musk's "hyperloop" design inspired a number of independent companies, including Hyperloop One, which folded at the end of last year.

Photographer: John Gurzinski/Getty Images

During this time, Musk was flirting with a new political identity. The incoming Trump administration was teasing a possible \$1 trillion infrastructure program and Musk, who'd styled himself as a left-leaning environmentalist during the Obama years, wanted some of that money. He made several trips to Trump Tower and the White House, joined two presidential business advisory boards, and even endorsed ExxonMobil CEO Rex Tillerson's nomination as secretary of state. Ultimately, though, neither Trump nor Musk seems to have been able to stand the other. Musk resigned from the advisory boards in a huff over Trump's opposition to climate change regulation, and Trump taunted Musk as a "bullshit artist" and a suckup. "Elon Musk came to the White House asking me for help on all of his many subsidized projects," he later posted on Truth Social, his right-wing Twitter alternative. "I could have said, 'drop to your knees and beg,' and he would have done it."

In 2017, Musk tweeted that he "just received verbal govt approval for The Boring Company to build an underground NY-Phil-Balt-DC Hyperloop." This turned out not to be true, and set the tone for a series of Boring efforts over the next few years. As relations with Trump cooled, Musk courted Maryland Governor Larry Hogan, Los Angeles Mayor Eric Garcetti and Chicago Mayor Rahm Emanuel. Within short order, Boring announced a Baltimore-to-Washington Loop, a "Dugout Loop" that would serve Dodger Stadium in Los Angeles, and a high-speed train to connect Chicago's O'Hare Airport to the city's downtown. None of this panned out. The Chicago project was killed in 2019, after Emanuel left office (his successor, Lori Lightfoot, has described Musk's financing plan as a "fantasy"), while the Maryland and Los Angeles projects died in their planning stages.

Davis pitched the Las Vegas Convention and Visitor Authority in 2019. The plan was for the visitors board to pay about \$50 million for a pair of tunnels, each less than a mile long, plus \$4 million per year for Boring to operate the system. Mayor Goodman, who sits on the visitors board, opposed the project, pointing out that Boring lacked obvious qualifications. She circulated a flyer comparing the Austrian tram-building company Doppelmayr (125 years in operation and 15,000 working projects, according to the flyer) with Boring (three years in operation, zero working projects), and stressed that other US cities had said no. “Everybody turned them down,” she now recalls thinking. “What are we, dumb here?”

The convention and visitor authority, which didn't immediately respond to a request for comment, approved the project over Goodman's objections. A few months later, its president, Steve Hill, stood on a podium with Davis, and the two men inserted matching keys that started the company's tunnel-boring machine, Godot. Hill called the launch a “Kitty Hawk-type moment” that “has the ability to change transportation.” Davis suggested it was the first step to helping “solve the congestion problem.”



The Vegas Loop in action during the CES conference in January.
Photographer: Travis P Ball/AP

When it set to work near the Las Vegas Strip, Boring's only commercial success had been in selling swag, notably a \$500 branded flamethrower. (Yes, really. It has also sold a fragrance called Burnt Hair.) But former employees say the Vegas job should have been easy enough. Despite Musk's existentialist branding, Godot wasn't anything special. It was a standard-issue machine made by the Canadian brand Lovat.

Then came the grand promises. Boring unveiled another machine, dubbed Prufrock, and said it could work six times as fast and tunnel a full mile per week. Five people who've seen the machine in action say that's nowhere near how things worked out, particularly with the latest version, Prufrock 2, which dug the Encore tunnel. Although the machine could dig faster in theory, they say, it required more employees to manage it. Including pre-tunneling prep work, it took 18 months to finish the first section of the Loop, totaling 1.7 miles of tunnel, then another year to build the spur connecting the convention center with Resorts World, giving the company a rough speed of 1 mile of tunnel per year.

Workers say that particularly during the spring and summer of 2023, as Boring began digging its connector tunnels to the Encore and Westgate hotels, they faced tremendous pressure to speed things along, before conference season started in the fall. Encore crews tunneled for 24 hours a day, with each employee working 12-hour shifts six or sometimes seven days a week, some later told Nevada OSHA inspectors. Besides the long hours, these workers complained to the state agency about faulty machinery and a lack of personal protective equipment. One of the former employees says the company "was trying to do everything on the cheap."

Last May, a Boring technician was driving a forklift into the tunnel when its brakes failed, causing the machine to careen down the hill before it fell onto its side, according to the state OSHA investigation. Oil and hydraulic fluids spilled from the forklift, and skid marks stained the roadway. According to someone familiar with the accident, the driver escaped serious injury only because he wasn't wearing a seat belt. He was thrown a few feet from the forklift, which might otherwise have crushed him as it tumbled over. Nevada OSHA declined to penalize Boring, however, because it found no documented prior complaints or maintenance requests for the forklift, which Boring replaced. In its own internal report, the company said it would implement a forklift maintenance schedule.

Employees interviewed by Nevada OSHA described conditions in the Encore tunnel ranging from unpleasant to unsafe. Workers were forced to spend entire 12-hour shifts in the tunnel, including lunch breaks, and ask for permission to use the bathroom. They had to beware of muck falling from a conveyor system overhead, which moved the sludge from the front of the dig site back toward the exit. When the muck reached the bins outside the tunnels, those receptacles were often dangerously full, as in the case of the collapse that almost killed the intern. Temperatures in the tunnels soared to well over 100F. Some called the site "the Plantation."

And then there were the chemical puddles. The tunnels were dug at the level of the water table, not unusual in the tunneling industry, which meant that water was constantly seeping into the tunnel, mixing with the dirt and accelerants. Workers had installed pumps, but they couldn't pull the water out quickly enough, particularly when summer rains exacerbated the situation. So they regularly had to wade through the polluted water. The accelerants came in

with the grout via long hoses, which in the Encore tunnel often resulted in employees getting sprayed as they maneuvered the hoses from spot to spot. Over the course of a month, 10 to 15 workers suffered chemical burns that way, according to the state OSHA report.

In early July, Boring released a video showing its machines breaking through into a parking lot at the Encore site, noting that the 2,350 feet of digging (more than four-tenths of a mile) had taken just 10 weeks and calling it a “good step towards building infrastructure projects in a matter of weeks versus years.” But that hasn’t happened. Seven months after Prufrock finished boring the Encore tunnel, the company hasn’t completed the station there.

The Las Vegas Loop remains a long way from the citywide transit system that Musk promised. The Westgate will soon open its Boring tunnel, a hotel spokesman said. Boring recently started prep work to expand the loop to the Virgin hotel and the University of Nevada at Las Vegas, but neither project has announced a timetable. The company has pitched numerous hotels and other sites on tunnels, according to former employees, including with the dominant casino groups Caesars and MGM, but hasn’t announced any related contracts.

In the meantime, what Boring has built amounts to a modest convenience for conventioners. During a conference in early February, the Loop station at the Resorts World hotel was nearly empty as several groups of riders waited for a car to take them through the tunnel. An attendant explained that although the conference floor itself was reasonably busy, few were taking advantage of the Loop. Boring had started that day with 20 drivers, but had sent six of them home—they didn’t have anything to do.

(Updates with reports about Starlink in Taiwan in fourth paragraph. A previous version corrected the amount of money that Boring had raised from outside investors.)

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Jim Aley

Tesla Tries to Halt EEOC Suit, Citing 'Unseemly, Toxic Interagency Competition'

 [law.com/therecorder/2024/02/23/tesla-tries-to-halt-eeoc-suit-citing-unseemly-toxic-interagency-competition](https://www.law.com/therecorder/2024/02/23/tesla-tries-to-halt-eeoc-suit-citing-unseemly-toxic-interagency-competition)

By Ellen Bardash

The EEOC alleges Black workers at Tesla's 22,000-employee Fremont, California, factory suffered pervasive discrimination. The automaker says the suit cites only a hodgepodge of anecdotes. Credit: Jason Doiy/ALM

The automaker argues that the racial discrimination lawsuit suffers from "factual vacuity." Separately, it has asked the court to stay the case, asserting the agency skipped a required "conciliation" process in a mad rush to to outshine the California Civil Rights Department, which had filed its own suit.

February 23, 2024 at 02:04 PM

Civil Rights

Chris O'Malley 

The original version of this story was published on Corporate Counsel

Tesla is seeking dismissal of an Equal Employment Opportunity Commission racial discrimination lawsuit, arguing it strings together vague anecdotes of purported behavior that amount to "factual vacuity."

The filing this month in U.S. District Court for the Northern District of California is in addition to Tesla's request in December to stay the case on grounds the EEOC raced to court and skipped over the mandatory conciliation process because of an "unseemly, toxic interagency competition" with the California Civil Rights Department.

The EEOC filed the case in September, after the Democrat-controlled commission voted 3-2 along party lines to do so. The CDR brought a similar suit against Tesla in 2022, which remains pending.

A hearing on the dismissal and stay motions s set for March 21.

In the suit, the EEOC alleges Tesla subjected Black employees at its 22,000-worker Fremont, California, factory to a hostile work environment and retaliated against those who complained. The agency claimed workers endured slurs such as "monkey," "boy" and "black

b*tch.”

But Tesla’s lawyers came out swinging in a Feb. 6 filing to dismiss, saying the EEOC is “ignoring” its obligation to plead plausible claims based on particularized facts and fails to identify a “single victim or perpetrator of harassment” or to provide other specifics to back up its claims.

“EEOC has alleged a random collection of disconnected incidents involving anonymous individuals interacting at unspecified times in undisclosed locations over a period of over eight years,” wrote Thomas Hill, a partner of Holland & Knight’s Los Angeles office, which is representing Tesla in the suit.

“This type of hide-the-ball pleading has become part of EEOC’s litigation playbook, a fact concerning which federal courts have taken note and for which they have rebuked the agency,” Hill added.

The filing argues that the EEOC’s “broad and amorphous” 10-page suit “cannot show the requisite elements of a hostile work environment claim for even a single anonymous employee.”

As such, “it is certainly insufficient to state a claim for class-wide relief to thousands of unidentified individuals.”

For its part, the EEOC said in court filings that it is not required to meet the high level of specificity that Tesla claims it must show. The complaint contains “an abundance” of information supporting its allegations that Tesla created a racially hostile and abusive work environment, the commission said in a filing.

“Tesla misconstrues the pleading standard and nature of EEOC enforcement actions. It conflates what the EEOC must allege in a complaint with what it must ultimately prove to prevail at summary judgement or trial to recover relief for individual victims.”

The EEOC suit is the third alleging discrimination against Black employees at the plant. In 2017, a former assembly line worker, Marcus Vaughn, who is Black, alleged in his class-action lawsuit the Tesla factory was a hotbed for racist behavior.

In 2022, the California Civil Rights Department, formerly known as the California Department of Fair Employment and Housing, sued Tesla in Alameda County Superior Court, also alleging pervasive racial discrimination and harassment.

Both cases are pending.

In its December filing to stay the EEOC suit, Tesla argued that the case amounts to a third duplicative action, “indeed, virtually identical” to the CRD and Vaughn cases. Tesla also attempts to make the case that the EEOC is acting in part because of a rivalry with the CRD.

“EEOC’s sprint to the courthouse, which saw the agency hastily wrap up its sham pre-suit investigation, without any meaningful disclosures to Tesla, was done at the expense of express Congressionally mandated public policy and in the pursuit of headlines to show it, and not CRD, is the toughest regulator on the block,” Hill wrote.

Tesla contends the EEOC failed its Congressional mandate to engage in “robust” pre-suit investigation and conciliation to resolve problems without litigation so “it could file this lawsuit and issue its accompanying press release.”

Tesla alleges that it wasn’t until June of last year that it and the EEOC met for the statutorily mandated conciliation, “which EEOC soon declared had failed.”

Hill argued that if the EEOC earnestly believed as it alleges that racial problems were pervasive and that the factory even had graffiti urging workers to “kill black people, then it is “unconscionable that the agency intentionally failed to provide Tesla the means to voluntarily address the issue.”

Tesla argues the EEOC and the CRD barely engaged with Tesla and neither accepted invitations to visit its factory to investigate allegations. The company paints a picture of an “inter-agency turf war” rather than a coordinated effort by the agencies.

“With each agency increasingly eager to file headline-grabbing complaints and report multimillion dollar settlements, their historical coordination and cooperation has collapsed.”

The electric car manufacturer pointed to a dispute in 2021 between EEOC and CRD involving sexual harassment allegations at Activision Blizzard. The California agency sued the company months before the EEOC did so and attempted to intervene in the EEOCs case against the videogame maker.

U.S. District Judge Dale Fischer rejected the state agency’s bid to intervene and chastised the two regulators for not playing well together. Activision settled the EEOC case in 2022, agreeing to pay \$18 million.

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Wolf Richter: Nvidia, the WTF Chart of the Year. Tesla also Had WTF Charts of the Year before Shares Plunged

 nakedcapitalism.com/2024/02/wolf-richter-nvidia-the-wtf-chart-of-the-year-tesla-also-had-wtf-charts-of-the-year-before-shares-plunged.html

February 25, 2024

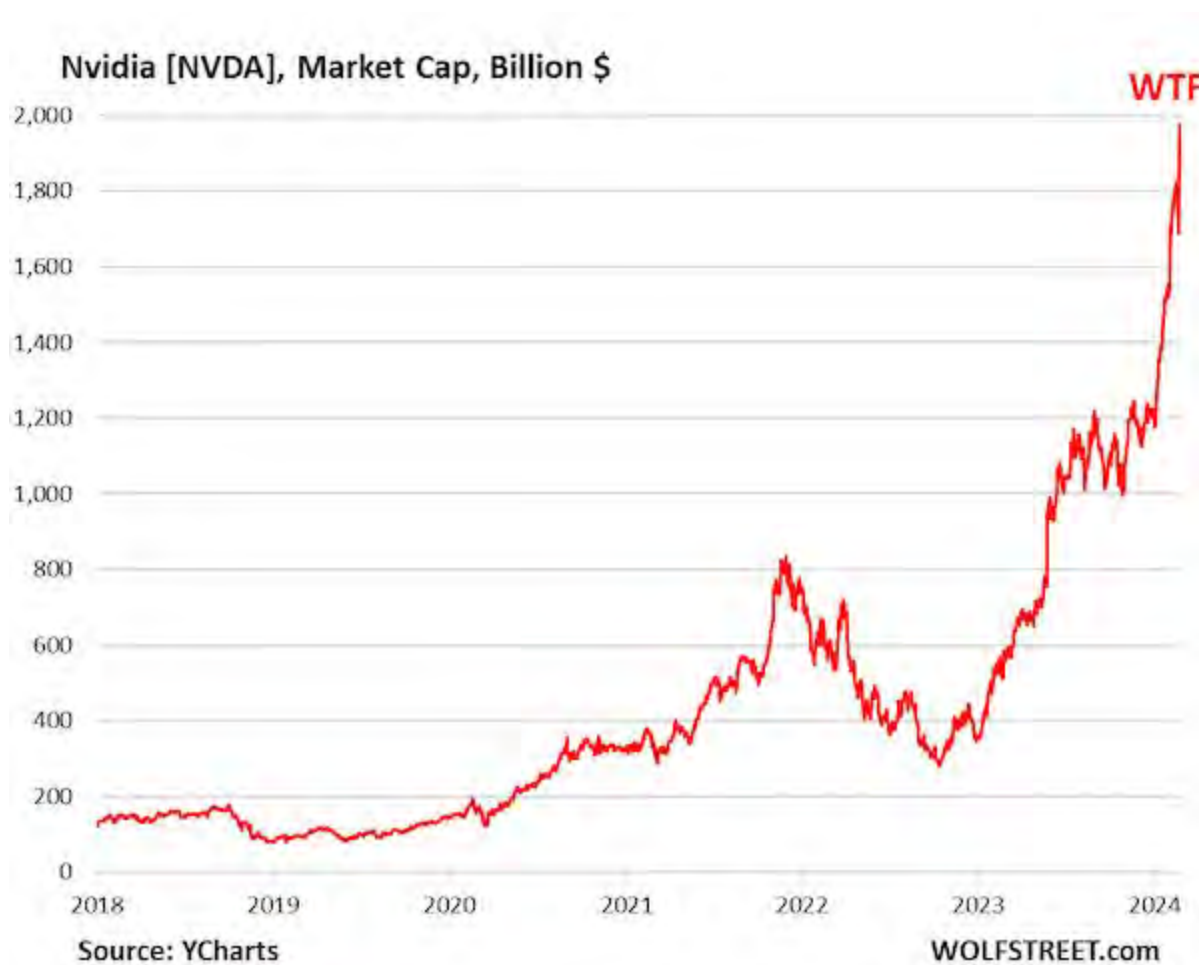
Lambert here: I don't play the ponies, so Richter's charts, as such, have little charm for me. That said, the money sloshing into AI is so ginormous that most of it must be stupid. And at some point, you have to wonder — although we don't seem to, even after the dot.com bubble, the Great Financial Crash, and whatever it was that fastened facehuggers like Meta and Uber onto the body politic — whether turning over society-wide capital allocation to stupid people driven by greed, fear, and the stories they tell themselves is optimal.

By Wolf Richter, editor of Wolf Street. Originally published at Wolf Street.

Nvidia is special because the dollars are suddenly so huge — a hair over \$2 trillion at the open on Friday, and just a little below \$2 trillion at the close. Over the past 12 months, market cap has spiked by \$1.46 trillion, including the biggest-ever-for-any-stock one-day spike of \$277 billion on Thursday, on exceeding revenue expectations by \$2 billion.

There are other charts that look even wilder because these are crazy times, and all kinds of stuff has been spiking and in crazy ways. And Tesla's chart used to look like this too, before the shares plunged 70% in 2022. Crazy spikes like this generally don't lead to a permanently high plateau. But Nvidia is now huge, and it's floating on top of a mindboggling AI-mania.

Nvidia has always been a volatile stock because something always derails the latest GPU-to-the-moon narrative. For example, between November 2021 and October 2022, Nvidia shares plunged by 65%, barely dodging our Imploded Stocks pantheon (minimum requirement: -70% from high). And now the numbers are much bigger. We show the market cap in the chart because the dollars are now so huge that they really matter for the overall market:



The utter mania around generative AI that has suddenly gripped corporate America led to an explosion in sales of high-dollar and high-margin systems of GPUs for Nvidia.

Just about every major company is touting its progress with AI – for now, mostly just spending money on it – and periodically there are hilarious stories about generative AI's not so intelligent work. I mean, can you fire AI if it screws up badly enough? Or is that suddenly a human's fault?

The amounts of money thrown at generative AI from all directions are just vast. And Nvidia is getting its share of the pie. Nvidia's revenues might hit \$100 billion in 2024, knock on wood, up from \$27 billion in 2022. And it just might, or might not, surpass Tesla's revenues, which were already \$97 billion in 2023.

These Price Spikes Are a State of Mind: See Tesla.

So we just accidentally remembered that Tesla's stock too went through these WTF spikes until it hit \$414.50 on November 4, 2021, and then plunged 70% over the following year and was inducted into our pantheon of Imploded Stocks in December 2022, when its shares hit \$123, after which they dropped some more. These spikes unwind brutally.

Then came the big rally through mid-July 2023, and then the shares spiraled down again, and today they're down 54% from the peak in November 2021, and they're still overvalued though Tesla has become a much bigger and a much more successful automaker since the all-time high in November 2021.

Since that all-time high, Tesla has become very profitable. Its Model Y has become the #1 best-selling model in the world, blowing away Toyota's Corolla, and it has become the #2 best-selling model in the US, just behind Ford's F-series truck. And since the all-time high, Tesla opened two new factories, one in Germany and one in Texas, and production and deliveries have soared, and it's eating market share of the legacy automakers in big gulps, and despite its already substantial size, its global deliveries jumped by 38% in 2023.

And yet, over those two years when Tesla's business continued to boom, Tesla's market cap plunged by over \$600 billion. Turns out, these WTF spikes are a state of mind. And when that state of mind changes, the spikes unwind.



How Long will the Nvidia Narrative Last?

Will Nvidia have a monopoly on AI-suitable GPU systems? Will no one figure out how to make something competitive and sell it at a lower price? And will Meta, a gigantic customer of Nvidia's GPU systems, suddenly discover that it has all the GPUs it'll need, just like it had

suddenly discovered that it had way too much office space and way too many employees? Companies are kind of weird in what they suddenly discover. All kinds of things can change that might rattle that overstretched state of mind – same thing that Tesla went through to get off its WTF spike.



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Well, that's interesting. Proxy advice is not solicitation under Section 14(a):
news.bloomberglaw.com/us-law-week/se...

From this history, the Court concluded that "[t]he purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *Id.* Thus, Congress's focus in adopting Section 14(a) was to promote transparency and the exchange of complete and truthful information by and among interested parties seeking to obtain proxies in connection with a shareholder vote. See *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 421-22, 294 U.S. App. D.C. 198 (D.C. Cir. 1997) ("[S]ection 14(a) shelters use of the proxy solicitation process as a means by which stockholders may become informed about management policies and may communicate with each other.").

The regulation of proxy voting advice as "solicitation" would seem to do little to advance these legislative purposes. By definition, proxy advisory firms are hired by a shareholder to provide confidential advice to the shareholder with respect to a corporate ballot measure. Their advice is not for all shareholders or for management consumption. It is exclusively for the investor that hires them. Thus, the risk that a proxy advisor's advice will deceive or mislead an ordinary, non-client shareholder is minimal.

Further, proxy advisors are in no position to conceal the "real nature" for seeking a proxy because they have no financial or governance interest in the outcome of a vote. Their advice will be tailored to the client's interests, not their own. This puts proxy advisors in a very different posture vis à vis the ordinary shareholder compared to, say, management or an activist investor.

Finally, litigation risk constrains proxy advisors. A proxy advisory firm that deceives a client or fails to act in a [§19] client's interests presumably is subject to common law torts, including malpractice and fraud. Similar causes of action arguably are less tenable against management or another shareholder that seeks a proxy. Thus, the need for agency oversight under Section 14(a) over proxy advisors is even further diminished by the prospect of tort liability.

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Note that final paragraph - litigation risk for tort, or malpractice, if the advice contains a false statement.

As I previously blogged (before the rule defining advice as solicitation went into effect) -

lawprofessors.typepad.com/business_law/2...

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If proxy advice is not a solicitation, it's not clear there's any federal prohibition on false voting advice.

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SEC Rule Regulating Proxy Advisory Firms Struck Down by Court

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- Interpretation made voting advisors subject to proxy rules
- SEC exceeded its statutory authority, federal court rules

By Martina Barash

(Bloomberg Law) --

An SEC rule subjecting firms that offer proxy voting advice to the regulator's authority is invalid, a federal court ruled.

The Securities and Exchange Commission "acted contrary to law and in excess of statutory authority when it amended the proxy rules' definition of "solicit" and "solicitation" to include proxy voting advice for a fee," Judge Amit P. Mehta said Feb. 23 for the US District Court for the District of Columbia.

Large institutional investors rely on the firms for advice when considering votes—typically by proxy, rather than in person—on major company issues. "Reliance on proxy advisory firms, and their impact on vote outcomes, has steadily grown over the past 25 years," Mehta said.

The SEC issued its final rule in September 2020 interpreting the term "soliciting" proxies under the Securities Exchange Act and its implementing regulations to include providing proxy-voting advice. The change meant that public filing requirements, other documents, and anti-fraud provisions would apply to advisory firms, according to the court.

The commission loosened the restrictions in July 2022, with SEC Chair Gary Gensler saying then, "It is critical that investors who are the clients of these proxy advisory firms are able to receive independent and timely advice."

By then, Institutional Shareholder Services Inc., one of the largest proxy advisory firms, had already sued the agency, asserting that its business doesn't involve seeking proxy authority or asking shareholders to vote a certain way.

At the time of the 2022 SEC vote, the firm said the initial rulemaking should have been "rescinded in its entirety." The agency's action "misses the mark by failing to address the most critical defect; namely, the reclassification of proxy advice provided in a fiduciary capacity as proxy solicitation," ISS said in a statement at the time.

Mehta sided with ISS. The commission overstepped when it interpreted “solicit” and “solicitation” to include what the proxy firms do, he said. “The ordinary meaning of those terms when Congress enacted the Exchange Act in 1934 did not encompass voting advice delivered by a person or firm with no interest in the outcome of the vote.”

Phrases with the meaning of urging, moving to action, or inciting “were no longer ordinary meanings of ‘solicit’” in 1934, the judge said.

Consovoy McCarthy PLLC and Pickard Djinis & Pizarri LLP represented ISS. The SEC represented itself. Gibson, Dunn & Crutcher LLP represented the National Association of Manufacturers, which intervened as a defendant.

The case is *Institutional S’holder Servs. Inc. v. SEC*, 2024 BL 59512, D.D.C., No. 19-cv-3275, 2/23/24.

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Energy Use Data Collection Is Unlawful, Crypto Groups Say (1)

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWQ3MjltZGZiMi1hNThkLWY3NmE1NmE4MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IiYreGRWNjdQM3pKV2Z1Y21jM3BHSUE9PUZIV2w4bnczUTByaEtRdW81TDk3MXc9PSIsInRpbWUiOiIxNzA4OTQ5Njk1Njxliwic2lnIjoicXV3UW1VL1VkQzVWVTIU5WU9pQ1RiOVdBaWhzPSIsInYiOiIxIn0=

- **COURT:** W.D. Tex.
- **TRACK DOCKET:** No. 6:24-cv-00099

A cryptocurrency industry association and one of its members sued to stop the Energy Department from collecting their electricity use data.

The DOE, Energy Information Administration, and the Office of Management and Budget violated the Paperwork Reduction Act and Administrative Procedure Act in seeking the data, the Texas Blockchain Council and Riot Platforms Inc. told the US District Court for the Western District of Texas on Thursday.

The lawsuit comes after the EIA released a report finding that electricity usage from crypto mining represented 0.6% to 2.3% of all the country's demand in 2023. The agency plans to collect monthly data from February to July on cryptocurrency energy use after OMB granted it emergency clearance to do so. The TBC and Chamber of Digital Commerce denounced the move, saying the emergency action was federal overreach.

The PRA bars agencies from collecting information without proper authorization from OMB, the complaint said. It allows for an accelerated process to approve collection under certain conditions, including if public harm is "reasonably likely" to occur if typical clearance procedures are followed.

EIA allegedly violated the law by going through with collection without establishing that there was an emergency or that public harm was likely, the complaint said. The agency also failed to consult with members of the public or provide public notice before seeking emergency processing.

OMB shouldn't have approved the emergency collection because EIA didn't follow the proper steps or PRA standards, the complaint said.

The plaintiffs will be "irreparably harmed by being forced to divulge confidential, sensitive, and proprietary information to EIA," they said.

They're asking the court to prohibit the information collection from taking place and vacate OMB's emergency approval. The plaintiffs also want all survey data already received to be destroyed and for identified commercial cryptocurrency miners who were sent the survey to be notified of what the court orders.

The EIA said it can't comment on ongoing litigation. OMB didn't immediately respond to requests for comment.

Judge Alan D. Albright will hear the case.

TBC and Riot Platforms are represented by New Civil Liberties Alliance, Gray Reed, and Cherry Johnson Siegmund James PLLC.

The case is Tex. Blockchain Council v. US Dep't of Energy , W.D. Tex., No. 6:24-cv-00099, complaint filed 2/22/24 .

(Updates paragraph nine with EIA's response to request for comment.)

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Jamie Dimon and Nine of His Top Executives at JPMorgan Chase Have Dumped Over \$150 Million of their JPMorgan Stock in Last Two Months

 wallstreetonparade.com/2024/02/jamie-dimon-and-nine-of-his-top-executives-at-jpmorgan-chase-have-dumped-over-150-million-of-their-jpmorgan-stock-in-last-two-months

By Pam Martens and Russ Martens: February 26, 2024 ~



According to Form 4 filed with the Securities and Exchange Commission by corporate insiders, ten of the key executives at the largest bank in the United States, JPMorgan Chase, have dumped more than \$150 million in common stock in the bank this year. The sales come as the bank's stock has been hitting all time highs while the scandals at the bank are also hitting unprecedented levels.

The largest seller by far was the Chairman and CEO of the bank, Jamie Dimon. According to his Form 4, on February 22 of this year, Dimon sold 737,420 shares of the bank's common stock for \$135 million.

The newly promoted Troy Rohrbaugh, who is now Co-CEO of JPMorgan Chase's Commercial and Investment Bank (CIB), sold 75,000 shares on February 22 of this year for \$13.7 million.

Stacey Friedman, General Counsel at the bank, sold 6,030 shares on February 22 for \$1.1 million.

Peter Scher, Vice Chairman, sold 1,812 shares on January 16 and another 1,810 shares on February 16 of this year for proceeds of approximately \$626,000.

Jennifer Piepszak, Co-CEO, Commercial and Investment Bank (CIB), on February 16, 2024, sold 1,648 shares for \$295,000. Piepszak has been selling large chunks of the bank's stock since 2019.

Marianne Lake, CEO of the Consumer and Community Bank (CCB), on Feb 16 sold 4,459 shares for \$798,000.

Ashley Bacon, Chief Risk Officer (at a bank that is ranked by its regulators as the riskiest bank in the U.S.) sold 3,368 shares on February 16 of this year for approximately \$602,856. Bacon has been selling large chunks of JPMorgan Chase stock since 2013.

Mary Erdoes, who has been implicated in the Jeffrey Epstein sex trafficking scandal at the bank, but remains CEO of the Asset & Wealth Management unit, on January 16, 2024 sold 4,814 shares for \$861,664. Erdoes has also been selling large chunks of JPMorgan Chase's stock since 2010. This is how the New York Times reported Erdoes' role with Epstein in August 2019:

"When compliance officers at JPMorgan Chase conducted a sweep of their wealthy clients a decade ago, they recommended that the bank cut its ties to the financier Jeffrey E. Epstein because his accounts posed unacceptable legal and reputational risks.

"Yet Mr. Epstein, who had been charged with sex crimes and pleaded guilty in 2008 to solicitation of prostitution, remained a JPMorgan client until 2013.

"The main reason, according to six former senior executives and other bank employees familiar with the matter, was that Mary C. Erdoes, one of JPMorgan's highest-ranking executives, intervened to keep him as a client."

Other key executives at JPMorgan Chase selling the bank's stock this year include:

Lori Beer, Chief Information Officer, sold 3,920 shares for \$716,000.

Doug Petno, previously the head of the commercial bank, but now reporting to Piepszak and Rohrbaugh, sold 3,267 shares of common stock in January and another 3,266 shares this month for a combined \$1.1 million.

It does not appear that Daniel Pinto, JPMorgan's president and chief operating officer, has sold stock yet this year. However, Pinto has been selling large blocks of JPMorgan Chase stock since 2013. For example, on May 11, 2023, Pinto sold 113,640 shares of the bank's common stock for proceeds of \$15.4 million.

In most cases, when an insider executes a transaction, he or she must file a Form 4 with the SEC within two business days following the transaction date. Transactions in a company's common stock as well as derivative securities, such as options, warrants, and convertible securities, are reported on the Form 4. We will watch to see if other key executives report sales and if Dimon increases his sale of common stock. Dimon initially reported that he would be selling 1 million shares of his stock.

Correction: The paragraph describing sales by Peter Scher has been updated to include both his common stock sales in January and February of this year.

By Ben Stupples



Charif Souki

Aaron M. Sprecher/Bloomberg

Take Tellurian Inc. co-founder **Charif Souki**, once America's best-paid executive. Last year, lenders to the one-time billionaire seized 25 million shares of the Houston-based natural gas firm that he had pledged in 2017 to secure loans for real estate investments. Worth about \$250 million at the time of the pledge, they were sold for just \$37 million after Tellurian's stock hit a three-year low following the notification that virtually all of Souki's stake had been seized.

"The whole thing can unravel quite quickly," Jason Zein, a finance professor at the University of New South Wales' business school, said on share pledges, which are often sensitive to fluctuations in interest rates. "If you've pledged at market highs, you could still be under water."

Souki makes up the bulk of at least \$50 million in pledged US stock sales since the start of last year, with the latest transactions filed in the past few weeks, according to data compiled by Bloomberg. A spokeswoman for Tellurian declined to comment, while a representative for Souki didn't respond to a request for comment.

The most devastating part of pledged share sales for executives is that they're often forced to offload their stock at precisely the wrong time: when it's trading at multiyear lows. All together, the sold stakes were worth more than \$330 million at the time the pledges were first disclosed, filings show.

'Huge Impacts'

Souki, 71, was left with a stake of less than 1% in Tellurian after lenders led by Wilmington Trust sold most of his stock, filings show. He later sued his lenders, alleging they fueled a stock selloff for Tellurian after calling in the shares. He also claimed they sold his custom sailing yacht at a cut-rate price and improperly foreclosed on an 813-acre ranch he'd put into bankruptcy.

He was then ousted in December as Tellurian's chairman and stripped of any executive roles as the company struggled to remain in business.

For **Andy Moore**, CEO of the investment banking arm of B Riley Financial Inc., his forced sale came in the form of a margin call. His broker sold about \$1.3 million worth of shares in November when B Riley's stock hit a three-year low. The financial services firm had recently reported a large quarterly loss and was facing questions about its involvement in the buyout of Franchise Group and ties to its former CEO, who has been linked to a hedge-fund fraud case.

Read More: [B. Riley Says Internal Review Finds No Link to Prophecy's Demise](#)

And Blend Labs Inc. CEO **Nima Ghamsari** has offloaded about \$1.5 million of stock in the fintech company through trading plans since the start of last year. He had pledged most of his stake to an undisclosed lender, with the latest sale in January, filings show. The San Francisco-based company's stock has dropped about 88% since its 2021 initial public offering as it struggles to turn a profit, underscoring the risk of pledging shares if their value sinks.

"If the market swings like during the levels in the financial crisis, there can be huge impacts," said Jihun Bae, assistant professor at the Rotterdam-based Erasmus School of Economics.

US Company Bosses Sell Pledged Stocks			
Name	Company	Title	2023-24 Pledged Stock Sales
Charif Souki	Tellurian	Co-founder and chairman*	\$37.0M
Gregory Garrabrants	Axos Financial	President and chief executive officer (Axos Bank)	10.7M
Nima Ghamsari	Blend Labs	Co-founder and chief executive officer	1.7M
Andrew Moore	B. Riley Financial	Chief executive officer (B. Riley Securities)	1.3M
Source: SEC filings as of Feb. 19, 2024			Bloomberg
Note: Charif Souki was Tellurian chairman until December 2023			

Pledging stock typically helps executives diversify their wealth. Oracle Corp. Chairman Larry Ellison has put up company shares to fund a lavish lifestyle that includes trophy properties, America's Cup sailing teams and the Indian Wells tennis facility in California. **Mat Ishbia**, owner of the Phoenix Suns, pledged more than half of mortgage giant UWM Holdings Corp.'s outstanding stock last year to secure loans before buying the NBA team for a record \$4 billion.

Read More: [Ishbia Pledged UWM Shares Worth \\$4.6 Billion Ahead of NBA Deal](#)

Lending against individual stocks or a portfolio of listed holdings is often easier and quicker for banks to process as the value of the collateral is more easily verifiable than less liquid assets such as real estate, art or superyachts. But it can also result in faster demands for extra collateral to cover borrowing costs if the pledge asset's valuation declines.

Rising Rates

Axos Financial Inc. CEO **Gregory Garrabrants** sold pledged stock to help pay borrowing costs in August when the financial firm's stock was falling, posting its longest streak of daily losses in almost a year.

While his lenders didn't force those sales through a margin call, he more than doubled the shares pledged to secure his margin loan a year after he had disclosed it in September 2021. Since that first filing, the benchmark interest rate for federal funds in the US has surged from almost zero to more than 5%, putting pressure on borrowers who don't have secured fixed monthly repayments for their loans.

Garrabrants still owns a roughly 2.7% stake worth about \$80 million, based on the latest public filings.

"Pledge loans are generally on a floating rate," said Zein. "Rising rates means the liability you have every month to repay the interest goes up. That makes pledging less attractive."

Some US executives also pledge shares to buy extra stock in their business, even if it already makes up most of their fortune. The mean loan value for US executives pledging stock is \$65 million, according to a 2019 research paper from University of Bern's Kornelia Fabisik.

That was the case for Blend co-founder Ghamsari, a Stanford University computer science graduate who worked at Palantir Technologies Inc. before setting up the lending platform about a decade ago.

He leveraged his Blend stake for a personal loan he mostly used to acquire extra shares before Blend's IPO, according to a statement from the company. He remains aligned with Blend's long-term outlook, board of directors and other shareholders but will continue to sell stock from time to time to pay down the loan, the company said.



Ghamsari started disclosing sales of pledged shares in late 2022 when the company's stock had fallen 94% below its July 2021 IPO price, valuing his shareholding at the time at about \$200 million. His stake in Blend Labs has dropped by at least 25% since he began offloading shares, though he's due to receive new stock options this year. Excluding those options, his current stake is worth less than \$35 million.

On Friday, he filed to sell a further chunk of stock through Charles Schwab Corp.

--With assistance from **Ruth Liao**.

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Feb. 23, 2024, 5:08 AM PST

Fortress Co-CEO Sees CRE Stress Leading to More Bank Failures

By Lisa Lee and James Crombie

- Pack sees a \$1 trillion opportunity emerging for investors
- About half of maturing CMBS loans are troubled, he said

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Fortress Co-CEO Sees CRE Stress Leading to More Bank Failures

By Lisa Lee and James Crombie2024-02-23T08:08:16997-05:00

- Pack sees a \$1 trillion opportunity emerging for investors
- About half of maturing CMBS loans are troubled, he said

More US banks will fail as the commercial real estate crash begins to work its way through to lenders' balance sheets, according to **Joshua Pack**, co-chief executive officer at Fortress Investment Group LLC.

Fortress has already acquired about \$1.5 billion of performing office loans from financial institutions at prices ranging from 50 cents to 69 cents on the dollar, he said in an interview with Bloomberg's Credit Edge podcast. Lenders are selling at those levels because they fear values have further to fall and want to take the hit now, he said, adding that regulators will merge some banks as they look for solutions to the problem.

Though the stress is not systemic, "you're going to see more of this consolidation and/or liquidation of US banks," Pack said. "A lot more eggs are going to get broken."

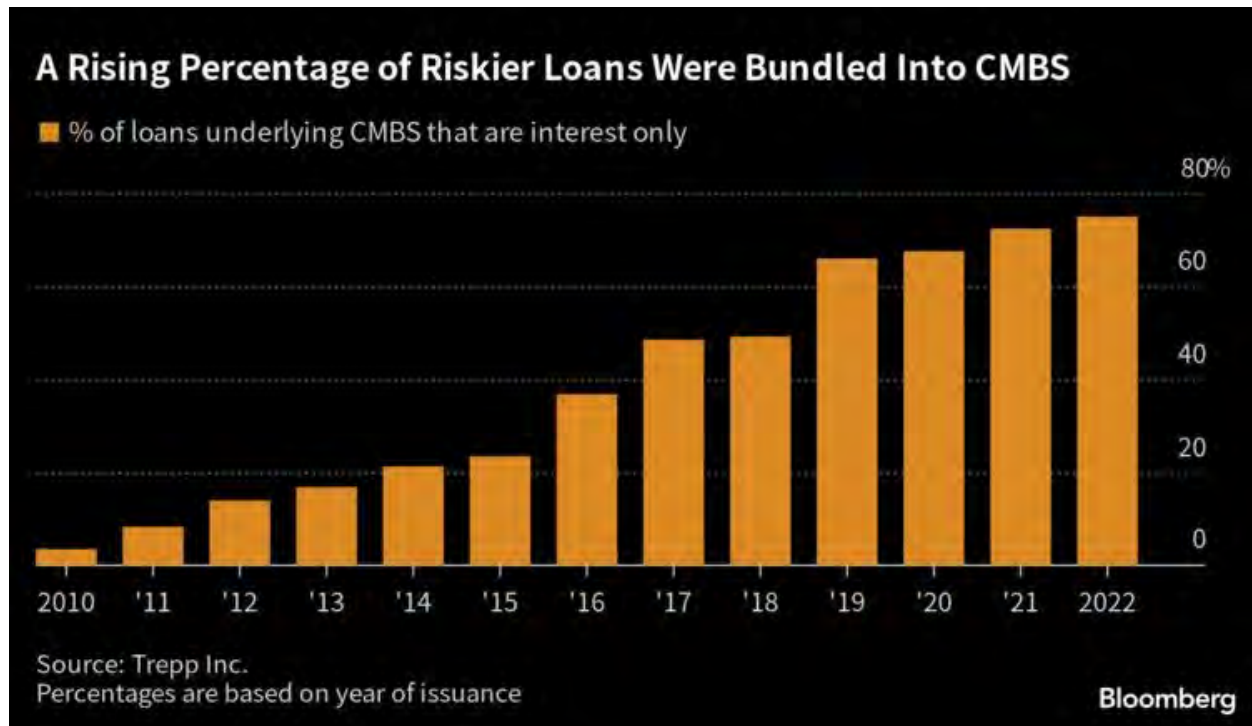
[Click here to listen to the Credit Edge podcast](#)

More than \$900 billion of debt on US commercial and multifamily real estate will require refinancing or property sales this year as building values fall and credit costs remain much higher than they were when the loans were taken out, according to the Mortgage Bankers Association. Smaller banks are particularly vulnerable after they increased their CRE lending during the pandemic, boosting their market share, and leaving themselves vulnerable to soaring interest rates.



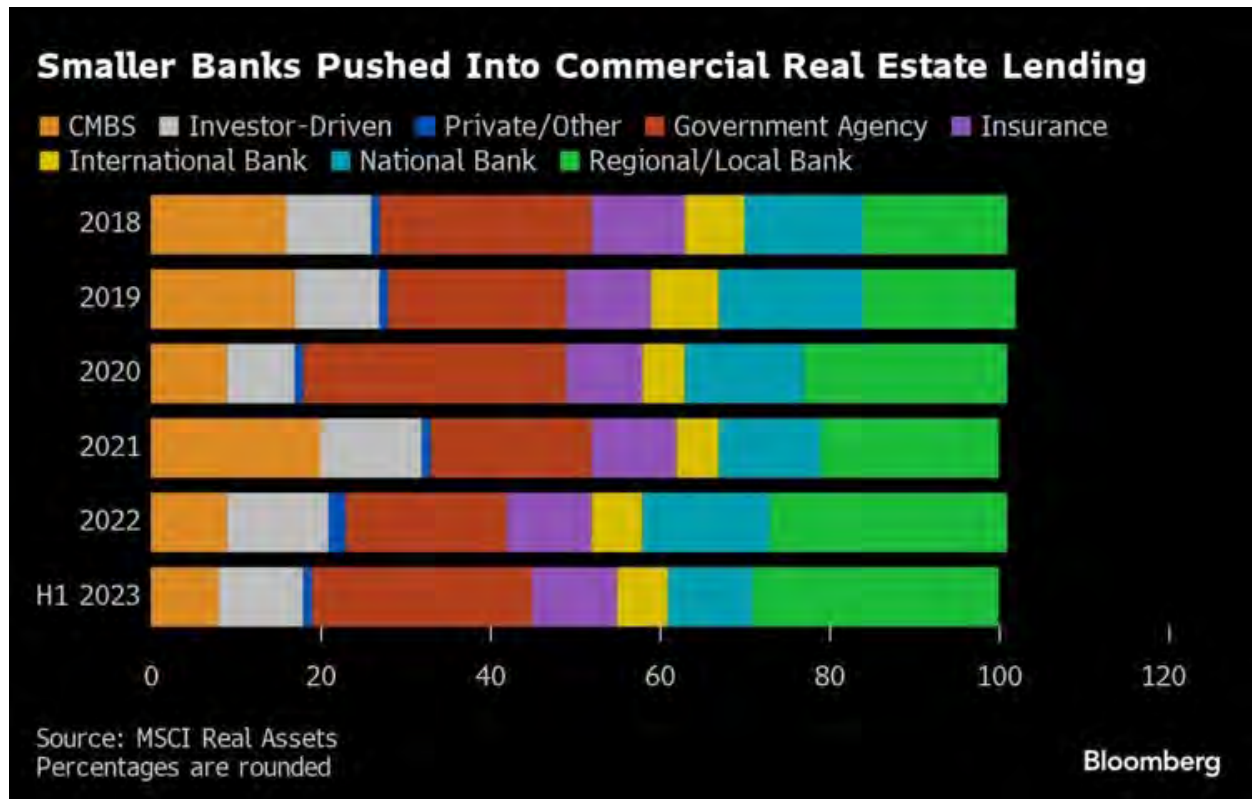
Low interest rates sent money pouring into real estate, transforming cities around the world. But pandemic lockdowns emptied out business districts and tenants have been slow to return. Now commercial real estate is in trouble, and the consequences may extend across the global economy. Source: Bloomberg

The problems won't be confined to the banks, Pack forecasts. About a trillion dollars of commercial mortgage-backed security loans come due by 2025, he said, half of which are estimated to be troubled. Debt levels that stood at 80% of a property's value last year may now be at 100% or more because of value declines, he said.



"CMBS prices have been kind of bid up," Pack said. When lenders and investors "start seeing those higher quality properties get into trouble and they start seeing sponsors hand back the keys on them, that's when I think you'll see a real kind of shift in how people are underwriting and approaching the CMBS market."

The Fortress executive sees a trillion dollar opportunity emerging in the coming years for investors in troubled assets. New capital will be deployed by those firms to work out problem loans and properties after banks have written down and sold their exposure.



Fortress has bid for some of failed bank assets offered for sale through the Federal Deposit Insurance Corp. Pack found “a lot of reticence” from bank watchdogs to sell to private capital. But given the scope of the problem, he says the FDIC will have to be more open to non-bank buyers.

“The underlying stress here is just so big,” it’s “a multi trillion dollar problem,” he said. Regulators will “eventually get to a point where I think they’re just going to have to utilize private capital to help clean up the mess and to help recapitalize the system.”

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IPO Lawyers See Cornerstone Investors Boost Deals in Slow Market

By Mahira Dayal

- Law firms look for activity after IPOs hit decade low by value
- Cornerstone investors have helped inject confidence into deals

Bloomberg Law News 2024-02-26T10:21:31024004671-05:00

IPO Lawyers See Cornerstone Investors Boost Deals in Slow Market

By Mahira Dayal 2024-02-26T05:00:46000-05:00

- Law firms look for activity after IPOs hit decade low by value
- Cornerstone investors have helped inject confidence into deals

Lawyers confronting a sluggish market for initial public offerings are helping companies turn to cornerstone investors to buffer the risk of going public.

Such investors allow their names to be published in a prospectus ahead of an IPO in exchange for an allocation of shares. For those committing the money, the early access can allow them a larger allocation at a lower value.

There were cornerstone investors in “just about every large IPO in 2023,” said Daniel Forman, a capital markets partner at Ropes & Gray. Those backers will remain important as the IPO market gains momentum, he said.

Lawyers are optimistic they will begin to see an increase in initial public offerings by 2025 after a decade-worst drop last year. Reddit Inc. on Feb. 22 filed for an IPO that is set to be one of the biggest listings of the year.

BrightSpring Health Services Inc.'s January IPO raised more than \$690 million and CG oncology Inc.'s offering the same month collected \$435 million, according to Bloomberg data.

“The pipeline is deep across industries,” said Ian Schuman, global chair of Latham & Watkins’ capital markets practice. “Consumer retail and tax—you will see some big names come out. Energy and infrastructure will be the most robust in terms of overall growth.”

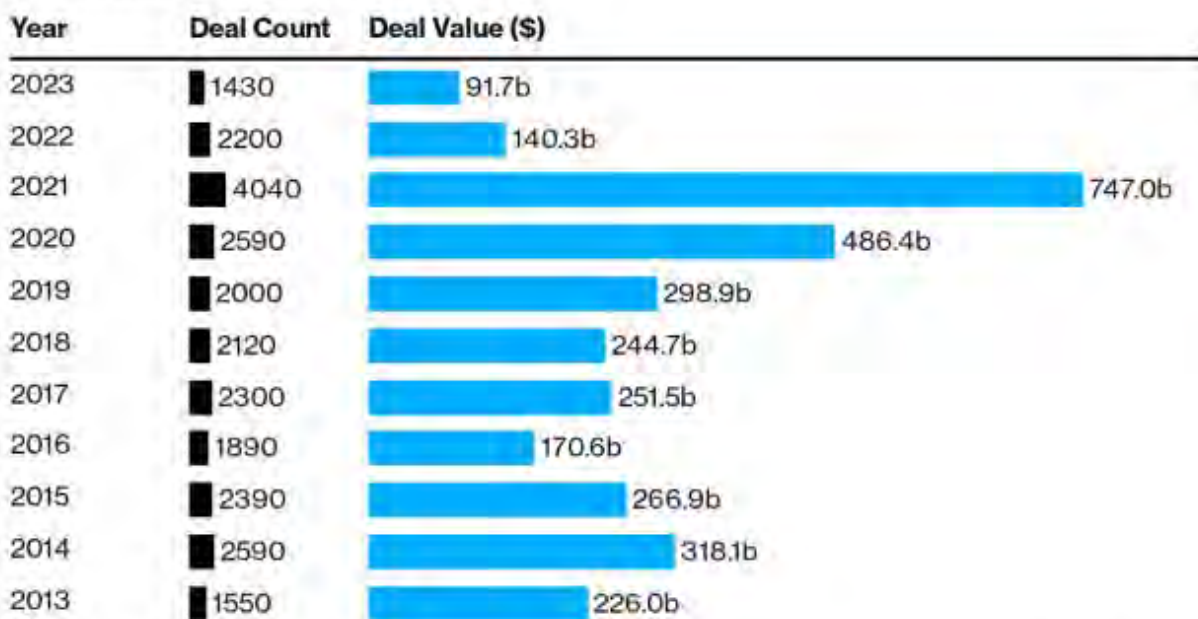
Big Law practices would like IPO work to help fuel demand for billable hours that according to a Wells Fargo & Co. survey are expected to grow by about 3% this year. Firms last year had to rely on counter-cyclical practices such as litigation and bankruptcy to drive demand that rose by only 1%, according to Wells Fargo's legal specialty group.

Company chief executives last year delayed plans for IPOs in the face of low valuations, high borrowing costs and difficult macroeconomic conditions. The \$91.7 billion worth of IPOs in 2023 was the lowest in at least a decade, and the number of transactions—1,430—was the lowest since 2013, according to Bloomberg data.

Law firm IPO shops kept busy by helping clients prepare to go public through steps such as building out financial reporting functions and hiring advisers.

IPO Volumes Settle at Decade Lows

Count and value of IPOs per year



Source: Bloomberg

Bloomberg Law

Cornerstone investors first began to emerge as strategic partners to an IPO around six or seven years ago, Schuman said. They picked up steam after the Securities and Exchange Commission allowed for companies and institutional investors to collude when filing IPO registrations in 2019.

The cornerstone investors have become a helpful tool to increase confidence in deals, Schuman said. "The emergence of the increased frequency is in part a function of trying to de-risk some of the deals in a weaker market," he said.

Companies that go forward with cornerstone investors benefit from the confidence of support from partners in their IPO—and big names backing them could encourage other potential investors to pay attention to the offering.

Chip designer Arm Holdings Plc's IPO last September valued at \$54.5 billion was the largest of 2023. The British firm lined up major clients as cornerstone investors, including Apple Inc., Nvidia Corp. and Alphabet Inc., ahead of going public.

Pushing Ahead

One reason companies may push forward with a public offering despite muted valuations and macro difficulties is to appease investors who need liquidity and are unwilling to wait for the markets to ease.

"The owner of the company is going to be the real deciding factor in whether the company goes out into a capital raising event or not," said Rachel Phillips, a capital markets partner at Ropes & Gray.

On a whole, investors, including those in venture capital and private equity, are patient, Schuman said. They may instead choose to avail debt or diversity into secondary trades in the private market to gain more time. "There are other ways to gain liquidity or gain some return on capital," he said.

Despite the slowdown in IPOs, biotech, health and energy companies have supplied some transactions.

"Life sciences will always be a robust industry from the perspective of capital markets," Schuman said, because the companies require capital to fund their operations. Life sciences companies often need capital to reach research and development milestones, especially in growth stages, he said.

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Del. SPAC Rulings Said To Weigh Against Super Group Case

By **Jeff Montgomery**

Law360 (February 23, 2024, 5:18 PM EST) -- Attorneys for investors seeking damages after a special purpose acquisition company took Super Group Ltd., an online international gambling venture, public in a \$4.75 billion deal in 2022 repeatedly pointed a Delaware vice chancellor on Friday to the Chancery Court's growing SPAC case law as reasons to keep their lawsuit alive.

"We've heard from a lot of defense counsel about how their particular SPAC is not covered" by decisions in a string of cases in recent years, "and that argument has been rejected again and again," Gregory E. Del Gaizo of Robbins LLP, counsel for SPAC shareholders, told Vice Chancellor Lori W. Will at a hearing. The session focused on a dismissal motion filed by those behind the deal orchestrated by Sports Entertainment Acquisition Holdings LLC, the merger vehicle.

Both sides acknowledged that the vice chancellor had "written the book" on SPAC suits and standards of review in a series of rulings since 2001. Prominent among such cases was a watershed decision in January 2022 that plaintiff-friendly "entire fairness" should apply in the case of *In re Multiplan Corp.*

Del Gaizo argued Friday that entire fairness — as opposed to business judgment deference — likewise should apply to Super Group, in part because of what the shareholders called disclosure failures during the run-up to the blank-check company merger and heavy dilution of public investors' \$10-per-share stake in Sports Entertainment.

By the time the transaction closed, the true value of the SPAC's net cash per share was \$6.33, the stockholders alleged. Super Group, meanwhile, has seen its price fall post-closing into the \$3 range.

Asked by Vice Chancellor Will if the materiality of the loss the investors alleged should be the combined value of the company or the difference in the SPAC investment, Del Gaizo answered, "It should be the delta: between the \$10 and the actual net cash per share. What we care about is the value of the SPAC, not the legacy company."

David B. Hennes of Ropes & Gray LLP — counsel for Sports Entertainment co-founder and former CEO John Collins, as well as SPAC co-founders Eric Grubman and Chris Shumway, among others — contended that the Super Group deal was unlike other troubled transactions.

"Less than five months before the transaction, Super Group generated over \$1 billion in revenues for the first half of 2021," Hennes said at the hearing, noting the complaint focuses heavily on two disclosure claims and net cash per share.

"That claim ignores two important things: the highly profitable and cash-rich nature of the target" and the "clear, plain English nature of the disclosures," as well as what was described as a Delaware law expectation that a combined company should be valued based on the present value of expected future cash flows, he added.

Hennes also asserted, among other points, that the disclosure claims were "impermissibly based on hindsight, and there are no factual allegations" that those behind the deal should have known that Super Group might need to revise its projections downward.

Del Gaizo pointed to indicators of trouble not disclosed, including the company's inability to complete a public investment in private equity financing before the closing.

"It wasn't because they didn't have cash. It's because legacy Super Group couldn't get its financials done," the investors' lawyer said. "Companies are going public for a reason. They're not going public because they don't need money."

Those sued argued that the proxy statement provided stockholders with the information needed to calculate cash per share and assess their investment.

"The investment decision is not \$10 back or \$10 going in, it's \$10 back or do it get a piece of this big entity that is throwing off a lot of cash," Hennes said Friday. "It's not a 1-for-1 trade."

Investors were presented with "clear, cautionary language" regarding risk, and the investments can't be judged in hindsight since the business was negatively affected by subsequent regulatory actions in other countries, including Germany, Hennes continued.

"At the end of the day, trial is probably going to be a battle of the experts," Del Gaizo told the vice chancellor. "But we have pointed out that, as the truth came out, there was a substantial decrease in price" to under \$4 currently.

"Under Multiplan, I think the significant drop in stock price does show, at the motion to dismiss stage, that there was an unfair price," he added.

According to the suit, Collins, Grubman and Shumway formed Sports Entertainment in July 2020 for the purpose of effecting a merger or similar business combination within two years of the SPAC's initial public offering. However, if a deal wasn't completed, over 11 million founder shares and over 10 million warrants the defendants had purchased for almost \$10.4 million would expire and become worthless, the complaint contends.

The investors are represented by David M. Sborz, Peter B. Andrews, Craig J. Springer, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC; Brian J. Robbins, Gregory E. Del Gaizo and Mario D. Valdovinos of Robbins LLP; and Randall J. Baron, Benny C. Goodman III, Erik W. Luedeke, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP.

Sports Entertainment and the individual defendants are represented by Stephen C. Norman, Jaclyn C. Levy and Ryan M. Ellingson of Potter Anderson & Corroon LLP, and David B Hennes, Martin J. Crisp and Sarah M. Samaha of Ropes & Gray LLP.

The case is Newman v. Sports Entertainment Acquisition Holdings LLC et al., case number 2023-0538, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera. Editing by Covey Son.



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Law360 Pulse's Spotlight On Mid-Law Work

By **Emma Cueto**

Law360 (February 23, 2024, 3:48 PM EST) -- Pryor Cashman's handling of a suit against Pandora over royalty payments and Nutter's work on a healthy-snacks company acquisition lead this edition of Law360 Pulse's Spotlight On Mid-Law Work, recapping the top matters for Mid-Law firms from Feb. 9 to 23.

Opening Pandora's Cash Box

The Mechanical Licensing Collective, a nonprofit created by the Music Modernization Act of 2018 to provide music licenses to streaming services, is represented by Pryor Cashman LLP and Shackelford Bowen McKinley & Norton LLP in a suit alleging music streaming giant Pandora Media LLC has been **withholding royalties** from songwriters and publishers.

A complaint filed Feb. 12 in Tennessee federal court focused on streams from Pandora's free, ad-supported user option, with the nonprofit saying that the ratio of royalties to streams was notably low and that when it investigated, it learned that Pandora was not reporting the revenue from Pandora Free correctly.

Organic Growth

Boston-based firm Nutter McClennen & Fish LLP advised RIND Snacks, a venture-backed snack producer, in its acquisition of Vermont granola maker Small Batch Organics, according to a Feb. 14 announcement. The acquisition, which is RIND's first, brings manufacturing capabilities in-house, which the company said is part of its plans to grow beyond its current dried fruit products into a larger healthy-snacks brand.

As part of the merger, Small Batch's products will be rebranded as RIND products over the course of 2024 and at least one joint dried fruit and granola product, a RIND Cherry Cashew Crunch, is planned.

Rate-Hike Fight

Day Pitney LLP is handling a suit by electric company The United Illuminating Co. in its latest suit challenging the state of Connecticut's December 2023 denial of a proposed \$14 million rate hike, saying the state was preventing it from maintaining "financial integrity." The suit filed in Connecticut state court Feb. 9 **alleges** the Public Utilities Regulatory Authority failed to schedule a hearing last year to discuss the proposed interim hike, and that the interim increase was necessary because PURA in August 2023 trimmed a 2022 rate hike request by 87%.

Bad Banking Behavior

New York Community Bancorp Inc. was hit Feb. 13 with **a second proposed class action**, this one filed by Robbins Geller Rudman & Dowd LLP, over allegedly misleading statements by executives about the bank's performance after acquiring Signature Bank. The complaint, which follows one filed by Glancy Prongay & Murray LLP earlier this month, alleges that despite executives' boasting, the acquisition actually weighed down the balance sheet and led to a reduction in dividends.

Makeup Work

Beauty retail chain Sally's Beauty Supply tapped FordHarrison LLP to defend it from an **employee's**

suit alleging she was wrongfully terminated following a reportedly 5- to 10-minute tirade by her supervisor over a memory loss disability. The suit, which was removed to Florida federal court Feb. 13, says the business could owe \$482,000 in back pay despite the employee, Samantha Planner, working there for only a month.

Insurance Integration

Whiteford Taylor & Preston LLP advised Virginia Insurance Group in its merger with Richmond Insurance Services, according to a Feb. 16 announcement. The group, which offers home, auto, life and commercial policies to individuals and small-to-medium-sized businesses, will continue to operate independently.

---Additional reporting by Hailey Konnath, Aaron Keller, Brent Godwin and David Minsky. Edited by Kelly Duncan.

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Walgreens Investors Near Deal In Suit Over Opioid Epidemic

By **Gina Kim**

Law360 (February 23, 2024, 6:01 PM EST) -- An Illinois federal judge agreed Friday to maintain a stay in a stockholder derivative suit accusing Walgreens and its leadership of failing to limit retail pharmacies from dispensing unreasonable amounts of opioids, a day after the parties announced an agreement in principle to resolve their dispute.

The plaintiff investors, Walgreens Boots Alliance Inc., and its current and former leadership, told U.S. District Judge Matthew F. Kennelly on Feb. 22 that they have reached an agreement in principle to resolve the dispute and asked for a continued stay to allow the parties to execute, finalize and prepare written agreements and to prepare for the subsequent motion for preliminary approval.

The joint motion to continue the stay seeks to pause the case until April 22, remove the March 7 deadline to submit a joint status report and scrap the subsequent status conference scheduled for March 14.

On Friday, Judge Kennelly partly granted their stay request until March 14, noting he still wants a joint status report that includes details about their progress in executing and completing the settlement agreement by March 7. The judge also kept the March 14 status conference on the calendar.

Friday's order is the latest development in a derivative suit Walgreens stockholders filed last fall, **alleging** the company and nearly a dozen current or former officers and directors didn't do enough to ensure the company was fulfilling its duties under the law to verify the prescriptions they were filling were legitimate and to report suspicious activities to the authorities, costing it hundreds of millions of dollars to resolve opioid-related litigation in multiple states.

The stockholders said Walgreens had to pay \$80 million in 2013 to end a U.S. Drug Enforcement Administration probe into claims that several of its Florida pharmacy locations and distribution centers failed to control the sales of narcotic painkillers that illegally ended up on the black market.

Eight years later, shareholders voted to force the retail pharmacy chain to prepare a report explaining what steps the board of directors implemented since 2012 "to more effectively monitor and manage financial and reputational risks related to the opioid crisis in the U.S.," the complaint alleged.

That led to a report in 2019, hyping the implementation of a "good faith dispensing" policy that purportedly allowed pharmacists the right to refuse to fill controlled substance prescriptions if they couldn't be properly verified. However, the plaintiffs alleged the company didn't do anything to ensure enforcement of the policy.

According to the investors, the defendants were "actively sabotaging" efforts to give pharmacists that kind of autonomy, with managers regularly insisting pharmacists fill suspicious prescriptions or face termination.

Further, its corporate policies allegedly encouraged the over-distribution of opioids, with the investors alleging Walgreens never required its employees to check states' prescription drug monitoring databases and rewarded those who filled as many prescriptions as possible through pharmacist bonus programs.

According to Thursday's joint motion to continue stay of action, the investors commenced their suit in the Northern District of Ohio on Sept. 23, 2022.

A year later, the Ohio court dismissed the case without prejudice, which allowed the plaintiffs to refile in the appropriate venue.

The investors brought the instant action to the Northern District of Illinois, asserting claims for fiduciary duty breach, unjust enrichment and violations of federal securities laws.

On Nov. 14, Judge Kennelly stayed the case until Feb. 22 to allow the parties to discuss settlement.

Representatives for the investors and for the defendants did not immediately respond to requests for comment Friday.

The plaintiffs are represented by Matthew T. Hurst and Matthew T. Heffner of Heffner Hurst, Robert B. Weiser and James M. Ficaro of The Weiser Law Firm PC and Richard A. Maniskas of RM Law PC.

The defendants are represented by John M. Skakun III, Kristen R. Seeger and Caroline A. Wong of Sidley Austin LLP.

The case is Vladimir Gusinsky Revocable Trust v. Stefano Pessina et al., case number 1:23-cv-15654, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Celeste Bott. Editing by Drashti Mehta.

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Judge Trims Bulk Of Investor Suit Against Oil, AI Companies

By **Sydney Price**

Law360 (February 23, 2024, 10:12 PM EST) -- A California federal judge retained only a small part of an investor suit against artificial intelligence company C3.ai and oil company Baker Hughes, cutting Baker Hughes entirely, and finding only some claims accusing C3.ai and its executives of misleading investors about its financial performance and partnership with the oil company could survive dismissal.

Reckstin Family Trust brought the action against C3.ai in March 2022, alleging C3.ai hid material facts about its partnership with oil giant Baker Hughes, which was added as a defendant in an amended complaint in February 2023.

In their suit, the investors allege that the C3.ai defendants made statements suggesting Baker Hughes had a 12,000-person sales team engaged in selling C3.ai's software. In reality, the tech company had a separate sales division that lacked connections with the oil industry, the suit claims. The reseller agreement also turned out fruitless, as Baker Hughes did not bring in any deals, according to the amended complaint. The defendants filed motions to dismiss the suit last May.

The suit also accuses Baker Hughes of fraudulently influencing C3.ai Inc.'s business decisions, as well as insider trading.

To bring control person liability claims, the investors must successfully show that Baker Hughes violated federal securities laws, which it does not, Baker Hughes **argued in its motion to dismiss** the suit. U.S. District Judge Haywood S. Gilliam Jr. agreed in his order Thursday dismissing the claim.

When dismissing the insider trading claim, Judge Gilliam said he cannot conclude that the sales of C3.ai shares were a materialization of the risks concealed regarding C3.ai's lack of access to Baker Hughes' 12,000-person sales force.

C3.ai went public in December 2020, and Baker Hughes sold 11% of its holdings in the tech company the following April, according to the suit. C3.ai's stock price dropped after the company revealed during an earnings call in December 2021 that it had reorganized its sales force and operated as an independent unit separate from Baker Hughes, the investors said.

Judge Gilliam also cut claims from the investors alleging C3.ai made false and misleading statements regarding the structure of Baker Hughes' workforce. The investors allege C3.ai set up a separate sales division that relied on a subset of salespeople who did not have the industry experience of Baker Hughes' typical sales force, but Judge Gilliam said C3.ai was not required to disclose the structure of its sales force.

"While investors may have been interested to know what proportion of the 12,000-strong BH sales force was engaged in selling C3 products, 'Section 11 does not require the disclosure of all information a potential investor might take into account when making his decision,'" Judge Gilliam said.

The C3.ai defendants argued that certain statements regarding their partnership with Baker Hughes are puffery. For example, C3.ai said that Baker Hughes is among the notable partners that "vastly extend" C3.ai's global reach, and that there is "no better partner."

Judge Gilliam sided with the defendants on these statements, saying they cannot be considered false because they are "not easily susceptible to objective verification."

However, Judge Gilliam said that the investors have reasonably shown the statements made by C3.ai CEO Thomas Siebel regarding the size of the sales force were false and not just "inactionable puffery," as the defendants suggested in their motion to dismiss. The investors say Siebel claimed the entire 12,000-person sales force was selling C3.ai products, which was not true. Judge Gilliam said the claim can survive for now.

"Since Plaintiffs allege that fewer than 12,000 people at Baker Hughes were selling C3 products, the Court agrees that Siebel's statements are sufficiently alleged to be misleading for representing otherwise," Judge Gilliam said. "The number of C3 salespeople at Baker Hughes is a figure 'capable of objective verification,' and is not merely a 'mildly optimistic, subjective assessment' of how business is going."

Judge Gilliam also said that a statement C3.ai made regarding its revenues is actionable. The suit alleges that C3.ai suggested the Baker Hughes arrangement closed deals by the close of the fiscal year ending April 30, 2020, when it actually had not, and that this claim can be verified by a former employee of C3.ai who reported directly to the CEO. Judge Gilliam said the defendants have not shown that the deal closed during the timeframe.

"The Court does not find at this stage that the complaint or judicially noticed documents necessarily contradict [the former employee's] allegations concerning the lack of deals closed," Thursday's order states.

Reed Kathrein, an attorney at Hagens Berman Sobol Shapiro LLP and counsel for the investors, told Law360 in an email Friday he is pleased with Judge Gilliam's guidance in the order, and that the investors will refile an amended suit.

"While the Court found more was needed to strongly infer Defendant's knowledge that it knew the statements about the size of its sales force were false, the Court has given us clear direction of what it expects in an amended complaint," Kathrein said. "We believe we can meet those expectations."

Counsel for C3.ai and Baker Hughes did not immediately respond to requests for comment on Friday.

The investors are represented by Reed R. Kathrein and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP.

The C3.ai defendants are represented by Harry A. Olivar Jr., Michael B. Carlinsky, David Myre, Jesse Bernstein, Jacob J. Waldman and Leigha Empson of Quinn Emanuel Urquhart & Sullivan LLP.

Baker Hughes is represented by Jessica Valenzuela and George B. Adams of Gibson Dunn & Crutcher LLP.

The case is The Reckstin Family Trust et al. v. C3.ai Inc. et al., case number 4:22-cv-01413, in the U.S. District Court for the Northern District of California.

--Additional reporting by Henrik Nilsson. Editing by Vaqas Asghar.



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Momentive Shareholders Battle In Del. Over \$19M Settlement

By **Leslie A. Pappas**

Law360 (February 23, 2024, 8:41 PM EST) -- Hedge funds with shares of Momentive Performance Materials Inc. that withdrew from a consolidated class lawsuit over the silicone maker's \$3.1 billion sale in 2019 urged Delaware's Court of Chancery on Friday to carve them out of a proposed \$19 million class settlement, accusing their former co-lead counsel of grabbing their "cake."

The hedge funds, which sued for appraisal rights shortly after Apollo Global Management sold its interest in Momentive to a consortium of South Korean investors in 2019, say they have been fighting for rights to opt-out of a class settlement since they withdrew as co-lead counsel in the summer.

"We're not blowing up the settlement," Steven M. Hecht of Rolnick Kramer Sadighi LLP, an attorney for Three Court Master LP and a group of funds affiliated with Highland Global Allocation Fund, told the court at a hearing in Wilmington Friday. "We withdrew in August with the understanding that we were carved out."

Ned Weinberger of Labaton Keller Sucharow LLP, an attorney for the remaining lead plaintiff Frank Funds, urged the court to approve the proposed settlement, **achieved through mediation in October** after the hedge funds withdrew.

"Nineteen million is more than \$1 per share for the class," Weinberger said, arguing that Highland and Three Court were "trying to blow up a settlement purely for selfish reasons."

Highland and Three Court, which hold about 2 million shares, have not shown that the settlement is unfair to other shareholders, Weinberger argued. They're asking the court to reject a fair and reasonable settlement "because they're hedge funds and they've decided to forgo the merger consideration and they seem to think that they can just dictate things."

The dispute dates back to May 2019, when South Korean-based chemical manufacturer KCC Corp., semiconductor component maker Wonik QnC Corp., and private equity firm SJL Partners acquired Apollo's interest in Momentive's parent company, MPM Holdings Inc., for \$32.50 per share in cash.

In July 2019, a group of six hedge funds including Highland and NexPoint Capital LLC petitioned Delaware's Court of Chancery for an appraisal of their MPM shares. Three Court Master LP and BCIM Strategic Value Master Fund LP also filed separate petitions for appraisal, and the three cases were later consolidated.

In February 2020, mutual fund company Frank Funds filed a proposed class action challenging the 2019 buyout, asserting claims of breaches of fiduciary duty.

The appraisal cases were consolidated with the Frank Funds case in November 2020, and Frank Funds and the Highland and Three Court hedge funds became co-lead plaintiffs.

Disputes between co-counsel broke out last year in the summer, and Labaton Labaton Keller and Frank Funds petitioned the court to remove Highland and Three Court and their counsel at Rolnick Kramer from the leadership structure.

At the hearing Friday, an attorney for MPM Holdings, Jaren Janghorbani of Paul Weiss Rifkind Wharton & Garrison LLP, told the court that the \$19 million settlement would fall apart if the court granted the

hedge funds their requested carve-out.

"If they are granted an opt out, the settlement goes back to the drawing board," she said.

Andy Bednark of O'Melveny & Myers LLP, an attorney for Apollo Global Management, agreed. "The settlement was always negotiated as a non-opt out settlement," he said.

Hecht argued that the hedge funds did 75% of the work in the first years of the litigation, and that the "bulk of the settlement process happened when we were still co-lead counsel."

Hecht said that his team should also be paid for the 5,300 hours spent on the case. "We shouldn't be stiffed out of a fee," he said.

The case is like a bake-off in which his clients came up with the recipe, bought all the ingredients, mixed the batter, and put the cake in the oven, Hecht said. And now suddenly another team of bakers has pulled out the cake and is saying, "Look what we did."

Labaton Keller sought about \$4 million in fees plus about \$39,401 in expenses. The Rolnick Kramer team **objected to the request**, saying it had about \$5 million in expenses and deserved a fee for its work.

Hecht argued that Rolnick Kramer and its Delaware counsel, Heyman Enerio Gattuso & Hirzel LLP, ran three-quarters of a relay race, and then handed the baton to Labaton Keller to take it over the finish line.

"The race analogy is too tempting to be passed up," Weinberger said during his rebuttal arguments. The hedge funds didn't hand over the baton, he argued. "They took the baton into the stands and then ran backwards around the course and tackled their teammates."

Vice Chancellor Nathan A. Cook, the judge presiding over the case, did not ask any questions Friday. He took the matter under advisement and did not say when he would issue a decision.

Lead Plaintiff Frank Funds is represented by Jonathan Gardner, Alfred L. Fatale III, David J. Schwartz, Joseph N. Cotilletta, Charles Wood, Ned Weinberger, Mark Richardson, and Jiahui (Rose) Wang of Labaton Keller Sucharow LLP.

Apollo Global Management Inc. and the Apollo defendants are represented by Jonathan Rosenberg and B. Andrew Bednark of O'Melveny & Myers LLP and Kevin R. Shannon, Matthew F. Davis, and Abraham C. Schneider of Potter Anderson & Corroon LLP.

MPM Holdings Inc. and certain individual defendants are represented by Andrew J. Ehrlich, Jaren Janghorbani, Jacobus Schutte, Daniel A. Mason, Matthew D. Stachel, and Sabrina Hendershot of Paul Weiss Rifkind Wharton & Garrison LLP.

Highland Funds and Three Court Master LP are represented by Steven M. Hecht, Sheila Sadighi, and Joseph R. Sparacio of Rolnick Kramer Sadighi LLP and Samuel T. Hirzel and Elizabeth A. DeFelice of Heyman Enerio Gattuso & Hirzel LLP.

The case is In re MPM Holdings Inc. Appraisal and Stockholder Litigation, Consolidated, case number 2019-0519, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Barclays Must Face Trimmed Suit Over \$17.6B Over-Issuance

By **Katryna Perera**

Law360, London (February 24, 2024, 2:13 AM GMT) -- Barclays PLC and a number of its top executives must face a trimmed version of a proposed class action over a financial reporting error that led to Barclays selling more than \$17.6 billion in securities over its maximum registered amount, a New York federal judge ruled Friday.

U.S. District Judge Katherine Polk Failla's **order** said the investors have adequately pled facts supporting their allegations that Barclays did not disclose that it had not implemented any internal controls to prevent the over-issuance of securities and that the individual defendants knowingly misled investors about the bank's compliance with securities laws and purposefully disregarded the lack of internal controls.

However, the judge also said the investors' claims "stretch too far" related to statements made by the defendants after the over-issuances were discovered, and that these statements cannot support a securities fraud claim.

The suit was **filed in September 2022** by two South Florida retirement plans, alleging that Barclays failed to inform investors about the weaknesses of its internal financial reporting system, which led to the error that resulted in the \$17.6 billion securities over-issuance and a subsequent enforcement action from the U.S. Securities and Exchange Commission.

Just a few days after the suit was filed, Barclays **agreed to pay \$200 million** in civil penalties and \$161 million in disgorgement and prejudgment interest to put the SEC's enforcement action to rest.

In previous years, Barclays was a "well-known seasoned issuer" of securities, meaning it was able to issue securities by filing an open-ended shelf registration statement. Whenever the bank wanted to issue securities, it just had to pay the registration fee and file the correct papers, without any SEC review, according to the suit.

However, Barclays lost this status after it **agreed to pay \$97 million** to settle SEC claims in May 2017 for investment client overcharges.

Judge Failla said Friday that the investors have adequately alleged that Barclays and the defendants made material misrepresentations before the first corrective disclosure in March 2021, when Barclays revealed the over-issuances from the 2019 shelf registrations.

These misrepresentations included statements about Barclay's financial reporting internal controls and affirmations about the bank's compliance with securities laws.

The investors offer five facts in the suit that they say constitute "strong circumstantial evidence" of the defendants' misbehavior or recklessness, Judge Failla said.

"According to plaintiff, these facts demonstrate that the executive defendants 'knew, or were reckless in not knowing, that Barclays did not implement any internal controls to account for the amount of securities issued once it became an ineligible issuer yet represented repeatedly that the company had effective internal controls over financial reporting,'" the order said.

The judge rejected the defendants' characterization of the over-issuances as an "honest mistake" of

which they were not aware, and had no obligation to be aware of, before their discovery.

The judge also said the investors have adequately pled loss causation and control person liability. However, she tossed two groups of alleged misrepresentations related to statements made between the first and second corrective disclosures about the financial effect of the over-issuances and a statement made between the second and third disclosures about the bank's third quarter 2022 results.

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

By the time Barclays disclosed the over-issuance in March 2021, the bank said it expected to see a £450 million (\$489 million) loss from it. After the disclosure, the investors say, the price of Barclays' American depositary receipts fell 10.6%, from \$9.05 on March 25 to \$8.09 on the next trading day, March 28.

Then, that July, Barclays issued quarterly financial results and announced that it had also over-issued unregistered securities under a second registration statement, according to the suit. Barclays said it would buy back \$17.6 billion of the securities issued in error beginning Aug. 1.

At the news of more over-issued securities, the price of Barclays ADRs dropped another 5.2%, according to the suit.

Ex-Barclays CEO James E. Staley, who stepped down in November 2021, and current CEO C.S. Venkatakrisnan and former group finance director Tushar Morzaria are all named in the suit.

The investors are represented by Christine M. Fox and James M. Fee of Labaton Keller Sucharow LLP.

Barclays and the individual defendants are represented by Jeffrey T. Scott, Matthew J. Porpora and Julia A. Malkina of Sullivan & Cromwell LLP.

The case is City of North Miami Beach Police Officers' and Firefighters' Retirement Plan et al. v. Barclays PLC et al., case number 1:22-cv-08172, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Adrian Cruz. Editing by Brian Baresch.



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Chancery Scuttles Moelis Pact Ceding Control To Founder

By **Leslie A. Pappas**

Law360 (February 23, 2024, 8:42 PM EST) -- All but three provisions of a stockholder agreement that gives Moelis & Co. founder Kenneth Moelis board-trumping power over the global investment bank's business are "facially invalid" under Delaware law, a Court of Chancery vice chancellor said Friday in a decision that might have implications for similar stockholder agreements at other companies.

In a **133-page opinion**, Vice Chancellor J. Travis Laster said the provisions violate Delaware law because they take away powers from the board that can only be altered by a company's charter or bylaws. The compact is part of "a new wave of stockholder agreements" corporate planners now regularly use that include "extensive veto rights and other restrictions on corporate action," the vice chancellor said.

"What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law?" the vice chancellor said at the beginning of his opinion. "A court must uphold the law, so the statute prevails."

The stockholder agreement at issue applies to Moelis, who also serves as the bank's CEO and board chairman, and three entities he controls. Moelis and his three affiliates negotiated the agreement with the company in 2014 when the bank went public.

West Palm Beach Firefighters' Pension Fund **sued the bank in March 2023**, saying the stockholder compact violated various aspects of Delaware's General Corporation Law.

Earlier this month, Vice Chancellor Laster **rejected the bank's bid for summary dismissal** of the suit, saying the case raised fundamental issues of corporate control.

Section 141(a) of the DGCL states that the business and affairs of every corporation "shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation," the opinion says.

The presence of a stockholder who controls the corporation "does not alter the board-centric framework," the vice chancellor wrote. But internal arrangements that are not in the charter and that deprive a board of a significant portion of its authority contravene Section 141(a), he said.

A pre-approval requirement in the stockholder agreement is invalid because it requires the board to get Moelis' consent before taking 18 types of actions that "encompass virtually everything the board can do," the opinion says.

"With the pre-approval requirements in place, the board is not really a board," Vice Chancellor Laster wrote. "The board cannot approve, authorize or even plan to take a covered action without Moelis' prior written approval."

Other invalid provisions include a requirement that compels the board to recommend the founder's designees for election; a vacancy mandate that forces the board to fill any open seat created by a departing, Moelis-designated board member with another Moelis designee; and a committee composition provision that prevents the board from creating an independent committee that doesn't include a Moelis-designated member, according to the opinion.

The three provisions in the agreement that were not facially invalid included one that gives the founder the right to name a certain number of board designees, another that requires the board to nominate Moelis' designees as candidates, and a third that mandates the company to make reasonable efforts to enable Moelis' designees to get elected, the opinion says.

The decision could have implications for several other cases winding their way through the Chancery court.

On Thursday, Vice Chancellor Laster **deferred approval of a settlement** that Texas-based insurance provider Goosehead Insurance reached with a shareholder over a similar stockholder agreement to Moelis & Co.'s, saying that it might be best to wait until the Delaware Supreme Court could weigh in.

Friday's opinion could also have an impact on **a class challenge to a stockholder agreement** with BRP Group Inc. that the plaintiffs in that suit claim gives disproportionate control to the insurance broker's co-founders — board Chairman Lowry Baldwin and his son, CEO Trevor Baldwin.

Counsel for the plaintiffs declined to comment on the ruling Friday, and counsel for Moelis did not immediately respond to Law360's request for comment.

West Palm Beach Firefighters' Pension Fund is represented by Thomas Curry, David Wales and Adam Warden of Saxena White PA.

Moelis & Co. is represented by John P. DiTomo and Miranda N. Gilbert of Morris Nichols Arsht & Tunnell LLP, and William Savitt, Anitha Reddy, Getzel Berger and Emma S. Stein of Wachtell Lipton Rosen & Katz.

The case is West Palm Beach Firefighters' Pension v. Moelis & Co., case number 2023-0309, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Melissa Treolo.



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Ex-Citrix Chief Hit With Class Action Over \$16.5B Sale

By **Isaac Monterose**

Law360 (February 23, 2024, 7:44 PM EST) -- A proposed class of former Citrix Systems Inc. stockholders accused the company's former CEO and chairman Robert M. Calderoni of failing to get enough for stockholders for the \$16.5 billion sale of the cloud software company to Vista Equity Partners Management LLC and Elliott Investment Management LP affiliate Evergreen Coast Capital Corp.

In their suit filed Thursday in Delaware state court, named plaintiffs Pablo Legorreta and Mark Liebenthal alleged that Vista Equity Partners Management and Elliott Investment didn't invest that much equity in the **January 2022 deal** despite its more than \$16 billion price tag. In April 2022, both stockholders **sued** Citrix to obtain documents relating to the deal, but the suit is currently inactive.

"This financing scheme was just the tip of the iceberg of corporate maleficence that supported Elliott's and Vista's take-under efforts, and is indicative of how Citrix insiders repeatedly capitulated to Elliott's interests rather than the interests of the company's public, non-insider shareholders," the proposed class alleged in their current suit.

According to the proposed class, Calderoni and Elliott Investment Management became allies in 2014 after the company joined Calderoni on Juniper Networks Inc.'s board. Elliott Investment Management started to get after Citrix in the summer of 2015 by joining the cloud software company's board and getting Calderoni appointed as executive chairman, the proposed class claimed.

Citrix's value started to decline following a **\$2.25 billion acquisition** of project management software company Wrike Inc. in January 2021, the proposed class alleged.

The acquisition being funded by debt and the COVID-19 pandemic slowing the economy allegedly caused the company's decline in value. Elliott Investment Management saw its chance to buy up Citrix and tried to buy enough of the company to get a 10% stake, the proposed class alleged.

They also claimed that Elliott Investment Management started pushing for a sale in August 2021, and that Calderoni told shareholders in November 2021 that Citrix would have to "moderate" its revenue expectations for the fourth quarter because the company was underperforming.

However, according to the proposed class, Citrix's fourth-quarter revenue would surpass expectations in a way that would create suspicion around "the company's decision to publicly 'moderate' its revenue expectations simultaneously with a massive cost-reduction and restructuring plan."

Calderoni's statements eventually caused Citrix's stock to drop to \$78.36 per share in December 2021, which is the lowest price it's been at since 2017, the proposed class claimed.

Also, Elliott Investment Management and Vista Equity Partners Management both manipulated the sale process by using investment bank Qatalyst Partners as a financial advisor and forming a transaction committee that had directors that were professionally linked to Elliott Investment Management and Vista Equity Partners Management, according to the proposed class.

"Then, as Elliott and Vista repeatedly lowered their proposed purchase price, the company's conflicted management repeatedly lowered the company's financial projections, despite Citrix's quarterly earnings exceeding management's prior top-line guidance during the same time period," the proposed class claimed.

"Ultimately, after Elliott and Vista submitted their lowest, 'best and final' proposal, the transaction committee authorized Qatalyst to use the new, deflated financial projections recently created by management, and an even lower sensitivity case, for its fairness opinion, allowing the transaction committee and board to justify the merger agreement to shareholders," the proposed class also alleged.

Elliott Investment Management and Vista Equity Partners Management made a sale proposal in December 2021 to buy Citrix for \$110 per share after Citrix's share value declined to \$78.36, the proposed class claimed. After some more haggling, the transaction committee agreed to sell Citrix for the "inadequate" price of \$104 per share and an official announcement was made in January 2022, according to the proposed class.

In order to get shareholders to agree to the sale, Citrix's board allegedly filed a misleading proxy statement in March 2022 with the U.S. Securities and Exchange Commission. The proxy statement had misleading aspects such as misrepresented financial projections, according to the proposed class.

"The false and misleading proxy was authorized and signed by defendant Calderoni and misled uninformed shareholders into approving the merger and selling their shares to Elliott and Vista at an unfair and inadequate price," the proposed class claimed.

Class counsel didn't respond to a request for comment on Friday. Counsel information for Calderoni wasn't immediately available. Calderoni is currently on the board of directors for semiconductor manufacturer KLA and software company Ansys and neither company responded to requests for comment.

The proposed class is represented by Michael J. Palestina, Brian C. Mears, Gina M. Palermo and Christopher P. Quinn of Kahn Swick & Foti LLC.

The case is Pablo Legorreta et al. v. Calderoni, case number 2024-0153, in the Court of Chancery of the State of Delaware.

--Editing by Patrick Reagan.