

Opioid Judge Weighing Disqualification Has Concerns About Motley Rice.

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By Christine Charnosky



Judge Dan Aaron Polster of the U.S. District Court for the Northern District of Ohio.
Courtesy photo

NEWS

Opioid Judge Has Concerns About Motley Rice: 'I Can't Understand Why You Don't See That'

U.S. District Judge Dan Polster, who is weighing a disqualification motion in the opioid multidistrict litigation, raised concerns this month about Motley Rice obtaining confidential information while representing the state of Hawaii, the District of Columbia and the city of Chicago in other cases.

February 27, 2024 at 01:36 PM

Legal Ethics and Attorney Discipline



Amanda Bronstad [→](#)
staff reporter

What You Need to Know

- At a Feb. 12 hearing, U.S. District Judge Dan Polster, who is overseeing the opioid multidistrict litigation in the Northern District of Ohio, raised several questions to Motley Rice's Linda Singer about her responsibilities as outside counsel in separate government lawsuits.
- Brian Boone, of Alston & Bird, has alleged in a disqualification motion that Motley Rice, in the government cases, used its subpoena powers to obtain confidential documents from his client, OptumRx, and some of them pertain to opioids.
- The debate addresses a thorny but longstanding issue when private plaintiffs' firms serve as outside counsel to government entities, particularly state attorneys general.

A federal judge is weighing whether to disqualify Motley Rice from dozens of opioid lawsuits because the firm obtained confidential information when representing the state of Hawaii, the District of Columbia and the City of Chicago in separate actions.

At a Feb. 12 hearing, U.S. District Judge Dan Polster, who is overseeing the opioid multidistrict litigation in the Northern District of Ohio, raised several questions to Motley Rice's Linda Singer about her responsibilities as outside counsel in government lawsuits against the same defendants her firm has sued in the opioid cases—specifically, pharmacy benefit manager OptumRx Inc., owned by United HealthCare.

Brian Boone, of Alston & Bird in Charlotte, North Carolina, has alleged in a disqualification motion that Motley Rice, in the government cases, used its subpoena powers to obtain confidential documents from his client, OptumRx, and some of them pertain to opioids.

At the hearing, Singer insisted Motley Rice never shared the confidential documents with other clients and, in any event, Hawaii's lawsuit, filed last year, did not even reference opioids.

"I want to be clear," she said. "It's our legal position that, again, none of that matters."

“Well, I disagree with that,” Polster said. “I can’t understand why you don’t see that there is a difference between your work for these—your firm’s work for these three entities and your work for all of your other clients, and particularly the four—you know, the four bellwether clients that you’re representing.”

Though the bellwether clients, as cities and counties, also are public entities, Polster drew a distinction because Motley Rice had subpoena powers in the state cases.

“At the moment you got confidential government information on OptumRx,” he told Singer. “Whether you can use it or not, I don’t know because I don’t even know exactly what it is. But that’s the concern. You got it. Your firm has it.”

He said he would issue a ruling “as expeditiously as I can.”

Singer, in Washington, D.C., did not respond to a request for comment.

The debate addresses a thorny but longstanding issue when private plaintiffs’ firms serve as outside counsel to government entities, particularly state attorneys general. At the hearing, liaison counsel Peter Weinberger, of Cleveland’s Spangenberg, Shibley & Liber, referenced “a move afoot” to “curtail the rights of state and cities and counties to retain outside counsel who are prepared to represent them on a contingent fee.”

But OptumRx’s motion says Motley Rice has violated both the American Bar Association’s Rules of Professional Conduct and the Ohio Rule of Professional Conduct 1.11(c), which prohibits a lawyer with confidential government information about a person from representing a private client “whose interests are adverse to that person.”

In opposition, the plaintiffs’ executive committee, which includes Motley Rice’s Joe Rice, insisted the firm had no conflict because the government investigations involved allegations of overbilling for insulin and other prescription drugs, not causing the opioid epidemic. As such, the information wasn’t even material, they wrote.

But that information, Boone wrote in a reply, was not available to anyone else in the opioid cases.

“Motley Rice has a problem,” Boone, an Alston & Bird partner in Charlotte, North Carolina, wrote.

And, even though the firm is representing cities and counties in opioid cases, he wrote, those entities do not have the subpoena powers that Motley Rice utilized on behalf of state attorneys general.

‘I’d Like to Know the Specifics of the Arrangement’

At the hearing, Polster found Motley Rice hadn’t answered enough questions.

“Motley Rice’s response doesn’t specifically acknowledge the details of the relationship you had with the three public entities, Chicago, Hawaii, and DC,” the judge held. “I want to know specifically what the arrangement was, so I’d like to know the specifics of the arrangement; the way you were compensated; the duration; and in particular, is at least one of those or any of them continuing till the present or is it all in the past?”

After the hearing, the plaintiffs’ executive committee sought to file another response that would clarify Polster’s questions—in particular, that the firm was not acting as an officer or employee of the government and that its retainer agreements clarified that the state had control over decisions.

A proposed brief cites a 2015 decision by U.S. District Judge Jorge Alonso, in the Northern District of Illinois, that refused to disqualify Singer, then at Cohen Milstein Sellers & Toll, from representing the City of Chicago in its opioid case based on her firm’s alleged “police powers.”

OptumRx has asked Polster to reconsider allowing the plaintiffs’ executive committee to file another response or, alternatively, allow its lawyers to depose Motley Rice’s expert witness and three attorneys who filed supporting declarations: District of Columbia Senior Assistant Attorney General Wendy Weinberg; John Price, supervising deputy attorney general of the complex litigation department at the Hawaii Attorney General’s Office; and Stephen Kane, deputy corporation counsel at the city of Chicago’s Department of Law.

The Motley Rice motion is the latest disqualification attempt in the opioid multidistrict litigation. In 2019, Polster disqualified Carole Rendon and her firm, Baker & Hostetler, from defending opioid manufacturer Endo Pharmaceuticals in the first bellwether trial. Rendon, a former federal prosecutor, had previously served on a heroin and opioid task force while at the U.S. Attorney’s Office in the Northern District of Ohio.

OptumRx and another pharmacy benefit manager, Express Scripts, unsuccessfully attempted to unseat David Cohen, the special master in the opioid multidistrict litigation, who became embroiled in the Motley Rice disqualification matter this month after the plaintiffs’ executive committee sought documents related to opioids, many of which were turned over in the government cases.

OptumRx’s attorney, Boone, resisted, calling the request “frivolous” and a “transparent attempt to justify Motley Rice’s ethical violations” in a Feb. 21 memo. Plaintiffs’ executive committee member Paul Farrell, of Farrell & Fuller in San Juan, Puerto Rico, replying two

days later, accused Boone of having “misrepresented and manipulated my spoken words during a teleconference with the special master.”

Farrell sought an immediate status conference, which Polster scheduled for Wednesday.

Neither Farrell, Rice nor Jayne Conroy, of New York’s Simmons Hanly Conroy, all members of the plaintiffs’ executive committee, responded to requests for comment. Boone also did not respond to a request for comment.

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- **New Suit**

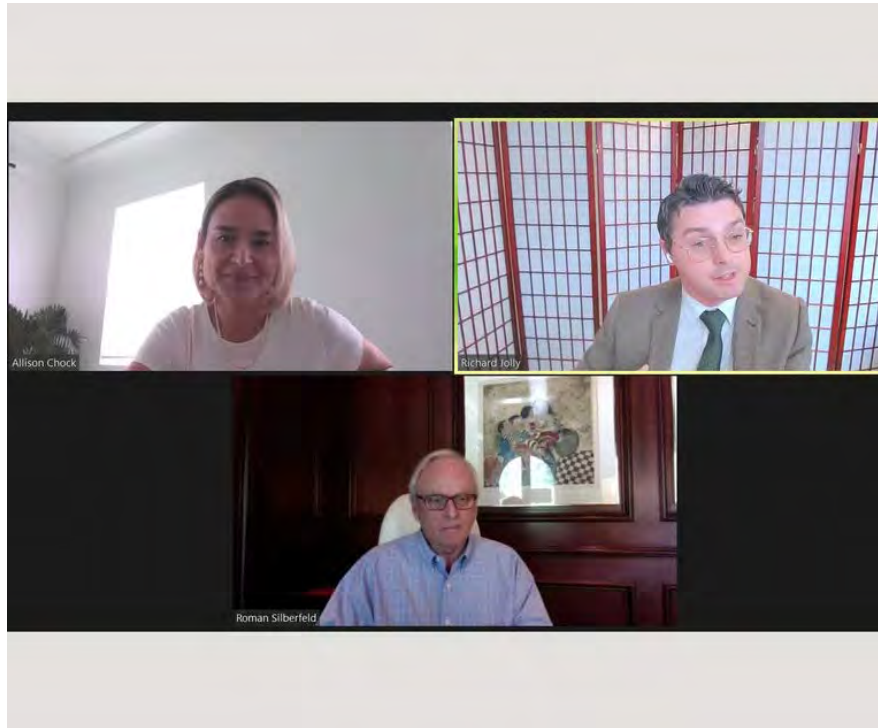
Milberg Coleman Bryson Phillips Grossman filed a data breach class action on Feb. 27 in California Central District Court against Multi-Fineline Electronix. The suit pursues claims on behalf of individuals whose personally identifying information and private health data was allegedly compromised in a cyberattack. Counsel have not yet appeared for the defendant. The case is 8:24-cv-00400, Biondi v. Multi-finline Electronix, Inc.

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By Ross Todd



Screenshot of a webcast on case valuation sponsored by Berkeley Law Executive Education featuring Roman Silberfeld, national trial chair of Robins Kaplan and Allison Chock, Director of Omni Bridgeway Management and Richard Jolly of The Civil Justice Research Initiative.

ANALYSIS

How to Evaluate a Case Like a Plaintiffs Lawyer or Litigation Funder

Roman Silberfeld, the national trial chair of Robins Kaplan based in Los Angeles, and Allison Chock, director at litigation finance company Omni Bridgeway Management (USA), discuss the basics of their respective approaches to evaluate a potential case.

February 27, 2024 at 07:30 AM

Litigation Funding



Ross Todd 
Editor/columnist

File this under “Yet another thing they don’t teach you in law school that could be central to the success of your legal career.”

Whether you’re building a plaintiff-side contingency fee practice or making investment decisions about which cases to fund at a litigation finance firm, figuring out how to value a potential piece of litigation is a vital first step. **Roman Silberfeld**, the national trial chair of **Robins Kaplan** based in Los Angeles, and **Allison Chock**, director at litigation finance company **Omni Bridgeway Management (USA)**, discussed their respective approaches to that process last week in conversation with **Richard Jolly**, a professor at Southwestern Law School and a fellow for the Civil Justice Research Initiative of UC Berkeley School of Law, which sponsored a webinar on the topic.

Chock, who oversees litigation investment management, due diligence process and operations for international funder Omni Bridgeway’s stateside operations, and is a member of its U.S. investment committee, said that when it comes to valuing a case the procedures that plaintiffs firms and funders use are “quite similar.” But she added they usually involve tasks that all the lawyers involved have to learn by doing.

“They get thrown into the deep end of the pool and they start trying to learn these things on the fly,” said Chock, who started on the defense side early in her career as an associate at **Latham & Watkins** before practicing as a partner at plaintiff-side contingency firms for about a decade.

Silberfeld said the time he spends evaluating a case at the front end is often the most important time he puts in on any piece of litigation, including any potential trial. He said he has a series of questions he has to work through: What are the facts, the liability story, causation, and damages? Who’s the client? What’s the venue? What’s the applicable law?

“If I don’t answer all those questions pretty satisfactorily based on what I know, I’m walking into a minefield of problems,” he said. “The old saw is that a case never gets better than the first time you evaluate it.”

“It always tends to get slightly worse,” he said.

Chock said the idea of the initial evaluation being key is “doubly or triply true” for a litigation funder because once the funder decides to invest in a case, it steps out of any sort of active role in how the litigation is going to be prosecuted. “Frankly, it’s the litigators who are in charge,” she said. “So this intensive evaluation process is absolutely critical to us.”

Jolly asked Chock and Silberfeld whether law firms and funders have their own independent evaluations or if trial attorneys in any way “market” their cases to funders.

Silberfeld said that in his experience with Omni Bridgeway, his evaluation of the case has been independent of the funder’s. The funder brings on its own counsel and does its own due diligence, he said. “We may well have a conversation about what I find to be true and what somebody else finds to be true, and try to reconcile the differences if there are differences,” he said.

Chock said that the evaluation phase is so important to funders that they have internal staff, all of whom are lawyers “looking at it intensely.” She said Omni Bridgeway also frequently brings on outside lawyers as diligence counsel just to assess the probability of success on certain issues. She said that could be lawyers or judges from a particular foreign jurisdiction that the firm isn’t familiar with or experts on a certain issue or type of litigation.

“Then finally we are, of course, talking to lawyers and getting their version of how they view the case,” said Chock, of the counsel involved. She said the funder wants to know how the lawyers intend to proceed strategically. “We can’t control what they’re doing,” she said. But she said it does make sense that everyone sees eye to eye on case strategy and the potential issues going into any funding arrangement.

Silberfeld said the main issue he looks at when taking on a potential case is who the client is. The law, the jurisdiction and the potential timeframe all matter, but he said “who the client is is paramount.”

Chock said from the funder’s perspective that holds true, but that it’s not just who the client is, but whether what that client is seeking in the litigation is reasonable or not. “What do they really want here?” is the central question, she said. If the client is using litigation as leverage to achieve something else, she said that’s probably not going to be something of interest to a litigation funder—and likely not for a contingency fee lawyer either.

But Chock also added for financing to make sense there has to be a big enough “quantum” of damages at stake at the end of the road for the client, the lawyers and the funder to all have a reasonable upside. “If there’s not going to be enough money to make everybody happy, it’s not a good road to go down,” she said.

Chock said that despite the rapid growth of the litigation finance industry over the past decade, from the best she can tell something less than .1% of cases involve funding. She said in most cases the amount at stake is either too small or the claims are not strong enough to make sense for funding.

“There are large dollar numbers involved,” she said. “But that’s because they’re going into big, big cases.”

Silberfeld said that there are some parts of Robins Kaplan’s practice where there are no funded cases, and others where funded cases make up 10 to 15% of the docket. “Relatively modest numbers still,” he said. He added that in the decade-and-a-half he’s been working with funders, he’s never actually seen funding “be the trigger for an unmeritorious or questionable case.”

“It’s actually just the opposite,” he said. “It makes good cases better.”

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- **New Suit**

Milberg Coleman Bryson Phillips Grossman filed a data breach class action on Feb. 27 in California Central District Court against Multi-Fineline Electronix. The suit pursues claims on behalf of individuals whose personally identifying information and private health data was allegedly compromised in a cyberattack. Counsel have not yet appeared for the defendant. The case is 8:24-cv-00400, Biondi v. Multi-finline Electronix, Inc.

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Texas Pacific Again Beats Investors in Delaware Stock Fight

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Litigation

Photo: Bloomberg

- Investors opposed Permian Basin land giant's plan to add stock
- Delaware high court affirms trial judge's opinion for company

The Delaware Supreme Court sided with Texas Pacific Land Corp., upholding a ruling that cleared the way for the Permian Basin land giant to alter its 135-year-old business model and issue new stock.

The state's high court on Monday affirmed a Court of Chancery post-trial opinion that gave Texas Pacific a win in its lawsuit against its major shareholders who opposed the proposal to issue additional shares.

Texas Pacific argued before the Supreme Court last week that the investors knew they were breaching their voting commitment in opposing the board's recommendation to vote to increase the number of authorized shares of common stock at the company's 2022 annual meeting.

The investors had sought to reverse the Chancery Court's ruling.

The investors are represented by Young Conaway Stargatt & Taylor LLP and Vinson & Elkins LLP. Texas Pacific is represented by Abrams & Bayliss LLP and Sidley Austin LLP.

The case is Horizon Kinetics LLC v. Texas Pacific Land Corp., Del. Ch., No. 478,2023, 2/26/24 .

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MINISO Gets Class Action Fraud Suit Over Franchise Model Tossed

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- Investors alleged retailer overstated reliance on franchises
- Judge grants motion to dismiss with chance to amend suit

MINISO Group Holding Ltd. and its underwriters will not face allegations that they failed to disclose the company directly owned and operated stores previously portrayed as franchises to investors.

A proposed class action alleging MINISO artificially inflated its share price by touting the franchise model and a joint venture to build a new headquarters, while concealing challenges to revenue, fails to show any material misrepresentations, according to the opinion filed Feb. 23 in US District Court for the Southern District of New York.

MINISO investors didn't establish loss causation, failing to identify corrective disclosures from the company that prompted a stock drop and focusing instead of the alleged impact of a report from Blue Orca Capital on the company's share price, said Judge Edgardo Ramos in the opinion.

The short seller report published on July 26, 2022 alleged that MINISO had 620 stores in China registered under the names of executives or individuals connected to the company's chairman, highlighting that franchising was limited to smaller markets, which contradicted the company's representations that it relied heavily on a retail partner model for the majority of its stores.

MINISO said the next day that an independent committee of directors would investigate and refuted the allegations the day after that, ultimately announcing on Sept. 15, 2022 that the investigation had determined Blue Orca's allegations were unsubstantiated, according to the complaint.

The company's American Depositary Share price fell nearly 15% the day the Blue Orca Report was published, closing at \$5.88 on July 26, 2022, according to Bloomberg data.

Investors' argument that the company made disclosures prior to the Blue Orca report that revealed false statements also fails because "these disclosures had nothing to do with the alleged fraud," Ramos said in the opinion.

The plaintiffs will have until March 15 to amend their complaint, Ramos said in his order.

The Rosen Law Firm PA and Pomerantz LLP represent the plaintiffs and the proposed class.

Skadden, Arps, Slate, Meagher & Flom LLP represent MINISO, its executives, and authorized IPO representative Puglisi & Associates. Latham & Watkins LLP represents underwriters Goldman Sachs (Asia) LLC and BofA Securities Inc.

The case is In re MINISO Grp. Holding Ltd. Sec. Litig. , S.D.N.Y., No. 1:22-cv-09864, 2/23/24

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Citrix's \$16.5 Billion Sale to Elliott, Vista Hit With Challenge

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- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0153

Citrix Systems Inc. ex-investors are suing its former chairman over the software giant's \$16.5 billion leveraged buyout by affiliates of Vista Equity Partners Management LLC and Elliott Investment Management LP.

The proposed class action targets Robert Calderoni, who was also Citrix's interim CEO at the time of the transaction. The lawsuit says Calderoni—driven by loyalty to Elliott—deflated the company's financial forecasts to justify ever-lower bids by the activist buyout firm, which had spent years trying to force a sale.

With Citrix's share price weighed down by the pandemic and its transition to a software-as-a-service business model, Elliott "pounced," according to the complaint made public Feb. 23. "The Citrix board quickly surrendered."

The September 2022 deal combined Citrix with Tibco Software, a Vista portfolio company, while spinning off Wrike Inc., which Citrix had previously acquired from Vista for \$2.25 billion.

A spokesperson for Citrix said Monday that the company is aware of the lawsuit but doesn't comment on ongoing litigation. Elliott and Vista, which aren't named as defendants, didn't immediately respond to requests for comment.

The suit, filed in Delaware's Chancery Court, portrays the sale as the culmination of a yearslong campaign by Elliott, starting around 2015. Elliott—run by the billionaire Paul Singer—allegedly grew frustrated with its efforts to force a sale, sold down its stake, and took a more passive role for several years.

But investment firm again stepped up the pressure and "began agitating for a sale—this time, however, to Elliott itself"—after recognizing that Citrix's difficult transition and struggles integrating Wrike had left it underpriced, according to the complaint. The board, aware of Elliott's reputation as a corporate raider, "did not need much convincing," the lawsuit says.

Citrix's board retained financial adviser Qatalyst Partners, "a curiously common participant on the target side of Elliott and Vista deals that has a known history of conflicted negotiations," according to the complaint. Qatalyst—which also isn't named as a defendant—was allegedly working simultaneously on a lucrative private equity buyout involving Calderoni's brother, the CEO and chairman of Anaplan Inc.

Although the Citrix board set up a nominally independent transaction committee, the sale process "had already been tainted by Calderoni's allegiance to Elliott," the suit says. Elliott began cultivating its relationship with Caderoni when he served on the board of Juniper Networks Inc., a company it invested in, and continued to ply him with "other lucrative professional opportunities," according to the court filing.

Shareholders who approved the buyout, meanwhile, were given incomplete disclosures ahead of the investor vote, the complaint says. It was originally filed under seal Feb. 19.

The investors are represented by Kahn, Swick & Foti LLC. Calderoni hasn't yet made a court appearance.

The case is Legorreta v. Calderoni , Del. Ch., No. 2024-0153, complaint unsealed 2/23/24 .

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IQIYI Investors Get Judge's Blessing to Amend Fraud Class Action

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- Judge holds dismissal bids to allow plaintiffs a chance to amend
- Investors allege Chinese streaming giant overstated prospects

IQIYI Inc.'s request to dismiss allegations the Chinese streaming platform deceived investors in related to its 2018 IPO will be paused while the plaintiffs amend their complaint, Judge Diane Gujarati said during oral arguments on Monday.

The federal judge appeared receptive to certain arguments that the class action suit should be tossed, but wouldn't grant or deny dismissal of the suit until after the updated complaint and additional briefs add more data on a stock drop allegedly linked to the claims at issue, she said during proceedings held in US District Court for the Eastern District of New York.

The new filing will also strengthen allegations that the companies made misleading disclosures about deferred revenue, lawyers for plaintiffs and the proposed class said during oral arguments.

"I conclude leave to amend is appropriate here," Gujarati said, noting that she hadn't made a determination on the dismissal motion discussed at oral argument. "Defendants have not demonstrated that amendment at this stage would result in undue prejudice to defendants or that amendment would be futile."

The amended complaint is due by March 11, with subsequent reply briefs due by March 25, a response from plaintiffs due by April 8, and another reply from defendants due April 22. Gujarati will consider the initial and supplemental briefing together, applying them to the amended complaint when considering the current dismissal bid, she said.

IQIYI, which the complaint referred to as the "Netflix of China," is named as a defendant alongside several top executives and parent company Baidu Inc. They argue that the class of investors in IQIYI's American Depositary Shares failed to adequately allege that the pre-initial public offering disclosures contained material misrepresentations, and relied solely on the contents of a 2020 short-seller report published by Wolfpack Research.

The Wolfpack report highlighted allegedly deficient and false disclosures IQIYI made about its revenue, mobile user numbers, and investment in Xin'ai Sports Media Technology Co. The defendants argue the plaintiffs' claims are meritless, based on apples-to-oranges

comparisons between data from public filings and third-party metrics.

“Plaintiffs don’t tell us which entities they’re looking at,” Robert Fumerton, partner at Skadden, Arps, Slate, Meagher & Flom LLP, who represents IQIYI and Baidu, said during the argument. “All we know is that they copied a chart verbatim from Wolfpack, this self-interested short seller.”

IQIYI’s share price fell more than 4% over the two trading days following the report’s April 7, 2020 publication.

The stock’s price fell again by more than 11% on August 14, 2020, the day after IQIYI issued a press release disclosing that the Securities and Exchange Commission had launched an inquiry into the company based upon the allegations in the Wolfpack report, the complaint says. That was the stock’s biggest single-day drop in nearly two years, according to data compiled by Bloomberg.

The IQIYI shareholders seek to recover damages for a class of investors who acquired the company’s American Depositary Shares between March 29, 2018 and Aug. 13, 2020.

Labaton Sucharow LLP and the Rosen Law Firm PA represent the plaintiffs and the proposed class.

Skadden represents iQIYI, Baidu, and the executive defendants. O’Melveny & Myers LLP represents the underwriter defendants.

Lawyers for the plaintiffs and defendants declined to comment.

The case is In re: iQIYI Inc. Sec. Litig. , E.D.N.Y., No. 1:20-cv-01830, 2/26/24 .

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Class action watchdog blasts \$33 mln legal fee bid in controversial Verizon surcharge deal

 [reuters.com/legal/government/column-class-action-watchdog-blasts-33-mln-legal-fee-bid-controversial-verizon-2024-02-26](https://www.reuters.com/legal/government/column-class-action-watchdog-blasts-33-mln-legal-fee-bid-controversial-verizon-2024-02-26)

Alison Frankel

The Verizon logo is seen on the 375 Pearl Street building in Manhattan, New York City, U.S., November 22, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights [↗](#), opens new tab

Feb 26 (Reuters) - A nonprofit that specializes in policing class action settlements has accused plaintiffs' lawyers who struck a controversial \$100 million settlement with Verizon of colluding with the company to garner at least \$8 million in undeserved legal fees.

In a motion [↗](#), opens new tab filed on Friday in federal court in San Francisco, the Hamilton Lincoln Law Institute told U.S. District Judge Edward Chen that when plaintiffs' lawyers reached a nationwide deal with Verizon (VZ.N) [↗](#), opens new tab to resolve claims of deceptive charges on monthly wireless bills, they turned to a New Jersey state court for approval of the settlement — even though the plaintiffs' firms originally filed their claims in Chen's courtroom and obtained crucial rulings and discovery in the San Francisco federal case.

The motive for this alleged forum shopping, according to Hamilton Lincoln, is fees for class counsel from law firms Hattis & Lukacs and DeNittis, Osefchen, Prince.

If plaintiffs' lawyers had asked Chen to approve the Verizon settlement, the nonprofit argued, they would be entitled to no more than 25% of the \$100 million fund, because that's the benchmark for fee awards in the 9th U.S. Circuit Court of Appeals.

But class action fee requests receive far less scrutiny from New Jersey state court judges, according to Hamilton Lincoln. So it's no surprise, the nonprofit said, that class counsel have asked [↗](#), opens new tab Middlesex County Superior Court Judge Ana Viscomi to approve an award of \$33.3 million. That's at least \$8.3 million more, Hamilton Lincoln argued, than the firms could have expected from Chen if they'd settled in federal court.

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Hamilton Lincoln is seeking to intervene in the San Francisco case, arguing that Chen should either use his equitable powers [↗](#), opens new tab to distribute the allegedly undeserved \$8.3 million to class members or allow the nonprofit to file a class action [↗](#), opens new tab against the DeNittis and Hattis firms.

Verizon and class counsel, the group told Chen, had "conspired" to seek settlement approval without confronting federal and 9th Circuit rules for class actions.

“Public policy and the law demand that there be material consequences for attempting to evade Rule 23 review,” Hamilton Lincoln said.

Both Verizon and class counsel rejected the basic premise of Hamilton Lincoln’s new filings, pointing out that the DeNittis and Hattis firms filed parallel class actions in state and federal court in New Jersey, where Verizon is headquartered, soon after they initiated the case before Chen.

The New Jersey cases were just as hard-fought as the California branch of the litigation, they said. In fact, said both Verizon counsel Shon Morgan of Quinn Emanuel Urquhart & Sullivan and class counsel Stephen DeNittis, the \$100 million settlement came as the New Jersey Supreme Court was poised to hear Verizon’s appeal of an intermediate state appellate ruling that its so-called “batch arbitration” process for resolving consumer arbitration demands was unconscionable. (Chen also held that Verizon’s batch arbitration process was fundamentally flawed. The \$100 million settlement aborted Verizon’s closely watched appeal of that ruling to the 9th Circuit.)

“We did not forum shop,” DeNittis told me flatly. “We’ve been litigating in state court in New Jersey since January 2022.”

Verizon counsel Morgan said in an email statement that the company chose to settle in New Jersey because that’s where it was defending three of the four class actions filed by the DeNittis and Hattis firms. The company, which maintains that its “administrative” charges on wireless bills were not deceptive, said it’s now up to Viscomi, the New Jersey judge, to decide how much of the \$100 million should go to class counsel rather than to class members.

Verizon also said it is significant that Hamilton Lincoln is not challenging the settlement itself. The group did raise concerns in its filings to Chen about the scope of class members’ releases, the “illusory” impact of an injunction requiring Verizon to change some wording in its consumer contracts, and the parties’ purported failure to alert state attorneys general about the resolution of the federal-court cases, as required in the Class Action Fairness Act. But Hamilton Lincoln said it was taking no position on the ultimate fairness of the \$100 million deal.

I’ve previously described the settlement as a big setback for critics of mass arbitration, since Verizon, in the face of nearly 25,000 customer demands for arbitration, chose to pay out \$100 million instead of attempting to defend its batch arbitration process, which was designed to reduce the leverage of arbitration fees for plaintiffs’ lawyers, on appeal. But you may recall that deal was roundly criticized by a plaintiffs’ firm that represents thousands of Verizon customers who have demanded arbitration against the company. I told you last month that Murphy Advocates and its lawyers at Goldstein, Russell & Woofert sought to intervene in the New Jersey state court case, arguing (among other things) that

Murphy should be permitted to opt about 10,000 clients out of the class without obtaining their individual signatures.

Murphy's argument, in a nutshell: After Verizon forced customers to give up the right to litigate as a class when it required them to agree to individual arbitration, the company should not be permitted to use a class action to wriggle out of arbitration demands by thousands of those customers.

Class counsel countered Murphy's attempt to disrupt the proposed settlement with a motion to block him from continuing to solicit Verizon wireless customers to bring arbitration claims.

Verizon, meanwhile, told the New Jersey judge overseeing the \$100 million settlement that hundreds of Murphy's purported clients filed claims in the class action, undermining his argument that his clients wanted to pursue individual arbitration.

Viscomi said at a Feb. 16 hearing, according to Verizon counsel Morgan, that she would deny Murphy's motion to intervene. She has not yet issued a written order.

Neither Evan Murphy nor his counsel Kevin Russell of Goldstein, Russell & Woofert responded to my query on the competing New Jersey motions or the Hamilton Lincoln filings in California.

The New Jersey settlement, which received preliminary approval last December, is slated for a final approval hearing in March.

Read more:

Verizon's \$100 million settlement gets thumbs down from lawyers for 10,000 customers

Verizon's \$100 million fee settlement is setback for mass arbitration critics

Verizon appeal will be early test of corporate strategy to combat mass arbitration

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Reporting By Alison Frankel

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Alison Frankel

Zuckerberg's liability in social media addiction suits debated

DJ [dailyjournal.com/articles/377332-zuckerberg-s-liability-in-social-media-addiction-suits-debated](https://www.dailyjournal.com/articles/377332-zuckerberg-s-liability-in-social-media-addiction-suits-debated)

Feb. 26, 2024

The plaintiffs' claims against Zuckerberg are based on personal statements, not his actions as a corporate officer, the plaintiffs' attorneys said.

OAKLAND — The attorney representing Meta Platforms Inc. CEO Mark Zuckerberg told a federal judge on Friday that the billionaire businessman should not be found personally liable for allegedly causing social media addiction among children.

Facebook, Instagram, TikTok, and other major social media sites are defending dozens of lawsuits claiming that these platforms promote compulsive use. U.S. District Judge Yvonne Gonzalez Rogers in Oakland presides over the multidistrict litigation. In Re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, 4:22-md-03047-YGR (N.D. Cal., filed Oct. 6, 2022).

The plaintiffs have asserted their claims against Zuckerberg based on personal statements, not his actions as a corporate officer, "and in that setting, superior knowledge [of the alleged wrongdoing] can't support a duty to disclose," said Covington & Burling LLP partner Timothy C. Hester. "If that were true, any employee or senior officer of any company would have a duty to disclose to the world."

The plaintiffs' firms are led by Lieff Cabraser Heimann & Bernstein LLP. According to the docket, some short-form complaints accused Zuckerberg of fraudulent and negligent misrepresentation mainly because of the CEO's public statements about the safety of Meta's platforms. During a Senate Judiciary Committee hearing in January, Zuckerberg said that mental health was a "complex issue" and that a causal link has not been proven between social media use and minors' mental health problems.

Motley Rice LLC partner Mathew P. Jasinski told Gonzalez Rogers that Zuckerberg should be found liable given his "outsized role" at Meta and his public prominence. Zuckerberg "is a household name, unlike any other CEO. I gather most Americans could not tell you who the CEO of Proctor & Gamble is, or General Motors, or for that matter, TikTok." Jasinski referred to a decision by U.S. District Judge Edward M. Chen in San Francisco in which the court ruled that Fiat Chrysler Automobiles CEO Sergio Marchionne should personally face claims that his company tried to circumvent emissions regulations.

Gonzalez Rogers also asked the parties about potential bellwether cases. The first trial is tentatively set for October 2025.

In response to the defendants presenting their data on the gender of the plaintiffs, Lieff Cabraser partner Lexi J. Hazam said gender should not be a factor in picking a bellwether case as the plaintiffs did not have the same data. “We don’t know how the defendants have derived this information and if they’re making assumptions based on names or looking at their own account data.”

Faegre Drinker Biddle & Reath LLP partner Andrea R. Pierson said the data came from an analysis of names and an investigation of the plaintiffs. She said the defendants did not look at account data but “other means,” not providing additional clarification.

Pierson also presented data that showed that 46% of the plaintiffs were over 18 at the time of filing and 52% are over 18 today. “That’s an important demographic and very different than what the plaintiffs’ counsel suggest this MDL is comprised of,” she said.

Hazam disagreed that the plaintiffs’ filing age or current age was an important factor. “It tells you nothing about liability, causation, or damages, and it says nothing about what is important in this case, age of first use,” the attorney said.

Gonzalez Rogers told the parties that she was strongly against putting young children on the stand. “I had to testify as a 10-year-old, and I’m very sensitive to putting children up there for no reason,” she said. “You have not found a judge who would do that easily.”

#377332

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Justices Appear Divided Over State Laws Regulating Content-Moderation by Social Media Sites

The high court is reviewing the constitutionality of GOP-backed laws in Florida and Texas to stop the perceived censorship of conservative views by the sites.

February 26, 2024 at 05:13 PM

United States Supreme Court



Jimmy Hoover



The U.S. Supreme Court expressed both skepticism and sympathy for new Republican-backed social media laws regulating content moderation at large internet platforms during a marathon session Wednesday, leaving no clear indication of how it will resolve challenges from the internet industry.

The high court is reviewing the constitutionality of recent laws passed by GOP-controlled legislatures in Florida and Texas to stop what they perceive as the censorship of conservative views by social media platforms. The laws purport to accomplish that goal by restricting the manner in which companies such as Facebook, X and YouTube can take down content that violates their policies.

Both laws are currently blocked by court order until the Supreme Court reviews challenges brought by two groups representing the internet industry. The groups say the laws compel private platforms to publish and disseminate speech against their will in violation of the First Amendment.

The justices expressed sympathy with the internet groups’ arguments during back-to-back hearings on Monday.

Justice Brett Kavanaugh suggested that state control of private social media companies would be “Orwellian,” while Justice Elena Kagan suggested that the government telling social media companies which content to host represents a “classic First Amendment violation.”

Added Chief Justice John Roberts Jr: “That’s not the First Amendment.”

At the same time, a sizeable bloc of the court raised a procedural issue they seemed to think undermined at least the challenge to the Florida law, and possibly the Texas one as well, namely that the laws could be constitutionally enforced in some contexts.

Justices from across the ideological spectrum noted that NetChoice and the Computer & Communications Industry Association brought a “facial challenge” to Florida’s S.B. 7072, rather than an “as-applied challenge” to a particular instance of the state enforcing the law against a particular company for certain conduct.

Justices Ketanji Brown Jackson, Amy Coney Barrett and Samuel Alito Jr. raised applications of Florida’s law they suggested could pass constitutional muster, such as prohibiting viewpoint discrimination by non-social media services like Gmail or Uber that could conceivably be subject to the broad language of the statute.

“I can’t figure out why those other applications aren’t in this case.” Jackson said. “I don’t understand why that just doesn’t mean that NetChoice hasn’t met it’s burden and that’s the answer.”

Barrett said she is not ready to rule on the First Amendment implications of “DMs,” or direct messages, or whether it would be unconstitutional to apply the law to the ecommerce site Etsy.

“It’s not obvious to me that they can’t qualify as common carriers,” she said, explaining later that there are “a lot of landmines” in the case.

Alito raised the idea of Gmail suspending the accounts of political pundits Tucker Carlson or Rachel Maddow over their views.

Justice Neil Gorsuch said, “I just think separating the wheat from the chaff here is pretty difficult.”

It’s unclear how similarly concerned the justices are with the procedural aspects of the challenge to the Texas law.

Barrett pointed out that Texas’ law seems to be more narrowly tailored to “classic” social media companies like Facebook, X and YouTube. Still, Jackson pointed out that those “big three” still have functions similar to email services, such as Facebook’s Messenger app.

The New ‘Public Square’

Procedural issues aside, Monday’s back-to-back cases featured an almost philosophical debate about the power of today’s giant online platforms, and whether there is any role for the government to root out censorship or viewpoint discrimination by tech firms.

“Florida’s effort to level the playing field and to fight the perceived bias of Big Tech violates the First Amendment several times over,” said Paul Clement, a former U.S.

solicitor general and veteran Supreme Court lawyer who argued on behalf of the internet industry.

“It interferes with editorial discretion. It compels speech. It discriminates on the basis of content, speaker, and view viewpoint,” Clement added. “And it does all this in the name of promoting free speech but loses sight of the first principle of the First Amendment, which is it only applies to state action.”

If allowed to take effect, the laws would “fundamentally change our business model,” Clement said, half-joking that many platforms would simply be left hosting videos of puppies to avoid potentially massive liability.

Lawyers for Florida and Texas, meanwhile, emphasized the power of large social media platforms during the back-to-back hearings.

Sites like Facebook, X and YouTube now “control the way millions of Americans communicate with each other and with the world,” said Florida Solicitor General Henry Whitaker in his opening statement to the court.

Jackson appeared sympathetic with that view.

“What do you do with the fact that now, today, the Internet is the public square?” she asked. “And I appreciate that these companies are private companies, but if the speech now is occurring in this environment, why wouldn’t the same concerns about censorship apply?”

Alito also pushed back on the internet companies' "Orwellian" description of their editorial decisions as "content moderation."

"Is it anything more than a euphemism for censorship?" he asked Clement.

“So if the government is doing it, then content moderation might be a euphemism for censorship,” Clement answered. “If a private party is doing it, content moderation is a euphemism for editorial discretion. And there’s a fundamental difference between the two.”

Kavanaugh, who was perhaps the companies' most vocal ally on Monday, suggested that allowing the state to control what appears on private websites is actually what is "Orwellian."

"When I think of 'Orwellian,' I think of the state, not the private sector, not private individuals," he said. "Maybe people have different conceptions of 'Orwellian,' but [to me it's] the state taking over media, like in some other countries.... The [Supreme] Court [has] made clear that we don't want to be that country."

U.S. Solicitor General Elizabeth Prelogar also took the lectern Monday to support the internet companies and encouraged the justices to leave issues involving other services that could be covered for another day.

The Florida and Texas cases are among several cases this term involving the First Amendment and social media. Others ask whether public officials can block users from their private accounts, or whether Biden officials exerted illegal pressure on platforms to remove content that they deemed “misinformation.”

The justices are expected to rule in the cases by the end of June.

The social media cases are *Moody v. NetChoice*, No. 22-277, and *NetChoice v. Paxton*, No. 22-555.

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BNSF Railway to pay \$75 mln to resolve biometric privacy class-action

 [reuters.com/legal/litigation/bnsf-railway-pay-75-mln-resolve-biometric-privacy-class-action-2024-02-27](https://www.reuters.com/legal/litigation/bnsf-railway-pay-75-mln-resolve-biometric-privacy-class-action-2024-02-27)

Mike Scarcella

A freight train of BNSF Railway Company is pictured in Ciudad Juarez, Mexico, October 1, 2018. REUTERS/Jose Luis Gonzalez Purchase Licensing Rights , opens new tab

Feb 27 (Reuters) - Freight rail giant BNSF has agreed to pay \$75 million to resolve a class action accusing it of violating an Illinois state law that restricts the collection of biometric information such as fingerprints and eye scans.

Attorneys for a class of 46,500 truck drivers disclosed the proposed deal , opens new tab in a filing on Monday in Chicago federal court, where the claims against BNSF were tested last year in the first-ever trial under the stringent Illinois Biometric Information Privacy Act. BNSF, owned by billionaire Warren Buffett's Berkshire Hathaway (BRKa.N) , opens new tab, operates one of the country's largest freight rail networks.

The lawsuit alleged Fort Worth, Texas-based BNSF unlawfully collected fingerprint scans without consent from thousands of drivers using automated gate systems at the company's four facilities in Illinois.

The drivers' attorneys said the settlement will bring "closure and valuable cash compensation to what has been contentious and costly litigation."

Representatives for BNSF and the plaintiffs did not immediately respond to requests for comment.

The deal requires a judge's approval. BNSF did not admit any liability.

BNSF lost a jury trial over its liability in the case last year, and a U.S. district judge said the company owed \$228 million in damages for violating the Illinois biometric law.

But the court in June overturned the award and said a jury should determine damages.

The Illinois state biometric law poses myriad compliance hurdles for companies, and many have faced litigation. In 2020, Facebook said it would pay \$650 million to resolve class action allegations that it violated the Illinois law.

The plaintiffs' attorneys in the BNSF case said they would seek up to 35%, or \$26.2 million, for legal fees from the settlement fund.

The case is Rogers v. BNSF Railway Company, U.S. District Court, Northern District of Illinois, No. 1:19-cv-03083.

For plaintiffs: Jon Loevy of Loevy & Loevy; and Myles McGuire and David Gerbie of McGuire Law

For BNSF: Bethany Biesenthal and Michael Gray of Jones Day

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Docket [↗](#), opens new tab.

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BNSF must pay truck drivers \$228 mln for privacy violation

Reporting by Mike Scarcella

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BNSF Settles Illinois Biometric Privacy Case for \$75 Million (1)

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BNSF Railway Co. Monday agreed to pay \$75 million to settle a landmark Illinois biometrics privacy case after a jury found the company violated the privacy rights of thousands of employees, a decrease from an initial award \$228 million.

“The Settlement Agreement before the Court, if approved, will resolve the most advanced claims ever prosecuted under the Illinois Biometric Information Privacy Act,” said the proposed agreement, which is unopposed by both sides.

“The terms of the Settlement, which include a Settlement Fund providing significant cash compensation to the Settlement Class Members, meet and exceed the applicable standards of fairness,” it said.

The case is the first BIPA case to go to trial and the first to wrestle with the issue of just how much money a company found to violate the BIPA law should pay. The case was also settled after the Illinois Supreme Court, in *Cothron v. White Castle System Inc.*, ruled BIPA penalties were discretionary. Citing that decision, BNSF had argued the penalty could be as little as zero because the plaintiffs suffered no harm.

Both sides can claim a degree of satisfaction from Monday’s proposed agreement. After a jury trial, US District Court for the Northern District of Illinois Judge Matthew Kennelly initially imposed on BNSF a \$228 million penalty—before ordering a new trial on the damages amount—but Monday’s agreement cut that amount to \$75 million.

Under the deal, class members will receive more money than other settled BIPA class action lawsuits in Kennelly’s district. The agreement estimated each class member will receive approximately \$1,000, more than the plaintiffs in *Davis v. Heartland Employment Services LLC*, who each received \$490.40. In *Figueroa v. Kronos Inc.*, each class member received \$88.55.

Settlement Avoids Second Trial

The Illinois law requires companies to inform individuals in writing if their fingerprints or other biometric indicators will be collected or stored and for how long, obtain in writing permission to collect the identifiers, and publish a retention schedule that includes information on how and when the information will be permanently destroyed.

More than 45,000 truck drivers whose fingerprints the Berkshire Hathaway Inc. subsidiary scanned for identity verification sued, claiming BIPA violations. After a jury sided with the truck drivers and found BNSF liable, Kennelly awarded plaintiffs \$228 million based on the product of the number of class members (45,600) and the statutory fine for a reckless violation (\$5,000).

But Kennelly then ruled a jury, not a judge, should set the fine and ordered a second trial to determine damages. The second trial was scheduled to start Oct. 2, 2023, but both sides reached a preliminary settlement in principle in September. It then took months for both sides to hammer out a final agreement.

Attorneys in the case agreed “to limit their request for attorneys’ fees to no more than 35% of the Settlement Fund, plus their reasonable litigation costs and expenses,” the proposed agreement said.

The deal would be effective after review and approval by Kennelly.

The case is Rogers v. BNSF Railway Co. , N.D. Ill., No. 19-cv-03083, unopposed settlement 2/26/24 .

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Litigation funder Burford fights order denying bid to take over Sysco cases

 [reuters.com/legal/legalindustry/litigation-funder-burford-fights-order-denying-bid-take-over-sysco-cases-2024-02-26](https://www.reuters.com/legal/legalindustry/litigation-funder-burford-fights-order-denying-bid-take-over-sysco-cases-2024-02-26)

Mike Scarcella

A Sysco sign is shown outside one of their distribution centers in Poway, California, U.S. February 6, 2017. REUTERS/Mike Blake Purchase Licensing Rights , opens new tab

Feb 26 (Reuters) - Burford Capital (BURF.L) , opens new tab has asked a judge to reverse a decision that blocked the litigation funding firm from taking over as the plaintiff in lawsuits brought by its financing client Sysco (SYY.N) , opens new tab.

Burford subsidiary Carina Ventures on Friday asked , opens new tab a Minnesota federal judge to overturn a Feb. 9 order requiring food distribution giant Sysco to remain the plaintiff in antitrust lawsuits it filed accusing meat suppliers of overcharges.

Sysco in a filing also challenged , opens new tab the order, calling it “legally flawed.” The filings set up what is expected to be a novel and closely watched dispute over how and when third-party litigation funders, which back clients' cases in exchange for a cut of an eventual settlement or judgment, can steer litigation.

The case has drawn attention from critics of litigation funding like the U.S. Chamber of Commerce that say it encourages meritless lawsuits and drives up costs. Defenders of the practice say it can level the playing field for plaintiffs.

Burford and Sysco declined to comment.

Sysco last year assigned its claims in some antitrust cases to Carina in a settlement with Burford. The settlement resolved Burford's claims that Sysco was preparing to settle antitrust cases for amounts that were too low, in violation of the companies' litigation financing arrangement.

Burford had loaned \$140 million to Sysco since 2019 in exchange for proceeds in the litigation, court papers show.

U.S. Magistrate John Docherty this month refused Sysco's request to allow Burford's Carina to replace Sysco as the plaintiff.

Docherty questioned Burford's motives and authority to steer the food distributor's cases.

Burford's Friday filing said Docherty got it wrong, and it wants a U.S. district judge to take up the dispute.

“There is no sound policy reason to require Carina to control the prosecution of its claims from the sidelines, rather than litigating them directly in its own name,” Burford said.

Sysco said Docherty’s order [opens new tab](#) left the Houston-based company “in the undesired and impracticable position of having to continue to litigate claims that it no longer owns or has any economic stake in.”

The meat processor defendants in the case had urged the court to reject Sysco’s move to substitute Burford as the plaintiff. They said such a move could “meaningfully frustrate any future attempts for settlement discussions.”

Burford and Sysco said any prior settlement plans were irrelevant to the dispute over who should serve as the plaintiff.

The cases are In re: Pork Industry Litigation, U.S. District Court for the District of Minnesota, No. 0:18-cv-01776, and In re: Cattle and Beef Antitrust Litigation, same court, No. 0:22-md-03031.

For Sysco: Christopher Wilson of Baker Botts

For Carina: Derek Ho of Kellogg, Hansen, Todd, Figel & Frederick; Scott Gant of Boies Schiller Flexner; and Christopher Seeger of Seeger Weiss

Read more:

Litigation funder Burford loses bid to take over Sysco antitrust cases

Sysco's plan to cede antitrust claims to Burford entity draws opposition

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Reporting by Mike Scarcella

PFAS settlement disclosures

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Brief

MONTGOMERY, Ala. — The Alabama Supreme Court found that a chemical manufacturer doesn't have to immediately release the terms of its settlement with the city of Gadsden over leaking PFAS materials, also known as "forever chemicals," in the city's water. The city is accepting bids for a new water treatment system project, and sharing the settlement terms would hurt its ability to keep the bidding prices low.

Read the ruling **here**.

Categories / Briefs, Environment, Government, Media

US Military Rejects Liability Over PFAS Damage From Bases (2)

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The US government has expanded its legal rationale for asserting the Department of Defense can't be held liable for alleged nationwide PFAS damage under two statutes.

The Department of Justice filed on Monday three motions detailing its rationale for asking the US District Court for the District of South Carolina to dismiss allegations that the military is liable for alleged damage from certain widely used fire suppressants containing per- and polyfluoroalkyl substances (PFAS).

Two motions address alleged nationwide liability, while the third focuses on damage that New Mexico state and four dairies say Cannon Air Force Base has caused.

If the court eventually rules in the federal government's favor in the case, *In Re Aqueous Film-Forming Foams Products Liability Litigation MDL 2873*, and deems it not liable, plaintiffs are expected to ramp up their pressure on companies that have made the PFAS-enabled aqueous film forming foam (AFFF) and chemicals it contains.

Three Dismissal Motions

The government asserts the discretionary function exemption bars plaintiffs' claims under the Federal Tort Claims Act (FTCA). That statute allows private parties to sue the US government in federal court with certain exceptions, including exempting the government from liability when its actions violated no federal law or regulation. That exemption was put in place by Congress so courts won't second guess the federal government's policy decisions when it's made choices among several optional actions.

This exemption applies to more than two dozen bases and airports in nine states, according to one of 144 attachments the government used to add detail for and support its motion.

The government also is exempt under the Comprehensive Environmental Response, Compensation, and Liability Act, also known as CERCLA or Superfund law, from liabilities alleged through seven lawsuits that are part of the multidistrict litigation, said the DOJ, which represents federal agencies.

The DOD already is taking actions to control its PFAS releases, and the claims seek injunctive relief to alter, supplement, speed up, or otherwise dictate those response actions, the motion said. "They must be dismissed."

The third Cannon-specific motion asks the court to dismiss alleged damage because “Plaintiffs cannot identify any mandatory and specific directive that the Air Force violated in using or handling aqueous film-forming foam (AFFF).” That foam has been an integral element of protecting military personnel and property, the motion says.

High Hurdle

The discretionary function exemption poses a high hurdle for plaintiffs to overcome, law professors said in interviews prior to the government’s motions being filed.

It’s possible for a court to determine that a government’s actions or failure to act caused harm, yet that agency is not liable, said Stephanie Clark, a professor at the Vermont Law and Graduate School who directs its Center for Justice Reform. “It goes against what ordinary people think of as just.”

But not all discretionary decisions are exempted, said Steve Gold, who teaches at the Rutgers Law School. He cited an example where plaintiffs secured a favorable verdict because the court ruled the National Park Service could have put up a warning sign on a dangerous section of a road.

Litigation can, however, spur settlements such as faster federal agency actions or additional congressional support for affected parties, they said.

Plaintiffs’ opposition briefs and the government’s replies will be filed through at least mid-May, according to a schedule the court issued last year. Judge Richard M. Gergel oversees the case.

The case is In Re Aqueous Film-Forming Foams Products Liability Litigation MDL 2873 , D.S.C., No. 18-mn-02873, Motions Filed, 2/26/24 .

(Updated with additional reporting following the subshead “High Hurdle.”)

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Producers of “Forever Chemicals” Knew They Were Toxic, Say UN Experts

 [motherjones.com/politics/2024/02/dupont-chemours-fayetteville-toxic-pfas-un-human-rights](https://www.motherjones.com/politics/2024/02/dupont-chemours-fayetteville-toxic-pfas-un-human-rights/)

February 27, 2024

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Aerial views of Cape Fear River in North Carolina, which is surrounded by forests. Ken Blevins/Star News/AP

This story was originally published by Inside Climate News and is reproduced here as part of the Climate Desk collaboration.

In advance of a United Nations meeting this week where pollution is on the agenda, a UN human rights team has called out a PFAS manufacturing plant in North Carolina as a poster child for irresponsible behavior.

Nine independent UN human rights advisors put blame for widespread contamination in the area from a Chemours plant near Fayetteville, a Dupont spinoff, and said “even as DuPont and Chemours had information about the toxic impacts of PFAS on human health and drinking water, the companies continued to produce and discharge PFAS.”

The experts also rebuked state and federal regulators, alleging lax enforcement and arguing that regulatory bodies, including the Environmental Protection Agency, had been “captured” by the plant’s current and past owners, a term implying the regulators were inappropriately

doing the companies' bidding.

At issue are the PFAS chemicals made at the Fayetteville plant, or per- and polyfluoroalkyl substances. They are known as "forever chemicals" because they last a very long time in the environment. Various PFAS are used to make certain kinds of plastics, and are found in a wide array of consumer products, such as shampoo, dental floss, nail polish, eye makeup, fast food containers and stain-resistant coatings on fabrics.

Created in the 1940s, PFAS are now found in the blood of humans and animals all over the world.

"DuPont and Chemours have produced, marketed and profited from PFAS for decades, contributing to a global toxic contamination problem," the UN panel said in a public statement released Wednesday. "DuPont and Chemours appear to have impermissibly captured the US Environmental Protection Agency and delayed (their) efforts to properly regulate PFAS chemicals."

For their part, the companies pushed back hard.

Chemours said in a written statement that products it makes in North Carolina are contributing to "vital technologies for green hydrogen, electric vehicles and semiconductor manufacturing. We are committed to responsibly manufacturing and producing products in a manner consistent with international principles, including the UN Guiding Principles on Business and Human Rights," a set of standards adopted in 2011 that seek to prevent and address human rights abuses committed in business operations.

In its response, DuPont de Nemours, Inc., shared a letter with Inside Climate News that it wrote late last year to the UN Human Rights Commission in response to the inquiry. That letter detailed a complicated history of Dupont corporate reorganizations, and denied responsibility for the Fayetteville plant.

"To implicate DuPont de Nemours in these issues disregards these varied corporate histories, the movement of product lines and personnel that now exist with entirely different companies," the company wrote.

In a press release, four UN experts on human rights and the environment and five members of the UN Working Group on Business and Human Rights, following an investigation into the Chemours plant last year, called on the UN Environment Assembly meeting next week in Nairobi to "address the serious risks and harms posed by PFAS for communities around the world."

The 10-year-old Environment Assembly will meet from Feb. 26 to March 1. Its resolutions are not legally binding but can be important steps toward global environmental accords and national policymaking. The meeting will be attended by heads of state and more than 5,000 representatives from government, civil society and the private sector, according to the UN.

Emily Donovan, the co-founder of Clean Cape Fear, the North Carolina citizens group that last year petitioned for the human rights investigation, welcomed the UN team's findings and said she hoped the matter would be discussed at the Nairobi meeting.

"It feels like validation," Donovan said in an interview. "For a while, we felt like we were going to be ignored. Having the United Nations elevate PFAS, using North Carolina's story as an example, amplifies a global concern that we really need to talk about."

The UN advisors responded this week to Chemours and DuPont, saying in a press release that "this corporate restructuring has posed further obstacles to achieving accountability and effective remedies. Corporate restructuring should not lead to impunity for human rights abuses."

Last June, Chemours, DuPont and another DuPont spinoff, Corteva, Inc., announced they had reached an agreement in principle to "comprehensively resolve all PFAS-related drinking water claims" in a class action lawsuit involving public water systems that serve the vast majority of the US population. "The companies will collectively establish and contribute a total of \$1.185 billion to a settlement fund," they announced, while denying the allegations.

The UN human rights investigation began following the petition by Clean Cape Fear, with help from the University of California, Berkeley School of Law.

In its request for help, Clean Cape Fear described what it called "an environmental human rights crisis in North Carolina involving pervasive human exposure to toxic chemicals. There, in the lower reaches of the Cape Fear River watershed, more than 500,000 residents have been chronically exposed to dangerous quantities of PFAS" from the Fayetteville plant.

The community action group demanded, among other remedies, company accountability for water treatment and clean-up costs for all impacted residents, and said it was worried about Chemours' plans to expand PFAS production at its Fayetteville Works plant, and to ship PFAS waste from the Netherlands to the Chemours plant.

Last fall, UN human rights investigators released to the public several letters of allegation, including those sent to Chemours and Dupont. In the letter to Chemours, the investigators expressed "our most serious concern regarding the human rights and environmental impacts of Dupont and Chemours' activities in the Fayetteville Works, particularly the discharge of

toxic PFAS into the local environment. We are especially concerned about Dupont and Chemours' apparent disregard for the wellbeing of community members, who have been denied access to clean and safe water for decades."

That investigation has continued, said Marcos Orellana, one of the UN advisors whose title is special rapporteur on toxics and human rights, in a written statement.

This week, the UN advisors expressed "grave concern" about Chemours' pending air permit before North Carolina regulators for the PFAS production expansion, and described the movement of PFAS waste from the Netherlands to North Carolina an "apparent breach of international law."

Chemours said the recycling "is environmentally beneficial and has been repeatedly consented to by the applicable regulatory agencies."

Donovan said the waste shipments "were going on for years, until they were stopped in 2018," after they became public. Recently the shipments resumed, she said, with approval by the EPA. But EPA has since reversed course and stopped them.

For its part, the EPA said in a written statement—without elaborating—that the agency has since withdrawn its permission for the shipments because Chemours had provided inaccurate information.

"EPA is committed to protecting public health and the environment from PFAS pollution," the EPA said. "Chemours ... has a history of PFAS releases, which raises concerns about the company's ability to take measures that fully protect public health and the environment. EPA will continue to work in close partnership with the North Carolina Department of Environmental Quality, as well as maintain a constructive dialogue with the company, to use every available tool to protect people from dangerous PFAS chemicals."

The North Carolina Department of Environmental Quality described itself as "a leader" in addressing PFAS, citing enforcement actions since 2017 that have required Chemours to reduce its releases of the chemicals into the air and water, and onto the land.

Sharon Martin, deputy secretary for public affairs for the agency, cited a 2019 consent order and a 2020 addendum with the company, and other directives for Chemours, to reduce PFAS emissions and discharges, including having the company sample for contamination in more than 10,000 private drinking water wells in eight counties.

"DEQ will continue to hold Chemours accountable for the cleanup of PFAS contamination and for preventing future PFAS impacts to North Carolinians," she said.

Responding to Chemours' statements that PFAS is vital to a clean-energy transformation, the UN advisors declared that decarbonization strategies to address climate change must be integrated with detoxification strategies and guided by human rights.

It wasn't clear this week the extent to which PFAS would be discussed at the forthcoming meeting of the UN Environment Assembly, the world's top decision-making body on matters related to the environment.

The Stockholm Convention on Persistent Organic Pollutants, a 2001 treaty to protect human health and the environment from chemicals that remain intact in the environment for long periods, has taken action to control certain types of PFAS. But there is no comprehensive action yet at the global level addressing the threat of this class of hazardous chemicals, said Orellana, in a written statement.

The US signed the Stockholm Convention in 2001 but never ratified it.

The United Nations Environment Assembly "should take a strong commitment to prevent exposure from hazardous chemicals such as PFAS, highly hazardous pesticides, endocrine disrupting chemicals, and others," Orellana said.

Of 19 draft resolutions on the meeting's agenda, he said one of them sponsored by Switzerland deals with the "sound management of chemicals and waste" and refers to a 2020 "Assessment Report on Issues of Concern: Chemicals and Waste Issues Posing Risks to Human Health and the Environment," which includes references to PFAS.

If the assembly doesn't directly take up PFAS concerns, it might do so indirectly in agenda items dealing with plastics, said Charles Margulis, a spokesman for the International Pollution Elimination Network (IPEN), a group that advocates for strong global protections from toxic chemicals.

Leila Benali, president of the United Nations Environment Assembly, said recently that the agenda would include "effective, inclusive and sustainable multilateral actions to tackle climate change, biodiversity loss and pollution."

With many people in North Carolina likely still drinking unsafe water and others paying higher rates for improved treatment, PFAS continues to be a local and regional concern, Donovan said. But the UN advisors are pointing out the global nature of the problem, and that's important, too, she said.

"This does need to be a global fight," Donovan said. "These are forever chemicals."

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Feb. 27, 2024, 2:00 AM PST

Corporate Counsel Navigate ESG Red State, Blue State Minefield

By MP McQueen

Deep Dive

- General counsel grapple with political polarization on ESG
- Greenwashing, 'woke' investing issues keep them up at night

Bloomberg Law News 2024-02-27T10:09:48167301491-05:00

Corporate Counsel Navigate ESG Red State, Blue State Minefield

By MP McQueen 2024-02-27T05:00:39000-05:00

- General counsel grapple with political polarization on ESG
- Greenwashing, 'woke' investing issues keep them up at night

General counsel are navigating a widening divide between Republican- and Democrat-led states over environmental, social, and governance issues, with growing concerns about ESG “dispute exposure” from regulators, attorneys general, and others.

Red and blue state polarization—over ESG-related restrictions on carbon emissions standards, diversity, equity and inclusion policies, workers’ rights and other matters— is forcing in-house counsel leaders to have hard discussions with executive teams and boards to clarify company values, adding to their already demanding jobs. Now, legal teams are reacting by scrutinizing company programs, public statements, regulatory filings, and even marketing messaging for statements and phrasing that could trigger lawsuits from either side.

Sonia Galindo, executive vice president and general counsel at KBR, Inc., a Houston-based engineering solutions company with more than 34,000 employees globally said “states have taken very different positions” on ESG-related employment issues like diversity and inclusion programs or protections, non-competes and non-solicits. “Quite frankly it has gotten a little heated in that regard,” she said.

Current and recent in-house lawyers said the conflicts between the states mean they have to worry that companies' efforts to stay in compliance with one state's rules on carbon emissions don't prevent them from doing business in another state that imposes restrictions on businesses that "boycott" the oil and gas industry. Additional complexity comes from the need to comply with evolving federal rules, and for multinational companies, EU and UK ESG regulatory agendas. For example, Galindo said her legal team spends a great deal of time "around collecting and managing the information that we have to report" for various agencies at the state, federal, and international level that are not aligned.

Companies are also facing lawsuits from attorneys general, shareholders, and consumers who feel their corporate ESG efforts are misleading, don't go far enough, or go too far.

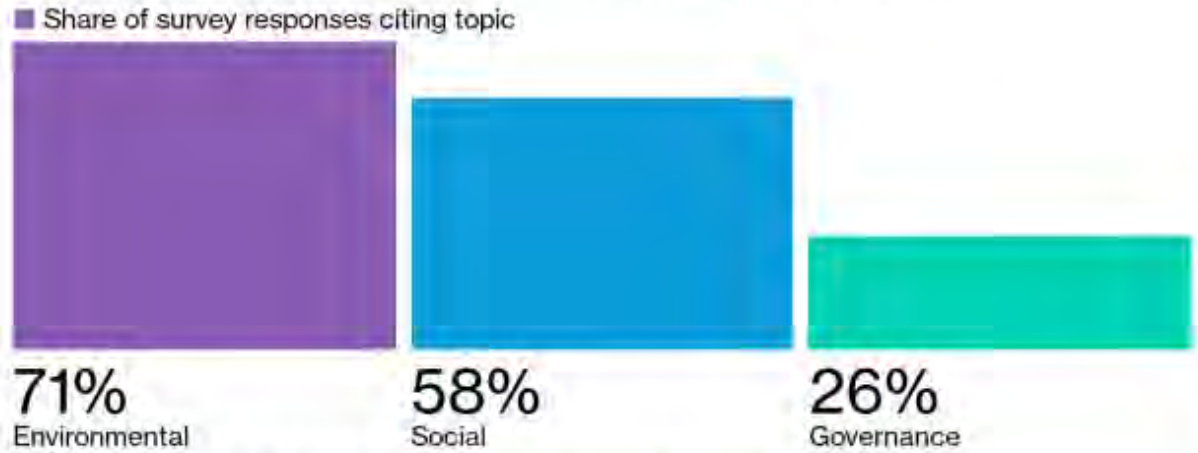
In November 2023, for example, Democratic New York Attorney General Letitia James filed a lawsuit in New York State Supreme Court in Erie County against PepsiCo Inc., alleging the company polluted the Buffalo River with plastic bottles and wrappers, while acknowledging a plastic pollution crisis on its website. James also alleged that the company "misled the public about its efforts" to combat the crisis. The company responded that it is "serious about plastic reduction and effective recycling and has been transparent in our journey to reduce use of plastic and accelerate new packaging innovation."

A month earlier, Republican Texas Attorney General Ken Paxton said the state would probe financial services companies that were members of the UN-convened Net Zero Banking Alliance to see if they violated a Texas law prohibiting companies from contracting with "businesses that boycott energy companies."

Taylor Pullins, a partner at White & Case in Houston, who served as managing counsel, director of sustainability, and assistant corporate secretary at oil-and-gas producer Noble Energy until January 2021, said: "What I didn't see in 2017 through 2020 was formal anti-ESG pushback. In discussions you may have heard opposing views, but you didn't see state attorneys general bringing claims or taking an anti-ESG stance. The more politicized posture that synonymizes anti-ESG with anti-woke is a creature of the last couple of years."

Environment Leads Legal Dispute Concerns

Corporate counsel expect increasingly charged environmental, social, and governance issues to drive litigation exposure over the next year.



Source: Norton Rose Fulbright's 2024 Annual Litigation Trends Survey (litigationtrends.com)

Note: responses based on Sept. 2023 survey of more than 400 general counsel and in-house litigation leaders based in the US and Canada

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Credit: Norton Rose Fulbright and Andrea Vittorio/Bloomberg Law

Outside counsel at major firms with ESG, governance and asset management practices said they are getting more calls from legal departments requesting help with composing and vetting public statements and regulatory filings with respect to ESG, including Securities and Exchange Commission 10-K filings. They said that is not only because of the tug-of-war between red and blue state regulators in the US, but also the US's increasing divergence from the EU's determined ESG rulemaking.

An annual survey by Norton Rose Fulbright of 400 corporate counsel in the US and Canada conducted in September and released on Jan. 17 found that 24% of respondents said their ESG dispute exposure increased in the last year, and 27% expected more exposure in 2024. Pro-ESG regulatory pressures drove the trend (40%) followed by stakeholders with anti-ESG sentiment (37%).

It's Not Easy Being Green

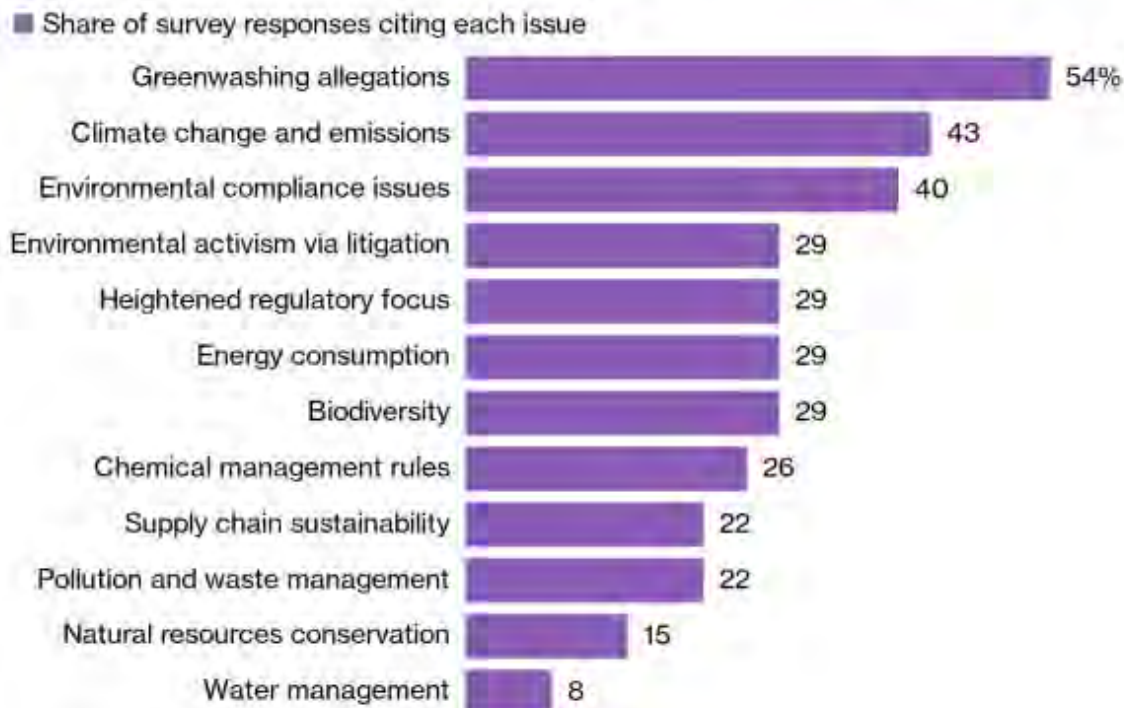
As an in-house counsel at The Clorox Company from 2015 to 2022, Jon Solorzano helped to establish and head the company's ESG strategy and stakeholder engagement. He said that what most often kept him up at night was the risk of "greenwashing."

Solorzano, now counsel at Vinson & Elkins and co-head of the firm's ESG task force, said the fear stemmed from the idea that "companies have figured out that being green sells with their consumers or employees, and companies have not historically had a robust process for ensuring all their claims are substantiated, or have been properly reviewed by counsel." He cited a situation where, for instance, a company's use of carbon credits to achieve net-zero emissions elicited a greenwashing allegation by an environmental advocacy group.

"A well-meaning but injudicious social-media manager, for example, could have made a statement in a post, and now you have to clean up the claim because the company does not have substantiation to support that. Those are issues GCs need to be mindful of," said Solorzano, former senior director of legal and corporate development at Clorox.

Environmental Litigation Exposure

Corporate counsel expect greenwashing allegations will be a top source of environmental disputes over the next year.



Source: Norton Rose Fulbright's 2024 Annual Litigation Trends Survey (litigationtrends.com)

Note: responses based on Sept. 2023 survey of more than 400 general counsel and in-house litigation leaders based in the US and Canada

Bloomberg Law

Credit: Norton Rose Fulbright and Andrea Vittorio/Bloomberg Law

Much of a GC's ESG-related work in the current fraught political environment involves making sure that corporate statements are supported by data and tied to the company's financial well-being, the attorneys said.

David Lopez, a corporate, securities, and ESG partner at Cleary Gottlieb, said general counsel "should be sure that the company's corporate policies can be supported clearly by an economic and business rationale." He added, "that is the best way to balance the needs of a company to support all the needs of stakeholders while minimizing the risk from unwanted political and cultural commentary that would be distracting to the business."

The investor relations department can help the executive team and the board by identifying trends in investor inquiries. Some companies also involve their outside counsel in these discussions and trainings, Pullins and Solorzano said.

KBR's Galindo said: "When I think about our communication, marketing, legal and HR we all work very closely on any public statements, our sustainability report, our other reports, so we are intentional and thoughtful about what we are saying and how we are saying it."

She said her company's stakeholders, including its 10 largest shareholders, are aligned in their values and so thus far the main challenges for the legal department come from just staying up-to-date and in compliance with so many different regulatory authorities at the federal, state, and local levels and internationally.

"We are a values-based organization and so our customers, our employees, and our shareholders are very aligned to those programs. And also, we are very intentional about our programs. Any kind of program we roll out we really think about how to make sure we are doing it in the most fair and highest integrity way," she said.

Galindo said the legal department also analyzes the applicability of new laws and court rulings to company operations. For instance, after the US Supreme Court in June 2023 struck down race-based affirmative action in higher education, 13 attorneys general sent a letter to Fortune 100 companies threatening legal action over race-based employment actions. The department had to determine whether the ruling was applicable to the publicly traded company.

Corporate counsel for asset managers have a different set of ESG concerns from other types of businesses.

"Asset managers are very focused on ensuring that messaging about investment philosophies and ESG won't inadvertently get them prohibited from, or cause difficulties, doing business in certain states," said Joshua A. Lichtenstein, a Ropes & Gray partner in New York, who heads the firm's ERISA fiduciary practice.

Recently some companies have decided to downplay ESG in corporate and shareholder communications, which some critics have dubbed "greenhushing."

A recent Bloomberg Law analysis found that Standard & Poor's 500 companies have reduced mentions of ESG in earnings calls 30% since 2021. Similarly, some companies have scrubbed references to DEI in regulatory filings and websites, and altered diversity policies and programs under pressure from conservative activists, and Republican state attorneys general after the US Supreme Court's ruling on affirmative action.

Daniel F.C. Crowley, a partner in the Washington, D.C. office of K&L Gates, where he leads the firm's global financial services public policy practice, said that one corporate crisis that calls for highly specialized counsel is when a company official is called to give public testimony in a legislative hearing, especially Congress.

"Hiring a courtroom litigator to represent you before Congress is like asking your psychiatrist to perform open-heart surgery," said Crowley, who formerly led government relations at the Investment Company Institute.

"The problem is that lawyers who don't regularly work with Capitol Hill don't know what they do not know, including the fact that they are navigating a political minefield," he added.

ESG Support, Then Backlash

In-house counsel leaders said corporate support for ESG goals was relatively uncontroversial for two decades. Shareholder initiatives supporting green policies and sustainable investing funds increased.

But in 2020, after the George Floyd protests, many companies made public attestations in ads and social media supportive of social and environmental justice, often under pressure from their employees and customers.

Then came the backlash, especially in the United States.

For instance, in May 2023, 23 Republican-led states' attorneys general sent a letter to the Net Zero Insurance Alliance seeking information about insurers' membership in the group, leading 12 of 28 to drop out.

Additionally, anti-ESG shareholder proposals grew to 79 from 30 from 2021 to 2023, per a 2023 study by the Sustainable Investments Institute, and most were about DEI rather than the environment.

That same month, in Florida, Gov. Ron DeSantis signed legislation "prohibiting the use of ESG factors by state and local governments when issuing bonds" and "prohibiting state and local entities from considering or giving preference to ESG as part of the procurement and contracting process," among other provisions.

[For a state-by-state map of ESG laws and regulations in the US and other up-to-date information, click [here](#).]

Despite the ESG pushback, Solorzano said sometimes companies must embrace controversy.

"It is incumbent on businesses to understand their stakeholders and do things with some commitment," Solorzano said. He said businesses need to "be selective and be strategic" when taking a stand.

The most common allegation by shareholder groups and red-state politicians against corporate ESG policies is that ESG factors are non-pecuniary. But, Solorzano argues, "the whole argument is a bit of a red herring."

"These are pecuniary issues if you broaden what is a reasonable investment timeline. If they hold an asset for 10, 20, 30 years it is in my pecuniary interest to make sure that climate change, DEI are considered," Solorzano said.

Solorzano said by "seeking not to make anyone angry," a company could cede market share to a competitor. "It is not necessarily wise for a company to shut up and stay out of it," he said.

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SoCal Edison to pay \$80 million in settlement with Forest Service over 2017 Thomas Fire

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Edvard Pettersson

A hillside glows with embers as the Thomas fire burns through Los Padres National Forest near Ojai, Calif., on Dec. 8, 2017. (Noah Berger/The Associated Press)

LOS ANGELES (CN) — Southern California Edison has agreed to pay \$80 million to settle a civil lawsuit by the U.S. Forest Service that blamed the utility's equipment for the massive Thomas Fire that tore through Southern California in late 2017.

The Thomas Fire burned about 282,000 acres in Santa Barbara County and Ventura County before it was contained in January of 2018. At the time, it was the largest wildfire on record in modern California history, but it soon was surpassed by even more destructive wildfires in Northern California later that year.

The Justice Department sued Edison on behalf of the Forest Service for negligence, among other claims, to recover the costs of fighting the fire as well for the extensive damage to the Los Padres National Forest. Edison isn't admitting liability as part of the settlement, provided Monday by the U.S. attorney's office in Los Angeles.

"The settlement with the Department of Justice resolving the Thomas Fire litigation is a reasonable resolution," Southern California Edison spokeswoman Diane Castro said. "We continue to protect our communities from the risk of wildfire with grid hardening, situational awareness and enhanced operational practices."

The settlement is the largest ever by the office to recover the costs of fighting wildfires.

"This record settlement provides significant compensation to taxpayers for the extensive costs of fighting the Thomas Fire and for the widespread damage to public lands," First Assistant U.S. Attorney Joseph McNally said. "The United States Attorney's Office will continue to aggressively pursue compensation from any entity that causes harm to our forests and other precious national resources."

The Thomas Fire was reportedly caused by two separate incidents. In Anlauf Canyon, the U.S. claims that high winds caused two Edison power lines to make contact with each other and to ignite dry vegetation below the conductors. Separately, on nearby Koenigstein Road, the U.S. claims an Edison pole transformer failed and caused an energized power line to fall to the ground, igniting adjacent dry vegetation.

The fire is one of several unprecedentedly destructive wildfires that have plagued California in the recent past as the state contended with prolonged droughts that left its woods and forests bone dry. In the wake of the Thomas Fire, as the scorched hillsides above Santa Barbara were without vegetation to hold back the soil, a rain storm caused large mudslides that engulfed the affluent town of Montecito.

As of Sept. 30, 2023, Edison had paid \$8.4 billion under executed settlements related to the wildfires and mudslides in 2017 and 2018, according to its latest quarterly report.

In 2021, Edison reached a settlement with the California Public Utilities Commission under which the utility would be on the hook for \$550 million in penalties, disallowed cost recoveries and safety improvements for violations that contributed to devastating wildfires in Southern California in 2017 and 2018.

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Southern California Edison to pay \$80 mln to US over 2017 wildfire

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Jonathan Stempel

An airplane weather-vain propeller spins from the heavy winds from the Thomas Fire in the hills outside Montecito California, U.S., December 16, 2017. REUTERS/Gene Blevins/File Photo Purchase Licensing Rights , opens new tab

Feb 26 (Reuters) - Southern California Edison agreed to pay the United States \$80 million to cover costs and damages incurred by the U.S. Forest Service from the 2017 Thomas wildfire in California's Los Padres National Forest, the Department of Justice said on Monday.

The accord with the unit of Edison International (EIX.N) , opens new tab is the federal government's largest wildfire settlement in the Central District of California, which includes Los Angeles, and resolves a lawsuit that began in 2020.

Southern California Edison did not admit wrongdoing in agreeing to settle.

The Thomas fire began on the windy night of Dec. 4, 2017, and burned more than 280,000 acres (113,312 hectares), or about 440 square miles, including more than 150,000 acres of National Forest System land in Santa Barbara and Ventura counties.

More than 1,300 structures were damaged or destroyed, and two people died.

Authorities said the fire began when dry vegetation ignited in two locations, as molten metal fell from two Southern California Edison power lines that contacted each other, while a failed transformer caused a different power line to topple.

In its annual report filed on Feb. 22, Rosemead, California-based Edison International said it believed the fire started at least 12 minutes prior to any issue involving its equipment.

Gabriela Ornelas, a Southern California Edison spokeswoman, called the settlement "a reasonable resolution. We continue to protect our communities from the risk of wildfire with grid hardening, situational awareness and enhanced operational practices."

The utility declined to address whether it had set aside money for the settlement.

Southern California Edison has faced a slew of lawsuits and investigations into its role in wildfires and mudslides in 2017 and 2018, leading to \$5.1 billion of after-tax charges through 2023.

Some cases relating to the Thomas fire are still pending.

In September, the federal government sued Southern California Edison over the September 2020 Bobcat wildfire, which burned close to 180 square miles and was one of Los Angeles County's largest wildfires.

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Reporting by Jonathan Stempel in New York; Editing by Leslie Adler, Marguerita Choy and Deepa Babington

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ANALYSIS

California Expands Protections for Whistleblowers

Despite the new test spelled out in the law, courts continued to apply the three-part *McDonnell Douglas* burden-shifting test to whistleblower retaliation claims. They continued to do this until 2022, when the California Supreme Court finally laid down the law of the land.

February 26, 2024 at 01:05 PM

Employment Law

By JJ Johnston | February 26, 2024 at 01:05 PM

f in t p e c

California cares about its workplace whistleblowers. Exactly four decades ago, state legislators enacted a law designed to protect employees who blew the whistle on their employers. Labor Code Section 1102.5 says that employers cannot prevent their employees from disclosing information to authorities when they believe that a rule or regulation is being or has been violated.

The law explicitly bars companies from retaliating against any employee whom they believe has made or is planning to make such a disclosure. But when it was drafted, the law failed to lay out a process that would enable whistleblowers to prove that they had been subject to retaliation by employers as a direct result of their actual or suspected whistleblowing activity. This was a big omission.

‘McDonnell Douglas’ Test

Courts, left to figure out the process, generally opted to apply the *McDonnell Douglas* burden-shifting test. The three-part test was first established by the U.S. Supreme Court in 1973 for proving certain types of workplace discrimination. (See *McDonnell Douglas v. Green* (411 U.S. 792 (1973).) It essentially shifted to the employee the burden of proving retaliation. First, the worker had to make a prima facie showing of discrimination; then the employer was required to offer a legitimate reason for its adverse action against the worker; finally, the burden shifted back to the employee to prove that the employer’s stated reason was merely a pretext for intentional discrimination.

Although *McDonnell Douglas* did not actually address whistleblower retaliation, the burden-shifting test seemed to most courts the best option for establishing proof of such retaliation. For almost two decades, it served as the default standard for establishing retaliatory intent.

Section 1102.6

California legislators finally got their act together in 2003. They attempted to address the confusion surrounding proof of whistleblower retaliation by adopting Labor Code Section 1102.6. The new law was intended to provide an actual framework for proving retaliation under Section 1102.5:

“In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.”

This was a wholly different standard than had been established under *McDonnell Douglas*. Instead of putting the burden on the employee to prove nefarious intent, the onus now would remain on the employer to demonstrate that its actions were independent of the whistleblowing activity. Surprisingly, despite the new test spelled out in the law, courts continued to apply the three-part *McDonnell Douglas* burden-shifting test to whistleblower retaliation claims. They continued to do this until 2022, when the California Supreme Court finally laid down the law of the land.

‘Lawson’ Decision

The U.S. Court of Appeals for the Ninth Circuit certified the issue to the California Supreme Court in 2020 with a note that “17 years after the passage of Section 1102.6, neither federal nor state courts can agree on the correct evidentiary standard for Section 1102.5 retaliation claims.” See *Lawson v. PPG Architectural Finishes*, 982 F.3d 752 (9th Cir. 2020).

And in what was viewed as a major victory for employees, the California Supreme Court stated in January 2022 that the *McDonnell-Douglas* test did not apply to Section 1102.5 cases. In *Lawson v. PPG Architectural Finishes*, the state’s highest court ruled that the proper—and only— framework for courts to analyze whistleblower retaliation claims was Section 1102.6. (*Lawson v. PPG Architectural Finishes*, No. S266001, 2022 WL 244731, at *1 (Cal. Jan. 27, 2022).)

Courts, the justices wrote, “should apply the framework prescribed by statute in Labor Code Section 1102.6.” The *McDonnell Douglas* test, they said, was “well-worn, but meaningfully different” than the statute. Under the law, “employees need not satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation.”

SB 497

But this was not the end of the good news for employee whistleblowers. In January, SB 497 took effect. The new law makes it even easier for employees to prove whistleblower retaliation. Far from requiring workers to prove that a company’s reasons for terminating them were merely pretextual, the law puts the ball solidly in the employees’ court. It creates a rebuttable presumption of retaliation if any employee is disciplined or discharged within 90 days of engaging in any alleged protected activity, including whistleblowing.

Employees can meet their initial burden by merely alleging that they engaged in conduct proscribed by Section 1102.5 and were then terminated within 90 days of that conduct. The onus is now squarely on the employer to rebut the legal presumption by presenting clear and convincing evidence, as required by Section 1102.6.

In addition, SB 497 amended the civil penalty provision in 1102.5 to make it more favorable to affected employees. Prior to SB 497, the penalty of up to \$10,000 could only be assessed against an employer that was “a corporation or limited liability company.” And because it was a civil penalty, it went to the labor commissioner rather than to the employee. Under SB 497, that provision has been revised to apply the penalty to any employer. The award now goes directly to the employee against whom the retaliatory action was taken. When assessing the amount of the penalty, the labor commissioner is now obligated to consider the nature and seriousness of the violation, using evidence obtained during the course of the investigation.

Conclusion

The tide has clearly turned for whistleblowers in California. Where once they faced an uphill battle trying to prove that their employers had no legitimate reason for taking adverse action against them, workers are now presumptively in the driver’s seat when alleging retaliation. The burden of proof has shifted to employers, putting pressure on them to carefully consider any negative employment actions and to be mindful of the timing of all such actions.

JJ Johnston *is the founder of Johnston Mediation. He has been mediating employment and class action matters for more than two decades and has more than three decades’ experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.*

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Imprisoned Ex-Ohio House Speaker Cries Violation Over Axed Juror

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- Former state official says judge improperly removed juror
- Ex-speaker was convicted of taking \$60 million in bribes

By Eric Heisig

(Bloomberg Law) --

The former Ohio House speaker, serving 20 years for the largest public corruption case in state history, has told a federal appeals court that he deserves a new trial because the judge removed a juror without attorney input.

Larry Householder's (R) wide-ranging brief filed late Monday led with an attack on federal prosecutors' presentation of their case at trial, and said Senior US District Judge Timothy S. Black of Cincinnati allowed the prosecutors to rely on "undisclosed campaign contributions permitted by federal law and protected by the First Amendment."

However, the biggest blunder cited in the brief was when Black allegedly violated Householder's Sixth Amendment right to a speedy trial with an impartial jury by unilaterally deciding to remove a juror who refused to wear a mask. The move to remove the juror from the six-week trial that began in Jan. 2023 came after another juror tested positive for Covid-19 and delayed the trial for a week, according to the brief. The removed juror also said he couldn't serve past a certain date.

Householder's attorneys objected at the time, saying there may have been "less extreme options" available. The sequence of these events deprived Householder of having attorneys present at critical stages of a criminal proceeding, the former speaker argued.

"Although the district court may have dismissed the juror anyway" regardless of whether Householder's lawyers weighed in, "it takes the risk of making erroneous decisions that will unfairly disadvantage the defendant," Householder's brief said.

Householder, 64, has been in prison since June 29, 2023, the day Black imposed the maximum sentence allowed by a law for a racketeering conspiracy conviction.

Federal prosecutors from the Southern District of Ohio argued at trial that Householder led an operation that involved accepting more than \$60 million in bribes from the Akron-based utility FirstEnergy Corp. over three years, which helped bankroll his political operation.

In exchange, the then-speaker worked to ram through a \$1.3 billion legislative package that bailed out two nuclear power plants that FirstEnergy owned at the time.

In addition to the claims about the removed juror, Householder argued that an appearance of bias on the judge's part and claims that the judge improperly instructed the jury on the definition of "bribery" also support his request for a new trial or an acquittal judgment.

"The key defining element of bribery is an agreement," the brief argued. "But the district court's instructions did not adequately convey that requirement."

Five people were charged in July 2020 in the case involving Householder. The jury that convicted Householder also found lobbyist and ex-Ohio Republican Party Chairman Matthew Borges guilty for his role, and Black sentenced him to five years in federal prison. He has also appealed.

Former aide Jeff Longstreth and lobbyist Juan Cespedes pleaded guilty and testified. Their sentencing dates haven't been set. A fifth defendant, lobbyist Neil Clark, died by suicide before trial.

The investigation that led to the initial arrests has since led to additional probes and defendants, including former FirstEnergy executives Charles Jones and Michael Dowling and former Ohio utilities regulator Samuel Randazzo.

FirstEnergy also admitted to violations, agreeing to pay a \$230 million penalty and cooperate.

Householder is represented by Marein & Bradley and McCarthy Lebit Crystal Liffman Co.

The case is *US v. Householder*, 6th Cir., No. 23-3565, brief filed 2/26/24.

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Ex-House Speaker Larry Householder appeals conviction in Ohio's \$60 million bribery scandal

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Sarah Szilagyi

February 27, 2024

COLUMBUS, Ohio (WCMH) — The former Ohio House leader sentenced to 20 years in prison for overseeing the largest bribery scandal in state history has asked a federal appeals court to toss his conviction.

Attorneys for ex-Ohio House Speaker Larry Householder argued in an appeal filed Monday that a series of errors, ranging from jury instructions to inadmissible testimony, unduly prejudiced the jury against Householder and violated his rights as a criminal defendant. Householder also claimed in his appeal that the judge presiding over the case should have recused himself because Householder raised campaign funds for the judge's electoral opponent more than two decades ago.

The former elected official, a Republican from Perry County, was convicted nearly a year ago of conspiring with executives at Akron-based FirstEnergy to pass a \$1.3 billion, ratepayer-funded energy plant bailout bill in exchange for \$60 million in bribes. He and co-conspirator Matthew Borges, former chairman of the Republican party, were sentenced last summer after a seven-week trial.

Westerville superintendent resigns after five months on the job

Over more than 100 pages, Householder urged the U.S. Sixth Circuit Court of Appeals to vacate his conviction and order a new trial. His attorneys wrote that the prosecution used Householder as a "scapegoat for what it viewed to be a corrupt piece of legislation."

Householder's appeal makes six main claims:

- The judge improperly dismissed a juror for refusing to take a COVID-19 test or wear a mask without consulting Householder's attorneys
- The jury was not given proper instructions on findings necessary to prove a racketeering case
- The evidence did not show that Householder engaged in a quid-pro-quo bribery scheme
- Testimony from the government's cooperating witnesses about their own guilty pleas in the bribery scheme should not have been allowed in court
- The maximum sentence was unreasonable and amounted to the judge's "abuse of discretion"
- The judge should have recused himself for the appearance of impropriety

The \$60 million in bribes was mostly funneled through a campaign funding group called Generation Now, a 501(c)(4) organization not required to disclose its donors. The appeal contends that the evidence the state provided did not show bribery, but rather showcased how Householder “participated lawfully in contributions to dark-money groups.”

More than a dozen bills hope to relieve Ohio property taxes

“The government relied on speculations, inferences, and generalizations to win a conviction. But those are insufficient to sustain one,” the appeal reads.

Householder’s attorneys further argue the judge, Timothy Black, gave Householder an overly harsh sentence of 20 years in prison. He also should have recused himself, they contend, because Householder raised money for Black’s opponent for the Ohio Supreme Court in 2000 and 2002.

Borges has appealed his own five-year conviction in the case on similar procedural grounds. Householder’s appeal comes about two weeks after two former FirstEnergy executives and the former chairman of the Public Utilities Commission of Ohio were indicted on state corruption charges related to the bribery scheme. Meanwhile, most provisions of the law whose passage the scheme secured, House Bill 6, remain in effect, costing ratepayers more than \$100,000 each day.

Householder’s attorneys have demanded oral arguments. The prosecution will have the opportunity to respond to the appeal.

Read the full appeal below.

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Householder appeal contends verdict punishes constitutionally protected politics

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Jim Provance

The Blade

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Feb 27, 2024

11:49 AM

COLUMBUS — Former Ohio House Speaker Larry Householder accused federal prosecutors of making him the “scapegoat” for constitutionally protected campaign and legislative activity that it did not like as he laid out his case for overturning his racketeering conspiracy conviction.

“Unlike most other bribery prosecutions, Householder did not receive an envelope of cash or extravagant gifts or trips,” reads his appeal filed late Monday. “Rather, the government presented evidence that Householder helped raise money into a [non-profit] organization, Generation Now.

“Under federal law and under the First Amendment, corporations can contribute unlimited monies to those organizations, which are not required to disclose publicly the identity of the contributors,” it reads.

Mr. Householder, 64, is serving a 20-year sentence for racketeering conspiracy in a low-security federal prison in Lisbon, Columbiana County, about 130 miles from Glenford, Perry County, where he built the political career that twice made him one of the most powerful men in Ohio politics.



Jim Provance

'Check writers' in bribery scandal now wearing ankle monitors

In a 27-day trial, federal prosecutors contended it was hunger for that political power that led to the Republican's hatching of what became a \$61 million bribery scheme with Akron utility giant FirstEnergy Corp. secretly funneling the bulk of the cash.

Householder was convicted of leading the convoluted dark-money “enterprise” that led to his return as speaker and then passage of a \$1.3 billion customer-financed bailout of two struggling nuclear power plants owned at the time by a FirstEnergy subsidiary. The dark money continued to flow through a pipeline of non-profit corporations to kill a petition effort that could have led to the new law's repeal.

Householder attorneys Steven L. Bradley and Nicholas R. Oleski are asking the Cincinnati-based U.S. 6th Circuit Court of Appeals to grant a new trial before a different judge.

The appeal contends that the federal government charged Householder to make a point about the use of “dark money” in politics. The prosecution chose not to simply charge him with outright bribery or money laundering but rather under “an unwieldy single-count racketeering conspiracy” that incorporated elements of such crimes, the appeal claims.

It accuses the federal government of charging Householder, the bribed, but not the alleged bribers, executives of the utility. Fired executives Charles (Chuck) Jones and Michael Dowling were recently charged in state court with corruption, bribery, and other charges, but they have not been charged in federal court. Nor did they testify although the federal jury heard their voices on recordings and read their words in emails and texts.

The appeal contends the prosecution tried Householder as “a scapegoat for what it viewed to be a corrupt piece of legislation supported by undisclosed campaign contributions that were permitted by federal law.”

“Said differently, the government wanted and wants to deter corporations and other donors from exercising their constitutional right to contribute monies to [non-profit] organizations,” the appeal reads. “That, however, is not the function of federal prosecutors or criminal juries.”

At trial, however, the prosecution contended that some of the cash was diverted to his personal use, particularly repairs to a hurricane-damaged home in Florida that he then sold.

Among the appeal’s arguments:

- U.S. District Court Judge Timothy Black, a former two-time Democratic candidate for Ohio Supreme Court, was biased against Householder and should have recused himself from the case.

“When Judge Black ran for the Supreme Court, Householder was the then-Speaker of the Ohio House of Representatives, and he opposed Judge Black’s election,” the appeal reads. “But more than that: in 2002, Householder helped raise money for an advocacy group called Informed Citizens of Ohio that backed Republican Supreme Court candidates and did not disclose its donors.”

- The judge dismissed, without defense input, a juror after a panel of 12 plus alternates had already been seated. That juror had refused to wear a mask in court as a precaution against coronavirus, which led to some delays in last year’s trial.

- The judge should not have allowed the jury to hear inflammatory recordings in which Householder used expletives in talking about going after donors to his chief competitor for speaker.

“The government invited the jury to convict based on improper considerations — that Householder was a vindictive ‘bully with a lust for power’ ... That is of course exactly why these recordings should have been excluded,” the appeal reads.

- The judge allowed the jury to learn that two fellow defendants had already pleaded guilty as part of the same criminal conspiracy that the defense claimed didn’t exist.

- Imposition of the maximum sentence of 20 years was unreasonable.

- The prosecution failed to prove that there was a clear quid pro quo agreement to make the case for bribery.

“... the government needs the clearest possible proof to prove bribery — that is, the agreement must be unambiguous and cannot be proven by implication,” the appeal reads. “After all, ordinary political conduct is not enough to prove public corruption, and it is not a crime when elected officials take actions that are supported by or benefit those who have contributed to their campaigns and advocated for those actions.”

The prosecution will respond to Householder’s claims in one month.

Three others have been convicted of federal racketeering for their roles.

Matt Borges, former Ohio Republican Party chairman and lobbyist, was tried and convicted with Householder. But he played a smaller role in the scheme and is serving a five-year sentence instead of the maximum of 20 at a federal prison in Milan, Mich. He is also appealing his conviction.

Political strategist and Householder ally Jeff Longstreth and former Columbus lobbyist Juan Cespedes are awaiting sentencing after pleading guilty and testifying against Householder and Borges.

A Summit County grand jury recently brought the first state indictments against former FirstEnergy executives Jones and Dowling for allegedly using corporate funds to finance most of the deal.

Also charged was Samuel Randazzo, whom Mr. DeWine had appointed to chair the powerful Public Utilities Commission of Ohio regulating FirstEnergy. The corporation paid a \$230 million fine, admitting that, in addition to fueling most of the \$61 million bribery pipeline, paid a \$4.3 million bribe to curry favorable action from Mr. Randazzo.

All three of the state defendants have pleaded not guilty.

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Matt Levine's Money Stuff: Honey, I Insider-Traded Your Merger

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Honey, I Insider-Traded Your Merger

By Matt Levine 2024-02-26T14:13:33117-05:00

Insider trading

Look, if your spouse works as a mergers and acquisitions manager at a big public company, and her company acquires another public company, and you “methodically sold all [your] positions in both [your] individual brokerage account and [your] Roth IRA (totaling approximately \$2.16 million)” to buy shares of the target stock before the deal was announced, and then you sell the target stock when the deal is announced and make a profit of \$1.76 million: That is insider trading and you will get arrested. I don’t need to know any more facts. Your spouse worked on the deal, you sold everything you owned to buy the target stock, the regulators can very easily put those two facts together, and when they ask you what happened and you are like “crazy coincidence right?” they will absolutely not believe you, nor should they. Bad, bad, bad look.

No, the only question is: Will your *spouse* get arrested? Because there are two possibilities here:

- 1. Your spouse used the inside information from her job to tell you about the coming deal, knowing that you would trade on it. She “tipped” you with the inside information, expecting (as your spouse) to share in your profits. So she, like you, is guilty of insider trading.
- 2. Or your spouse *didn’t* tip you. Maybe she kept the information secret from you, but you snuck onto her computer at night and read her email and figured it out. Or, much more likely, she mentioned to you what she was working on, but she expected (as your spouse) that you would keep her confidences and not go out and trade on the information like a moron. In that case, *you* are guilty of insider trading — you misappropriated

information that you got from her in breach of a “duty of trust or confidence” — but *she* is just an innocent victim.

In general this seems like a hard question for investigators to resolve. (If you *have* gone and insider traded on your spouse's information, the *least* you can do is say that it was all your idea and she knew nothing about it, whether or not that is true.) Sometimes it's easier though. Here's a pretty grim US Securities and Exchange Commission case:

The Securities and Exchange Commission [Thursday] charged Tyler Loudon of Houston, Texas, with insider trading ahead of a February 2023 announcement that London-based oil and gas company BP p.l.c. agreed to acquire TravelCenters of America Inc., a full-service truck stop and travel center company headquartered in Ohio. Loudon allegedly made \$1.76 million in illegal profits from his trading.

According to the SEC's complaint, Loudon allegedly misappropriated material, nonpublic information about the proposed acquisition from his wife, a BP mergers and acquisitions manager who worked on the planned deal. The SEC alleges that Loudon overheard several of his wife's work-related conversations about the merger while she was working remotely.

Loudon also pleaded guilty to criminal charges. The SEC complaint describes how Loudon found out about the deal, which is standard post-Covid it's-easy-to-insider-trade-when-you-work-from-home stuff:

Loudon and his wife generally worked in home offices within 20 feet of each other. As a result, they frequently overheard and witnessed each other's work-related conversations and video conferences. In late December 2022, Loudon and his wife traveled to Rome, staying in a small Airbnb where Loudon's wife regularly worked on the TA acquisition and discussed the deal while Loudon was seated nearby.

But also: “Loudon's wife acknowledged discussing aspects of the acquisition with Loudon during the normal course of marital communications.” This is not a case where she rigorously kept the deal secret from him, and he broke into her laptop: It's a case where a husband and wife talked about their days, and she trusted that he would not go and insider trade on the deal. Because why would he do that? That would be crazy!

Anyway, after the deal, regulators *of course* checked into whether anyone who worked on the deal, or their contacts, traded in the stock. Loudon's wife mentioned this to him, and he realized what he had done:

One week later, on April 3, 2023, Loudon confessed to his wife that he had traded in TA prior to the acquisition announcement. Loudon did not tell her the number of shares he purchased or the profits he realized from their sale. Loudon told his wife that he had bought the TA shares because he wanted to make enough money so that she did not have to work long hours anymore.

“I was doing it for you!” Bad!

Stunned by this revelation, Loudon's wife reported the trading to her supervisor at BP. In turn, BP placed her on administrative leave. BP reviewed Loudon's wife's emails and texts, finding no evidence that she knowingly leaked the acquisition to Loudon or otherwise knew of her husband's trading. BP nonetheless terminated her employment.

Well, so, she's not working long hours anymore.

After Loudon's confession, Loudon's wife moved out of their house and generally ceased all contact with Loudon. A few weeks later, Loudon delivered a handwritten note to his wife apologizing for violating her trust and asking for her forgiveness. Loudon's wife initiated divorce proceedings in June 2023.

I think that's the worst insider trading case I've ever read? Between her prompt reporting to BP, their review of her texts and emails, and the *immediate divorce*, it seems pretty clear she wasn't in on the insider trading. Still, terrible.

Activist Man vs. Activist Man

I wrote a few weeks ago about Bill Ackman's plan to raise a new closed-end fund for US retail investors. I started by talking about Ackman's existing closed-end fund for retail investors, Pershing Square Holdings (PSH), which is listed in Europe and which, at this point, is Ackman's main investing vehicle, holding about \$12.3 billion of his \$15.8 billion of net assets under management. PSH is mostly pretty simple: It does some hedging and derivatives trading, but *mostly* it owns the stocks of a small number (currently 10) of large public companies. It has a small amount of debt. And it charges hedge-fund-ish fees, an annual management fee of 1.5% of assets and a performance fee of 16% of gains.

So you can pretty easily figure out PSH's net asset value (NAV): Add up the value of its liquid public holdings, subtract the debt, and you get a decent estimate of how much each share of PSH is worth. And in fact PSH's net asset value is reported regularly on Bloomberg and on PSH's website. But PSH's shares, which trade on the Amsterdam and London stock exchanges (and over the counter in the US), generally trade at a discount to NAV. On Friday, the stock closed at \$48.80, a 26.3% discount to the \$66.21 NAV. I wrote: "I don't know exactly why PSH trades at a discount, but," and then went on to talk about other things.

Several readers emailed me to propose explanations for why PSH trades at a discount, but the simplest explanation is that the discount capitalizes the fees. Say you have \$100 to invest. PSH consists *mostly* of a short public list of publicly traded stocks. You can look at the list of stocks that PSH owns and then replicate it yourself, just buying \$100 of those stocks. Then you will own \$100 worth of stocks. If the stocks go up 20% in a year, then next year you will own \$120 worth of stocks.

Or you can put \$100 into PSH. Assume counterfactually that PSH trades at no discount: You put in \$100 for \$100 worth of NAV. Then you will (indirectly) own \$100 worth of those same stocks. If the stocks go up 20% in a year, then next year you will own — well, you'll pay \$1.50 in management fees and \$3.20 (16% of 20% of \$100) of performance fees, so you'll own \$115.30 worth of stocks. This is worse. The following year you will also pay fees, and on plausible assumptions those fees will end up eating a large chunk of your gains, enough to explain a 26% discount.

Again, just buying the stocks that PSH holds should cost you \$100. PSH is a package consisting of (1) the stocks it holds (2) *minus* its fees, so it *should* cost less than \$100. Thus the discount.

Now, this argument is far too crude. The counterargument is that PSH is *actually* a package consisting of (1) stocks (2) minus fees (3) *plus* Bill Ackman's investing skill, which allows him to *change* the portfolio over time, selling the stocks that will go down and instead buying other, better stocks that will go up. If you just buy his most recently disclosed portfolio, you avoid the fees but also miss out on his investing skill. Buying the stocks Ackman owns now is not actually a good substitute for buying the stocks (and derivatives, etc.) that Ackman will own over time.

But the market, at least for PSH, seems to attribute more (negative) value to the fees than to the skill. And part of what we talked about last time was that Ackman's new US fund seems to be a bet that US retail investors will attribute more value to the skill. Also the US fees will be lower.

In any case, this situation does suggest a simple trade, which is "stop paying the fees and give us the stocks":

- 1. You can buy PSH's shares at a 26% discount to net asset value. PSH is a pot full of \$12.2 billion worth of stock, but that pot trades for \$9 billion.
- 2. So buy *all* of PSH, or at least a controlling stake.
- 3. Crack PSH open, take out the \$12.2 billion worth of stocks, give them to yourself and stop paying the fees.
- 4. Sell them if you want, whatever; the point is that you bought \$12.2 billion of stocks for \$9 billion.

You can't really do that, for various reasons. One reason is that Ackman himself owns a lot of the shares. Another is that if you actually go and buy all the PSH shares you'll push up the price and the math might no longer work. Still the fact that a pot of \$12.2 billion of large publicly traded stocks is available for \$9 billion does create a temptation.

For instance, Bloomberg's Yiqin Shen reported last week:

Elliott Investment Management targeted Pershing Square Holdings in 2017, when Paul Singer's firm privately tried to force fellow activist Bill Ackman to liquidate his listed company.

Ackman disclosed the details of the battle around the fund publicly for the first time during a three-hour interview on the Lex Fridman Podcast. The billionaire posted the discussion on X, the social media site formerly known as Twitter, on Tuesday.

Elliott took a big position in Pershing Square Holdings, a closed-end vehicle that traded at a discount to the value of its assets, while shorting the underlying securities held in the fund, Ackman said. It was a bet that the target would be forced to liquidate, allowing investors to profit from the shakeup.

"I envisioned an end where the permanent capital vehicle ends up getting liquidated and another activist in my industry puts me out of business," Ackman said.

Ackman managed to fend off Elliott by snapping up shares in his own company, effectively buying control, he said. He borrowed \$300 million from JPMorgan Chase & Co., to help him to do this.

"I give JPMorgan enormous credit in seeing through it," Ackman said. "It's a handshake bank and they bet I'd succeed."

Here are the interview and Ackman's X post. Closed-end fund activism is a popular trade, and Ackman's buddy Boaz Weinstein has made a crusade of it. (Though not against Ackman; that would be rude.) In some ways it is the most schematic possible form of activist investing:

- 1. There is a company with publicly traded stock.
- 2. The stock price is below the company's fundamental value.
- 3. The company is paying its management a lot.
- 4. An activist buys up all the stock and tries to kick out management.
- 5. Management says "no, you don't understand, we are getting paid for creating long-term value, and the market is too focused on the short term so the stock price does not incorporate all the long-term value we are creating."
- 6. The activist disagrees.

Sometimes management's long-term plans are good and worth the money, other times they aren't. Here, management won.

When we previously talked about PSH, I emphasized what a good idea it was, and is, for Ackman (or any other hedge fund manager) to have a permanent capital vehicle. If you run a hedge fund and you have disappointing performance, your investors can ask for their money back, and eventually you have to give it to them, and then you don't run a hedge fund anymore. If you run a closed-end fund and you have disappointing performance, no one can ask for their money back — that's kind of what "closed-end" means — and so you get to keep running a hedge fund forever. But not *literally*; you can't keep running even a closed-end fund forever if you keep disappointing your investors. There is a safety valve. The safety valve is that someone can buy up all the shares and do activism on you.

Private credit

Just a very dumb simple model of private credit is:

- 1. People — asset managers, sovereign wealth funds, banks, rich individuals, whoever — have flocked into private credit because it can offer higher yields than traditional bonds and syndicated bank loans.
- 2. Why would you want to *borrow* from them? "Private credit has higher yields than bank loans" is a great pitch to *lenders*, who want to receive higher yields, but it is a bad pitch to *borrowers*, who want to pay lower yields.

There are answers. The one that I have probably heard the most is that private-credit lenders can be faster and more decisive: If you are a company looking for a loan, or a private equity firm looking for buyout financing, going to one or two direct lenders and saying "can you lend me the money" and having them reply "yes, here are the terms, sign here" is better than going to a bank and having them say "we'll need a one-month marketing process, here are the indicative terms but we reserve the right to flex based on market conditions." In private credit, borrowers deal directly with the people making the lending decision; in bonds and bank loans, they deal with intermediaries. In a choppy market, it is worth paying up a bit for certainty of execution.

There are a few other answers. If you don't deal with intermediaries (banks), you don't pay their fees; the economic model of private credit might be not just "private credit lenders charge more than syndicated loan and bond investors" but "private credit lenders charge more but you save on bank underwriting fees." Also you could imagine private credit firms being nicer to deal with if you run into trouble and need to restructure your debts: You have fewer lenders, you know who they are, they can't sell their loans, they probably all work on the same floor as private equity investors so they sympathize with your troubled private equity buyout, etc.

Still my general view of lending markets is that if one product offers some long appealing list of qualitative advantages, and the other product is three basis points cheaper, everyone prefers the cheaper product. The Financial Times reports:

Roughly \$10bn of so-called private credit loans have been refinanced in public markets, as borrowers pay down burdensome loans in favour of a cheaper alternative, according to data from Bank of America.

Private equity firms that buy out companies are taking advantage of a recovery in global corporate bond and loan markets, after the Federal Reserve signalled that inflation had been sufficiently tamed for it to begin cutting interest rates.

That shift has opened the door for investment banks to pitch hard for business that they lost to private lenders after rates dramatically rose in 2022, with the banks hoping for a revival of lucrative fees.

"Pressure is coming from sponsors for the coupons to be cut and this is just a race to the bottom between the banks and the direct lenders," said Neha Khoda, a strategist at Bank of America. ...

The changing market conditions offer an opportunity to banks, which were saddled with billions of dollars of losses on the deals they agreed to finance in 2022. ... The losses limited lenders' interest in extending new loans, and when they did the terms were often too expensive for private equity firms to turn to.

This is the good and bad side of the "private credit is faster and more decisive" point: If you got a commitment letter from some banks for a leveraged buyout financing in 2022, and then rates shot up, then when that financing closed months later you got an outrageously good deal. (Ask Elon Musk.) But the banks were burned by the outrageously good deals they gave out in 2022, so they could only offer pretty bad deals in 2023. Now they are back.

Private IPO

If you do a "private IPO," what does the P stand for? "Private initial public offering"? You see the problem. Here's the Wall Street Journal:

The concept is being bandied about on Wall Street as investors and bankers search for ways to keep the money flowing. The contradictory moniker refers to stock sales in which early backers privately sell to longer-term investors such as mutual funds or sovereign-wealth funds, sidestepping the traditional IPO process.

Private IPOs don't come with the splashy bell-ringing ceremony of a traditional debut or result in publicly traded stock. They do allow companies to avoid the potential embarrassment of a new listing falling flat.

Some on Wall Street balk at the name, seeing it as window dressing for private placements, which are sales of shares from one private owner to another and have been used for years. Skeptics say bankers, never a group to sit still, are playing with semantics to drum up business.

What's more, some mutual-fund managers who have been approached to do private IPOs are wary. While they might get better prices and bigger allotments of shares in a private IPO, the liquidity—or lack of it—is a big drawback. If the managers buy stakes this way, it isn't clear when they would be able to sell them.

We have talked about this phenomenon before, and I have argued that it kind of doesn't make sense? In general, you would expect the public markets to put a higher valuation on reasonably mature companies than the private markets, because liquidity is valuable, and public markets are much more liquid. You should pay more for stock that you can sell than for stock that you can't sell. If you are a company considering going public, and you decide not to because you don't think you'll get a good enough price, why would you get a *better* price in a "private IPO"?

I suggested a few weak counterarguments:

- 1. Maybe private investors are systematically mistaken about valuation? Seems weird.
- 2. Maybe *illiquidity* is actually valuable: If you can't sell a stock, you won't sell it in a foolish panic, so maybe your long-term returns will be higher. Again it would be strange if this were *generally* true.
- 3. Maybe going public actually destroys value, because of public financial reporting or compliance costs or short-termism or short selling or whatever, so private valuations should be higher.

Eh. Anyway the "semantics" point seems right. Lots of private companies have done trades — private placements, Series G fundraising rounds, employee tender offers, etc. — that have the essential shape of "the company stays private but somebody buys stock." What makes a trade a "private IPO" instead of "selling stock"? Is it that the buyer of the stock is a mutual fund? I think the answer might be "it is pitched to you that way by an investment bank."

Maybe don't put the money in the BOXX?

Last week I described BOXX, the Alpha Architect 1-3 Month Box ETF, an exchange-traded fund that is meant to pay money-market interest rates without taxes, using options strategies. I wrote: "The first thing you want to do is turn interest income into capital gains. ... In some sense this should be *easy*." Some assets pay you a return that is called "interest," which is fixed and paid in installments and taxed at ordinary income rates; other assets pay you a return that is called "appreciation," which you receive when you sell the asset and which is taxed at lower capital gains rates. There is some economic equivalence between these things; assets that don't pay interest generally appreciate at some rate that compensates you for the use of your money, sort of like interest does.

The trick is to find an asset that appreciates at the risk-free rate, i.e., that reliably pays you roughly the same return as short-term Treasury bills, but in the form of "appreciation" rather than "interest." The simplest way to do that would be with a zero-coupon bond — a bond that doesn't make quarterly interest payments, but just pays you back more at the end than you put in at the beginning — but that's *too* simple, and the US tax code looks through that trick and treats the appreciation on a zero-coupon bond as interest.

So the second-simplest way to do it is by buying a *stock* (a classic capital asset) and *hedging out the stock-price risk*. For instance, if you buy a stock and simultaneously sell it in a fixed-price forward contract, you have effectively hedged out the stock-price risk. And that's roughly what BOXX does, in the form of "box spreads" on S&P 500 index options (get synthetically long the index by buying a call option and selling a put, get synthetically short the index by selling a call and buying a put, and do those things at different strike prices so that you lock in some payoff in the future).

But several readers emailed to point out that, at least sometimes, the US tax code looks through *that* trick too. Section 1258 of the Internal Revenue Code recharacterizes some capital gains as ordinary income, if those gains are *effectively* interest on a "conversion transaction," meaning a transaction where you (1) buy an asset and (2) simultaneously enter into a contract to sell the asset at a fixed price. So a simple transaction like "buy a stock and sell it forward" probably produces ordinary income, not capital gains.

Do BOXX's box spreads produce ordinary income? My understanding is that there is a common view that box spreads are *not* "conversion transactions," and in particular that box spreads with *index* options are covered by different rules. But I do not claim to be an expert, or to give tax advice, and apparently some people disagree.

Who controls Byju's?

Is it ... Byju? A few years ago, we talked about John Schnatter, the founder and papa of Papa John's International Inc., who got in a fight for control of his corporate child. He was a big but not controlling shareholder, and the former but not current chief executive officer; also the company was named after him, with a possessive apostrophe-s. These advantages were large, though not decisive; he never did come back as CEO, and was reduced to maybe eating 40 pizzas in 30 days to prove that he didn't even like the pizza anymore anyway.

Last month we talked about another possessive-apostrophe-s company, Byju's, once "the world's most valuable edutech," but now not so much. We talked about Byju's because it was trying to do a rights offering, hoping to raise \$200 million at a "post-money valuation ... of \$220 million to \$225 million, a 99% drop from the \$22 billion valuation that the startup had attained in 2022," oops oops oops oops oops. Raising \$200 million at a \$220 million post-money valuation is "hey, turns out we blew all your money and the company is worthless, want to try again?" Why would they want to try again? Anyway here's Byju:

Byju Raveendran, the founder of eponymous edtech group Byju's, told employees on Saturday that he continues to remain the chief executive of the startup and that rumors of his firing have been "greatly exaggerated," a day after a shareholder group voted to remove him at an emergency general meeting.

In a 758-word letter, content of which was reviewed by TechCrunch, Raveendran claimed that the shareholders violated several "essential" local rules.

The shareholder group, which included Prosus Ventures and Peak XV Ventures, said in a statement on Friday that the investors “unanimously passed” the resolutions that seek to enact, among other things, addressing governance, compliance issues, financial mismanagement, reconstitution of its board and a change in leadership “so that it is no longer controlled by the founders of T&L.” ...

Raveendran claimed in the letter that the extraordinary general meeting lacked the minimum quorum and failed to win majority support for proposed resolutions. Raveendran claimed the EGM was convened without adhering to the procedures set out by law and only 35 of Byju's 170 total shareholders attended, representing around 45% ownership in the company. ...

“Our rights issue has seen an overwhelming response. In fact, such has been the scale of its success that even those who were sitting on the fence are now rushing to get a piece of the action. This momentum is irreversible, and our comeback is now inevitable,” Raveendran told employees.

Ah. If I ran a company that was once worth \$22 billion and is now worth \$25 million, I would be hesitant to say things like “this momentum is irreversible,” but I guess that’s why I don’t.

Things happen

China's Quant Clampdown Risks Damaging Fragile Markets for Years. The Hedge Funds That Changed the Game. How Klarna's boardroom spat exposed a schism at Sequoia Capital. Risk Models Behind World's Best Hedge Fund Strategy Are Getting a Lot Harder to Crack. The Third Network. European banks promise €120bn of shareholder returns on interest rate gains. Venezuela Calls in Oil Debt It Once Traded Away for Literal Beans. Billionaire Forrest Calls on LME to Identify 'Clean' Nickel. Indonesia to wipe out global nickel rivals, warns French miner Eramet chief. Jack Ma-Backed Ant Outbids Citadel Securities for Credit Suisse's China JV. Popular China Swap Trade Cools, Signaling Lower Demand for Bonds. US Republicans call for McKinsey to be banned from federal contracts. Bundesbank burns through more than €20bn to cover huge losses. Peter Thiel's \$100,000 Offer to Skip College Is More Popular Than Ever. Leap Day accounting.

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- 1. See slide 26 here. That is the equity value, that is, assets minus debt. I have previously cited gross assets (\$18.2 billion total, \$14.6 billion in PSH), but since we're talking about discount to net asset value here the equity value seems more relevant.
- 2. That is, you *can* buy PSH — under the ticker PSHZF — in the US, but it does not trade on a stock exchange and, because it is not registered under the Investment Company Act, Pershing Square can't market

to US investors. Also it is a passive foreign investment company for US tax purposes, which might be unpleasant.

- 3. Marc Rubinstein has a good recent column on the discount.
- 4. Again, not entirely; the 2024 investor presentation mentions an “energy hedge,” “interest rate swaptions” and “all other positions” as smallish negative contributors to performance. But as a rough cut, “it’s 10 stocks” gets you reasonably close these days.
- 5. On my crude math, if you put \$100 into the portfolio and it grows at 20% per year, you’ll end up with about \$619 worth of stock in 10 years. If you instead pay 1.5% annual management fees and 16% on that same performance, you’ll end up with \$415, or 33% less. The impact is greater the better the performance. Here is another calculation.
- 6. Also, if you do the crude thing I suggest — buy PSH, crack it open, sell the stocks — you have a lot of market risk during the trade, and selling the stocks all at once might drag their prices down. In practice the better way to do this is what Elliott apparently did: You buy PSH and *short* the underlying stocks *simultaneously*, managing your market risk and not moving the price too far either way. (Though your trading — long PSH, short the portfolio — will have the effect of reducing the discount.)
- 7. This oversimplifies, and some economic-equivalent-ish transactions also count as conversions.
- 8. That’s actually a 99.9% drop, right? Like \$22 billion to \$20 million, down 99.9%, before the new money comes in.

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Matt Levine's Money Stuff: Ketchup Caddy Sold Fake Electricity
By Matt Levine
Opinion

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Matt Levine's Money Stuff: Ketchup Caddy Sold Fake Electricity

By Matt Levine 2024-02-27T13:22:12029-05:00

Ketchup Caddy

Demand response is the business of getting paid for not using electricity. You might think that would sometimes lead to fraud, and oh does it. Here is the story of someone who allegedly committed fraud by signing up fake customers, promising that they would cut back their electricity use, and then getting paid even though they didn't.

First, a very stylized sketch of the electric grid. In the US, there are several regional electric grids that transmit electricity from power providers to users and are run by organizations with names like MISO (Midcontinent Independent System Operator) or ERCOT (Electric Reliability Council of Texas). Various providers – power plants, etc. – sell power to the grid, and much thought goes into the auction mechanisms that match supply and demand and determine how much the providers get paid.

A key problem is that the demand for power fluctuates from hour to hour, while the supply of power is more or less capped over the medium term by the capacity of the power plants connected to the grid. At peak times, the grid has to call on every available resource – always-on nuclear plants, whatever wind is blowing, gas peaker plants, obsolescent coal power plants, capacity from neighboring grids, batteries, etc. – to meet demand. But it might not be economical to own and operate a power plant that only gets turned on, like, two hours a year. And so much thought also goes into figuring out how to make sure there will be enough capacity to meet peak demand.

Here are two methods to do that. One is capacity payments, where power suppliers can get paid some amount of money just for *committing* to turn on their plants if they're needed. If the plants are never needed, they never turn on, but the suppliers are paid for the commitment, which makes it more economical to keep the plants around, which makes the grid more reliable. (In MISO, the grid operator for some of the middle of the US, these payments are set by an annual "Planning Resource Auction," or PRA.)

The other is demand response. At some point, it occurred to some genius of electricity economics that *turning off your air conditioner*, at times of peak electric demand, is just as good as *generating* a bit more power. If you are a *user* of power, and you agree to *stop* using power at peak times, that's as valuable to the grid as generating power would be, and so the grid operator will pay you for the power you don't use. If you run a factory that normally uses 10 megawatts, and you shut down the factory for an hour of peak demand, the grid could pay you as though you generated 10 megawatt-hours. Just like a power plant operator, you can get paid the market rate for peak electricity for curtailing your use – and you can also get capacity payments for *promising* to curtail your use if necessary.

You can easily imagine how this might lead to fraud. Here's the way I have always imagined it might lead to fraud. Demand response is essentially counterfactual: You get paid for how much electricity you *would* have used but didn't. So the more electricity you say you would have used, the more you get paid. You can't literally just write down "I would have used 10 megawatts, so pay me," but you have some baseline measurement of what you would have used, and if you manipulate that baseline then maybe you can manipulate your payout.

But there is a much funnier way to do demand response fraud. Demand response is generally a business of middlemen: Demand-response intermediaries (or "aggregators") enter deals with consumers or factory owners or whoever to curtail their usage if called upon, and then the aggregators enter deals with the grid operators to deliver that curtailment. The grid pays the aggregators – in the form of capacity payments for *committing* to curtail usage, and/or in the form of curtailment payments for actually cutting back electricity use – and the aggregators share some of the payments with the customers.

Again, the capacity payments get made even if the customers are never asked to cut back their electricity use: The point is to make the electric grid more reliable by making sure that there is enough capacity to handle peak loads, even if that capacity is never actually used. So! The trade is:

- 1. Be a demand-response aggregator, a middleman between the electric grid and customers willing to cut back on usage at peak times.
- 2. *Don't* sign up any customers.
- 3. Instead, just write down a bunch of fake customers' names – or rather, names of real people who are not your customers – and offer their capacity to the grid.
- 4. Receive capacity payments.
- 5. If the grid operator never asks you to deliver power, terrific: You keep the capacity payments, and you don't have to share them with your "customers," who don't even know about any of this.
- 6. If the grid operator *does* ask you to deliver power, oops.

I mean, that's the schematic funny version. The real version is in this Federal Energy Regulatory Commission enforcement action (via Utility Dive) and it is even funnier, starting with the names. The company that allegedly did this fraud is called Ketchup Caddy LLC, and its founder and chief executive officer is named Philip Mango. Mango learned (at lunch with an employee of "Company A," another demand-response aggregator) that you could just go to the website of Ameren Illinois Co. (a retail power company) and scrape the names of its customers, and he got his friend – a computer programmer named Todd Meinershagen – to do that:

To do this, he created an automated tool that accessed Ameren's website, bombarded the website with millions of random account numbers until it located a valid customer account, and then downloaded the account data to a spreadsheet.

Terrific. Mango explained to Meinershagen that he would use that list – of people who use electricity – to go out and solicit customers for Ketchup Caddy's demand-response business, at terms that were very favorable to Ketchup Caddy:

Specifically, Mango told Meinershagen ... "that my job was to acquire customers that [Meinershagen] had scraped through legitimate means, getting them to agree to be part of the program and accepting a term of 100 percent payout to us, zero percent payout for them. In return, my pitch that I explained to Todd [Meinershagen] and how I was able to do that was by saying that they were participating in getting green credits being sustainable, and he accepted that explanation."

Sure! "Green credits." But in fact Mango never called any customers, in part because that would be a lot of work and in part because no customers would actually agree to a deal in which they promised to turn off their air conditioners and Ketchup Caddy got all the payments. Instead, he just submitted the fake list of customers to MISO, the grid operator:

In late February 2019 ... Ketchup Caddy was accepted to participate in MISO's annual PRA. To register its purported customers to participate, Ketchup Caddy had to provide certain data about them to MISO. To obtain this data, Mango selected a set of customers from the data that Meinershagen's scraping tool had illicitly collected from Ameren's website. He then had Meinershagen create "curtailment plans" for these customers based on a [Company A] document provided to Ketchup Caddy by Company A Employee 1. To do this, Meinershagen reviewed the data from Ameren's website for instances in which a customer's energy usage dropped during a 1-2 hour period, and then provided Mango with two graphs consisting of "a week with the lowest hour of energy usage and one with the max hour of energy usage." Mango testified that these graphs reflected "mock test" information, "[i]n other words, not a real test of the facility but a graphical representation of a load drop that could be performed, if called upon." Mango also testified that, despite submitting this "mock test" information to MISO, he knew that these customers would not perform if called upon.

MISO rejected some of Ketchup Caddy's fake customers because they were *actual* customers of other demand-response aggregators, but despite noticing that red flag, it let the rest of the customers through and started paying Ketchup Caddy for hundreds of megawatts of capacity. This went on for about three years, and Ketchup Caddy got about \$1 million of capacity payments. The fake customers got nothing. Also, no harm, no foul, ish:

Because MISO did not call a curtailment event in any of these Planning Years and required only mock tests to verify performance, Ketchup Caddy's false registrations and offers did not come to light until Staff's Investigation.

They sold fake power capacity to the grid for three years, but nobody noticed, because they were never called on to deliver that power.

Anyway, great fraud. Apparently Meinershagen was totally innocent:

Unlike Mango, Staff found no evidence that Meinershagen was expressly aware that Mango had been registering customers with MISO for Ketchup Caddy without their consent. In fact, Mango testified that he kept Meinershagen "in the dark" and created a "mirage" to make Meinershagen believe that their company was formally engaging with its purported customers.

Meanwhile, Mango was hilariously candid with the FERC staff who investigated him:

Mango explained that his decision to operate his business in this manner was based on his understanding that "[Company A] is doing this. They must have figured out something that I don't, like this is essentially free money, no harm to the customer." He said he planned to "[d]o this for just a couple of years, make a bunch of money to put kids through school and do all those things, and no one's hurt. Do it with the least amount of resource possible, the least amount of money invested."

Mango also testified that the idea of enrolling customers with MISO and not sharing payments with them seemed a little too good to be true, but that he justified it as follows: "My logic at the time was that if it wasn't too good to be true, that at some point in this year-long process of trying to get into the market something will stop us, something will trigger and that will be my – as naive as this sounds – that will be my sign that this is not meant to be."

I think that is probably part of the explanation of a lot of frauds? "If I'm really not allowed to do this, probably someone will stop me before I actually do it," you think, and then nobody stops you before you do it, so you do it, and then they stop you *after* you did it, when it's much worse. The FERC wants Ketchup Caddy and Mango to pay \$27 million of penalties and disgorgement.

AI disruption

I think there is something charming about Sam Altman's frequent public insistence that building good artificial intelligence models will cost more than, like, everything else in the history of human civilization combined. "Oh, just out doing a roadshow to raise a few trillion dollars for chips," Altman shrugs. It feels like a clever strategy? Like:

- 1. If you get everyone thinking that it will cost trillions of dollars to build AI, then a lot of potential competitors won't even bother; there's no way they could raise that kind of money.

- 2. If you go to the UAE or Masayoshi Son or whomever and are like "I'm looking for \$7 trillion," maybe that will anchor their expectations high enough that they're like "well we can't do that, but we're in for a more modest ticket, would \$7 billion help," and then you've got \$7 billion, which is actually a lot.
- 3. It fits nicely with Altman's [other strategy](#) of suggesting that AI, if mishandled, could destroy humanity: That self-aggrandizing claim is more plausible if it also comes with an enormous price tag.
- 4. It's gotta help with recruiting, throwing around numbers like that.

OpenAI is a relatively young company (and a [nonprofit](#)!), and while by many measures (valuation, money raised so far, revenue) it is quite large, it also does a good job of giving the *impression* of hugeness, and part of that comes from Altman going around always saying the biggest possible number.

But I suppose that does create an opportunity for someone with a contrarian view:

[Arthur] Mensch's startup, called Mistral AI, is challenging the conventional wisdom that the winners of the AI race will emerge from among the tech industry's U.S. giants. Mensch, who founded the company with two engineering-school friends, doesn't think enormous scale is essential – or that the U.S. will necessarily dominate. ...

Mensch's company, which has raised just over \$500 million from investors including Andreessen Horowitz, remains tiny compared with the Goliaths of the industry. Microsoft-backed OpenAI and Alphabet's Google are pouring billions of dollars into training the latest AI systems, leveraging their access to the specialized computer chips needed to build such systems and the fat balance sheets needed to pay for the electricity those chips consume.

Mistral, named for a strong wind that blows from France, is founded in part on the idea that a lot of that money is being wasted. ...

"We want to be the most capital-efficient company in the world of AI," Mensch said. "That's the reason we exist." ...

Mensch said his new model cost less than €20 million, the equivalent of roughly \$22 million, to train. By contrast OpenAI Chief Executive Sam Altman said last year after the release of GPT-4 that training his company's biggest models cost "much more than" \$50 million to \$100 million.

In general, we are coming out of many years of venture capital exuberance in which saying "we are competing to build a world-changing technology, and we're going to win by spending slightly less money than our competitors" was *not* a particularly appealing pitch: The [whole game](#) was to spend freely now to win market dominance later. But now interest rates are higher, and also surely there is *some* cap on that? "We will build world-changing technology for less than \$7 trillion" *is* kind of a good pitch.

Reddit IPO

Reddit Inc. is planning an initial public offering of its stock. In a typical IPO, a company and its early investors sell stock to institutional investors at the IPO price, and then the next day the stock opens for trading and regular investors can buy it (from those institutions). Usually – not always – the stock goes up on that first day of trading, as everyone who wants to own the stock, but could not get any in the IPO, buys it. This is called the "IPO pop," and institutional investors try to get into the good graces of IPO issuers (and their banks) so they can get good allocations in hot IPOs and benefit from the pop.

Reddit will mostly sell stock to institutional investors, but it plans to sell some of the shares to "eligible Reddit users and moderators." I suppose this is a sort of a loyalty program, letting Reddit's most active users buy stock at the IPO price and participate in some of the upside. I [wrote a bit](#) about this plan last week. Here's how Reddit describes it:

Users and moderators who created an account on or before January 1, 2024 are potentially eligible for the directed share program. Eligible participants must reside in the United States and be at least 18 years of age. Further, eligible users and moderators must be in good standing on our platform and cannot be a current or former Reddit employee.

We will invite users and moderators to participate in the directed share program in six phased priority tiers. We will assign each eligible participant to a tier based on that participant's contributions to Reddit. User contributions will be measured in karma (a user's reputation score that reflects their community contributions). Moderator contributions will be measured by membership and moderator actions on our platform. Tier 1 will include certain users and moderators identified by us who have meaningfully contributed to Reddit community programs. Tier 2 will include users who hold at least 200,000 karma and moderators who have performed at least 5,000 moderator actions.

And so on down to Tier 6. "An invitation to participate in the directed share program does not guarantee that the participant will receive an allocation of shares," and there's not a lot of description about how the allocations will work. But I suppose if you have a lot of Reddit karma then there's at least a decent chance you can buy some shares at the IPO price.

Also, separately, Reddit plans to sell some of the IPO shares "to retail investors through Fidelity Brokerage Services LLC, SoFi Securities, Inc., and Robinhood Financial LLC, as selling group members for this offering, through their respective brokerage platforms." So even non-redditor retail investors can probably buy stock at the IPO price. As I wrote last time, you might expect this sort of thing to reduce the IPO pop: If enthusiastic retail investors can buy at the IPO price, they won't have to buy in the open market the next day, reducing demand for the shares. But I suppose it depends on how much they get in the IPO.

One question is: If you are a retail investor and a redditor, and you have at least 200,000 karma and 5,000 moderator actions on Reddit, how much is that *worth*? You have, not a golden ticket or anything, but at least an inside track to buy an uncertain number of shares of a high-profile IPO at the IPO price. That ... probably has some slight positive expectation, right? You'd rather have that than not? It is ... transferable-ish? A reader emailed:

Today I was given the opportunity to participate in the Reddit IPO as someone who has wasted far too much time on the site. Unfortunately, I am a Canadian and thus forbidden from participating. But Reddit doesn't know that, which is why they offered me the option. So I could sell my account, one of 75,000, to someone who meets the criteria - a purely hypothetical scenario, of course.

Obviously this is not allowed by Reddit's terms of service, but on the other hand Reddit accounts really are pretty anonymous, so maybe it would work. How much would you charge? How much would you pay? My reader adds:

What if they change my password and start posting terrible takes all over the site? Will the money be worth losing internet points?

My sense is that, if you are a redditor with lots of karma, the value of this directed share program is probably in the ... tens of dollars? Whereas the value of your Reddit reputation is ... priceless? Like, you have worked hard to build up all that karma, and you're not going to sacrifice it by transferring your account to someone who just wants a slight advantage in stock trading.

Also it is not clear how much value *actual Reddit users* place on the right to buy the stock. Elizabeth Lopatto reports at the Verge:

Here's the thing: Redditors aren't enthused about it.

"Short ... it," wrote one r/Wall StreetBets user. "They have not proven that this user base or data set can be monetized."

And there was this person: "Loads puts into the put-cannon with malicious intent."

If Reddit power users can sell their rights to buy in the IPO, there might be a lot of supply.

Work hard, meme hard

I [sometimes argue that](#) it is good, for your career in finance, to get fired for losing a billion dollars on a trade. That's a perverse badge of honor; other potential employers will be nervous, yes, but intrigued. But is it good or bad to get fired from your investment-bank analyst job for [sending offensive memes around to your analyst buddies](#) ?

Junior bankers who were recently fired from Bank of Montreal's metals and mining group used work-sharing platforms to circulate crude jokes and at least one obscene image, which were discovered during an internal investigation after another employee complained, according to people with knowledge of the matter. ...

A spokesperson for Bank of Montreal described the incident as "completely unacceptable," adding that the bank takes matters of misconduct very seriously and immediately began probing the matter after the employee escalated it.

But multiple former Bank of Montreal employees who spoke with Bloomberg said it wasn't the first case of crude jokes being circulated, and that in some respects, the junior bankers' actions were in keeping with a culture that has existed in BMO's high-pressure mining banking unit.

Yeah, no, it was not the first, or 70,000th, time that junior investment bankers sent crude jokes to one another. It was not the first time that they got fired for it, either, though that is rarer. Here are some claims about workplace culture:

Bankers at competing firms in Toronto's financial district, some of whom previously worked for Bank of Montreal, described its mining and metals group as extremely demanding – sometimes asking more of junior analysts and associates than other banks do. Employees have pulled all-night sessions to finalize deal documents and will work through weekends to meet deadlines. In recent years, the bank has explicitly encouraged entry-level analysts to take at least one day off on the weekends, to manage concerns about overwork. ...

In investment banking in general, "hours are long, tensions are high and egos and management oversight is thin," said Bill Vlaad, a former investment banker and chief executive officer of Vlaad and Co., a recruitment agency.

"Understanding acceptable professional behavior seems to be another organizational tool that firms are struggling to manage when employees are only in the office two or three days a week," he said.

One person who previously worked in BMO's mining and metals group said that while the experience young bankers receive is top-notch and there's a prestige to working in the group, it can be an intimidating environment, and junior bankers tend to adopt a work-hard, play-hard culture in the group to fit in.

One claim there is that they spend all their waking hours together and are acculturated into a work-hard, play-hard, send-rude-memes culture. The other claim there is that they aren't in the office much, so the bank struggles to acculturate them. I think those are opposite claims, and the first is correct? BMO did not *struggle to manage* teaching these analysts how to fit in with its culture. These analysts learned exactly how to fit in with its culture, the way analysts have always learned how to fit in: by observing slightly older analysts and being hazed by them. It's just that the culture of the mining group was not the sort of culture that BMO's management wanted to be *made explicitly aware of*.

Anyway the point is that BMO's mining group is prestigious and has influential alumni, *who also grew up in this culture*, and if you get fired from that group for sending rude memes and then go interview for a new job with one of those alumni, they might give you a fist bump and a job offer.

Things happen

Debt-Addicted Companies [Look to Equity](#) as Interest Costs Skyrocket. Treasury Markets Are Losing Their Shock Absorber. FTC Sues to Block \$25 Billion Kroger-Albertsons Merger. Exxon Considers [Pre-Emption Rights](#) to Hess' Guyana Oil Stake. Shein [Tempts London](#) With the Prospect of Biggest-Ever Listing. Barclays offloads US credit card debt to Blackstone. Large Apple shareholders seek AI disclosures. Booming Stock and Sky-High Pay: Nvidia Is Silicon Valley's Hot Employer. Elon Musk's Vegas Tunnel Project Has Been Racking Up Safety Violations.

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- 1. Here's a case involving a steel mill that got demand-response payments and, among other things, "participated by offering energy (in the form of DR) during periods when it expected to be on outages." Which seems like cheating – though it was apparently encouraged by MISO staff?

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- CFO Vidul Prakash still on hook after SEC settled with View
- Judge denies bid to toss claims over liability disclosures

Bloomberg Law News 2024-02-27T14:28:49728701791-05:00
SEC Suit Against Former View CFO Advances After Company Settles

By Ben Miller 2024-02-27T12:56:41000-05:00
CFO Vidul Prakash still on hook after SEC settled with View
Judge denies bid to toss claims over liability disclosures

Vidul Prakash, former chief financial officer of “smart window” manufacturer View Inc., will face the Securities and Exchange Commission’s allegations that he failed to disclose over \$20 million in liabilities after a federal judge denied his bid to toss the case.

The liabilities at issue allegedly stemmed from product defects that were identified in View’s windows shortly after Prakash became CFO in 2019, and the executive’s arguments that the disclosure failures were made in error didn’t convince Judge Beth Freeman to dismiss any claims against him, according to the order filed Monday in US District Court for the Northern District of California.

Product warranties and installation costs to replace the defective windows weren’t included in the overall warranty liability figure View disclosed in its 2019, 2020, and first quarter 2021 public filings, the SEC said in its complaint.

In 2020, for example, Prakash allegedly gave approval for the disclosure of \$24.5 million warranty liability for the projected cost of manufacturing replacement windows, but left out the \$20 million in estimated installation costs, according to the complaint.

The commission settled similar claims against View for an undisclosed amount in July and said in a press release that the company self-reported the misconduct, promptly correcting disclosures and accounting lapses.

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Freeman found that the SEC adequately alleges that Prakash acted negligently, citing multiple instances when he was informed that management had decided to pay installation costs before the deficient disclosures were made. She also rejected the argument that Securities Act claims should be tossed, saying that scheme liability doesn't require conduct beyond misstatements and highlighting Prakash's alleged failure to investigate or address the installation costs.

Prakash's argument that his name is used sparingly in the allegedly deficient filings also failed to convince Freeman that a proxy violation claim under the Securities Exchange Act should be dismissed. She also declined to dismiss the SEC's request for an order barring Prakash from serving as an officer or director, the order says.

Current and former View directors and executives, including Prakash, are named as defendants in a separate shareholder derivative suit over similar accounting issues, which is currently paused in the same California district court pending the outcome of a related proposed class action. The proposed class action against View, which also names Prakash as a defendant, was dismissed last May, but the plaintiffs have since amended their complaint, also in the California district court.

Morrison & Foerster LLP represents Prakash.

The case is SEC v. Prakash , N.D. Cal., No. 5:23-cv-03300, 2/26/24 .

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Guest Post: SPACs Poised to Turn a Corner in 2024: Annual Risk Update

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February 26, 2024

Class Actions



The D&O Diary

Guest Post: SPACs Poised to Turn a Corner in 2024: Annual Risk Update



By Kevin LaCroix on February 26, 2024

Posted in Uncategorized



Yelena Dunaevsky

Teresa Milano

As readers of this blog well know, SPAC transactions have been a frequent target of corporate and securities lawsuits. In the following guest post, Yelena Dunaevsky, Esq., Senior Vice President at Woodruff Sawyer, Executive Editor, SPAC Notebook and Teresa

Milano, Esq., Vice President at Woodruff Sawyer, take a detailed look at the SPAC litigation and enforcement activity so far, including some interesting observations about recent trends. A version of this article was previously published on the SPAC Notebook (here). I would like to thank Yelena and Teresa for allowing me to publish their article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is the authors' article.

Here we are again—another year of SPAC ennui. We're hearing derisive comments about the death of SPACs, unending deadline extensions, almost 200 liquidations, 70 deal terminations, and general SPAC malaise. If you've followed SPACs in 2023, you might even be wondering why this blog is still here.

The answer is that not all is doom and gloom in SPAC-land. Those in the know realize that there are still good deals to be made using the SPAC vehicle. They are keeping that knowledge to themselves, allowing the media to paint a different picture for the rest.

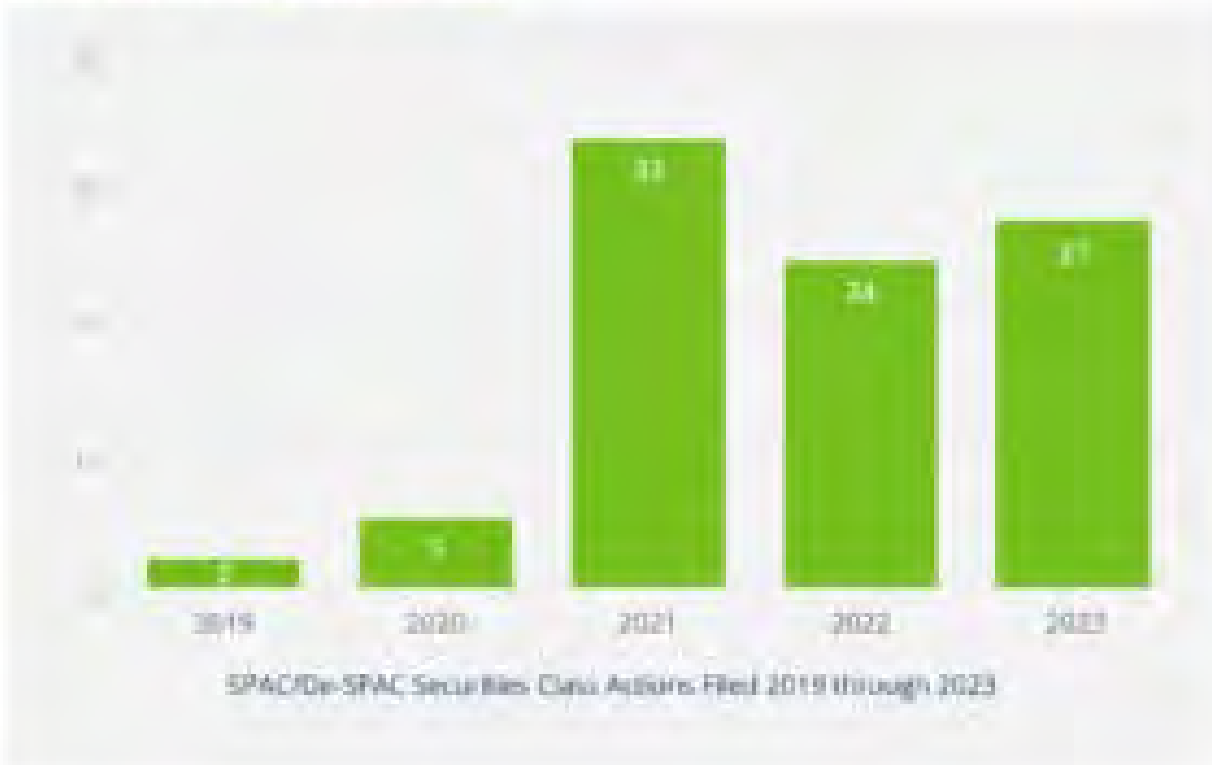
Let's look at some of the interesting recent trends, including SPAC lawsuits, that can give us insights on how things might progress in 2024.

SPAC Lawsuits by the Numbers

In 2022, we observed a 27% decline in the number of SPAC-related securities class actions (SCAs) from the previous year; there were 24 cases in 2022, down from 33 cases in 2021. A few new cases were filed in the first half of 2023, but activity picked up in the second half, with a total of 27 filed SCAs by year-end.

Half of these cases stemmed from business combinations that closed in 2021. The rest were related to deals that closed between 2019 and 2022. At least four of the 2023 SCAs were followed or accompanied by a bankruptcy filing.

SPAC Securities Class Actions



Source: Bloomberg Law

Reasons for SCA Numbers Holding Steady and an Interesting Development

The likely reasons for the number of SCAs holding steady are (1) an increased sophistication of SPAC market participants and (2) lessons learned from others' previous errors.

Continued difficulties in the financial market in 2023 made it difficult to single out dismal SPAC performance when many traditional IPOs and mature public companies were also underperforming. As we reported last year, when the entire market is hurting, it is difficult for a plaintiff's attorney to claim that one particular team or merger did particularly badly.

The proposed SEC rules, which came out in March 2022, were largely integrated into the playbook for a new SPAC IPO or a de-SPAC even before they were finalized in January. This delay in finalizing the rules is another reason for a smaller number of SCAs.

The third reason—which was not really present in 2022 but became noticeable in 2023—is the fact that many plaintiffs opted not to bother with an SCA but to instead bring their claims in Delaware as direct-action breach of fiduciary duty suits. These plaintiffs were undoubtedly encouraged by the Delaware courts' negative view of SPACs as exemplified by several decisions that came out in early 2023.

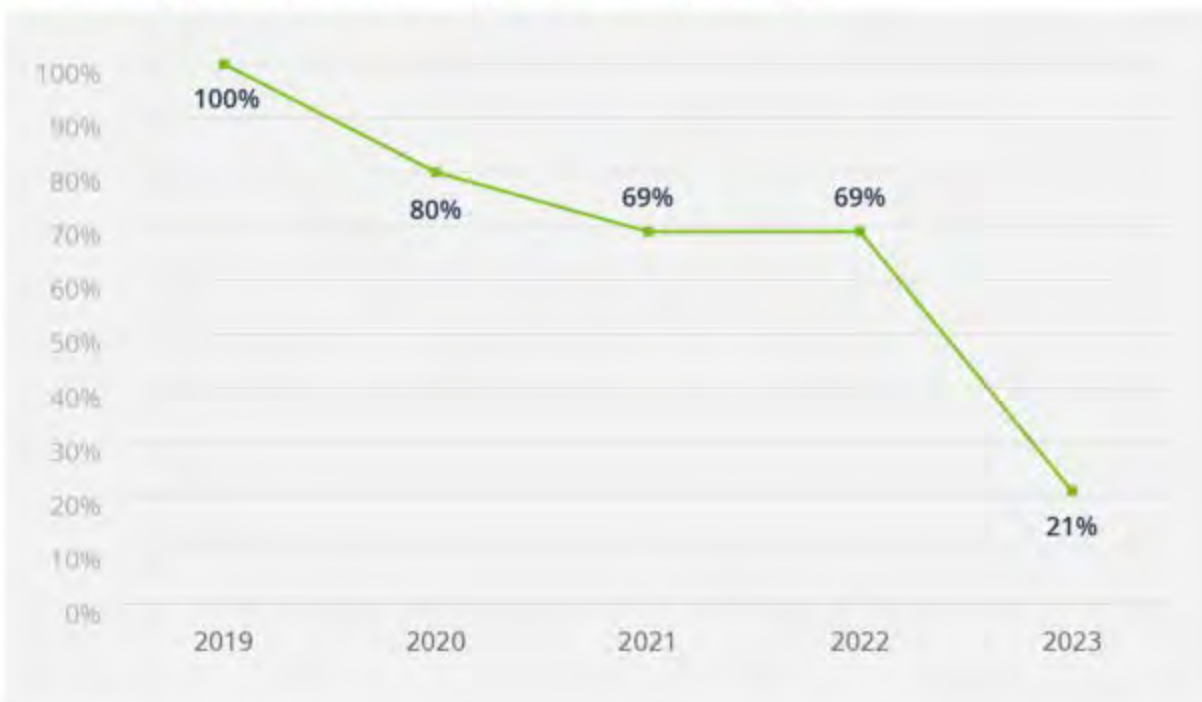
SPAC Lawsuits Are Old News

Another important element that emerged last year is the fact that many of the recent lawsuits have nothing to do with the original SPAC or its business combination. The plaintiffs bringing SCAs in 2023, while mentioning the fact that the company had originally gone public via a SPAC typically in 2021 or thereabouts, had no issues with any SPAC-related activities. Their claims centered on the business failings of the operating company stemming from the recent market downturn or other non-SPAC-related business problems a year or two after the merger.

A good example of this is the Fisker, Inc. lawsuit, which was filed three years after the closing of the business combination with no former SPAC executives or SPAC sponsors named as defendants. The allegations revolved around disappointing financial results, losses and production cuts, and material weaknesses in internal control over financial reporting. However, they did not relate to either the SPAC formation, the actions of the SPAC team, or the SPAC merger.

Our data shows that while many of the SCAs brought against SPAC-related entities in 2022 were still related to claims stemming from the SPAC's business combination, most of the SCAs since then have focused on business failures of the post-de-SPAC entity, which did not tie back to the entity's business combination.

Percentage of SCAs Relating to the SPAC Merger



Source: Woodruff Sawyer

Our conclusion here is that as entities continue to operate post-de-SPAC and mature as public companies (like all other public companies that went public via a traditional IPO), those that run into business issues are the ones that are going to be singled out for an SCA. The fact that these companies started their public life via a de-SPAC will have no bearing on the SCA, as is exemplified by the majority of the SCAs we saw in 2023.

SPAC Litigation Compared to SPAC Activity

SPAC lawsuit data can never be viewed in a vacuum. To understand the dynamics of this kind of litigation and developing trends within it, we must understand the deals that are being done and not done in the market. The graph below shows the number of filed SPAC-related securities class actions as compared to the number of closed de-SPAC transactions in the same year. It typically takes a few months—nine months on average—after the merger occurs for a lawsuit to be brought. Understanding the lag between a SPAC merger and the lawsuit, it is interesting to see the decline not only in the absolute number of SCAs from 2021 to 2023 but in the number of SCAs relative to the number of completed mergers in each of those years.

Number of Suits vs. Number of Closed DeSPACs



Source: Woodruff Sawyer

New Types of SPAC Lawsuits

We saw a few new types of lawsuits in 2023. The most interesting takeaway is that there were several suits against SPAC advisors.

For example, in May of 2023, a suit was filed in Delaware Chancery Court in connection with the Lottery.com SPAC deal. The lawsuit named not only SPAC directors and officers but also the financial advisor involved with the deal, Chardan Capital Markets, LLC. The lawsuit alleges that the defendants, including Chardan, breached their fiduciary duties by approving due diligence that should have revealed that the deal was not a great one.

And, as mentioned above, we are seeing an increase in the frequency of the direct-action breach of fiduciary duty suits being filed in Delaware, with several being dismissed but many proceeding forward. The usual themes for these suits include an accusation that the SPAC's directors and officers rushed into a transaction, failed to conduct proper due diligence, entered into a deal outside of the SPAC's targeted industry, and omitted important information relating to potential dilutive effects of the merger. The move by the plaintiffs' bar to channel SPAC-related disputes through Delaware courts is logical, given that court's typically hostile attitude towards SPACs and a few plaintiff-friendly decisions handed out in 2022 and 2023.

What we are beginning to see, however, is that only about 30% of the 2023 SPACs opted to be organized in Delaware. Compare this percentage to almost 100% of SPACs launched in prior years. SPAC sponsors, who are watching the unfavorable developments in Delaware courts and unwilling to shell out extra funds for the new 1% excise tax, are clearly reconsidering their place of incorporation. At this point, most new teams are opting for the Cayman Islands over Delaware.

Likelihood of Lawsuits

Our clients often want to know the likelihood of their team or venture getting sued. This information can assist teams in deciding on the amount or type of directors' and officers' (D&O) insurance they will purchase. Although the answer is complicated, some recent data may be instructive.

Companies that go public via a traditional IPO are more likely to get sued than mature public companies, and companies merging with a SPAC are more likely to get sued in an SCA than those going public via a traditional IPO.

How likely? Based on our data, we would expect to see:

- About 3% of mature companies (those that have been public for 10 years or more) getting sued

- About 13% of newly IPOed companies getting sued
- About 18% of newly de-SPAC'd companies getting sued

The reason the numbers are higher for new public companies, including SPACs, is simple—they are more likely to stumble out of the gate.

SPAC Bankruptcies

A few examples of serious stumbles are the 21 SPAC-related bankruptcies in 2023, as reported by *Bloomberg*. *Fortune* noted that the flexible workplace provider WeWork Inc. was the largest of these entities to succumb to a Chapter 11 filing in 2023. The list of the largest bankruptcies also included the electric vehicle makers Proterra Inc. and Lordstown Motors Corp. At least eight of these bankruptcies followed a previous SCA.

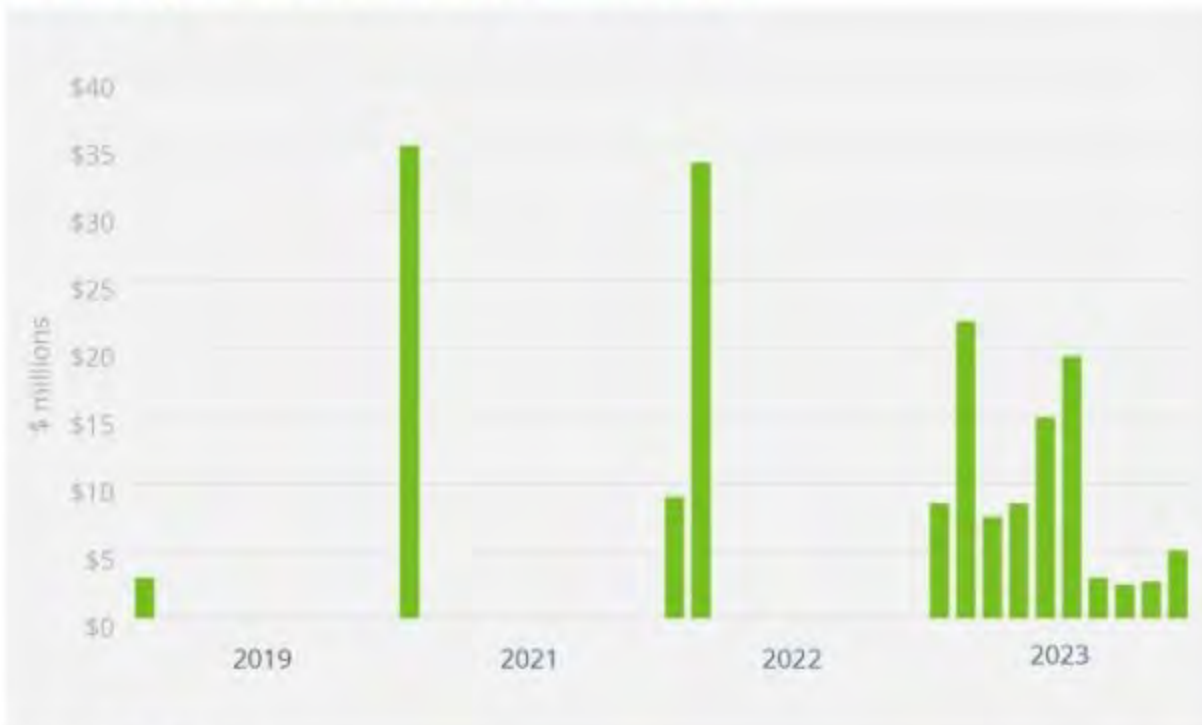
Of course, no company wants to find itself being forced to reorganize or wind down in bankruptcy, but are 21 bankruptcies catastrophic? Considering that about 515 companies went public via a SPAC since 2018 (the modern era of SPACs), 21 might not be such a daunting number.

In the wider market, S&P Global reported that US bankruptcy filings in 2023 hit a 13-year peak. S&P Global attributed the 642 bankruptcies in 2023 to rising interest rates and related operational difficulties, which are, of course, factors that would affect SPAC-related companies as well.

SPAC Settlements

Most lawsuits end in settlements. Ten settlements of SCAs that were recorded in 2023 totaled nearly \$94 million.

SPAC Litigation Settlements Over the Years



Source: Woodruff Sawyer

Outside of the actual settlement amounts, some of which in the above cases were covered by a D&O insurance policy, the defendants had to also pay substantial attorney fees. When deciding on the limit of a D&O policy, it is worth factoring in the potential costs of the attorney fees, which will be due whether the lawsuit ends up being frivolous or ultimately gets dismissed.

Regulatory Enforcement Actions

The other piece of the risk puzzle is, of course, the risk of regulatory enforcement actions and investigations. With the SEC continuing its openly hostile stance towards SPACs, many of us expected to see a barrage of SPAC-related investigations and enforcement actions. That expectation has not been realized, but here are some examples that made the headlines in 2023:

African Gold : Civil penalty of \$103,591 in February 2023. The SEC settled charges against African Gold Acquisition Corp. for internal controls, reporting, and recordkeeping violations, which enabled African Gold's former CFO to misappropriate approximately \$1.2 million from the company's operating bank account. As a result, African Gold made materially false filings with the Commission and maintained inaccurate books and records.

Morgenthau: Forfeiture of \$5.1 million, restitution of \$5.1 million, and 36 months in prison for the SPAC's former CFO in April 2023. In January 2023, the SEC brought fraud charges against Cooper J. Morgenthau, the former CFO of African Gold Acquisition Corp. The charges revolved around Morgenthau orchestrating a scheme in which he stole more than \$5 million from the company and from investors in two other SPACs that he incorporated.

Corvex: Settlement of a \$1 million civil penalty in April 2023. The SEC charged investment adviser Corvex Management LP with failing to disclose conflicts of interest regarding its personnel's ownership of sponsors of several SPACs into which Corvex advised its clients to invest. Corvex also agreed to a cease-and-desist order and a censure.

Marcum: In June 2023, Marcum LLP, an audit firm, agreed to a \$10 million penalty, censure and the undertaking of remedial actions to settle SEC charges against the firm for systemic quality control failures and violations of audit standards in connection with audit work for hundreds of SPAC clients.

Digital World Acquisition Corporation (DWAC): \$18 million penalty if DWAC closes a merger transaction. In July 2023, the SEC settled fraud charges against DWAC for making material misrepresentations in forms filed with the SEC as part of DWAC's IPO and proposed merger with Trump Media & Technology Group Corp (TMTG). The SEC found that DWAC misled investors and the SEC by failing to disclose that it had formulated a plan to acquire and was pursuing the acquisition of TMTG prior to DWAC's IPO.

Crowe U.K.: In August 2023, the SEC charged Crowe U.K. LLP, a London-based audit firm, its CEO, Nigel Bostock, and senior auditor, Matthew Stallabrass, for the firm's deficient audit of music streaming company Akazoo Limited. Crowe U.K., Bostock, and Stallabrass agreed to settle the charges and pay penalties of \$750,000, \$25,000, and \$10,000, respectively.

Alfonse Gregory Giugliano: In September 2023, Giugliano, the former National Assurance Services Leader at Marcum LLP, agreed to pay a civil penalty of \$75,000 and step down from leadership positions for failing to sufficiently address and remediate numerous deficiencies in Marcum's quality control system.

XL Fleet: Civil penalty of \$11 million. In September 2023, the SEC charged Spruce Power Holding Corporation, the successor to XL Fleet Corp., which provided hybrid electric vehicle systems for commercial fleet vehicles, for misleading investors about revenue projections. The SEC found that the company's projections, which were featured in public filings ahead of the 2020 SPAC merger, were misleading.

The list of regulatory actions against SPACs is shorter than one might have anticipated from the negative press that SPACs usually attract. In addition to the above eight actions, which totaled penalties of about \$46 million, we noted a few others from 2022 and previous years in our earlier updates.

Update on the D&O Insurance Market

The number of SPAC IPOs and de-SPACs as well as cases and enforcement actions relating to them are all factors that influence the availability and pricing of D&O insurance. As SPAC sponsors and target companies consider the risks and decide on risk mitigation measures, they need to consider the size, structure, and costs of their D&O coverage.

SPAC D&O coverage does not operate in a vacuum, however. It heavily depends on overall economic conditions and the wider D&O market, which includes coverage for traditional IPOs and mature public companies.

In 2023, we saw a significant easing in pricing for and availability of SPAC coverage, which stemmed from the continuing dearth of traditional IPOs and the significantly lower number of SPAC IPOs and de-SPACs. Competition among insurance carriers continues to be strong. Many have weathered the ups and downs of the recent SPAC environment and have a much better understanding of its risks.

Our prediction is that SPAC teams will continue to enjoy reasonable premium pricing as well as **continued D&O structure innovation** and flexibility from D&O carriers in 2024.

US Audit Board Re-opens Comment File on Illegal Acts Proposal

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Financial Accounting News

Photo Illustration: Jonathan Hurtarte/Bloomberg Tax; Photo: Getty Images

The US audit regulator has re-opened the comment file for a proposal that has sparked backlash for requiring auditors to dig deeper into possible corporate law-breaking.

Auditors, investors and other stakeholders can weigh in through March 18 on the 2023 proposal that would raise the bar for how auditors vet the financial toll of corporate crimes and regulatory violations, the Public Company Accounting Oversight Board said on Monday.

- The board also scheduled a virtual roundtable to discuss the rulemaking project on March 6. Sessions will explore how auditors would triage the range of laws and regulations that companies face and current practices to determine whether a violation has a direct or indirect impact on the financial statements.
- PCAOB Chair Erica Williams committed to the public debate during a December House subcommittee appearance where lawmakers urged her to rein in the proposal.
- Corporate stakeholders and other opponents have told the board to require auditors to focus on the riskiest corporate crimes and to rely on internal compliance programs. Investors have long called for auditors to give more scrutiny to legal risks that could hurt shareholder value.

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US judiciary toughens guidance for recusing over financial conflicts

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Nate Raymond

REUTERS/Chip East Purchase Licensing Rights 

- New ethics opinion advises judges on parent-subsidary recusal issues
- Mutual fund ownership could in some cases prompt recusal, opinion says

Feb 27 (Reuters) - A federal judge who invests in a publicly-traded company or a mutual fund that owns as little as a 10% stake of a party in a lawsuit may still have to be recused from presiding over the case, according to a new judicial ethics opinion.

The U.S. Judicial Conference's Committee on Codes of Conduct on Monday revised , opens new tab an earlier advisory opinion to strengthen the requirements governing recusals by judges involving parent-subsidary relationships between companies.

The stricter standards come three years after a Wall Street Journal report in 2021 documented how more than 130 federal judges had failed to recuse themselves from cases involving companies in which they or their family members owned stock.

That report prompted Congress to pass bipartisan legislation in 2022 that imposed tougher disclosure requirements on U.S. Supreme Court justices and federal judges regarding their financial holdings and stock trades.

That law did not specifically address recusal requirements, though judges are already required to recuse themselves when they have a financial interest in a case by statute and under the Code of Conduct.

Under an earlier 2017 ethics opinion, judges were advised to recuse themselves if they owned stock in a company that "controlled" a subsidiary that was a party to a case.

When a company only is a minority owner of a party, the judge needed to assess whether it controlled the party, according to the 2017 opinion. It said a company's ownership of 10% of a party was a "benchmark measure of parental control."

Monday's revised opinion goes further, saying the ownership of 10% or more of a party creates a "threshold rebuttable presumption of control for recusal purposes."

That presumption can be rebutted depending on "other indicia of control," such as board representation or how widely the remaining stock is dispersed, the opinion said.

The opinion says the 10% standard applies to mutual funds too and that regardless of control, a judge must recuse if a company or fund the judge is invested in "could be substantially affected by the outcome of the proceeding."

For example, if a judge invests in a "sector" or "industry" fund, he or she would be required to be recused from a case involving that sector or industry if the lawsuit's outcome could affect the value of his or her interest in the fund, the opinion said.

A different panel, the Advisory Committee on Civil Rules, is separately examining whether to revise rules governing the disclosure of a party's ownership by a parent company to address concerns that judges do not have enough info to always avoid conflicts.

Read more:

Delays plague US judiciary's financial disclosure database

U.S. judges' investments in Buffett's Berkshire a conflicts 'nightmare' - letter

Congress approves tougher financial disclosure rules for U.S. judges

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Reporting by Nate Raymond in Boston

Apple Inc

Large Apple shareholders seek AI disclosures

Norway's wealth fund and LGIM back resolution asking iPhone maker to outline risks associated with artificial intelligence



Apple's investors will vote on the resolution at its annual meeting on Wednesday © Julian Stratenschulte/dpa

Patrick Temple-West in New York and **Michael Acton** in San Francisco 8 HOURS
AGO



Two large Apple investors are seeking more information about the company's artificial intelligence risks as tech companies' ambitions in the fast-growing sector face mounting investor scrutiny.

Norges Bank Investment Management and Legal & General, [Apple's](#) eighth and 10th-largest shareholders respectively, have said they will support a resolution at the iPhone maker's annual shareholder meeting on Wednesday that asks the company to report about [AI](#) in its business operations.

The shareholder proposal asks the company to "disclose any ethical guidelines that the company has adopted regarding [its] use of AI technology".

US technology giants have faced a growing number of questions about their AI development as they spend billions of dollars to compete in the emerging sector. In January, the US Federal Trade Commission [issued information demands](#) to Alphabet, Amazon and Microsoft for details about their partnerships with generative AI companies. Last year, the US and UK unveiled efforts to scrutinise AI development.

Some Big Tech investors have expressed concerns. At Microsoft's annual meeting in December, 21 per cent of the company's shareholders supported a resolution demanding more information about risks posed by misinformation generated and disseminated through AI.

Although most shareholder petitions in the US are non-binding, support from 30 per cent or more of investors typically pushes companies to act.

Norges, which runs the world's biggest sovereign wealth fund, said in its voting disclosures that Apple's board should account for "social consequences of its operations and products".

LGIM said Apple "discloses very little about its approach to managing AI-related risks".

"We met with the company to discuss these topics, and it did not commit to increasing transparency and disclosures around AI at this time," LGIM said. "Apple should be transparent in their uses of AI and their risk management processes."

Institutional Shareholder Services, the largest investor advisory firm, has also recommended Apple's investors support the AI resolution. The tech group's existing guidelines "do not specifically identify the potential risks resulting from the use of AI" raised in the shareholder proposal, ISS said. Given the company's lack of disclosure, "there are concerns regarding shareholders' ability to properly evaluate the risks associated with the use of AI".

Apple has urged investors to reject the resolution. "The scope of the requested report is overly broad and could encompass disclosure of strategic plans and initiatives harmful to our competitive position," it said in its annual meeting disclosures.

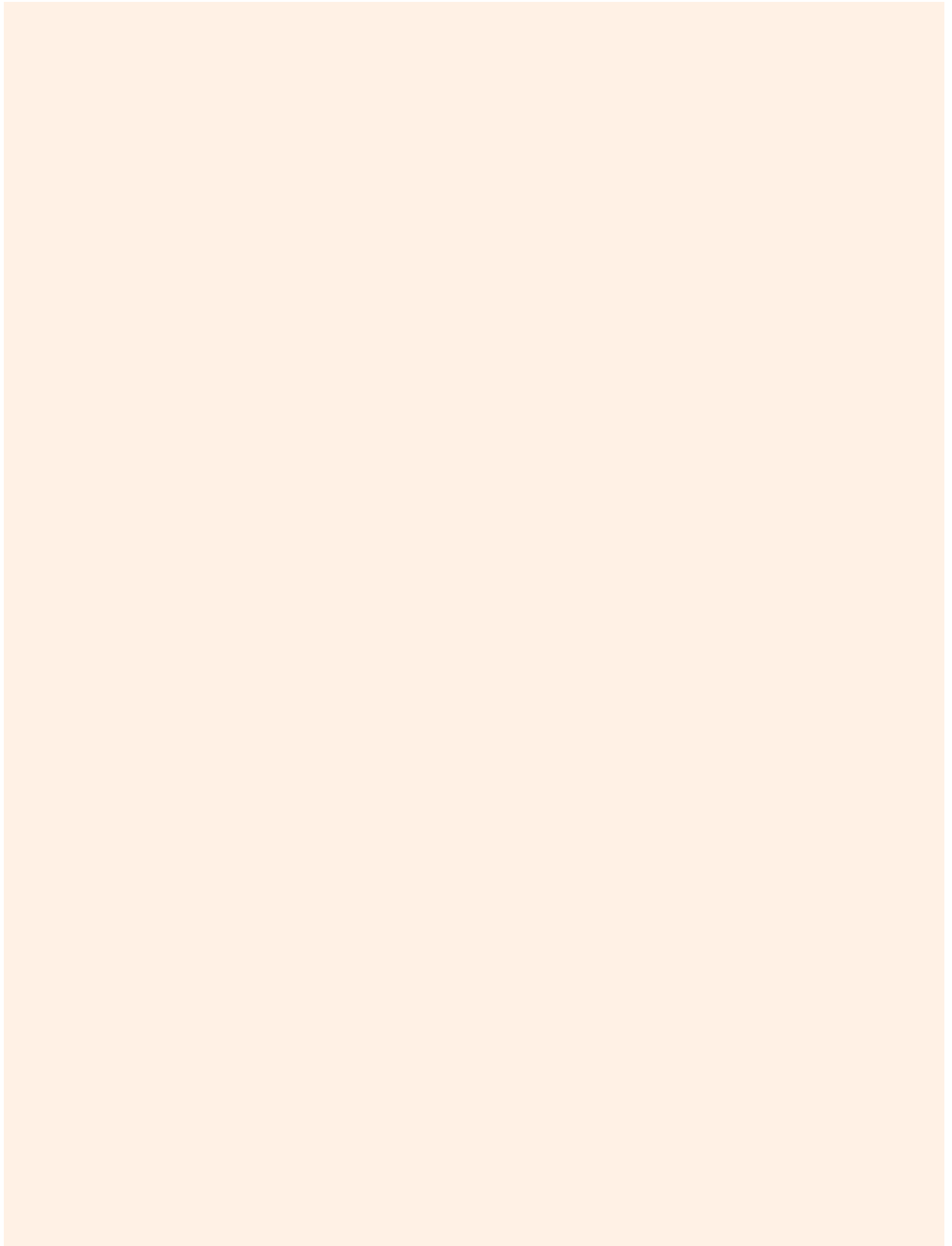
The proposal was submitted by the AFL-CIO, the US's largest trade union federation. The Sunday Times first reported LGIM's backing of the proposal.

Apple declined further comment.

Apple chief executive Tim Cook said during the company's latest earnings call that it plans to announce new details about its work in AI later this year.

The iPhone maker [has been quietly working](#) on large language models, the technology that powers generative AI products such as OpenAI's ChatGPT, as competitors including Samsung and Google roll out their own AI-enabled smartphones. It has unveiled new chips that will enhance AI capabilities on its devices, and has been hiring staff to work on deep learning as well as acquiring smaller companies in the space.

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Inside Robbins Geller's \$192.5M Deal In Novel Walgreens Suit

By Emma Cueto

Law360 (February 26, 2024, 4:45 PM EST) -- Following the collapse of a proposed merger between pharmacy giants Rite Aid and Walgreens, plaintiffs firm Robbins Geller Rudman & Dowd LLP pursued a novel class action on behalf of Rite Aid investors against Walgreens, eventually securing a landmark \$192.5 million settlement after eight years of litigation that the attorneys involved say was the result of their creative approach and success on key discovery battles.

The **unusual case**, which was led by individual retail investors and was a rare example of investors in one company pursuing claims against a different company, resulted in a settlement that was the largest ever awarded in the Middle District of Pennsylvania, and second-largest in the state.

Robbins Geller partners Randall J. Baron and David A. Knotts explained to Law360 Pulse that the unorthodox nature of the case required a creative legal approach, and that the decisive moment in the case was when the firm prevailed on a motion to receive certain unredacted documents.

"We were really honored to come up with this result," Baron said. "It took a long time. This was not a simple case. ... Getting a settlement like this, it's a phenomenal result."

The firm first filed the class action with named plaintiffs Douglas S. Chabot, Corey M. Dayton and Joel M. Kling in November 2018 on behalf of investors who purchased Rite Aid stock during a roughly eight-month period in 2016 and 2017 during which Walgreens executives were publicly expressing confidence that the merger would be finalized.

The complaint, which named not only Walgreens but its CEO Stefano Pessina and Chief Financial Officer George R. Fairweather, alleged that contrary to this public confidence, Walgreens executives knew that the Federal Trade Commission was skeptical of the merger.

Ultimately, despite various efforts to secure FTC approval — such as proposing to sell a sizable number of Rite Aid stores in order to keep the market competitive — the deal fell apart for good in June 2017, causing Rite Aid stock to drop 26% on the day of the announcement.

At the time, Robbins Geller was already working on a separate case challenging the merger, one that ultimately **went in Rite Aid's favor** in summer 2018. However, once the stock dropped so dramatically following the announcement, they began looking more closely at the statements by both companies.

"Why did the stock crater if there was an understanding in the market that the deal could fall apart?" Baron said. "Our investigation showed that both Rite Aid and Walgreens were out there denying anything was wrong. ... It showed that at the very least, the market was confused."



Randall J. Baron



David A. Knotts

Pursuing the case against Walgreens — whose executives were much less cautious and measured in their statements than Rite Aid executives, the attorneys said — was not straightforward. They were unable to find any exact precedents for a successful suit with the same features, seeking to compensate inventors of one company over statements made by executives of another company in connection with a failed merger.

"To our knowledge, this is the only such successful case in history," Knotts said. "So we knew there wasn't a blueprint out there. But we also knew that inventors were harmed. ... So we had to be somewhat creative and inventive."

The court **agreed to certify the class** in 2020, but Baron and Knotts said that the most important rulings were actually two orders on discovery in 2021. The first **ordered** Walgreens counsel at Weil Gotshal & Manges LLP, which represented Walgreens in the class action and had acted as the company's intermediary with the FTC during the merger talks, to hand over certain documents, with the court ruling that Walgreens "opened the door" to it by saying its public statements reflected their genuine beliefs about the FTC process.

In the second key order several months later, the court ruled that Weil had **overdone the redactions** when it handed over the documents. U.S. Magistrate Judge Karoline Mehalchick examined 15 exhibits with challenged redactions and concluded that the redactions in most of the documents were proper, but ordered Weil to remove some of the redactions in three of them.

The information contained in those documents — including the portions that Weil had attempted to redact — was critical to the case, Baron and Knotts said.

"It's unusual in a case to have a discovery motion that is as critical as it was in this case," Baron said. "I actually said to David [Knotts], 'We are going to win or lose this case on the motion to compel.' And we now know in hindsight that the best defense in this case was to keep the information about what the regulators were telling the lawyers out of the case."

With that information, the attorneys were able to directly juxtapose the information that Walgreens executives were getting from regulators with the public statements they made almost immediately afterward — statements that the attorneys characterized as false in light of what the FTC was saying about the merger.

It was "a key turning point," Knotts explained.

The team felt they had a strong case going into the summary judgment motions, which was borne out when U.S. District Judge Christopher C. Conner **denied both parties' motions** and sent the case to trial. The 55-page summary judgment order spent substantial time discussing specific statements Pessina and Fairweather had made during the merger process, and laid out why the allegations that the statements were misleading were credible.

The attorneys say it was "one of the strongest" summary judgment rulings they'd ever gotten.

The team was confident heading toward trial, but ultimately decided to take a \$192.5 million settlement in October 2023, which was approved earlier this month, including the firm's request for **\$58 million in attorney fees**.

It was a great result for the class and the retail investors who were lead plaintiffs, the attorneys said.

"We're very appreciative of the court," Knotts said. "There were four different federal judges that spent a significant amount of time on this case."

Counsel for Walgreens did not respond to a request for comment.

--Editing by Alanna Weissman and Kelly Duncan.



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Wells Fargo Rate-Lock Extension Fee Suit Tossed, For Now

By **Rose Krebs**

Law360 (February 26, 2024, 5:48 PM EST) -- A California federal judge on Monday dismissed a Wells Fargo customer's proposed class action seeking disgorgement of "billions" of dollars that the plaintiff alleged the bank earned by charging certain mortgage fees it later refunded, concluding the lawsuit failed to make specific factual allegations of wrongdoing.

In an **11-page order**, U.S. District Judge Haywood S. Gilliam Jr. granted Wells Fargo & Co.'s motion to dismiss, but gave plaintiff Anthony Morris until March 18 to file an amended complaint to make "sufficiently particularized factual allegations" to show "a legally cognizable basis for his claims."

The judge said he agreed with the lender that claims in Morris' proposed class action "ultimately fail for lack of specific factual allegations about" the bank's "wrongdoing."

In a July 31 filing, Wells Fargo **argued the suit should be tossed** as Morris wrongly assumed that because his rate-lock extension fee, or RLEF, was refunded, the charge must have been improper.

The lender said that if a customer prevents the closing of a home purchase from happening during the so-called "lock period," the time frame can be extended should the borrower pay the rate-lock extension fee. In his suit, Morris said Wells Fargo mailed him a refund check in 2021 for a rate-lock extension fee of \$4,807 he was charged in 2005. The case was originally filed in state court in May 2023, and then was removed to federal court.

Morris asserted in his complaint that "because Wells Fargo refunded RLEFs to plaintiff and class members beginning in or around 2020, it has effectively admitted that it engaged in willful misconduct by charging those RLEFs in the first place."

The mortgage borrower said Wells Fargo retained all the profits it received on the rate-lock extension fee, and he brought claims for civil theft, conversion, money had and received, and unjust enrichment.

In 2018, the bank **agreed to pay** a \$1 billion fine to the Consumer Financial Protection Bureau and Office of the Comptroller of the Currency to settle claims that it improperly charged some mortgage customers with rate-lock extensions fees and billed auto loan borrowers for insurance coverage they didn't need.

In a September 2023 filing opposing the motion to dismiss, Morris said Wells Fargo had "assured would-be borrowers that they would only be charged a rate lock extension fee when the borrowers themselves were at fault for delay in the closure of their mortgages."

Borrowers "relied on these representations, paying countless RLEFs to the bank during the complex and paperwork-laden closing process," he wrote.

"But Wells Fargo's representation was false; the bank knew it was not entitled to these funds," and "beginning in 2020, Wells Fargo effectively admitted it had wrongfully charged borrowers by refunding RLEFs even though its own policy expressly stated borrowers were not entitled to a refund except in cases of Wells Fargo's 'willful misconduct,'" the filing continued.

However, in multiple court documents, the lender took issue with Morris' assertions, insisting it did

not admit misconduct by refunding the rate-lock extension fee, an argument on which the complaint relies.

"The complaint tellingly offers no hint about the details of plaintiff's loan transaction, including that his closing was delayed beyond the rate-lock period," Wells Fargo said in its July filing. Morris "also fails to describe the reason he was charged a RLEF, nor does he allege any conduct by Wells Fargo that delayed his closing or that was otherwise 'wrongful,' much less anything that amounted to 'willful misconduct.'"

Judge Gilliam agreed Monday, ruling that Morris' allegations as to the exact nature of Wells Fargo's misconduct "are vague and conclusory," and that the court is left "to guess" what misrepresentations Wells Fargo allegedly made related to RLEFs.

The judge noted that "while the issuance of a refund years after the fact is certainly interesting, plaintiff has not pled sufficiently particularized factual allegations to allow the court to conclude that any such intrigue provides a legally cognizable basis for his claims."

Judge Gilliam further "declined to dismiss the complaint on statute of limitations grounds at this point in the litigation."

"The court finds that at this early stage, plaintiff has plausibly pled that they had no basis to suspect or discover the alleged wrongdoing until receipt of defendants' refund in 2021," the decision read.

A representative of Wells Fargo declined to comment. Counsel for the parties did not immediately respond to requests for comment.

Morris is represented by Shawn A. Williams, Stuart A. Davidson, Bradley M. Beall, Chad Johnson, Noam Mandel, Desiree Cummings and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP, Sean Baldwin and Zachary Smith of Selendy Gay PLLC, and Christopher L. Ayers and Steven J. Daroci of Seeger Weiss LLP.

Wells Fargo is represented by Amanda L. Groves, Drew H. Washington, Kobi K. Brinson and Stacie C. Knight of Winston & Strawn LLP.

The case is Morris v. Wells Fargo & Co. et al., case number 4:23-cv-03277, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sydney Price. Editing by Covey Son.

Update: This article was updated to reflect that Wells Fargo declined to provide comments.

'Rebel Alliance' Seeks Court Rescue In Opioid Discovery Clash

By **Dan McKay**

Law360 (February 26, 2024, 7:57 PM EST) -- A discovery dispute that includes references to the Rebel Alliance in the movie "Star Wars" and accusations of circumventing court rules — in a galaxy closer to Ohio — is headed before a federal judge handling multidistrict litigation over the opioid epidemic.



A status conference is scheduled in Ohio federal court to hash out rules for exchanging records and information in sprawling multidistrict litigation over the opioid epidemic. (AP Photo/Mark Lennihan)

U.S. District Judge Dan Aaron Polster on Friday scheduled a tentative Zoom status conference for later this week after a **request** Friday by city governments and other plaintiffs suing pharmacy benefit managers in the sprawling litigation.

The local governments — whose legal team joked last month that they operate like the Rebel Alliance — asked for an immediate meeting to go over the rules for exchanging records and information in the case. They accused the defendants of responding to a discovery request with 485 pages of objections, jeopardizing a key deadline and orderly progress in the case.

"The initial discovery process envisioned in this court's order ... has failed," plaintiffs' attorneys Paul T. Farrell Jr. and Peter H. Weinberger said in their request for an immediate status conference.

OptumRx, a defendant in the MDL, **told the judge** Monday that the plaintiffs had compared themselves

to the "Star Wars" heroes while abandoning the required discovery process outlined in court rules.

The "plaintiffs show no signs that they want to follow any orderly process for resolving discovery disputes," OptumRX attorneys Brian D. Boone and William H. Jordan said.

The discovery spat is part of the MDL's bellwether cases against pharmacy benefit managers. The city and county governments allege that the PBMs violated state laws as they helped fuel the opioid epidemic.

Emails attached to the filings outline some of the testy discovery exchanges.

Farrell, writing to the PBM lawyers on Jan. 11, cheekily introduced himself as a representative of the plaintiffs and wanted to know why no one had responded to his last two emails, according to a **message** attached to OptumRx's filing.

"I have the honor [of] serving as co-lead, but the truth is that we function more like the Rebel Alliance in the Star Wars saga with heroes and heroines aplenty," he wrote.

Farrell added: "I know that you know that I know that you are going to object to the geographic and temporal scope of discovery. Let's agree on this simple fact. I propose we take the matter(s) directly to Special Master [David Rosenblum Cohen] and allow him to resolve the dispute."

He closed with the question, "What say you?"

OptumRx contends that it still had 18 days at the time to respond to the plaintiffs' requests and that the "Rebel Alliance" email came within 24 hours of an earlier message from the plaintiffs.

"As the past 45 days have shown," OptumRX said, "the [plaintiffs' executive committee] wants every issue resolved in its favor, immediately, without affording the PBMs a chance to respond."

Neither party outlined what specific records are the subject of the dispute. But OptumRx in December urged Judge Polster **to disqualify** Motley Rice LLC from the case, contending that the plaintiffs' firm had "weaponized" confidential information it received while investigating on behalf of the government in separate litigation.

Judge Polster has set a status conference for Wednesday, but it's scheduled for Zoom, not in-person, as the plaintiffs had requested.

Counsel for the plaintiffs' executive committee and OptumRx didn't immediately respond Monday to requests for comment.

The plaintiffs' executive committee is represented by Jayne Conroy of Simmons Hanly Conroy LLC, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller and Peter H. Weinberger of Spangenberg Shibley & Liber.

OptumRx is represented by Brian D. Boone, William H. Jordan and Kimberly K. Chemerinsky of Alston & Bird LLP.

The multidistrict litigation is In Re National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Emily Field and Emily Sawicki. Editing by Rich Mills.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (February 26, 2024, 4:08 PM EST) -- Delaware's Court of Chancery dropped two potentially far-reaching decisions last week: one about founder control at Moelis & Co. and another about TripAdvisor's planned move to Nevada. On top of that, there were new cases involving Citrix Systems, Alcoa Corp., BGC Partners Inc. and Cantor Fitzgerald LP.

Here's a recap of a week's worth of news from Delaware's Chancery Court.

Decisions

In a ruling with implications for other Delaware-chartered companies pondering a relocation of their corporate home, Vice Chancellor J. Travis Laster **refused to block** travel planning giant TripAdvisor Inc.'s reincorporation in Nevada.

In an opinion that could affect special stockholder agreements that retain power for company founders, Vice Chancellor Laster found that most of a stockholder agreement that gave Moelis & Co. founder Kenneth Moelis broad powers over the investment bank's board is **"facially invalid"** under Delaware law.

The vice chancellor had **dashed hopes for a quick resolution** of a similar control dispute at Goosehead Insurance Inc. a day earlier, deferring his decision on a proposed settlement the Texas-based insurance provider reached with a stockholder and asking for further briefing on the implications of the Moelis lawsuit and similar cases.

In a completely separate case, Vice Chancellor Laster **trounced** a New Jersey attorney's demand to apply blanket attorney-client privilege claims to documents sought in a suit accusing advisers of siphoning millions from a family-controlled trust by appointing a discovery facilitator.

Vice Chancellor Lori W. Will **threw out a stockholder derivative suit** accusing Walgreens directors of ignoring an alleged scheme in which insulin pen prescriptions were overfilled and the government was overbilled, ruling that the investors haven't shown that the company's top brass acted in bad faith.

Boomerang Tube LLC, a defunct steel tube manufacturer, was **found in default** after failing to respond for more than a year to a lawsuit seeking \$7.35 million for unpaid invoices.

In the Courtroom

During appeal arguments, an attorney for Texas Pacific Land Corp. told Delaware's Supreme Court that stockholders who secured two board seats in 2021 **committed to voting with the board**, dooming their efforts to reverse Chancery's dismissal of their lawsuit challenging a share issuance.

Also at the state's highest court, shareholders asserted that Inovalon Holdings Inc. **didn't fully disclose \$400 million in fees** that a consortium of investors paid to Inovalon's financial adviser before they bought the healthcare data company in 2021, reason enough to revive a lawsuit challenging the \$7.3 billion acquisition.

At a hearing on a motion to dismiss in Wilmington, attorneys for online book and study aid giant Chegg Inc. argued that stockholders accusing it of operating as a cheating service for students filed their Chancery case to **circumvent a stay of litigation** in California federal court.

Hedge funds with investments in silicone maker Momentive Performance Materials Inc. that withdrew from a consolidated shareholder lawsuit challenging its 2019 sale urged Vice Chancellor Nathan A. Cook to **carve them out** of a proposed \$19 million class settlement, while the remaining plaintiff shareholder accused them of selfishly trying to blow up the deal.

Attorneys for investors seeking damages from a \$4.75 billion deal that took international online gambling venture Super Group Ltd. public in 2022 cited alleged disclosure failures and significant stock drops in their **arguments to keep the case alive**.

New Cases

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.

A stockholder of healthcare company Ontrak Inc. launched a derivative lawsuit claiming that the founder of the firm **traded company shares on insider information** and that nearly a dozen current and former directors and officers provided false and misleading disclosures about the business.

An investor in brokerage and financial tech firm BGC Partners Inc. whose shares were converted when it reorganized in July filed a proposed class action against billionaire Howard W. Lutnick and New York financial services firm Cantor Fitzgerald LP, alleging the **reorganization was unfair**.

A shareholder hit Alcoa Corp. with **a proposed class action** seeking to invalidate a "highly problematic" and "coercive" advance notice bylaw that allegedly serves to deter director nominations from public stockholders.

Stockholders of opioid drug producer Talphera Inc., formerly known as AcelRx Pharmaceuticals Inc., **sued its top officers and directors**, seeking derivative damages for harm to the business purportedly caused by the dangerous promotion of its flagship sufentanil tablets, better known under its brand name Dsuvia.

Canada-based information technology services provider Soroc Technology Holdings LLC sued private equity firm Oak Lane Partners and several of its top officers and affiliates, alleging that they were behind an **elaborate, \$115 million company sale fraud**.

The founder and former CEO of Rhythm Management Group Corp., a healthcare business that provides medical device monitoring services, **sued for her legal costs** in defense of fraud claims that investor Aldrich Capital Partners Fund LP lodged against her.

Successors to the founder of a global meat and protein supplier that made it big when it started supplying hamburger patties to McDonald's in 1957 sued affiliates of a long-ago investor, alleging changes to LLC agreements that appear to have altered control of the company. The case is Kolschowsky v. Lavin et al., case number 2021-0313.

The director of Roots Food Group Holdings Inc., a provider of medically tailored meals for chronically ill patients, filed two suits against the company's purged founder, seeking to annul a board reorganization and obtain damages from alleged breaches of fiduciary duty. The cases are Dorsey v. Jones, case number 2024-0131, and Dorsey v. Jones et al., case number 2024-0134.

Settlements

Healthcare-purchasing giant Premier Inc. agreed to **a proposed \$71 million settlement** of a derivative stockholder suit that challenged a \$473.5 million payout in a 2020 restructuring, with stockholder attorneys seeking up to \$14 million in fees and expenses.

Quotable

"The soritical paradox bedevils logicians, but not mere humans. We can recognize prototypes and draw distinctions by comparing and contrasting an example with a prototype. A housecat and a lion both have paws, claws, and other feline features. Yet for us, one is a pet and the other a predator. Show me a bobcat or a lynx, and I will keep a respectful distance. Yes, there can be close cases (is a love seat more like a couch or a chair?), but if anyone can make these types of distinctions, courts can." – Vice Chancellor J. Travis Laster, in **an opinion** about the legality of stockholder agreement that gave board-trumping powers to the founder of Moelis & Co.

--Additional reporting by Jeff Montgomery, Rose Krebs, Isaac Monterose and Hailey Konnath. Editing by Adam LoBelia.

Correction: An earlier version of this story misidentified which judge wrote the TripAdvisor opinion.

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Chancery Approves Snap Inc. Deal, Trims Fee Award By \$2M

By **Leslie A. Pappas**

Law360, Wilmington, Del. (February 26, 2024, 7:52 PM EST) -- An agreement between Snapchat parent Snap Inc. and a class of shareholders to settle litigation that accused the social media platform of giving its founders too much voting power won Delaware Chancery Court approval Monday, but shareholder attorneys got just \$4.5 million of the \$6.6 million in fees that they sought.

In a bench ruling after arguments in Wilmington, Vice Chancellor Paul A Fioravanti said he trimmed the requested hourly rate from \$3,068 per hour to roughly \$2,000 in part because "it was an early-stage settlement" and shareholders didn't achieve a "complete victory" for their efforts.

The City of Warwick Retirement Systems **sued in August 2022** in response to charter amendments that allegedly expanded the voting rights of the company's co-founders while reducing the rights of Class A public shareholders. Snap co-founders Evan Spiegel and Robert Murphy held a combined 22% interest in Snap but controlled 99.5% of its total voting power, the complaint said.

Snap's capital structure includes three types of stock: non-voting Class A stock, which is publicly traded; non-publicly traded Class B stock, which is held by a limited number of investors including Hong Kong-based Tencent, the owner of Chinese social media app WeChat; and supervoting Class C stock, which is 100% held by Snap's co-founders.

Shareholders later amended the complaint after the City of Warwick sold all of its Snap stock and Greater Pennsylvania Carpenters' Pension Fund stepped into the role of lead shareholder plaintiff.

The proposed **settlement, reached in June**, would implement a series of complex governance to correct alleged imbalances in the voting structure, including the addition of an independent director.

The settlement, while a benefit for the company, did not achieve many of the goals in the amended complaint, the vice chancellor said in his ruling Monday.

Shareholders sought a court declaration that Snap's charter amendments violated Delaware General Corporation Law and were void. Instead, the settlement resolved the case with corporate governance reforms that, while "valuable," shareholder attorneys did not attempt to quantify, the vice chancellor said. The settlement included no monetary benefit.

In baseball terms, the settlement is not a home run but is "a solid single," the vice chancellor said.

Monday's hearing marked the second time that Snap shareholders sought approval of the settlement.

Vice Chancellor Fioravanti in September **declined to approve it**, citing notification concerns and a last-minute expansion of the class beyond Class A shareholders.

At the hearing Monday, shareholder attorney Christopher M. Foulds of Friedlander & Gorris PA told the court that the parties had amended the settlement stipulation so that the class only consists of Snap's Class A stockholders as of July 19, 2022, and does not include Class B or Class C stockholders.

Foulds also said that additional notifications were sent out.

In his bench ruling Monday, the vice chancellor found that the notice since September was adequate, and the revised class definition was "appropriate."

Greater Pennsylvania Carpenters' Pension Fund is represented by John Vielandi, Ned Weinberger and Mark Richardson of Labaton Keller Sucharow LLP, Jeremy Friedman and David Tejtzel of Friedman Oster & Tejtzel PLLC, D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC and Joel Friedlander, Jeffrey M. Gorris and Christopher M. Foulds of Friedlander & Gorris PA.

Snap Inc. and the director defendants are represented by William M. Lafferty, Susan W. Waesco and Alexandra M. Cumings of Morris Nichols Arsht & Tunnell LLP.

Snap Inc. is also represented by Johnathan M. Moses and Sunny S. Jeon of Wachtell Lipton Rosen & Katz.

Evan Spiegel is represented by Michael A. Pittenger, T. Brad Davey and Eric J. Nascone of Potter Anderson & Corroon LLP and George M. Garvey and John M. Gildersleeve of Munger Tolles & Olson LLP.

Robert Murphy is represented by David Ross, Bradley R. Aronstam, S. Michael Sirkin and Holly Newell of Ross Aronstam & Moritz LLP.

The case is Greater Pennsylvania Carpenters Pension Fund v. Snap Inc. et al., case number 2022-0679, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Kelly Duncan.

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Chancery Says 'Game Over' On Fee Windfalls For Easy Cases

By **Jeff Montgomery**

Law360 (February 26, 2024, 4:53 PM EST) -- A Delaware vice chancellor has publicly slammed stockholder attorneys who sought an \$850,000 fee for "minuscule" hours spent on a corporate benefit case after a recent string of suits filed to police stockholder rights to separate class votes on company transactions.

Vice Chancellor Morgan T. Zurn, in an unusual and blunt "Statement of the Court" transcript made public on Monday, declared that the "game is over" on relatively large fee claims based on limited hours devoted to enforcing common shareholder rights to vote as a stand-alone, rather than consolidated, class on some deals and charter amendments.

The comments, given in court Feb. 15, called out Smith Katzenstein & Jenkins LLP and Purcell & Lefkowitz LLP in a ruling that rejected an \$850,000 fee request for efforts that prompted car-sharing venture Getaround Inc. to revise voting plans for a share increase developed as part of its reverse, take-public merger, approved by stockholders in December 2022.

After Getaround relented and lined up a separate vote for common stockholders, the battle shifted instead to the size of the fee for the corporate benefits gained in stockholder Robert Garfield's suit. On that issue, the vice chancellor described David Jenkins of Smith Katzenstein and his plaintiffs attorney colleagues as having "lost all perspective" after "having had a really good run making a literal fortune off a minuscule number of hours of work" on charter cases and class vote challenges.

"Seeking a fee that a company CFO has affirmed in a sworn affidavit would render the company insolvent appears to be a betrayal of the stockholders you purport to represent and a betrayal of the functions that plaintiffs counsel plays in the broader ecosystem," the vice chancellor said.

In a brief filed with the court in October, attorneys for Getaround argued that the \$850,000 fee requested equals \$35,789.47 per hour "for 23.75 hours worked with no disclosure of how the time was actually spent."

The company also argued that more than 94% of Class A shareholders redeemed their holdings for \$10.11 per share before closing, and only 181,199 remaining shares were traded on the single day afterward when the price was higher than \$10.11, equating to a combined \$10,872, or 6 cents per share, loss.

"In this case, plaintiff does not contend, nor could he, that the outcome of the stockholder vote was altered in any way" because of objections raised before the vote in July 2022 by the attorneys who would later sue, the company argued. "The Class A stockholders, in a class vote, approved the charter amendment with 89% approval (as compared to the 92% approval of all stockholders)."

Getaround hit the court months after Vice Chancellor Zurn's relatively earthshaking decision in *Garfield v. Boxed* in December 2022, which found that common shareholders have a right to vote as a single class, rather than in a multiclass pool, on proposals to increase the number of company shares under Delaware's General Corporation Law. The finding triggered a surge in charter changes and litigation aimed at revising charters and correcting share counts.

The *Boxed* decision also upheld an \$850,000 attorney fee for counsel representing stockholder Garfield, also represented by Smith Katzenstein and Purcell & Lefkowitz. Vice Chancellor Zurn

concluded at the time that the Boxed case "conferred a substantial benefit" to shareholders and prevented a cloud or "ticking time bomb" of invalid shares from hanging over the company's capital structure.

Vice Chancellor Lori W. Will weeks later applied a fix to part of the threatened chaos in a ruling on In re: Lordstown Motors Corp., declaring that companies can retroactively validate wrongly issued shares.

In the Getaround transcript, Jenkins pointed out to the vice chancellor that the \$850,000 fee in Boxed disappeared when the company sought bankruptcy protection, "and we got nothing."

Getaround counsel Thomas A. Uebler declined to comment Monday. Garfield's attorneys Jenkins and Steven J. Purcell did not immediately respond to a request for comment.

Garfield's suit asserted that by attempting to deny Class A common stockholders a right to a separate class vote, company insiders were trying to make it easier to secure approval of the share increase amendment.

Vice Chancellor Zurn cited "stark disappointment" in the fee proposal and said she would give the plaintiff's counsel an opportunity to "regroup and try to negotiate" with the company.

Proposals to value corporate benefit according to the size of the stockholder base, the decision added, would be impossible to follow across the board.

"You all know there's not much precedent out there to guide my thoughts on this action," the vice chancellor said. "One or both of you will be unhappy if the decision is left to me. So I hope everyone can be the best version of themselves and members of the Delaware bar, and I look forward to a stipulation."

Garfield is represented by David A. Jenkins and Jason Z. Miller of Smith Katzenstein & Jenkins LLP and Steven J. Purcell and Robert H. Lefkowitz of Purcell & Lefkowitz LLP.

Getaround Inc. is represented by Thomas A. Uebler and Terisa A. Shoremouth of McCollom D'Emilio Smith Uebler LLC.

The case is Robert Garfield v. Getaround Inc., case number 2023-0445, in the Court of Chancery of the State of Delaware.

--Editing by Rich Mills.



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Chinese Retailer Miniso, Underwriters Beat IPO Suit For Now

By **Katryna Perera**

Law360 (February 26, 2024, 9:44 PM EST) -- Goldman Sachs, BofA Securities Inc. and a Chinese retailer have secured the dismissal of a class action suit in New York federal court, with a federal judge ruling that the suing investors have failed to identify any actionable misrepresentations or omissions made by the company in connection with its 2020 initial public offering, among other things.

U.S. District Judge Edgardo Ramos issued an **opinion and order** on Friday tossing a suit launched against Miniso Group Holding Ltd., several of its executives, and Goldman Sachs and BofA Securities, which served as the company's underwriters in its IPO.

In the operative complaint, lead plaintiff Nova Scotia Health Employees Pension Plan alleges Miniso made misrepresentations about its reliance on a specific business model, a joint venture with its CEO Guofu Ye to build new headquarters and other challenges to Miniso's business, such as declines in revenue and an increase in store closures.

However, Judge Ramos said Friday that Nova Scotia failed to allege any actionable misstatement or omissions in the company's offering or post-IPO materials.

Specifically, the judge said the complaint does not allege any misrepresentations made about Miniso's joint venture with Ye.

According to the order, the joint venture was announced a few months after the IPO, and it was supposed to purchase a parcel of land in China on which Miniso would build its new headquarters. The land was purchased in 2021, but the pension plan claims Ye never contributed any funds to the joint venture and that his eventual buy-out from the partnership was a "naked transfer of shareholder money to the chairman."

The pension fund specifically points to a report published by short-seller Blue Orca in 2022, claiming to have reviewed Chinese credit reports allegedly showing that Ye did not contribute any capital to the project.

But Judge Ramos said Friday that these alleged credit reports "were not for the joint venture entity itself, but for a Chinese subsidiary of a different subsidiary of the joint venture." That Chinese subsidiary is called Mingyou Industrial.

The judge added that courts have rejected attempts to use one entity's filings to establish the falsity of another's.

"Here, these credit reports for Mingyou Industrial say nothing about what Ye contributed to the actual joint venture — an entity two levels above the Mingyou Industrial subsidiary. Mingyou Industrial's filings do not establish the falsity of the joint venture's filings," the order states.

According to the order, Nova Scotia also alleged that Miniso failed to disclose reductions in license fees it charged to its retail partners, which the pension plan says indicated that Miniso "was having significant difficulty attracting franchisees."

However, Judge Ramos said an omission is actionable when the corporation is subject to a duty to

disclose the omitted facts, and in the current action, the pension plan has not established that Miniso had such a duty.

"Nova Scotia alleges no facts establishing Miniso's obligation to disclose pricing changes, nor any statements rendered misleading without disclosure of the reduction. Accordingly, its claim of a material misstatement or omission based on changed license fees fails," the order states.

The judge further stated that no misrepresentations or omissions have been alleged relating to internal controls, and the complaint includes many protected, forward-looking statements.

Additionally, Judge Ramos said the suit does not adequately plead knowledge of wrongdoing, or scienter, by Ye or the other individual defendants, or loss causation.

Despite granting the defendants' dismissal motion, Judge Ramos gave the pension plan leave to amend its claims.

The suit is on behalf of all individuals and entities that purchased or acquired Miniso American depository shares between Oct. 15, 2020, and July 26, 2022.

Counsel for Goldman Sachs and BofA Securities declined to comment on Monday, and counsel for the other parties did not immediately respond to requests for comment.

The Nova Scotia Health Employees' Pension Plan is represented by Jeremy A. Lieberman, Matthew L. Tuccillo, J. Alexander Hood II, Jennifer Banner Sobers and Brandon M. Cordovi of Pomerantz LLP and Laurence M. Rosen and Phillip Kim of The Rosen Law Firm.

Miniso, Ye and the other individual defendants are represented by Scott Musoff, Robert Fumerton, Michael Griffin, Hope O'Leary, Steve Kwok, Siyu Zhang and Beatriz Paterno of Skadden Arps Slate Meagher & Flom LLP.

Goldman Sachs and BofA Securities are represented by Jeff Hammel, Jason Hegt, Alexander Mills and Larry Hong of Latham & Watkins LLP.

The case is In re Miniso Group Holding Limited Securities Litigation, case number 1:22-cv-09864, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.



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Del. Justices Back Toss Of \$500M Maxim-Analog Merger Suit

By **Hailey Konnath**

Law360 (February 26, 2024, 10:31 PM EST) -- The Delaware Supreme Court on Monday refused to revive investors' \$500 million challenge to Maxim Integrated Products Inc.'s \$21 billion merger with Analog Devices Inc., leaving intact a Chancery Court decision throwing out the case in May.

In a **short order**, the three-justice panel said only that "we find it evident that the judgment of the Court of Chancery should be affirmed." The decision puts to rest former Maxim shareholders' claims that they weren't fully informed when they signed off on the merger, which cut off a \$500 million, four-quarter string of dividends.

The justices didn't elaborate on their rationale Monday, but they pointed to the reasons laid out in Vice Chancellor Morgan T. Zurn's May 2, 2023, order, as well as a subsequent order refusing to give the shareholders another shot at arguing their case.

In her May 2 **decision**, Vice Chancellor Zurn found that the shareholders hadn't shown that Maxim's directors breached their fiduciary duties by failing to pursue the dividends after the tax liability was ruled out. Ultimately, the shareholders didn't establish any conflicts or bad faith behind Maxim's actions or that the claims could overcome liability shields for directors in Maxim's charter, the vice chancellor said.

Similarly, Vice Chancellor Zurn also threw out investors' claim that former Maxim CEO Tunc Doluca breached his fiduciary duty by failing to ensure the deal proxy fully disclosed uncertainty regarding the need for the holdback and the chance that no liability would be found.

On **appeal**, the shareholders had argued that Analog — a multinational producer of semiconductors — received a private letter ruling three months before closing the deal, yet Maxim took the combination to closing without restoring the dividends or invoking shareholder consent rights.

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

Maxim and Analog didn't immediately respond to requests for comment late Monday.

Justices Abigail M. LeGrow, Gary F. Traynor and N. Christopher Griffiths sat on the panel for the Supreme Court of the State of Delaware.

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

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

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



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Apache's \$3B Write-Down Merits Bigger Class, Investors Say

By **Jessica Corso**

Law360 (February 26, 2024, 10:22 PM EST) -- A group of Apache Corp. investors on the cusp of winning class certification are arguing that their promised class should be extended to encompass even more investors who were allegedly deceived by company promises of a potentially lucrative drilling project that ultimately led to a \$3 billion write-down when it went bust.

U.S. Magistrate Judge Andrew M. Edison earlier this month **recommended** that a federal judge overseeing a shareholder lawsuit against Apache approve a class of those who held stock in the company between Sept. 7, 2016, to Feb. 22, 2018, to pursue claims that the company misled investors about the potential profitability of a natural gas play.

In a Friday filing, lead plaintiffs Plymouth County Retirement System and the Trustees of the Teamsters Union No. 142 Pension Fund object to Judge Edison's recommendation, saying he committed "clear error" in his refusal to endorse a class period that encompassed all those who held stock through Oct. 25, 2019.

That's the day that Apache announced the "godfather" of the once promising play known as Alpine High had unexpectedly resigned, causing the stock price to close 5% lower compared to the prior trading day, the suing investors say.

They argue that Judge Edison was wrong to state that the resignation of high-ranking geologist Steven Keenan "did not reveal anything new about Alpine High," a play in West Texas, and was more likely linked to the market's concern about the company's prospects in drilling for oil in Suriname.

"[G]iven that Keenan was widely known as the Apache executive in charge of exploring, developing, and running Alpine High, his unexpected resignation revealed that Alpine High's prospects were far worse than defendants had previously portrayed to investors," the lead plaintiffs state.

"Indeed, within months of Keenan's departure, Apache shuttered its Alpine High-focused offices and took a \$3 billion write down on the play," they add.

The plaintiffs are asking to argue their case for a more extensive class period before a district judge ultimately makes the certification call.

Investors **sued** Apache in 2021, claiming that the company overstated the amount of natural gas and oil available at Alpine High and that the company made enthusiastic statements about the play's profitability even though it knew it didn't have the infrastructure to drill and transport those resources even if they existed.

Apache has said it was upfront with investors about the potential precarity of the project and blamed the stock price drop on the volatility of the energy markets. But the company **was defeated** in its attempt to have the case thrown out.

Apache declined to comment on the case Monday.

Plymouth and Teamsters 142 are represented by Gregory Castaldo, Johnston de F. Whitman, Austin Manning, Joshua D'Ancona, Richard Russo and Evan Hoey of Kessler Topaz Meltzer & Check LLP, David Kaplan, Wolfram Worms, Emily Bishop, Steven Singer, Maya Saxena, Sara DiLeo, Joseph White,

Joshua Saltzman and Lester Hooker of Saxena White PA, John S. Edwards and Thomas Ajamie of Ajamie LLP, and Douglas Daniels of Daniels & Tredennick PLLC.

Apache is represented by David Sterling, Amy Pharr Hefley, J. Mark Little, Anthony Lucisano, Frank Mace, John Lawrence and Sarah Coble of Baker Botts LLP.

The case is in re: Apache Corp. Securities Litigation, case number 4:21-cv-00575, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Spencer Brewer and Clark Mindock. Editing by Kristen Becker.

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Intel Unit Mobileye Hit With 2nd Investor Suit Over Supply Glut

By **Emilie Ruscoe**

Law360 (February 26, 2024, 8:10 PM EST) -- Autonomous driving company Mobileye Global Inc. and a trio of its current and former executives face a proposed investor class action after the company's trading prices slid after it cut its first quarter revenue expectations in half, citing a supply glut.

In a **complaint filed Friday** in New York federal court, plaintiff Tung Le claimed the Jerusalem-based technology company, its CEO, and its current and former chief financial officers should face liability after shareholders saw trading prices for their Mobileye shares fall by nearly \$10, or roughly 25%, to about \$30 on the heels of the company's supply announcement in January.

Le described Mobileye, a subsidiary of chip manufacturing giant Intel, as a developer of advanced driver assistance systems that makes most of its revenue off its EyeQ System-on-Chips computer chips, which are used in visual processing for autonomous driving systems.

According to Le, the company's shares were artificially inflated between January 2023 and January 2024, during which time Mobileye allegedly concealed that its automotive supplier customers were poised to deal a blow to Mobileye's profits by pulling back on their computer chip spending.

In its announcement, the company attributed the lowered revenue guidance to its discovery that its customers had potentially as many as seven million units of its chips on hand already, Le said.

According to the company, the chip supply glut occurred in part because certain automotive parts manufacturers saw "lower than expected production" in 2023.

The company also noted that in 2022 and 2021, automotive suppliers had purchased more chips than they had actual demand for, out of a "desire to avoid part shortages" amid supply chain issues.

Alongside the company, Le's suit names Mobileye CEO Amnon Shashua, Chief Financial Officer Shemesh Rojansky and former CFO Anat Heller.

Mobileye was founded in 1999 and acquired by Intel in 2017 in a \$15.3 billion deal. When the Israeli company **went public** in 2022, it started trading on the Nasdaq stock exchange at about \$28.

On Monday, Mobileye shares closed the day trading at about \$24, down from the \$30 Le cited at the end of the proposed class period of Jan. 26, 2023 to Jan. 3, 2024.

The suit comes amid intense market interest in chipmakers such as graphics processing unit maker Nvidia, which has seen extraordinary market gains as applications emerge for artificial intelligence technology.

Mobileye was hit with a **similar suit** in January by another investor.

On Monday, a representative for Mobileye told Law360 via email that "We will vigorously defend any litigation and stand behind our disclosures."

Counsel for Le didn't immediately respond to requests for comment.

Le is represented by J. Alexander Hood II, Jeremy A. Lieberman and James M. LoPiano of Pomerantz

LLP.

Counsel information for the defendants wasn't immediately available Monday.

The case is e v. Mobileye Global Inc et al., case number 1:24-cv-01390, in the U.S. District Court for the Southern District of New York.

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

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Securities Group Of The Year: Bernstein Litowitz

By **Emilie Ruscoe**

Law360 (February 26, 2024, 2:47 PM EST) -- Bernstein Litowitz Berger & Grossmann LLP recently secured \$1 billion for Wells Fargo investors who claimed losses over the bank's risk management practices and reached a \$145 million settlement on behalf of investors in Allianz's Structured Alpha Funds, earning the firm a place among **Law360's Securities Practice Groups of the Year**.



Bernstein Litowitz has described the **May 2023 Wells Fargo settlement** as "historic," noting the sum ranks among the top 20 biggest U.S. securities settlements and is one of the six largest in a decade.

Bernstein Litowitz partner Hannah Ross told Law360 the firm was "incredibly proud of that result," which ended claims the bank made false and misleading statements to investors about how it was complying with regulatory consent orders "when the reality was, as we alleged, that they were not" complying with the consent orders.

Ross said the settlement followed "extensive litigation" and that the investor claims were bolstered by highly public congressional hearings over the bank's compliance issues.

Similar misrepresentation claims were at play in the firm's litigation over the Allianz funds, Ross said. Since the 2020 collapse of funds overseen by Allianz Global Investors U.S. LLC, a U.S. subsidiary of German financial firm Allianz, securities practitioners at Bernstein Litowitz have played a role in over 20 related actions and have negotiated upwards of \$2 billion in recoveries for allegedly impacted investors.

Ross told Law360 that resolving the Allianz matters required "intense litigation and then negotiation"

of both proposed class actions and individual cases claiming Allianz deviated from the funds' stated mandates.

Allianz has admitted to defrauding institutional investors with its claims about the funds and has told investors it set aside over \$4 billion to deal with the fallout, including regulatory probes and litigation, related to the collapse.

Those recoveries include the \$145 million deal, approved in March 2023, that ended claims against Allianz in New York State Supreme Court.

The firm's other recent accomplishments have included its **\$450 million settlement** resolving investor claims against The Kraft Heinz Co. over alleged misstatements about its budget and revenues following the 2015 merger of Kraft Foods Group Inc. and H.J. Heinz Holding Corp.

Bernstein Litowitz partner Salvatore Graziano told Law360 the Kraft-Heinz matter was very complex because of the size of the companies and the fact the claims involved business segments all over the world, noting once a motion to dismiss was denied in the case, the company's investigation spanned many time zones and involved "just a massive amount" of document review and work on the part of the litigation team.

Graziano was also part of the team that reached a \$175 million deal to end claims against Chinese would-be Starbucks competitor Luckin Coffee over alleged investor losses following the company's admitted financial misstatements, which, like the Kraft-Heinz matter, made for a difficult multinational undertaking.

Ross credited Bernstein Litowitz's successes to the firm's very collaborative approach to its cases.

"From the initial stage, we put a lot of effort into analyzing and investigating the case," she said, describing the firm as conservative and selective with the cases it recommends.

Graziano said the firm's strong client base is also key to its success, noting because its clients are major institutional investors, "we often are in a position to represent a major client in [each] case."

Ross said that for the cases involving Allianz and Wells Fargo, "and really for all of [our] cases, we're so honored to have the opportunity to represent our clients and injured shareholders and do everything we can in our power to maximize, recover and return those lost monies to the harmed shareholders."

--Editing by Kristen Becker.

Latham, Jackson Walker Avoid Sanctions Over Sorrento Venue

By **Ben Zigterman**

Law360 (February 27, 2024, 12:08 AM EST) -- A Texas bankruptcy judge declined to level sanctions against Latham & Watkins LLP and Jackson Walker LLP for trying to establish Texas jurisdiction for California-based Sorrento Therapeutics Inc. in its Chapter 11 bankruptcy, finding that their conduct did not amount to bankruptcy fraud.



A sign for Sorrento Therapeutics is seen outside the company's headquarters in San Diego. (Kristoffer Tripplaar/Sipa via AP Images)

While U.S. Bankruptcy Judge Chris Lopez said at a three-hour hearing Monday that he may not like such efforts to establish jurisdiction, he said Texas solo practitioner Timothy Culberson hasn't presented evidence that the law firms intended to defraud the court.

"Lawyers made legal maneuvers that may be disfavorable, but there's no finding here, there's no evidence that they didn't think that they had a legal basis to try to do what they did," Judge Lopez said.

Culberson filed an emergency motion Feb. 20 requesting \$500 million in sanctions against Latham and \$40 million in sanctions against Jackson Walker, accusing them of fraudulently creating a Texas bank account and post office box for a Sorrento subsidiary shortly before Sorrento and the subsidiary filed for Chapter 11.

"I've talked to other bankruptcy attorneys who say that this happens all the time. That doesn't make it right," said Culberson, who asked Judge Lopez to stop a sale to a buyer associated with Sorrento CEO Henry Ji "for pennies on the dollar."

Culberson has previously alleged a wide-ranging scheme to have Sorrento file for bankruptcy in the Southern Texas district to exploit an undisclosed romantic relationship between then-U.S. Bankruptcy Judge David Jones, who ended up being assigned to the case, and ex-Jackson Walker partner Liz Freeman.

Both law firms have denied these claims. Judge Lopez, now overseeing Sorrento's insolvency, **declined last month** to sanction Latham over its disclosures, while saying further inquiry was needed with respect to Jackson Walker.

Counsel for the law firms blasted Culberson's latest motion at Monday's hearing.

Christopher Harris of Latham said Culberson "recklessly attacked" individual lawyers without "a shred of evidence that Latham knowingly believed any statement to be false."

John Kane of Kane Russell Coleman Logan PC, representing Jackson Walker, said that "taking efforts to establish venue, even in a different venue outside of the former headquarters of the business, is not a fraudulent act. It isn't even bad faith."

While Judge Lopez said that Culberson "has every right" to bring his motions and continue his investigation, calling it "serious work," Judge Lopez said he was concerned about Culberson being "a little bit loose with the personal identifiable information."

Judge Lopez also took issue with the timing of the motion, coming about a year after Sorrento filed for Chapter 11 in February 2023 and after its Chapter 11 plan was **confirmed in November** with the support of more than 90 percent of its unsecured creditors.

"The legal issue of timeliness is going to be an issue," Judge Lopez said. "A post-confirmation transfer or dismissal is what I'm being asked to do."

He told Culberson that "active participation early in cases" is "what's going to stop this."

While Judge Lopez did not rule on whether the case should be dismissed or transferred to another venue, as the U.S. trustee has sought **in a motion** that is scheduled to be heard March 11, he said he would have many questions about how that would work practically.

"Where do I send this case?" he asked. "I'm very concerned about the sanctity of the creditor vote and where unsecured creditors are."

Judge Lopez also agreed Monday to a \$3 million interim debtor-in-possession loan from proposed buyer Vivasor Inc. to fund the bankruptcy until March 8, when he will consider an additional \$2 million in DIP financing.

The buyer is associated with Sorrento CEO Ji, Caroline Reckler of Latham said at Monday's hearing, and it "will be funded by a syndicate of wealthy investors," she said. Sorrento hopes to close on the sale by the end of March, she said.

Sorrento is represented by Caroline Reckler and Jonathan Gordon of Latham & Watkins LLP and Matthew D. Cavanaugh, Kristhy M. Peguero and Genevieve M. Graham of Jackson Walker LLP.

Timothy L. Culberson of The Culberson Law Office PLLC is representing himself.

The U.S. Trustee's Office is represented by Alicia Lenae Barcomb and Hector Duran Jr.

Jackson Walker is represented by Joseph M. Coleman, John J. Kane and JaKayla J. DaBera of Kane Russell Coleman Logan PC.

The official committee of unsecured creditors is represented by Mark Shinderman of Milbank LLP.

The equity committee is represented by Andrew K. Glenn, Kurt A. Mayr, Shai Schmidt and Richard C.

Ramirez of Glenn Agre Bergman & Fuentes LLP.

The case is In re: Sorrento Therapeutics Inc. et al., case number 4:23-bk-90085, in the U.S. Bankruptcy Court for the Southern District of Texas.

--Additional reporting by Emily Lever and Emlyn Cameron. Editing by Michael Watanabe.

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Walgreens Brings On Ex-Shell, Sprint Atty As Global CLO

By **Michele Gorman**

Law360 (February 26, 2024, 4:50 PM EST) -- Walgreens' next top legal leader is a seasoned in-house lawyer who has worked at other high-profile companies including Shell and Sprint, the pharmacy giant said Monday.

Lanesha Minnix will become executive vice president and global chief legal officer at Walgreens Boots Alliance Inc. on April 15. Her appointment completes new CEO Tim Wentworth's executive committee.

WBA is the corporate holding company for Walgreens worldwide and includes a number of brands and chains including Boots, Duane Reade Inc., No7 Beauty Co. Ltd. and Farmacias Benavides SA.

"I am excited and inspired by the unique opportunity to join WBA, and its trusted and iconic brands that meet the pharmacy and healthcare needs of thousands of communities every day," Minnix said in a statement.



Lanesha Minnix

A spokesperson for WBA said Minnix wasn't available for comment Monday because she hasn't started working at the company yet.

Minnix replaces **Danielle Gray**, who left WBA in January to pursue another opportunity. She had been with the company since 2021. Her move came months after Wentworth's arrival at the Deerfield, Illinois-based company.

Minnix will take over the legal department as WBA continues to be involved in litigation accusing the company of playing a role in the opioid crisis.

On Friday, an Illinois federal judge **agreed 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, WBA, and its current and former leadership told the judge 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.

Prior to joining WBA, Minnix had been executive vice president, general counsel and corporate secretary at food safety company Ecolab Inc. for close to two years, her LinkedIn profile says.

For about five years before she joined Ecolab, Minnix held the top legal positions at machinery supplier Flowserve Corp. and construction company BMC.

From 2004 to 2007, Minnix was corporate counsel at Sprint Corp. and then she joined Shell PLC as senior legal counsel, according to her profile. Almost five years later, she started at facility management company ABM Industries, where she was deputy general counsel and chief compliance officer.

A graduate of the University of Tulsa College of Law, Minnix worked for about four years as a corporate associate at K&L Gates LLP earlier in her career, her profile shows.

Wentworth, the new CEO, credited Minnix with being a "widely respected leader and legal expert."

"The healthcare and retail landscapes continue to evolve, and her legal guidance and expertise will be invaluable as we continue to expand our reach beyond neighborhood pharmacies into other fast-growing areas of healthcare," Wentworth said in a statement.

--Additional reporting by Kaitlin Gebby and Gina Kim. Editing by Lakshna Mehta.

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Live Nation Can't Cancel Suit Over Eras Tour Sales Meltdown

By **Gina Kim**

Law360 (February 26, 2024, 10:58 PM EST) -- A California federal judge refused Friday to end a proposed securities class action alleging Live Nation made misleading statements about its operations when news of alleged anticompetitive practices with Ticketmaster caused stock prices to drop, finding the suit describes "a materially different state of affairs" than what Live Nation claimed.

In a 13-page order, U.S. District Judge Kenly Kiya Kato of the Central District of California refused to grant a dismissal bid by Live Nation Entertainment Inc. and its CEO Michael Rapino and Chief Financial Officer Joe Berchtold against an investor class action alleging violations of the Exchange Act and Rule 10b-5, arising from their allegedly false and misleading statements and omissions regarding the company's compliance with antitrust laws.

The investors' case — **steered by** Glancy Prongay & Murray LLP and The Rosen Law Firm PA — challenged multiple statements the defendants issued from Feb. 2022 to Feb. 2023 as false and misleading. The investors claimed Live Nation failed to disclose it engaged in anti-competitive behavior and didn't fully cooperate with **ongoing investigations** commenced by the U.S. Department of Justice and the U.S. Senate Antitrust Subcommittee.

The suit references statements that the investors said ran afoul of securities laws including comments Live Nation made about its cooperation history with authorities relating to any probe or inquiry, its discussion about antitrust concerns, its reference to stiff competition in the live entertainment industry, and revenue growth that the company attributed to its successes via its ability to put on even more concert events and the rise in ticket sales.

On Friday, Judge Kato said the investors stated a claim under Section 10(b) and Rule 10b-5 of the Exchange Act as to Live Nation's statements made in its 10-K forms that referenced intense competition from rivals like AXS, Eventbrite, Vivid Seats, SeatGeek and Stubhub, and that it mainly competes on its ability to delivery quality concerts and enhanced experiences for fans and performers.

Judge Kato said the investors raise several allegations that chip away at Live Nation's statements and describe a different "state of affairs" than what the company described, including the fact that Live Nation controls at least 60% of concert promotion services for major venues, and that concert venue promoters must pay a significant amount of money upfront to artists.

Judge Kato also referenced testimony from concert promoter Jam Productions before the Senate Judiciary Committee in January 2023 that "Live Nation attempts to lock up talent so competitors cannot produce concert tours," Friday's opinion said.

"While defendants couch their claims about the competition in the live entertainment industry as opinions and beliefs [...] an opinion statement can be found materially misleading when allegations show 'there is no reasonable basis for the belief,'" Judge Kato said, quoting **City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech Inc.** 

Friday's order is the latest development in a suit filed by Brian Donley and Gene Gress, after the fallout from the disastrous resale for Taylor Swift's The Eras Tour in 2022. The complaint centers around news coverage that Live Nation and Ticketmaster were under a federal antitrust probe after systems crashed during the Eras Tour presale.

Live Nation merged with Ticketmaster in January 2010 but the companies have been operating under a DOJ consent decree to preserve competition in the live events space, Donley alleged.

Between November 2022 and July 2023, articles published by The New York Times, NPR and Politico regarding the DOJ's probe into Live Nation and Ticketmaster following their platform crashes during the resale for Swift's tour tickets led to share price declines, **the investors said**.

In November, CNBC reported that a Senate investigative subcommittee subpoenaed Live Nation and Ticketmaster seeking information about ticket prices and fees, following a monthlong probe that the plaintiffs alleged wasn't previously publicized. The CNBC report revealed for the first time that Live Nation hadn't actually cooperated fully with the Senate subcommittee's probe into its practices and abuse of monopoly power, the investors claimed.

Live Nation moved to dismiss the investors' suit, arguing they failed to state a claim since the investors did not plead any material omission or misstatement, or that any statements were made with the intent to deceive.

On Friday, Judge Kato further found that the investors plausibly alleged that Live Nation's statement touting that its 2022 revenue growth reflected the quality of Ticketmaster and its popularity with clients contained a material misrepresentation.

The judge cited allegations that Live Nation didn't include material details relevant to Ticketmaster's success, including that the platform maintained control of ticket distribution for more than 70% of major concert venues, that it was the only platform for 82% of the biggest amphitheaters in the U.S. and 77% of the top 100 amphitheaters around the globe, or that Ticketmaster enters into long-term exclusive deals with venues that could span up to a decade or more.

"In light of these allegations, defendants' statements that revenue growth was a reflection of the quality of the Ticketmaster platform and its popularity, without additional explanation or context about their control in the market, 'give[s] a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists,'" Judge Kato wrote.

The investors also sufficiently plead scienter as to the statements, since both Berchtold and Rapino knew about the investigations into Live Nation's allegedly anticompetitive conduct from as early as 2010, and that their suit strongly infers both executives chose not to reveal the entire picture as to the company's revenue in 2022, its successes, or difficulties from competitors, the order said.

And the plaintiffs sufficiently allege that the defendants' actions caused their losses, as the allegedly misleading statements artificially spiked Live Nation's stock prices, which the investors relied on when purchasing the stock at artificially inflated prices, Judge Kato concluded.

Representatives for the investors and Live Nation did not immediately return inquiries seeking comment Monday.

The investors are represented by Robert V. Prongay, Ex Kano S. Sams II, Charles Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP, Laurence M. Rosen, Phillip Kim and Joshua Baker of The Rosen Law Firm PA and Frank R. Cruz of the Law Offices of Frank R. Cruz.

Live Nation is represented by Melanie M. Blunschi, Elizabeth J. Cheng and Gregory Mortenson of Latham & Watkins LLP.

The case is Brian Donley et al. v. Live Nation Entertainment Inc. et al., case number 2:23-cv-06343, in the U.S. District Court for the Central District of California.

--Additional reporting by Sydney Price and Joyce Hanson. Editing by Jay Jackson Jr.



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Banks Say Brazil Pollution Suit In NY Is In Wrong Country

By **Madeline Lyskawa**

Law360 (February 26, 2024, 5:56 PM EST) -- Four leading financial institutions are urging a New York federal judge to throw out a pair of proposed class suits accusing them of enabling environmental degradation in Brazil by lending \$17.2 million to Brazilian mining company Vale SA, arguing the claims don't belong in the United States because they are "all about Brazil."

Merrill Lynch Pierce Fenner & Smith Inc., Barclays Capital Inc., Citigroup Global Markets Inc. and JPMorgan Securities LLC pushed back at the suits in a filing Friday. Supporting a motion to dismiss on forum non conveniens grounds, the institutions argued that the cases are brought by Brazilian plaintiffs and based on Brazilian law and harms allegedly caused in Brazil.

"There is simply no reason why this court instead of a Brazilian court should adjudicate these cases," the banks said. "The forum non conveniens doctrine exists to ensure that cases like these — where the plaintiffs' factual and legal theories are deeply connected to another country — are not litigated in the United States."

The city of Ouro Preto and the Antônio Pereira and Pasárgada associations, the entities behind the cases, **sued** in mid-September, seeking to represent a class of municipalities and a class of community associations, respectively. In their complaints, they allege the banks have promoted environmental degradation in violation of Brazil's National Environmental Policy Act by issuing a series of loans to Vale between 2004 and 2023 totaling nearly \$12.2 billion and joining with other financial institutions to provide the company with another \$5 billion line of credit.

The money enabled Vale to expand its mining operations in an area known as the Iron Quadrangle in the Brazilian state of Minas Gerais, causing significant air and noise pollution, the plaintiffs say. The company also constructed 21 dams containing toxic waste from its mining operations, which face a significant risk of collapsing due to poor design, the plaintiffs say, noting two of Vale's dams collapsed in 2015 and 2019, causing massive environmental disasters and the death of 270 people.

Although the plaintiffs ultimately asserted claims against the banks under Brazilian law, they say they filed suit in New York federal court because the banks' financial agreements with Vale state debt securities are governed by New York law, and the evidence of the banks' wrongdoing lies in New York, where they conduct their business.

However, the banks argued on Friday that this understanding is incorrect, maintaining that Brazil is the only reasonable forum for litigating the cases, which are "factually centered in Brazil and brought under Brazilian law." The plaintiffs' insistence on litigating in New York "smacks of forum shopping," the banks said, and there is no bona fide connection between the plaintiffs and New York and the banks have already agreed not to contest jurisdiction in Brazil.

As for the validity of the claims, the banks argue the plaintiffs fail to allege any connection between the banks and the dams that purportedly caused their injuries, instead asserting they are strictly liable as "indirect polluters" under Brazilian law.

"This theory of liability is as groundless as it is far-reaching," the banks said. "There is no precedent in Brazil embracing plaintiffs' theory, which, if adopted, would have massive ramifications for business and investment in Brazil, as well as for Brazilian jurisprudence."

Representatives of Citigroup and Merrill Lynch declined to comment Monday.

Representatives for JPMorgan, Barclays and the plaintiffs did not immediately respond to requests for comment.

Ouro Preto, the Antônio Pereira Association and Pasárgada Association are represented by Alex R. Strauss, Roy L. Mason, Glenn Phillips and Greg Coleman of Milberg Coleman Bryson Phillips Grossman PLLC.

JPMorgan is represented by Jayant W. Tambe, Lauri W. Sawyer and Rajeev Muttreja of Jones Day.

Barclays is represented by Adam S. Hakki and Daniel C. Lewis of Shearman & Sterling LLP.

Merrill Lynch is represented by Tatiana R. Martins, Antonio J. Perez-Marques and Patrick W. Blakemore of Davis Polk & Wardwell LLP.

Citigroup is represented by Matthew D. Ingber and Christopher J. Houpt of Mayer Brown LLP.

The cases are City of Ouro Preto v. Merrill Lynch et al., case number 1:23-cv-08139, and Antônio Pereira Association et al. v. Merrill Lynch et al., case number 1:23-cv-08160, in the U.S. District Court for the Southern District of New York.

– Additional reporting by Henrik Nilsson. Editing by Drashti Mehta.

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Google Judge Rips \$700M Antitrust Deal: 'It's Not Great'

By **Bonnie Eslinger**

Law360 (February 26, 2024, 11:58 PM EST) -- A California federal judge lambasted a \$700 million deal that consumers and state attorneys general struck with Google blocking antitrust claims related to Android apps and the Play Store for 127 million consumers for the next seven years, saying Monday he's "never granted prospective relief" and that plaintiffs "folded" with "four aces."

U.S. District Judge James Donato made the remarks during a hearing in San Francisco over the requests from the states and lawyers for the consumer plaintiffs to send out notices to Play Store users about their settlement with Google letting them know of their right to opt out.

First disclosed in September, the **consumer deal** was inked by the attorneys general of more than 50 jurisdictions and lawyers for consumers in litigation claiming Google unlawfully controls the apps offered on Android devices. That settlement and another Google reached with Match Group left Epic Games Inc. to go to trial solo against the tech giant — a battle **the Fortnite developer won**.

At the start of Monday's hearing, Judge Donato told counsel for the states and consumers that the jury verdict in favor of Epic has no influence on the settlement and whether he'd approve it.

"That's completely separate, it has no impact on what I'm going to ask about today," the judge said.

After confirming that the settlement covers 127 million people, Judge Donato zeroed in on the fact that it releases Google from the suit's antitrust and unfair competition claims for seven years.

"You're asking 127 million fellow citizens to give up a bushel of claims in a hotly contested area ... and not just for the events to date, but for whatever events the future holds," the judge said. "I have to say I find that seven-year part to be particularly concerning. I have never granted prospective relief. I don't think that's fair to the class."

Paula Blizzard of the California attorney general's office told the court that the settlement was vetted and approved by all the attorneys general and will cultivate more competition in the Android apps market.

From Google's standpoint, the company argued that it needed some assurance that there wouldn't be a similar case just around the corner, Blizzard said. Google's lawyer, Glenn D. Pomerantz of Munger Tolles & Olson LLP, echoed the assertion.

"We can't be in a position where we settle, pay a lot of money, agree to a lot of injunctive relief, and they get sued the next day for this, the exact same conduct," he told the court.

Judge Donato said the argument was unpersuasive.

"If you are going to just double down and keep doing what got you sued over in the first place, why is it unfair to you to get sued again?" he asked.

The judge asked how much money the 127 million consumers could expect to get, on average.

Blizzard said the minimum would be \$2 each, but that sum would go up for consumers who use Google Play frequently.

"People who are very heavy users of Google Play will receive thousands if not tens of thousands of dollars," the lawyer said. "And very heavy users will receive much more."

The judge asked the parties to submit a supplemental brief that provides more clarity on the distribution graph.

"It looks to me as a matter of basic math, any single person isn't going to be getting much," he said.

Turning to the settlement's injunctive relief, Judge Donato noted that although developers can now offer their own billing system for their apps on Android, the deal doesn't say how much Google will charge them for that.

Blizzard said developers who want to sue over fees can opt out of the settlement, but Google will no longer do things it was doing before to block competition, like paying companies not to have app stores or preventing developers from launching a special version of an app with a rival.

"Competition will drive down the fees," she told the court.

The judge was skeptical.

"I understand you think that but, but it's very hard for me to say something that's fair, reasonable and adequate on a wing and a prayer," Judge Donato said. "And if it turns out ... you're wrong, these rights have been signed away."

The judge noted that at the start of the litigation the crux of the case had been the claim that developers were being overcharged.

Blizzard pointed out that the states were not able to use their overcharge expert, leaving them with just their expert on the plaintiffs' theory that Google's conduct resulted in less variety and innovation in the app market. Judge Donato said he recalled that the expert's opinion sounded pretty good; Blizzard said it was, calling it a "complete winner."

The judge pointed out that nevertheless the attorneys general and the consumers settled.

"You folded after you got four aces," he said.

Blizzard said the case was not that certain and the judge shot back that's true in every case, to some greater or lesser degree.

"That's the whole premise of settlement, uncertainty," Judge Donato said. "It's my job is to make sure that people don't get left holding a bag of nothing. And right now, I'm not saying it's a bag of nothing, but it's not great."

The judge gave the parties 30 days to address his concerns in writing.

Google has been accused of obstructing competition for applications on Android devices by making it hard to install apps from outside Google Play and by forcing developers to pay hefty fees for in-app purchases. The plaintiffs also allege that Google violated the Sherman Act by entering into agreements to dissuade major app developers from opening app stores that would compete with Google Play.

Under the deal reached with the attorneys general and consumers, Google agreed to pay \$630 million, minus costs and fees, to consumers who made Google Play purchases between August 2016 and September 2023, with another \$70 million going to the states themselves.

The five-year deal, according to details released in December, also **requires** that Google let developers allow users to use cheaper in-app billing systems that the developers can advertise to customers. It also bans Google from signing contracts making Play the preloaded exclusive option for those five years, among other restrictions.

Many plaintiffs have challenged Google's control over the Play Store, but only Epic has gotten all the way to trial.

Epic, which has said it seeks specific remedies after its win at trial, criticized the settlement in December, saying it offered "no true relief for consumers or developers." The company's vice president of public policy, Corie Wright, noted that the states had originally sought \$10.5 billion.

The consumer plaintiffs are represented by Karma M. Giulianelli of Bartlit Beck LLP, and Hae Sung Nam of Kaplan Fox & Kilsheimer LLP.

The states are represented by Brendan P. Glackin of the Office of the Utah Attorney General, and Paula L. Blizzard of the Office of the Attorney General of California.

Google is represented by Glenn D. Pomerantz, Kuruvilla Olasa, Justin P. Raphael, Dane P. Shikman and Jonathan I. Kravis of Munger Tolles & Olson LLP, Brian C. Rocca, Sujal J. Shah, Michelle Park Chiu and Richard S. Taffet of Morgan Lewis & Bockius LLP, and Neal Katyal and Jessica L. Ellsworth of Hogan Lovells.

The cases are In re: Google Play Store Antitrust Litigation, case number 3:21-md-02981, In re: Google Play Consumer Antitrust Litigation, case number 3:20-cv-05761, and Utah et al. v. Google LLC et al., case number 3:21-cv-05227, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig, Matthew Perlman and Dorothy Atkins. Editing by Adam LoBelia.



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Amazon Loses Round In Suit Over Subscription Renewals

By **Greg Lamm**

Law360 (February 26, 2024, 11:27 PM EST) -- Amazon must face claims in a proposed class action that its automatic renewal for Prime, Kindle and other services violates California and Oregon consumer laws, according to a Washington federal judge who said Monday that it was unclear if the retail giant did enough to make it easy to cancel after a free trial.

U.S. District Judge Ricardo S. Martinez said he was not persuaded that Amazon's policy and disclosures on how to cancel subscriptions satisfy California or Oregon automatic renewal laws, in an order rejecting Amazon's motion to dismiss.

Judge Martinez said Amazon's price disclosures were not illegal misrepresentations, and Amazon's cancellation policies contain the required information under California's and Oregon's automatic renewal laws.

But Judge Martinez said the plaintiffs have presented a strong enough argument at this stage of litigation to show that Amazon fell short of the laws by sending out emails telling consumers they may "cancel any time" without any further information on how to cancel or where to find instructions on how to cancel.

"It is not clear to the court that this meets the requirements of either Oregon or California ARL, thus these findings of fact are better left to a jury," Judge Martinez **said in his order** filed in federal court in Seattle.

Amazon had **urged the judge** to reject the customers' claims that they did not know Amazon would keep charging them for subscriptions at the end of a trial period because Amazon failed to disclose the terms of its services in a specific location, color or font size. Amazon said the company made the terms of the subscriptions clear, including how much the services would cost and how to cancel at any time.

In his order, Judge Martinez said he wasn't buying Amazon's argument that the company did enough to inform subscribers how to quit.

"Plaintiffs describe in their complaint multiple instances of consumers struggling to cancel their subscription, being unable to cancel via phone, failing to successfully cancel online after multiple attempts, or ultimately having to end their subscriptions by canceling their payment methods within Amazon Settings or through their financial institutions," the judge said.

According to their complaint, Oregon resident Mark Daly and California residents Elena Nacarino, Susan Sylvester and Michael Sonnenschein say they were not aware that Amazon would continue to automatically charge them for Prime and other services at the end of a trial period. The consumers further allege Amazon made it difficult for them to cancel.

In **opposing Amazon's motion to dismiss**, the consumers say Amazon failed to provide an easy-to-use mechanism for cancellation in an initial acknowledgment and follow-up emails.

Amazon is the target of **a similar lawsuit** filed by the Federal Trade Commission accusing the company of tricking consumers into enrolling in its Prime service and making it difficult for members to cancel subscriptions.

Representatives for the consumers and Amazon did not immediately respond Monday to requests for comment.

The consumers are represented by Wright A. Noel of Carson Noel PLLC and Philip L. Fraietta, Frederick J. Klorczyk III, Neal J. Deckant and Julia K. Venditti of Bursor & Fisher PA.

Amazon is represented by Brian D. Buckley, Jedediah Wakefield, Kimberly Culp and Garner Kropp of Fenwick & West LLP.

The case is Daly et al. v. Amazon.com Inc., case number 2:22-cv-00910, in the U.S. District Court for the Western District of Washington.

--Editing by Janice Carter Brown.

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Bayer Beats Flintstone Vitamin Buyers' Cert. Bid, For Now

By **Hailey Konnath**

Law360 (February 26, 2024, 10:38 PM EST) -- A California federal judge has refused to certify a class of consumers claiming that Bayer's Flintstones multivitamin gummies are falsely labeled as "complete," ruling that their named plaintiff isn't an adequate class representative, but giving consumers a chance to select a new named plaintiff and try again.

U.S. District Judge John A. Kronstadt denied the consumers' motion for class certification in an **order** Friday, agreeing with Bayer that named plaintiff Camille Cabrera's claims prompt defenses unique to her. That means certification would lead to class counsel devoting most of their time and resources to her individual claims as opposed to those of the larger class, the judge said.

"For this reason, plaintiff is not a typical member of the putative classes," Judge Kronstadt said. "Further, plaintiff's knowledge and priorities at the time of her purchases make her an inadequate representative of the members of the putative classes because it increases the risk that this litigation will focus on such knowledge and priorities."

Still, the judge gave the consumers the opportunity to amend their complaint and select a different named plaintiff.

The **litigation dates** to 2017. In the latest version of their complaint, the consumers claim Bayer can't call the Flintstones vitamins "complete" because they lack four essential vitamins: Vitamin K, Vitamin B1, Vitamin B2 and Vitamin B3. Those vitamins boost bone health, energy, metabolism and digestion, among other important functions, according to their amended complaint.

Cabrera claimed she purchased the vitamins in 2019, relying on the statement on the product label that it was a "complete" multivitamin supplement. However, had she known that it didn't actually contain all the vitamins, she wouldn't have made the purchase, she said. Cabrera also said she wants to keep buying the products but won't do so until they actually contain all the vitamins.

She was hoping to represent a nationwide class of individuals who purchased the products as well as two California subclasses.

In Friday's order, Judge Kronstadt agreed that the proposed class was numerous enough to warrant certification. And common questions dominate when it comes to their claims, he said.

However, Bayer has said it could argue that Cabrera didn't rely on the purported misrepresentations that appear on the products before purchasing them because she testified that she had never thought about what "complete" means in this context before answering a questionnaire on her lawyers' Facebook page.

She also testified that, since becoming a named plaintiff, she has repeatedly purchased Equate's multivitamins, another brand whose label states "compare to Flintstones Complete Gummies," according to the decision. That suggests she has continued to purchase similar products that do not have all essential vitamins, Judge Kronstadt said.

That testimony is enough to show that Cabrera is too "uniquely vulnerable" to specific defenses from Bayer to serve as the class representative, the judge said.

"Plaintiff is an inadequate and atypical class representative," Judge Kronstadt said. "Therefore, the motion is denied on this basis."

Because the proposed class's claims otherwise clear the requirements for class certification, the judge said the consumers could find a different class representative who doesn't have the unique circumstances of Cabrera.

For instance, Judge Kronstadt said, Bayer's products incorporate the term "complete" on the front of their labels in large, all-capital text, meaning it's reasonable to assume that proposed class members were exposed to the same "complete" term when deciding whether to make the purchase.

And whether Bayer received a benefit from those who purchased the allegedly mislabeled products and whether that benefit was unjust are questions "amenable to classwide resolution," the judge said.

As for damages, the consumers have offered a sufficient model for calculating liability, Judge Kronstadt said, rejecting Bayer's qualms with their expert. Those concerns "go to the weight, not the admissibility" of the expert's testimony and methodology and are better addressed in a motion to exclude testimony or in a motion for summary judgment, according to the decision.

Finally, Judge Kronstadt said a class action is clearly the superior method for resolving the dispute for several reasons. Notably, the potential damages for each class member are likely to be small, meaning they aren't likely to pursue their claims individually, he said.

Bayer and counsel for the consumers didn't immediately respond to requests for comment late Monday.

The consumers are represented by Lisa Omoto of Faruqi & Faruqi LLP and Aubry Wand of the Wand Law Firm PC.

Bayer is represented by Joshua J. Fougere, Jacquelyn Fradette, Amy P. Lally and Morgan Branch of Sidley Austin LLP and Jonathan F. Cohn of Lehotsky Keller Cohn LLP.

The case is Camille Cabrera v. Bayer Healthcare LLC et al., case number 2:17-cv-08525, in the U.S. District Court for the Central District of California.

--Additional reporting by Emily Field and Craig Clough. Editing by Linda Voorhis.



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Feds Want PacifiCorp To Cover \$1B Ore., Calif. Wildfire Costs

By **Lauren Berg**

Law360 (February 26, 2024, 11:14 PM EST) -- PacifiCorp revealed in a U.S. Securities and Exchange Commission filing Monday that the U.S. Department of Justice is potentially looking to collect more than \$1 billion from the company to cover costs related to 2020 wildfires in Oregon and California, even threatening to take one matter to court.

In an annual report filed by its parent company, Berkshire Hathaway Energy Co., PacifiCorp said it received correspondence from the Justice Department — representing the U.S. Department of the Interior, the Bureau of Land Management, the Bureau of Indian Affairs, the U.S. Department of Agriculture and the U.S. Forest Service — about potentially recovering \$625 million in costs and damages on federal lands from the September 2020 Archie Creek and Susan Creek fires in Oregon.

The DOJ reached that estimate for "mediation purposes only" relating to reforestation, damaged timber and improvements, fire suppression costs, cleanup, and other damages, according to the report.

"The amounts alleged for natural resource damage from these fires do not include intangible environmental and natural resource damages that the U.S. could potentially seek to recover if this matter was fully litigated," the report stated.

The company said it also received correspondence from the Oregon Department of Justice regarding potential recovery for about \$109 million in damages to state lands from the Archie Creek and Susan Creek fires. According to the ODOJ's "estimates for mediation purposes only," those damages relate to the sheltering of affected Oregonians, fire control and extinguishment costs, 39 acres of Oregon forestland, road damages, and damages at the Rock Creek Fish Hatchery.

Late last year, the Oregon Department of Forestry also sent demand notices to the company for \$2 million in fire suppression costs for three separate ignition points associated with the 2020 fires, according to the report.

In addition, PacifiCorp said it received a notice of indebtedness from the U.S. Department of Agriculture's Forest Service indicating that the company owes the U.S. government \$356 million for fire suppression costs, natural resource damages and burned area emergency response costs related to the September 2020 Slater Fire in California.

Then in January, PacifiCorp received correspondence from the Justice Department "indicating its intent to litigate the matter due to PacifiCorp not having paid the \$356 million," according to the report.

"PacifiCorp is actively cooperating with the USDOJ on resolving these alleged claims, including through the pursuit of alternative dispute resolution," the company said.

BH Energy Co. and the DOJ did not immediately respond to requests for comment late Monday.

The report comes just after a Portland, Oregon, jury last month held that PacifiCorp **must pay at least \$62 million** in compensatory damages to nine people who fled their homes during the 2020 wildfires.

A jury that decided classwide issues last year **heard that the power company was grossly negligent** before and during a historic wind event. Last year's classwide jury **also decided punitive damages** in all future trials would be awarded as one-quarter of compensatory damages. In this case, that would add \$15.6 million.

Last December, PacifiCorp settled for an additional **\$250 million with timber companies** whose commercial woodlands were burned by a series of wildfires in southwestern Oregon, less than two weeks after settling for nearly **\$300 million with residents** impacted by the fires.

Also on Monday, Southern California Edison Co. **agreed to shell out \$80 million** to resolve a DOJ lawsuit alleging the utility company caused the 2017 Thomas Fire that scorched large sections of the Los Padres National Forest.

The money will be paid in order for the Forest Service to recoup costs and damages associated with the fire, with SCE agreeing to pay within 60 days.

--Additional reporting by Cara Salvatore and Henrik Nilsson. Editing by Kristen Becker.

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