

Under Armour, Investors Head Toward Trial on Accounting Issues

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- Apparel maker, investors present competing narratives
- Genuine factual issues remain for fraud trial, court says

Under Armour Inc. has lost a bid to defeat a securities class action before trial on grounds that the investors suing it lacked proof of misleading statements about consumer demand and other metrics.

That issue will go to a jury, as will the issue of fraudulent intent, Judge Richard D. Bennett said in an order entered Tuesday in the US District Court for the District of Maryland's docket.

Under Armour argued "that the statements must be considered in the full context in which they were made, including risk disclosures and warnings," Bennett said. A question of fact exists for the jury as to whether the disclosures and warnings were meaningful, he said in denying the company's request for summary judgment.

Securities fraud cases often end before summary judgment. Where such claims survive for trial, companies face risks and pressure to settle.

The investors said in their complaint that Under Armour and its co-founder and former CEO Kevin Plank misled shareholders about government investigations into a practice of shifting sales from one quarter to the next to make the company's finances appear healthier. The

The jury will need to look at intent as well as the circumstances in which the challenged statements were made, Bennett said. The company's "internal communications demonstrating Plank's knowledge of pull forwards and increased sales to liquidators" create a factual issue for trial about intent, he said.

The case is In re Under Armour Sec. Litig. , 2024 BL 63194, D. Md., No. 17-0388, entered 2/27/24 .

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Diamondback Sued by Pension Fund Over \$26 Billion Endeavor Deal

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A pension fund sued Diamondback Energy Inc. on Thursday, challenging its planned \$26 billion acquisition of Endeavor Energy Resources LP over provisions requiring Endeavor's owner, billionaire oil tycoon Autry Stephens, to support Diamondback's board.

The lawsuit, filed in Delaware, assails a stockholder agreement between Diamondback and Stephens, whose family will control 40% of the combined business. The transaction, expected to close in the fourth quarter, would allegedly make Diamondback the third-largest oil and gas producer in the Permian Basin, behind only Exxon Mobil Corp. and Chevron Corp.

The complaint takes aim at sections of the agreement that say the Stephens family must vote for the company's sitting directors in any board election so long as they hold at least a 20% stake. The family would also allegedly face other restrictions so long as it owns at least 10% of Diamondback, including prohibitions on publicly offering to buy it, submitting stockholder proposals, seeking to influence the board, or selling stock to any prominent activist investor.

Although "the company may have had a legitimate business rationale for acquiring Endeavor," the transaction was structured to "prevent any potentially unfriendly stockholders from gaining even a toehold," according to the proposed class action in Delaware's Chancery Court. The shareholder suit was filed by the Plymouth County Retirement Association and Kenneth Webb, an individual investor.

It also targets board members at Diamondback, which didn't immediately respond to a request for comment Thursday. Stephens—whose net worth of \$23.4 billion makes him the world's 77th-wealthiest person, according to the Bloomberg Billionaires Index—isn't named as a defendant.

According to the complaint, Diamondback—with headquarters in Midland, Texas, across the street from Endeavor's—has traditionally been owned by passive institutional investors such as major asset managers. But when Wellington Management Group LLP disclosed an 8% stake Feb. 8, the board moved to protect itself from potential shareholder activism, the lawsuit says.

The structure of the merger, announced four days later, allegedly reflects an effort by board members with relatively small personal stockholdings to marshal the Stephens family's stake in their own defense. "A board that collectively possessed little voting power on its own exploited a transformative acquisition to appropriate for itself effective control of their own re-election," according to the complaint.

The restrictions “cannot be rationalized as anything other than an entrenchment vehicle,” the suit says. It requests an injunction against the voting requirement provision and clause restricting stock sales to activist investors.

The investors are represented by Labaton Keller Sucharow LLP and Friedman Oster & Tejtcl PLLC.

The case is Plymouth Cty. Ret. Ass’n v. Stice , Del. Ch., No. 2024-0183, complaint filed 2/29/24 .

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Fisker Founders, Board Sued Over Accounting, EV Delivery Issues

By Ben Miller

- COURT: C.D. Cal.
- TRACK DOCKET: [2:24-cv-01619](#)

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Fisker Founders, Board Sued Over Accounting, EV Delivery Issues

By Ben Miller 2024-02-28T16:25:59000-05:00

- COURT: C.D. Cal.
- TRACK DOCKET: [2:24-cv-01619](#)

Fisker Inc.'s co-founders, directors, and former chief accounting officer allegedly hid accounting and delivery issues from investors for more than three months, prompting a trio of stock drops, a shareholder derivative complaint says.

The electric vehicle maker's top brass failed to disclose material weaknesses in its financial reporting, inaccurate accounting, and limitations on deliveries, instead touting the potential to ramp up production, according to the complaint filed Tuesday in US District Court for the Central District of California.

Starting in August, a proxy statement and several press releases allegedly misrepresented the volume of US deliveries that would go out to customers, as well as the rate of production, which Fisker told investors would reach 140 vehicles per day by the end of the month. Despite forecasts that Fisker would produce up to 23,000 vehicles by the end of 2023, the company ultimately slashed its production forecast to an upper limit of 17,000.

Fisker allegedly filed a disclosure in November announcing its financial results would be delayed, citing the departure of ex-Chief Accounting Officer John Finnucan. The day of that announcement, the company's stock price fell more than 8% to close at \$3.99 on Nov. 8.

The company then filed a disclosure reporting net losses and announced it wouldn't be able to file its quarterly report on time, instead filing a disclosure that cited delivery and service infrastructure issues limiting its deliveries and slashed the production forecast. That day Fisker's share price fell more than 18% to close at \$3.34 on Nov. 14, the stock's biggest drop ever since its 2018 market debut, according to data compiled by Bloomberg.



One week later, the company announced that its new Chief Accounting Officer Florus Beuting had resigned after holding the role for only eight days. Fisker's stock fell nearly 15% that day to close at \$2 per share on Nov. 21. The day after a filing revealed that the company had identified approximately \$20 million of expenses that were incorrectly recorded as selling, administrative, and general expenses in prior filings, but were later determined to be associated with production.

Shareholders Sid Azizi and Saed Albittar seek to recover damages for Fisker, alleging that the current and former executives and directors violated the Securities Exchange Act. They also seek legal fees, the complaint says.

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

The company and executives also face a separate proposed class action filed in November, which is still pending in the same district court.

Bragar Eagel and Squire PC represents the plaintiffs.

The case is Azizi v. Fisker , C.D. Cal., No. 2:24-cv-01619, complaint filed 2/27/24 .

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Feb. 29, 2024, 10:10 AM PST

The Board of Directors Is in Charge

By Matt Levine

(Bloomberg Opinion) --

Moelis, Crown Castle

The basic rule is that the board of directors of a company is in charge of the company, and when they are faced with a decision, the directors are supposed to make the choice that they believe is best for the company and all of its shareholders. The shareholders don't make the decision; the board does. ¹

Now, the directors are elected by the shareholders, and when the company has a controlling shareholder, the idea that the directors are in charge can feel somewhat absurd. The controlling shareholder – say, a founder and chief executive officer who owns 60% of the stock – can come into the boardroom and say “I want you to sell all of the company's assets to me for \$1,” and the directors will say “no, in our independent judgment that's a bad idea,” and the founder/CEO/shareholder will say “okay you're fired,” and she will replace them with more pliable directors. And she can do that, because she has the votes. ² But still: The directors are supposed to exercise their independent judgment and do what is in the company's best interests, and if they conclude that the founder/CEO's plan is bad, they have to say no and get fired. They can't just say “well, ultimately she controls the company, so we have to do what she asks.” Exercising independent judgment is their job.

I cannot promise that every board of directors of every company sees things this way – I think some directors of private startups see their job as “advise and empower the founder/CEO” rather than “exercise independent judgment” – but the courts in Delaware, where most US public companies are incorporated, definitely see things this way. ³ So we talked recently about a Delaware court decision overturning Elon Musk's pay package at Tesla Inc. The basic theory there was that Musk is Tesla's controlling shareholder (even though he owns a minority of the stock), and that the board did not exercise sufficient independent judgment in deciding what to pay him: He asked for a pay package and they deferred to what he wanted. Not okay, said the judge; the board has a duty to make its own independent determination of what he should be paid.

Ken Moelis is the founder, chief executive officer and chairman of the board of directors of Moelis & Co., the investment bank. In 2014, Moelis & Co. went public, and over time Ken Moelis sold some of his stock. He now owns about 6.5% of the stock, but he has some supervoting shares, which give him about 40.4% of the voting power of the stock. ⁴ That's not a majority, but it's a lot more than Elon Musk owns of Tesla: Ken Moelis is not necessarily the controlling shareholder of Moelis & Co., but he's at least pretty close.

Beyond his voting stake, though, Ken Moelis has some extra control over his company. Specifically there is a Stockholders Agreement that gives Ken Moelis some rights to control the company:

1. He gets to designate a majority of the board of directors: He can name his candidates, and the company's board is obligated to nominate them, recommend that stockholders vote for them, and try to get them elected. 5 (If the shareholders all vote no, his candidates can lose, but with 40.4% of the vote that's pretty unlikely.)
2. His directors also get to serve on all of the board's committees.
3. Ken Moelis has to give his prior approval for a bunch of specified corporate actions, including incurring debt, issuing stock, paying dividends, entering new lines of business, adopting annual budgets and business plans, bringing lawsuits, signing material contracts, removing or appointing executives and changing the company's name.

A shareholder sued, arguing that this is not allowed: Moelis & Co. is a public company incorporated in Delaware, which means that its *board of directors* has to be in charge of things like hiring and firing the CEO, entering new lines of business or changing its name. A contract can't give its founder the right to make those decisions instead of the board.

And last week a judge – Vice Chancellor Travis Laster of the Delaware Court of Chancery – agreed. Here is his opinion, which finds that the requirement for Ken Moelis's prior approval of corporate actions is invalid:

Taken together, the Pre-Approval Requirements force the Board to obtain Moelis' prior written consent before taking virtually any meaningful action. With the Pre-Approval Requirements in place, the Board is not really a board. The directors only manage the Company to the extent Moelis gives them permission to do so.

As are most of his rights to name directors: "The Recommendation Requirement improperly compels the Board to recommend Moelis' designees for election," even if the board doesn't think those designees are good, and "Determining the composition of committees falls within the Board's authority. A stockholder cannot determine who comprises a committee."

Now, at some level, none of this matters. As a 40% shareholder (by voting rights), and the founder, CEO, chairman of the board and namesake of the firm, Ken Moelis probably *can* get the board to do most of what he wants, with or without a contract. For one thing, the directors are probably there – on the board of the company he founded and controls – because they think his ideas are mostly good! But also he has a lot of practical control. Moelis & Co. is not going to enter into any new contracts or lines of business without his approval: He's the CEO, he signs the contracts and picks the lines of business. And it's not going to set up any board committees without his approval: He's the chairman of the board, he's in the board meetings, and if the rest of the board votes to set up a committee without him, he does – as the controlling-ish shareholder – probably have the power to vote them out. As long as he gets to nominate directors – even if the board decides not to recommend them – they'll probably get elected, because he has 40% of the vote.

Also, even as a technical matter, there are ways around last week's decision. Vice Chancellor Laster writes:

Moelis did not have to frame an internal corporate governance arrangement using the Stockholder Agreement. He could have accomplished the vast majority of what he wanted through the Company's certificate of incorporation (the "Charter"). Even now, the Board could implement many of the Challenged Provisions by using its blank check authority to issue Moelis preferred stock carrying a set of voting rights and director appointment rights. A new class of preferred stock need not upset the Company's equity allocation; it could consist of a single golden share. The certificate of designations for the new preferred stock would become part of the Charter as a matter of law. At that point, because the provisions would appear in the Charter, they would comply with Section 141(a). 6 Although some might find it bizarre that the [Delaware General Corporation Law] would prohibit one means of accomplishing a goal while allowing another, that is what the doctrine of independent legal significance contemplates.

A company's charter can give a shareholder a lot of control over its board and business, but an outside agreement can't. 7

Still, this decision will have some effects. As Vice Chancellor Laster writes, there are a lot of agreements like this:

Corporate planners now regularly implement internal governance arrangements through stockholder agreements. The new wave of stockholder agreements does not involve stockholders contracting among themselves to address how they will exercise their stockholder-level rights. The new-wave agreements contain extensive veto rights and other restrictions on corporate action.

And now maybe they are all invalid?

In related news, Bloomberg's Jef Feeley and Crystal Tse report:

Crown Castle Inc. co-founder Ted Miller ratcheted up a proxy fight with the cellular tower company's board, suing directors over a cooperation agreement they struck with Paul Singer's Elliott Investment Management.

Miller, who helped launch Crown Castle in 1994, says the board is improperly beholden to activist investor Elliott, one of the company's largest shareholders. Elliott signed a cooperation agreement with Crown Castle in December and got two board seats.

The agreement amounts to an "unreasonable and disproportionate defensive measure," Miller argues in the suit, filed Tuesday in Delaware Chancery Court. He is asking the court to invalidate the pact, which he says harms Crown Castle shareholders by subjecting them to "the whims of Elliott and the artificial constraints imposed" by the pact on decisions such as finding a new chief executive officer.

"The affairs of Delaware corporations, however, must be managed by boards of directors, not backroom deals," Miller said in the complaint.

Here is the complaint. What happened here is that Crown Castle is a public company that has had a rough run in recent years, and it attracted two activists: Elliott, a classic activist hedge fund that bought about \$2 billion worth of Crown Castle stock, and Miller, the company's founder, who was CEO from 1994 until 2002 and who still owns about \$86 million worth of stock. Elliott threatened a proxy contest to get its own nominees on the board of directors, and Crown Castle quickly settled last December, agreeing to appoint two Elliott nominees to its board of directors. Elliott and Crown Castle signed a cooperation agreement in which they agreed on some plans, including forming a "fiber review committee" to think about what to do with its fiber business, forming a CEO search committee to find a new CEO, and agreeing to support each other's board nominees. In particular, Crown Castle agreed that, at its 2024 annual meeting, "the Company will recommend that the Company's shareholders vote in favor of the election of each of the Board's nominees," including the two Elliott representatives.

But Miller wants his say too, and he sued, claiming that this agreement gives Elliott power improperly:

In sum, the Board had struck a grand bargain with Elliott: Elliott would get significant influence over the Company's future direction and strategy – including seats at the table in selecting the next CEO and charting the Company's course on Fiber strategy; in turn, Elliott would lay down its arms, and the incumbent directors would keep their jobs.

Neither the Company nor Elliott explained why ceding control over key governance decisions to Elliott, a single minority stockholder, while effectively entrenching the incumbent Board, would benefit stockholders.

And in particular, the agreement requires Crown Castle to recommend the Elliott nominees to the board, *even if it gets other, better nominees*:

In their haste to lock in a deal and establish a frozen board, the Board agreed to the Cooperation Agreement a month before the nomination window for the 2024 Annual Meeting opened and before it had an opportunity to hear timely alternative proposals from any other stockholders. The Director Defendants had a duty to consider stockholder proposals made during the nomination window, which ran from January 18 to February 17, 2024, and to consider each proposal on its merits. The Defendant Directors breached their contractual obligations to stockholders by entering into the preclusive Cooperation Agreement foreclosing such consideration a month before the window opened.

At some level it seems obvious that the board of directors of a company facing a proxy fight might settle with the activist by signing a contract saying "we'll recommend two of your nominees to the board if you support the rest of ours." But is the board *allowed* to do that? Is it allowed to commit to making a governance decision like that, without considering other possible nominees? Or does that violate the board's obligation to run the company using its own best judgment?

Everything is securities fraud: OpenAI

I sometimes write “everything is securities fraud” as a shorthand for a particular weird argument about how modern US legal dynamics transmute every bad action taken by a public company into securities fraud, but never mind that. A simpler story is that if the board of directors of a company (public or private) puts out a public statement saying “turns out our chief executive officer is a big liar,” *somebody* is going to think that’s securities fraud. Whatever the CEO was lying about was *probably* material to the company – otherwise why would the board care? – and you’ve got to at least look into it.

This isn’t quite that, but the Wall Street Journal reports:

The Securities and Exchange Commission is scrutinizing internal communications by OpenAI Chief Executive Sam Altman as part of an investigation into whether the company’s investors were misled.

The regulator, whose probe hasn’t previously been reported, has been seeking internal records from current and former OpenAI officials and directors, and sent a subpoena to OpenAI in December, according to people familiar with the matter. That followed the OpenAI board’s decision in November to fire Altman as CEO and oust him from the board. At the time, directors said Altman hadn’t been “consistently candid in his communications,” but didn’t elaborate. ...

Some of the people familiar with the investigation described it as a predictable response to the former OpenAI board’s claim in its November statement. One of the people said that the SEC hasn’t pointed to any specific statement or communication by Altman that it has deemed misleading.

Right, maybe they’ll find a “specific statement or communication” *to investors* that was misleading, and he’ll get in trouble; probably they won’t. ⁸ But if the board of directors of a giant company fires the CEO for the stated reason that he was *not candid*, the SEC really does have to look into it.

“A giant company,” I said; not necessarily a *public* one. “The SEC enforces laws that forbid people from misleading investors, regardless of whether fundraisers seek capital in public or private markets,” notes the Journal, correctly. Still there are some relevant differences between OpenAI and most companies:

1. OpenAI’s stock does not continuously trade in public markets, so its CEO could go around lying about lots of stuff without *tricking investors into buying stock*. If you are the CEO of a public company and you go on television and say “we have built a superintelligent robot that can cure cancer,” people will buy your stock, the stock will go up, and if it turns out you were lying, they will sue you for fraud. If you are the CEO of a private company and you do that, nobody will trade the stock, because they can’t. If you then try to raise money by selling stock to investors two weeks later, and you send them a private placement memo saying “we have not built a superintelligent robot, we’re not even working on cancer, our CEO was just letting off steam on TV,” and then they buy the stock, they weren’t misled, were they? This is very much not legal advice, don’t do it, but the point is that *every public statement* by a public-company CEO is risky, while private companies have more limited investment-related communications.
2. In a typical *private* company, and particularly in a typical *tech startup*, if the CEO is lying to the board of directors, he is also lying to his investors, because ordinarily the board will include several representatives of the venture capital firms that invest in the business. So if the board feels misled, the investors probably feel misled, because they’re the same people. That’s not the case here. In fact, it is exactly the opposite here: OpenAI’s description of its corporate structure says “the board remains majority independent,” and “independent directors do not hold equity in OpenAI.” (Microsoft Corp., OpenAI’s biggest investor, is represented by an observer on the board, but has no voting rights, and even the observer seat came after Altman’s firing and unfiring.) So in some sense the board of directors was a good group for Altman to mislead: They weren’t investors!
3. I continue to find it funny and relevant that, at the top of OpenAI’s operating agreement, it warns investors: “It would be wise to view any investment in OpenAI Global, LLC in the spirit of a donation, with the understanding that it may be difficult to know what role money will play in a post-[artificial general intelligence] world.” I still don’t know what Altman was supposedly not candid about, but whatever it was, how material can it possibly have been to *investors*, given what they signed up for? “Ooh he said it cost \$50 million to train this model but it was really \$53 million” or whatever, come on, the investors were donating money, they’re not sweating the details.

Everything is securities fraud: JBS

On the other hand, the general idea of “everything is securities fraud” is that if investors care about a thing, and the company says misleading stuff about the thing, then that’s securities fraud. *Traditionally*, investors cared about things like profits, and companies sometimes cooked their books to show misleading profit numbers, and that was traditional securities fraud. But the modern theory understands that investors care about lots of things that could impact the company’s business – its policies for securing customer data, its treatment of its employees, its treatment of its whales – and misleading investors about any of those things could be fraud.

In the modern world of environmental, social and governance (ESG) investing, it seems pretty uncontroversial to say that at least *some* investors care about a company’s environmental record. And thus lying about your environmental record gives investors – or regulators – a securities-fraud hook to sue you.

You could imagine some sort of world in which governments directly regulated companies’ environmental behavior, in which people made collective judgments about climate trade-offs through a democratic process, governments made rules enacting those judgments, companies followed those rules, and people got the level of emissions that they wanted. It’s one approach.

But I think that the US approach is, roughly, that people make rough collective judgments about climate trade-offs *through their ownership of ESG investment vehicles*, investment managers pressure companies to enact those judgments, companies respond to those pressures by making environmental promises, and US regulators regulate those promises and punish the companies when they are false. Environmental regulation through securities fraud. It does seem second-best? Bloomberg News reports:

New York state is suing JBS SA over allegations the world’s biggest meat-packer misled “the public about its environmental impact.”

New York Attorney General Letitia James said the meat producer has failed to provide a viable plan to meet a widely-advertised commitment to reach net zero emissions by 2040 and that it could not feasibly meet such a goal, according to a filing. The company “has made several misleading claims about its environmental impact, including pledges to curb deforestation and reduce its greenhouse gas emissions,” a statement from the attorney general’s office said.

Several companies across different industries have made net zero commitments over the past few years amid growing pressure from investors, regulators and environmental groups. Still, many of them are yet to provide a clear pathway for decarbonization. Climate-washing claims against business have also become more usual, with most cases being originated in the US.

Right. I will say it is kind of strange to sue a company specifically for lying about whether it will have net zero emissions by 2040. It’s only 2024! How can you prove that?

Super users

The way corporate earnings generally work is that a company puts out a press release with all of its material financial results for the quarter, and then it usually has a public conference call in which it answers questions about those numbers. “Could you explain the drivers of increased expenses this quarter,” an analyst might ask, and the chief financial officer might say “sure, what happened there is ...” and try to give some further explanation of the numbers that investors care about.

And also there is, sometimes, a third thing, where investors can call up the company’s investor-relations officers directly and say “I am trying to update my model, I see that revenue in the widgets segment is up 2% but margins have contracted, can you help me understand,” and the IR officers might give the investor a bit more explanation. Or they might not. The IR officers have to balance their desire to be helpful – the investors own the company, and the IR officers’ job is to help them understand it – with their desire for fairness; the IR officers are not supposed to tell one investor secret material information that the other investors don’t know. (This is both a matter of *good investor relations* and also a legal requirement; in the US, Regulation FD prohibits a company from selectively disclosing material nonpublic information.) But it is a balance, and when an investor who follows the company closely calls up with a technical question, the IR officer might answer it. The theory is roughly “this information is material enough that the investor wants it and it would be helpful to give it to her, but not so material that it would be unfair to give it to her alone.” There are various ways for this to go wrong.

When the US Department of Labor's Bureau of Labor Statistics releases inflation data, generally it puts out a press release with all of the material numbers. And then ... can analysts call the BLS and say "can you explain a bit more about what drove the change in this number"? Hmm. Bloomberg's Matthew Boesler reports:

The US Labor Department's statistical agency emailed a group of analysts about a key factor behind the jump in January's consumer price index before trying to take it back, raising questions about the validity of the figures.

A Tuesday email to data "super users," seen by Bloomberg, suggested a surge in a measure of rental inflation – which had left analysts puzzled – was due to a shift in underlying calculations, rather than just a rise in prices. One recipient said the Bureau of Labor Statistics tried to retract it and told them to disregard its contents. ...

The BLS is "currently looking into this data, and we may have additional communication regarding the rent and OER data soon," an economist at the agency told Bloomberg in an emailed statement Wednesday. A spokesperson for the Labor Department referred inquiries to the BLS, whose official press contacts didn't respond to messages seeking comment.

The BLS did put out the additional communication, in response to "numerous inquiries." Did the super users get it before everyone else does? Kind of weird.

Things happen

Stripe reaches \$65bn valuation in deal to let employees cash out stock. Frackers Are Now Drilling for Clean Power. Greg Coffey in Talks to Buy EMSO, Create \$13 Billion Hedge Fund Firm. Hedge fund Eisler plans hiring spree to take on industry giants. Apple Investors Grow Impatient on Artificial Intelligence. Elon Musk Says Long-Delayed Tesla Roadster Coming Next Year. Uber chief unlocks \$136mn in options after beating \$120bn valuation target. Nigeria Detains Binance Executives in Overseas Tax Crackdown. Thinking Outside the BOX. Chocolate Makers Try a New Recipe: Less Chocolate. "Recently, I was asked to fill a role for a chef, literally just for Dobermans."

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1. Sometimes, also, the shareholders have to ratify the decision: If the directors want to do a big merger, they approve the deal and then put it to a shareholder vote. But the directors have to make their own decision first, using their own judgment. If they think the merger is bad, they have to say no to it; they can't generally just approve it and say "okay shareholders you decide, vote however you want." They should only approve a merger that they think is good.
2. To be clear, the more pliable directors should also say no to her plan, because they too have a fiduciary obligation to the company and its shareholders. And in fact *she*, as the controlling shareholder, has a fiduciary duty to the minority shareholders, so she can't even do this. But if the facts are less egregious maybe she will argue that her plan is fair to everyone; the point is that if the directors disagree they have to say no. We talked about this dynamic last year, when World Wrestling Entertainment Inc.'s directors pushed out Vince McMahon, WWE's majority owner, and then he fired them in return.
3. At least for Delaware public companies. I think people at least implicitly accept a bit more informality for private startups.
4. See pages 23 and 24 of last week's opinion, or the 2023 proxy statement.
5. The agreement was written when he had a majority of the voting power, and he keeps this right even with a minority of the votes (though if he sells down enough stock he will eventually lose it). But the opinion notes that "Moelis is still entitled to designate a majority of the Board, but he waived that right in 2021, 2022, and 2023 to ensure compliance with the [New York Stock Exchange] rules for non-controlled companies."
6. Section 141(a) of the Delaware General Corporation Law is the provision saying that "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." "Section 141(a) is the source of Delaware's board-centric model of corporate governance," writes Vice Chancellor Laster."
7. Actually there is a complication there: Some contracts obviously can give outsiders control over a company's business decisions. For instance, it is common for a credit agreement – a contract between the company and its lenders – to limit the company's ability to incur new debt, just like the Moelis & Co. stockholder agreement does. Vice Chancellor Laster writes: "Delaware corporations possess the power to contract, and contracts necessarily constrain a board's freedom of action. A corporation that has agreed to an exclusive supply contract cannot freely contract with a different supplier. No one would suggest that an exclusive supply contract violates Section 141(a). Not only that, but Delaware corporations can enter into commercial contracts that constrain specific acts otherwise entrusted to the board. Under a credit agreement, for example, declaring a dividend or buying back stock can be events of default. Both are board level decisions, so those provisions limit the board's freedom of action. Yet both are legitimate protections for a lender to demand." But he concludes that there's a difference between a "commercial contract" and an "internal governance arrangement," and that boards of directors can give up some freedom as part of a commercial contract but not just as part of this stockholder agreement.
8. Famously, after briefly firing Altman, the old board told employees "that Altman wasn't candid, and often got his way," but also "that Altman had been so deft they couldn't even give a specific example."

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<https://www.wsj.com/tech/sec-investigating-whether-openai-investors-were-misled-9d90b411>

EXCLUSIVE TECHNOLOGY

SEC Investigating Whether OpenAI Investors Were Misled

Regulator is examining internal communications of CEO Sam Altman, after board last year temporarily ousted him for alleged lack of candor

By [Deepa Seetharaman](#) [Follow](#)

Feb. 28, 2024 11:26 pm ET



Sam Altman, chief executive officer of OpenAI PHOTO: CLARA MOKRI FOR THE WALL STREET JOURNAL

The Securities and Exchange Commission is scrutinizing internal communications by OpenAI Chief Executive Sam Altman as part of an investigation into whether the company's investors were misled.

The regulator, whose probe hasn't previously been reported, has been seeking internal records from current and former OpenAI officials and directors, and sent a subpoena to OpenAI in December, according to people familiar with the matter. That followed the OpenAI board's decision in November to fire Altman as CEO and oust him from the board. At the time, directors said Altman hadn't been "consistently candid in his communications," but didn't elaborate.

Altman returned as CEO less than two weeks later as part of a deal that also entailed a reconstituted board, which he hasn't joined.

SEC officials based in New York are conducting the investigation and have asked that some senior OpenAI officials preserve internal documents.

The SEC enforces laws that forbid people from misleading investors, regardless of whether fundraisers seek capital in public or private markets. The SEC often closes investigations without making formal accusations of wrongdoing.

Some of the people familiar with the investigation described it as a predictable response to the former OpenAI board's claim in its November statement. One of the people said that the SEC hasn't pointed to any specific statement or communication by Altman that it has deemed misleading.

The SEC's civil investigation has been percolating in the background as OpenAI officials pitched investors as part of its recently closed tender offer, which valued the AI juggernaut behind viral chatbot ChatGPT at more than \$80 billion.

OpenAI is governed by a nonprofit. Investors in its for-profit arm include employees, venture capitalists, and Microsoft **MSFT 0.10% ▲**, which has committed \$13 billion to the company in exchange for what is essentially a 49% stake in the earnings of its for-profit arm.

The SEC probe adds to a growing list of government and legal challenges confronting OpenAI, reflecting intense global scrutiny of the company's business practices and impact on the world. It also shows how the company is still dealing with the fallout from the failed ouster of Altman last year.

At that time of the leadership turmoil, OpenAI executives started getting questions from regulators and law-enforcement entities such as the Manhattan U.S. Attorney's Office about the board's accusation of Altman's lack of candor, The Wall Street Journal reported in November.

That criminal investigation is ongoing, people familiar with the matter said. Its focus couldn't be learned.

Government officials in the U.S. and Europe also have launched competition inquiries into the relationship between OpenAI and Microsoft, which also has a

commercial partnership with the company.

As part of Altman's return, OpenAI appointed two new board members, who commissioned a review of the events around Altman's firing from the law firm WilmerHale.

The WilmerHale review is expected to wrap up in a few weeks and produce a report on the events, people familiar with that review said. The review focuses on the board's handling of his ouster as well as Altman's conduct.

In some cases, WilmerHale lawyers' line of questioning has appeared to be more focused on what happened in November and the board's role, rather than a broader look at Altman's conduct and managerial style over the years, some of those people said. Another person familiar with the review said the lawyers asked questions about both topics.

—Dave Michaels, Berber Jin and Tom Dotan contributed to this article.

Write to Deepa Seetharaman at deepa.seetharaman@wsj.com

Appeared in the February 29, 2024, print edition as 'SEC Probes If OpenAI Misled Its Investors'.

US SEC Probes Whether OpenAI Investors Were Misled, WSJ Says (1)

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- SEC asked OpenAI officials to preserve documents, report says
- Investigation relates to Sam Altman's brief ouster as CEO

The Securities and Exchange Commission is investigating whether OpenAI investors were misled as the startup went through a ferocious debate over leadership last year, the Wall Street Journal reported, citing people familiar with the probe.

The US regulator is studying internal communications by Chief Executive Officer **Sam Altman** in relation to his ouster from the post in November, the report said. The SEC sent a subpoena to the company in December and asked senior OpenAI officials to preserve internal documents, according to the people.

Sam Altman

Photographer: Dustin Chambers/Bloomberg

To regain his job, Altman agreed to an internal investigation, among other conditions. The abrupt nature of his firing and a statement from the board saying that Altman hadn't been "consistently candid in his communications" set up expectations for the emergence of a smoking gun. Nothing like that has come out, though there have been revelations of tensions within OpenAI over his fundraising for an outside chip venture, including seeking funding in the Middle East, and a dispute with former board member **Helen Toner** over a research paper she'd co-written that was critical of the company.

Read More: OpenAI's Altman Ouster Was Result of Drawn-Out Tensions

It was Altman's pattern of behavior, rather than a single egregious action, that caused the board to lose trust in him, according to a person with direct knowledge of the board's thinking, who asked not to be named discussing private business matters.

OpenAI's ChatGPT triggered the current rush to adopt artificial intelligence across all manner of industries and services, with Microsoft Corp. investing more than \$10 billion into its partnership with the closely held startup.

The SEC's probe may not lead to any finding of wrongdoing by the parties involved. OpenAI selected two lawyers from the firm WilmerHale to conduct its investigation into the events.

"While the review is ongoing, the board will continue to take steps to strengthen OpenAI's corporate governance, build a qualified and diverse board of exceptional individuals, and oversee OpenAI's important mission in ensuring that artificial general intelligence benefits all of humanity," **Bret Taylor**, chair of OpenAI's board, said in December.

(Updates with detail of Altman's ouster from third paragraph)

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Edwin Chan

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Apple Investors Reject Bid for Transparency on AI Risks, Ethics

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWQyNDEtZDg5My1hMzlkLWYyNWRhMTJjMDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6InVjRmwyMjZnWEoxaE9oZmU2TDZEcFE9PVpBeWhSekFrZU00OTZCZGpvV1pOeGc9PSIsInRpbWUiOiIxNzA5MjA4ODgxNjAwliwic2lnIjoiTUIWMkVmL3pFS3BIV1hRR1VxWnVIVzBpKzBVPStsInYiOiIxIn0=

- Shareholder activists target potential AI risk
- Apple said it already provides AI transparency

Apple shareholders rejected a bid seeking more information about how the tech giant uses artificial intelligence and what ethical guidelines it's adopted to navigate the technology.

The proposal, filed by the AFL-CIO Equity Index Funds, said that adopting ethical frameworks for using AI will strengthen Apple's position "as a responsible and sustainable leader in its industry." Apple did not provide the vote percentage at the meeting and did not immediately respond to a request for comment.

The vote comes as tech and other companies are being pressed on their use of AI. In December, Microsoft shareholders voted down a proposal seeking more information about the risks AI could pose to the business and the public. The Securities and Exchange Commission also warned companies in December not to make false claims about their artificial intelligence capacities.

"We believe that the adoption of ethical guidelines for the use of AI can help improve our company's bottom line by avoiding costly labor disruptions," the proposal said. The fund pointed to the writers' and actors' strike last year that was fueled in part by concerns over the use of AI. Shareholder momentum around workers' rights proposals has been building following highly publicized strikes, including those in Hollywood, as well as attention on alleged labor violations.

The vote comes a day after Bloomberg News reported that Apple is abandoning its efforts to build an electric car and is instead shifting some employees from that project to its AI team.

In its proxy statement, Apple said it already provides "resources and transparency on our approach to artificial intelligence and machine learning." It also said the proposal is overly broad, and "could encompass disclosure of strategic plans and initiatives harmful to our competitive position and would be premature in this developing area."

"Apple has been and will continue to be deliberate and thoughtful in the development and deployment of artificial intelligence," the company said.

Pay Equity

Another proposal that did not pass, filed by Arjuna Capital, sought a report on median pay gaps across race and gender, as well as potential reputational risks resulting from that gap and risks in retaining diverse talent.

Similar proposals on pay equity secured significant support last year, for example a bid at Kroger that passed in June.

“Apple reports only statistically adjusted gaps but ignores unadjusted gaps, which address structural bias women and minorities face regarding job opportunity and pay, particularly when men hold most higher paying jobs,” the proposal said. “Median pay gaps show, quite literally, how Apple assigns value to employees through the roles they inhabit and pay they receive.”

In its proxy statement, Apple said it already has “a comprehensive approach to promoting pay equity and diverse representation at every level of the Company.”

“Consistent with our commitment to be a leader in pay equity, every year we conduct a robust pay equity analysis encompassing the base salary, bonuses, and stock awards of 100% of our employees that utilizes sophisticated data inputs to assess appropriate compensation bands for each employee, and adjustments are made wherever employees fall below the appropriate range,” the company said, adding that its metrics are assessed by a third-party firm.

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NY Sues World's Top Meatpacker JBS Over Climate Impact (Correct)

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New York state is suing JBS SA over allegations the world's biggest meat-packer misled "the public about its environmental impact."

New York Attorney General Letitia James said the meat producer has failed to provide a viable plan to meet a widely-advertised commitment to reach net zero emissions by 2040 and that it could not feasibly meet such a goal, according to a filing. The company "has made several misleading claims about its environmental impact, including pledges to curb deforestation and reduce its greenhouse gas emissions," a statement from the attorney general's office said.

Several companies across different industries have made net zero commitments over the past few years amid growing pressure from investors, regulators and environmental groups. Still, many of them are yet to provide a clear pathway for decarbonization. Climate-washing claims against business have also become more usual, with most cases being originated in the US.

"We've seen a rise in suits targeting greenwashing, particularly as some companies have walked back prior commitments," said Bloomberg Intelligence analyst **Rob Du Boff**. "The challenge is proving these companies intentionally misled investors or customers."

The move by New York comes on top of fierce opposition by environmental groups and lawmakers to JBS's long-standing plans for a listing in the US. The meat packer recently said the move would likely be delayed into the second half of 2024. The Sao Paulo-traded company plans to file a new registration statement to the US Securities and Exchange Commission after its earnings release on March 26, Chief Financial Officer **Guilherme Cavalcanti** has said.

Read More: How Big Beef Is Fueling the Amazon's Destruction

Shares of the Sao Paulo-based company fell 2% on Wednesday.

JBS said it takes its commitment to a more sustainable future for agriculture very seriously. "We disagree with the action taken today by the New York Attorney General's office," the company said in an email. "JBS will continue to partner with farmers, ranchers and our food

system partners around the world to help feed a growing population while using fewer resources and reducing agriculture's environmental impact.”

The food industry's climate footprint is immense, accounting for about a third of global greenhouse gases. Livestock, which releases potent methane, makes up 14.5% of worldwide emissions. The Science-Based Targets initiative, a United Nations-backed agency that evaluates companies' net zero goals, recommends the food and agriculture sector cuts emissions by 3% a year between 2020 and 2030.

Read More: Rising Livestock Emissions Undermine World's Climate Fight

In a 2023 study, researchers at Carbon Market Watch and the New Climate Institute found JBS had among the lowest integrity scores among 24 of the biggest global companies that have pledged to achieve carbon neutrality and positioned themselves as climate leaders.

The company has also been tied to purchasing thousands of cattle directly from illegally deforested farms in the Amazon.

Just last month, a group of UK lawmakers said it was planning to push the SEC to block a US listing of JBS on the New York Stock Exchange, citing efforts to fight climate change.

Read More: Reject JBS New York Stock Listing, UK Lawmakers Urge

The company has been seeking a US listing for more than a decade, following its aggressive expansion that has made it a global giant. With operations from Colorado to New Zealand, the company is the largest producer of beef and chicken, the second-biggest supplier of pork and the No. 1 ready-meals company in the UK. US-based operations generated almost half of JBS's revenue in 2022.

The company sees a New York listing as a key part of its strategy to use equity to fund a deeper expansion into the branded and processed-food business, which typically commands higher profit margins than its beef, pork and chicken processing operations.

(Corrects year in second paragraph.)

--With assistance from **Misyrlena Egkolfopoulou**.

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Exxon, Chevron ask US Supreme Court to toss ruling in Honolulu climate change suit

 [reuters.com/legal/government/exxon-chevron-ask-us-supreme-court-toss-ruling-honolulu-climate-change-suit-2024-02-28](https://www.reuters.com/legal/government/exxon-chevron-ask-us-supreme-court-toss-ruling-honolulu-climate-change-suit-2024-02-28)

Clark Mindock

The logo of American multinational oil and gas corporation ExxonMobil is seen during the LNG 2023 energy trade show in Vancouver, British Columbia, Canada, July 12, 2023.

REUTERS/Chris Helgren/File Photo Purchase Licensing Rights , opens new tab

- Companies argue Honolulu's suit is preempted by federal law
- Honolulu is seeking damages to adapt to climate change

Feb 28 (Reuters) - Fossil fuel companies including Exxon (XOM.N) , opens new tab, Chevron (CVX.N) , opens new tab and Sunoco (SUN.N) , opens new tab, on Wednesday asked the U.S. Supreme Court to scrap a decision that allowed Honolulu's lawsuit alleging the companies misled the public for decades about the dangers of climate change to proceed to trial, according to a lawyer for the companies.

The petition for certiorari challenges an October Hawaii Supreme Court decision that rejected the oil companies' argument that the lawsuit is preempted, or blocked, by federal law because it seeks to regulate interstate emissions or commerce, powers reserved for the federal government. It said the case instead focused on allegedly misleading statements the companies made, which Honolulu claims led to property and infrastructure damage caused by climate change.

The oil companies told the justices Wednesday that the state's high court got its ruling wrong, since the source of Honolulu's alleged climate-related injuries is "most certainly" the greenhouse gas emissions from fossil fuels burned in vehicles and power plants across the country, which are beyond the scope of Hawaii law. They said that pollution is an inherently federal issue and that the federal Clean Air Act does not permit state-law claims based on emissions from other states that are properly regulated by the U.S. Environmental Protection Agency.

Honolulu's lawsuit is among dozens of challenges filed by state and local governments across the U.S. seeking billions of dollars from the companies to help pay to adapt to things like sea-level rise, flooding and other climate change-caused problems.

If left standing, the Hawaii Supreme Court's decision could allow Honolulu's case to be the first of such lawsuits to go to trial.

The companies, which are represented by Kannon Shanmugam and Theodore Wells of Paul, Weiss, Rifkind, Wharton & Garrison and Theodore Boutros of Gibson Dunn & Crutcher, said the case provides the court with the "ideal opportunity" to address the issue

“before the energy industry is threatened with potentially enormous judgments” from Honolulu’s case and others nationwide.

A spokesperson for Honolulu did not immediately respond to a request for comment. The city has argued previously that the energy companies are wrong to say the harms they are suing over come from interstate emissions since the case is primarily about the companies’ deliberate efforts to undermine climate change science and does not seek to directly force anyone to curb fossil fuel production or use.

In its lawsuit, filed in 2020, Honolulu said the companies knew for decades that burning fossil fuels would lead to climate change, but worked to conceal that fact from the public.

Honolulu said heat waves linked to climate change had already stressed the local electrical grid, and that a wastewater treatment plant would need to be retrofitted against sea level rise at a cost of hundreds of millions of dollars, among other harms. It sought to hold the companies responsible for those costs, though it did not give an exact damages figure.

The oil companies already tried to move the case and others to federal court using similar arguments, but were rebuffed by the U.S. Supreme Court in April. Similar cases filed by local governments in California, Delaware, Hawaii, Maryland, New Jersey and Rhode Island have also been sent back to state courts.

The case is Sunoco LP v. City and County of Honolulu, Hawaii, U.S. Supreme Court, No. 23A651.

For the energy companies: Kannon Shanmugam and Theodore Wells of Paul, Weiss, Rifkind, Wharton & Garrison; and Theodore Boutrous of Gibson Dunn & Crutcher

For Honolulu: not immediately available

Read more:

Honolulu climate case against oil cos can go to trial -Hawaii top court

US climate change lawsuit seeks \$50 billion, citing 2021 heat wave

US Supreme Court rebuffs Exxon, Chevron appeals in climate cases

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Reporting by Clark Mindock

Oil industry asks SCOTUS for protection from climate change suits

 legalnewsline.com/stories/655440394-oil-industry-asks-scotus-for-protection-from-climate-change-suits

February 29, 2024

Climate Change



Boutrous | <https://www.gibsondunn.com/>

WASHINGTON (Legal Newsline) - For the first time, the U.S. Supreme Court has been asked to review the merits of long-running climate change litigation that represents an alliance between personal injury lawyers and government officials nationwide.

Companies like Sunoco, Exxon and Chevron are among the defendants hoping the Supreme Court will put a stop to lawsuits that seek compensation to address alleged climate change-caused infrastructure problems.

The oil industry has claimed these suits are an improper attempt by states, cities and counties to regulate emissions standards that can only be set by federal authorities. The Hawaii Supreme Court ruled last year the cases are about disinformation and not emissions.

On Feb. 28, the defendants asked the Supreme Court to address the Hawaii decision. They want the court to answer whether federal law precludes state-law claims for injuries allegedly caused by the effects of interstate and international greenhouse-gas emissions.

"State court litigation is not a constitutionally permissible means to establish global climate and energy policy, said Theodore Boutrous of Gibson, Dunn and Crutcher, who is representing Chevron.

"As the U.S. Court of Appeals for the Second Circuit held in dismissing a similar New York City lawsuit, 'such a sprawling case is simply beyond the limits of state law.'"

That decision in the Second Circuit was nullified when plaintiffs won a battle at SCOTUS over where the cases should be heard. The Supreme Court found they should be tried in the respective state courts they were filed in and not by the federal judiciary.

Officials and the contingency-fee lawyers they hired, like the firm Sher Edling, crafted their complaints to avoid federal jurisdiction by centering them on state-law claims for public nuisance, SCOTUS ruled.

"The Hawaii Supreme Court's decision was incorrect, and it provides this Court with the ideal opportunity to address whether the state-law claims asserted in this nationwide litigation are even allowable before the energy industry is threatened with potentially enormous judgments," the defendants' petition to SCOTUS says.

"Contrary to the Hawaii Supreme Court's decision, state law can only provide redress for harms caused by instate sources of emissions.

"Without this Court's intervention, years might pass before another opportunity to address this pressing question comes along. The Court should grant review and clarify whether state law is competent to impose the costs of global climate change on a subset of the world's energy producers chosen by respondents."

In addition to the Second Circuit ruling, the brief cites a recent Delaware ruling that pared that state's case down to damages stemming from in-state emissions rather than global.

In its lawsuit, Delaware accuses the oil companies of "influencing the tenor of the climate change debate," "maintaining strong working relationships between government regulators" and organizations "carrying defendants' message," and pushing for long-term solutions to climate change instead of immediate regulations on carbon emissions.

The state says those alleged deceptions caused consumers – presumably including the state itself, which operates thousands of vehicles and owns buildings heated with fossil fuels – to consume more oil and gasoline products than they otherwise would, increasing global warming and damage to state property.

ORGANIZATIONS IN THIS STORY

U.S. Supreme Court

GSK settles another lawsuit on heartburn drug Zantac in California

 [reuters.com/legal/gsk-confidentially-settles-another-california-zantac-lawsuit-2024-02-29](https://www.reuters.com/legal/gsk-confidentially-settles-another-california-zantac-lawsuit-2024-02-29)

Reuters

Zantac heartburn pills are seen in this picture illustration taken October 1, 2019.

REUTERS/Brendan McDermid/Illustration/File Photo/ [Purchase Licensing Rights](#) , opens new tab

Feb 29 (Reuters) - GSK (GSK.L) , opens new tab agreed to confidentially settle another lawsuit in California that had alleged its discontinued heartburn drug Zantac caused cancer, the latest in a series of settlements made by the British drugmaker to end costly litigation. The case, which was set to begin trial on April 2, will be dismissed. GSK does not admit to any liability in this settlement with Boyd/Steenvoord, it said on Thursday.

This follows similar Zantac settlements since June last year, including several in California. GSK still faces thousands of lawsuits in the states of California and Delaware in the U.S. California is generally seen as a more challenging legal environment for multinational companies, as courts are known to be friendlier to plaintiffs.

The U.S. Food and Drug Administration in 2020 pulled all brands named Zantac and generic versions of the drug off the market, triggering a wave of lawsuits.

The drug, approved over four decades ago, had become the world's best selling medicine in 1988 and one of the first-ever drugs to top \$1 billion in annual sales.

Analysts had estimated total settlement costs for the company of around \$5 billion. GSK has not yet quantified the costs of these settlements.

Reporting by Eva Mathews in Bengaluru, additional reporting by Yadarisa Shabong; Editing by Rashmi Aich

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Cheerios Test Positive for Pesticide Linked to Fertility Issues, Suit Claims

 [law.com/therecorder/2024/02/29/cheerios-test-positive-for-pesticide-linked-to-fertility-issues-federal-class-action-alleges](https://www.law.com/therecorder/2024/02/29/cheerios-test-positive-for-pesticide-linked-to-fertility-issues-federal-class-action-alleges)

By Avalon Zoppo

What You Need to Know

- A class action complaint in federal court alleges Cheerios tested positive for containing the pesticide chlormequat chloride.
- A nonprofit group run by scientists promoting public health said the amount in Cheerios products exceeds the daily recommended limit of the pesticide, the complaint said.
- Multiple varieties of the oat-based cereal contained the pesticide in laboratory testing, including: regular Cheerios, Honey Nut Cheerios, Frosted Cheerios, and Oat Crunch Oats N' Honey Cheerios.

A San Marcos, California, couple filed a class action complaint in federal court Feb. 23 alleging laboratory testing revealed multiple varieties of Cheerios have dangerously high levels of the pesticide chlormequat chloride, which can reduce fertility if ingested.

This suit was surfaced by Law.com Radar, ALM's source for immediate alerting on just filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be first to know about new suits in your region, practice area or client sector.

The plaintiffs, Katrina and Benjamin Necaie, filed the complaint in the U.S. District Court for the Southern District of California last week, alleging General Mills violated the Consumer Legal Remedies Act, and that the cereal maker was unjustly enriched through product misrepresentation and breached an implied warranty with its customers for its Cheerios cereals.

General Mills' Cheerios products that tested positive for the pesticide at levels between 40 to more than 100 parts per billion include: regular Cheerios, Honey Nut Cheerios, Frosted Cheerios, and Oat Crunch Oats N' Honey Cheerios. The Environmental Working Group, a scientist-led nonprofit dedicated to public health, recommends a health benchmark of 30 parts per billion per day for chlormequat chloride, according to the complaint.

The complaint alleges independent laboratory testing of Cheerios products contained the presence of the plant growth pesticide chlormequat chloride, which can block hormone production and help control plant size when applied to oat and grain crops. The pesticide

poses a danger to human health when ingested, and it can risk fertility, fetal development, and impair the reproductive function in mammals, the complaint said.

The packaging and labelling of General Mills' Cheerios products do not list chlormequat chloride in the ingredients list, and the company does not disclose or warn of the potential inclusion of the pesticide in its products, the complaint said.

The plaintiffs are asking the court for a jury trial, class certification, damages, and a declaration that General Mills violated the act and that it was unjustly enriched.

Attorney Charles Weller, of San Diego, who is representing the Necaisses, told Law.com the suit aims to hold General Mills accountable for selling foods with dangerous pesticides.

"In millions of American families, Cheerios are often an infant's first solid food. Parents have a right to understand what their children are eating," he said. "They certainly should be told if their children are eating foods with pesticides in them. Chlormequat is a dangerous pesticide that can disrupt fetal growth and harm the reproductive system."

Counsel for General Mills has not yet made an appearance. A spokesperson for the company declined to comment on the lawsuit.

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Privacy class action over unauthorized voiceprint collection to proceed against Meta

 [courthousenews.com/privacy-class-action-over-unauthorized-voiceprint-collection-to-proceed-against-meta](https://www.courthousenews.com/privacy-class-action-over-unauthorized-voiceprint-collection-to-proceed-against-meta)

Michael Gennaro



Meta Platforms CEO Mark Zuckerberg at a 2019 event. (Meta via Courthouse News)

SAN FRANCISCO (CN) — A federal judge is allowing class privacy claims to continue against Meta from a class of Illinois consumers who say Meta took their voiceprints without permission in violation of an Illinois biometric privacy law.

The named plaintiff Natalie Delgado is an Illinois citizen who says that Meta took her voiceprint — a digital representation of a person's unique voice characteristics — without complying with the requirements of Illinois' Biometric Information Privacy Act.

Delgado claims that Meta uses the audio input into Facebook or Messenger to create encoded data of the speaker's voice, and that that data is then processed with an acoustical model that is then trained and further refined using the voice of a particular speaker such that the acoustical model can be used to recognize that user by voice.

Meta moved to dismiss the case, arguing that California law, not Illinois law, applied because the terms of service Delgado agreed to when she used Meta's products contain a California choice-of-law clause.

U.S. Senior District Judge Susan Illston found in her 16-page opinion that Illinois had a materially greater interest in the outcome of the case than California, so Illinois law applies.

Illston cited 2015's *In re Facebook Biometric Information Privacy Litigation* as precedent for using Illinois law, writing that many courts across the country have cited the case when applying Illinois law rather than the state law provided for in various technology companies' user agreements when choice-of-law conflicts arise.

The plaintiffs in that case claimed that Facebook used facial recognition technology to extract and store users' biometric identifiers without their written consent in violation of the biometric privacy act. The case ended in a \$650 million settlement in 2021.

“If California law is applied, the Illinois policy of protecting its citizens’ privacy interests in their biometric data, especially in the context of dealing with “major national corporations” like Facebook, would be written out of existence,” Illston wrote. “Illinois will suffer a complete negation of its biometric privacy protections for its citizens if California law is applied. In contrast, California law and policy will suffer little, if anything at all, if BIPA is applied.”

Illston wrote that Meta had failed to address the act in any cases it cited.

“Defendant instead relies on various cases analyzing consumer protection laws. But those cases provide little guidance to this court regarding BIPA’s application,” she wrote.

Even if BIPA applies, Meta had argued that Delgado has not plausibly alleged that Meta collected her voiceprint as opposed to her voice recording, or that the company has profited off of the use of her biometrics or failed to store and protect the data properly. Meta claims that a voiceprint is “something more” than a voice recording under the act, and Delgado must prove that Meta actually used the voiceprint.

Illston wrote that Meta’s arguments amounted to a heightened pleading standard, which wasn’t appropriate at this stage of the case.

“The court disagrees with defendant that plaintiffs must specifically allege that defendant, in fact, ‘used’ their biometric data to determine their identities. Instead, plaintiffs must allege that defendant’s collection of their biometric data made defendant capable of determining their identities,” Illston wrote.

Illston did toss class claims that Meta does not properly protect private data once collected and leaves the data open to cyber-attacks, however, because the class has not put forward any evidence that ties to how Meta stores their biometric information, ill-gotten or otherwise, violating a section of the act that requires companies protect biometric information from disclosure

“The complaint provides no allegations regarding how Meta stores biometric data or how its practices fail to comply with the reasonable standard of care. Without more, the fact that a company has been and may again be subject to cyber-attacks does not make it plausible that the company has violated an industry-wide standard of care for purposes of Section 15(e) of BIPA,” Illston wrote.

Delgado first sued in federal court in California in August 2023 on behalf of herself and a putative class consisting of all natural persons in Illinois from whom Meta created, collected, captured, received, obtained or stored digital voice data, voice characteristics and/or a voice profile. Delgado, on behalf of the proposed class, seeks statutory damages under the act, an injunction and attorneys’ fees and costs.

Netflix, Hulu Add NJ Victory to List of Franchise-Fee Court Wins

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X2QJ4S40000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X2QJ4S40000000)

- Statute doesn't allow municipalities to sue for enforcement
- Localities can't sue for fees under laws in dozens of states

Netflix Inc. and Hulu LLC notched another win against local franchise fees Thursday when a federal appeals court ruled that New Jersey localities can't charge them for using public rights of way.

The New Jersey Cable Television Act gives the state public utilities board full authority to enforce the franchise fees that cable companies owe municipalities, the US Court of Appeals for the Third Circuit ruled. The act "does not imply a right of action for municipalities to enforce the fee provision," Judge Jane R. Roth wrote for the court.

"If every municipality had an implied right to sue entities, there would exist an enforcement scheme with nonuniform decisions concerning which providers to sue, when to sue them, and what damages to seek," the court said.

This is the latest in a series of wins for the streaming services, which have faced similar class actions by localities across the country. More than a dozen courts have ruled in their favor, holding that state statutes don't provide municipalities a right to sue or that franchise obligations don't apply to streamers. Most recently, a California appeals court rejected a challenge led by the city of Lancaster.

The Jersey shore Borough of Longport and the Newark-area Township of Irvington filed a class action against the streamers on behalf of all New Jersey municipalities. The trial court dismissed the suit, concluding the municipalities have no private right of action under the act.

The appeals court affirmed, noting that the New Jersey supreme court has urged courts to hesitate to recognize another remedy where the legislature has expressly created specific ones. The language of the act vesting "all" enforcement authority with the board leaves no room for municipalities to sue for enforcement, the court said.

Judges Judge Patty Shwartz and Judge D. Michael Fisher joined the opinion.

Carella, Byrne, Cecchi, Olstein, Brody & Agnello PC and Kessler Topaz Meltzer & Check LLP represented the municipalities. Latham & Watkins LLP, Wilson Sonsini Goodrich & Rosati, and Saiber LLC represented the companies.

The case is Borough of Longport v. Netflix, Inc. , 3d Cir., No. 22-2139, 2/29/24 .

Nissan, Cummins Trim Claims Over Allegedly Defective Fuel Pump

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Class Action

The exterior of one of the buildings shows the reflection of people walking in front of Nissan Motor Co., at the new assembly plant in Aguascalientes, Mexico on Nov. 12, 2013.

Susana Gonzalez/Bloomberg

Feb. 28, 2024, 2:41 PM PST

Peter Hayes

Reporter

- Ruling leaves intact some claims against both companies
- Court rejects Cummins' challenge to personal jurisdiction

Nissan North America Inc. and engine manufacturer Cummins Inc. trimmed proposed consumer class claims in a suit alleging Nissan's sale of Titan XD pickup trucks, manufactured from 2016 through 2019, contained diesel engines with defective fuel pumps.

Nissan and Cummins filed separate motions to dismiss the class claims from multiple states, both of which, were granted in part and denied in part.

Nissan won the dismissal of a Florida resident's claim of fraudulent omission under the state's Deceptive and Unfair Trade Practices Act, brought on behalf of himself and others in the state who purchased or leased the vehicle. The claim is barred under the state's economic loss rule, which allows recovery for those losses only through contract law, the US District Court for the Middle District of Tennessee said.

Judge Aleta Arthur Trauger also found a Texas common law fraudulent omission claim barred by that state's economic loss rule but declined to dismiss a fraudulent omission claim under the Texas Deceptive Trade Practices Consumer Protection Act, saying the parties haven't adequately briefed the issue.

Trauger dismissed a claim for breach of the implied warranty of merchantability under Florida law against Nissan and Cummins for lack of privity—a sufficient relationship between the parties. The claim fails because Florida law requires that the plaintiff purchase a product directly from the defendant to pursue an IWM claim, the court said.

Nissan also shook off an unjust enrichment claim under Colorado law, brought by a plaintiff who purchased his car used. The claim fails because the plaintiff didn't show his purchase benefited Nissan at his expense, Trauger said.

Turning to Cummins' motion to dismiss, Trauger rejected the argument that the court lacks personal jurisdiction over the company due to lack of contacts with Tennessee. To hold that the plaintiffs "cannot sue both Cummins and Nissan in Nissan's home state, where the contractual relationship between Cummins and Nissan for the purchase of the allegedly defective engines was centered, would up-end presumptions about product-liability litigation and class actions generally," Trauger said.

The court, however, granted Cummins' motion to dismiss all of the plaintiffs' fraudulent omission claims and state statutory claims based on the various states' consumer protection statutes. The plaintiffs failed to allege fraud by Cummins with sufficient particularity, Trauger said.

The ruling leaves intact claims against Cummins for breach of the implied warranty of merchantability brought by all plaintiffs except the Florida plaintiff.

It also leaves the following surviving claims against Nissan:

- Unjust enrichment claim under Florida law;
- Colorado plaintiffs' fraudulent omission, Colorado Consumer Protection Act, unjust enrichment, and breach of implied warranty of merchantability claims
- Texas plaintiff's Texas Deceptive Trade Practices Act and breach of implied warranty of merchantability claims
- A Maryland plaintiff's fraudulent omission, Maryland Consumer Protection Act, breach of implied warranty of merchantability, and unjust enrichment claims
- Multi-state fraudulent omission claims

Branstetter, Stranch & Jennings PLLC; Stranch, Jennings & Garvey PLLC; Hagens, Berman, Sobol, Shapiro LLP; and Hilliard Law represent the plaintiffs. Faegre Drinker, Biddle & Reath LLP and Baker, Donelson, Bearman, Caldwell & Berkowitz PC represent Nissan. Sidley Austin LLP and Butler Snow LLP represent Cummins.

The case is Stanley v. Nissan N. Am. Inc. , 2024 BL 63733, M.D. Tenn., No. 23-cv-00261, 2/27/24 .

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Browse More Stories in Class Action

Lawsuit by Elon Musk's X against hate speech watchdog heads to court

 [reuters.com/legal/lawsuit-by-elon-musks-x-against-hate-speech-watchdog-heads-court-2024-02-29](https://www.reuters.com/legal/lawsuit-by-elon-musks-x-against-hate-speech-watchdog-heads-court-2024-02-29)

Jonathan Stempel

[1/2]A screen capture of Twitter's official page with an "X" on the profile image is seen on July 23, 2023 in this screengrab obtained from a social media website. via REUTERS/File Photo Purchase Licensing Rights , opens new tab

Feb 29 (Reuters) - A U.S. judge on Thursday will consider whether to dismiss X Corp's lawsuit against a nonprofit that has criticized a rise in hate speech on the social media platform once known as Twitter since Elon Musk took it over.

X sued the Center for Countering Digital Hate last July, accusing it of trying to "scare" advertisers away by claiming that Musk was doing little to stop hate speech, racist posts and other misinformation from overwhelming the platform.

According to X, the nonprofit improperly scraped and cherry-picked data to create false and misleading reports, hoping to silence those it disagreed with on hotly disputed topics such as COVID-19 vaccines, reproductive health and climate change.

The Center for Countering Digital Hate countered that it was Musk, a self-proclaimed free speech absolutist, who was attempting the silencing.

The center said it was not liable for how advertisers reacted to its non-defamatory reports about publicly available content on X, and that the lawsuit violated California's so-called anti-SLAPP law, or strategic lawsuits against public participation.

The nonprofit also denied X's claim that commercial rivals and perhaps foreign governments were bankrolling its efforts.

U.S. District Judge Charles Breyer in San Francisco will consider the dismissal request at a hearing. It was unclear whether he would rule immediately.

The European Climate Foundation, which promotes efforts to mitigate climate change, is also a defendant.

Musk, the world's second-richest person , opens new tab, bought Twitter for \$44 billion in October 2022.

He has since faced much criticism for firing too many people at X who policed misinformation, and for allowing more harmful and abusive posts.

Musk in November 2023 endorsed an antisemitic post on X that said members of the Jewish community were stoking hatred against white people, saying the user was speaking "the actual truth."

He has denied being antisemitic and sought to make amends for his post. In January he visited former Nazi death camp Auschwitz in southern Poland.

Advertisers have fled X since Musk bought it and reduced content moderation that has resulted in a dramatic increase in hate speech on X, civil rights groups have said.

Musk is also chief executive of electric vehicle maker Tesla (TSLA.O) [↗](#), opens new tab, which has faced several lawsuits claiming it tolerated harassment of workers.

The case is X Corp v. Center for Countering Digital Hate Inc et al, U.S. District Court, Northern District of California, No. 23-03836.

Reporting by Jonathan Stempel in New York; Editing by Richard Chang

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Feb. 29, 2024, 7:29 AM PST
Tesla Faces 5,977 Black Workers in Factory Racism Lawsuit (1)
By Robert Burnson

Bloomberg Law News 2024-02-29T12:13:47543441608-05:00
Tesla Faces 5,977 Black Workers in Factory Racism Lawsuit (1)

By Robert Burnson2024-02-29T10:29:09791-05:00

Almost 6,000 Black workers from Tesla Inc.'s California factory can sue the car maker collectively over claims that it failed to protect them from racism, under a tentative ruling by a California judge.

Alameda County Superior Court Judge Noël Wise said Wednesday the workers should be allowed to proceed with class action status because Tesla's alleged "pattern or practice" of failing to take reasonable steps to prevent discrimination was a common issue for all the Black workers at the Fremont plant.

The judge gave Tesla until Thursday to contest her ruling and scheduled a hearing for Friday for the parties to argue their positions.

The lawsuit was filed in 2017 by Tesla worker Marcus Vaughn, who claimed that the factory production floor was a "hotbed of racist behavior." According to the complaint, co-workers and supervisors routinely used racial slurs, and employee complaints to human resources went largely unanswered.

Tesla initially responded to Vaughn's suit with a blog post titled "Hotbed of Misinformation," denying wrongdoing and saying the company had fired three people after probing alleged incidents.

Tesla representatives didn't immediately respond to a request for comment on Wednesday's ruling.

The judge said she would split the trial into two phases, if the case goes to trial. During the first, the jury would decide whether Tesla failed to do enough to prevent discrimination and harassment. If the jurors find Tesla liable, then in a second phase the plaintiffs would pursue their claims for damages.

Elon Musk's electric vehicle maker has repeatedly been hit with damages in racism suits by individual workers and is also fighting claims by the US Equal Employment Opportunity Commission and California's civil rights agency.

The case is Vaughn v. Tesla, Inc., RG17882082, California Superior Court, Alameda County.

(Adds structure of trial and context on similar litigation in last two paragraphs.)

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Tesla must face class action claims by 6,000 US workers in race bias case

 [reuters.com/legal/tesla-must-face-class-action-claims-by-6000-workers-race-bias-case-2024-02-29](https://www.reuters.com/legal/tesla-must-face-class-action-claims-by-6000-workers-race-bias-case-2024-02-29)

Daniel Wiessner

A Tesla supercharging station is seen in the early morning sun, in Kettleman City, California, U.S., January 25, 2023. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

Feb 29 (Reuters) - A California state judge tentatively ruled that nearly 6,000 Black factory workers can sue Tesla (TSLA.O) , opens new tab as a group for the electric vehicle maker's alleged failure to address rampant race discrimination and harassment at its Fremont plant.

California Superior Court Judge Noel Wise in Oakland said in a written order issued on Wednesday that the lawsuit presents questions common to all Black workers at the plant of whether Tesla was aware of the alleged misconduct and refused to take steps to prevent it.

Tesla and lawyers for the plaintiffs did not immediately respond to requests for comment on Thursday.

The named plaintiff, former assembly line worker Marcus Vaughn, first sued in 2017, alleging that Black factory workers were subjected to a range of racist conduct including slurs, graffiti and nooses hung at their workstations.

Tesla has maintained it does not tolerate workplace harassment and that it has fired employees who were found to have engaged in racial harassment.

The tentative ruling comes ahead of a hearing scheduled for Friday where Tesla can contest Wise's decision, though judges are typically unlikely to change their minds.

The decision represents a major blow to Tesla as it opens the company up to a potential multimillion-dollar judgment. The class includes people who self-identified as Black and worked at the Fremont factory going back to November 2016.

Wise said she planned to hold a trial in the case beginning in October, when she also will preside over a trial in a case involving similar claims against Tesla by a California state civil rights agency.

Tesla is also facing race bias claims in federal court in California brought by the U.S. Equal Employment Opportunity Commission, which enforces federal anti-discrimination laws. Tesla has moved to dismiss that case or alternatively to pause it, claiming the other lawsuits should be resolved first.

The company, meanwhile, is appealing a \$3.2 million jury verdict awarded to a Black former elevator operator at the Fremont plant in a separate racial harassment lawsuit. The worker, Owen Diaz, had won a \$137 million jury verdict after an initial 2021 trial, but a judge ordered a second trial after ruling the award was excessive.

Reporting by Daniel Wiessner in Albany, New York; Editing by Toby Chopra, Alexander Smith, Alexia Garamfalvi and Jonathan Oatis

Daniel Wiessner
Thomson Reuters

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Judge reduces Monsanto damages verdict by \$300M

DJ [dailyjournal.com/articles/377377-judge-reduces-monsanto-damages-verdict-by-300m](https://www.dailyjournal.com/articles/377377-judge-reduces-monsanto-damages-verdict-by-300m)

Feb. 29, 2024

The judge found Monsanto engaged in “highly reprehensible conduct” by intentionally marketing a defective product, but reduced the punitive damages to \$21 million to comply with due process requirements.

A San Diego County judge has reduced an award against the Monsanto Company by nearly \$300 million. However, one of the plaintiff’s attorneys saw a bright side in the ruling, calling it “a thoughtful opinion completely eviscerating Monsanto’s grounds for appeal.”

In his order issued Monday in a suit over the company’s Roundup brand herbicide, Judge Kevin A. Enright found Monsanto engaged in “highly reprehensible conduct” by “intentionally marketing a defective product.” He also wrote that Monsanto had not “presented a valid basis for a new trial.”

But in a setback for the winning side, he added, “Plaintiff’s award of punitive damages is reduced to \$21 million to comply with due process requirements.”

Attorneys with Kiesel Law LLP sued Monsanto for claims including liability, negligence and fraud. Their client, Mike Dennis, blamed the company for his 2020 diagnosis of mycosis fungoides, a type of lymphoma. This followed two decades of using Roundup around his home “on a monthly basis,” he claimed. The complaint signed by Melanie M. Palmer, a partner with Kiesel Law, claimed Monsanto knew for years that “the main chemical ingredient of Roundup — glyphosate — is a probable cause of cancer.”

A jury agreed. In October, it issued an award of \$7 million in compensatory damages and \$325 million in punitive damages. Enright reduced the punitive damages to just \$21 million, for a total award of \$28 million. *Dennis v. Monsanto Company*, 37-2021-00047326-CU-PO-NC (S.D. Super. Ct., filed Nov. 5, 2021).

“For the reasons set forth below, the Court finds Plaintiff’s award of \$325 million in punitive damages violates due process by lacking a ‘reasonable relationship’ to the \$7 million in compensatory damages awarded to the Plaintiff and therefore exceeds the constitutional threshold,” Enright wrote.

Scott A. Love, representing Dennis as a partner with Clark, Love & Huston PLLC in Houston, praised the ruling despite the huge reduction.

“Unfortunately, California has strict caps on punitive damage,” Love said in an email on Wednesday. “The judge correctly applied the law and wrote a thoughtful opinion completely eviscerating Monsanto’s grounds for appeal. We are very confident that the verdict will be sustained on appeal.”

Dan Costello, a spokesman for Monsanto, shared the company’s official statement on the ruling by email.

“We are pleased with the court’s decision to significantly reduce the unconstitutionally excessive damage award by more than 90%, consistent with reductions made to damages overall in the first three Roundup trials,” the statement said. “However, we disagree with the court’s ruling that allows the liability verdict to stand, as it is at odds with the extensive weight of scientific evidence and the consistent assessments of expert regulators and scientists worldwide. Monsanto will be filing an appeal as the Dennis trial was marred by significant and reversible legal and evidentiary errors that unfairly prejudiced the Company and distracted from the scientific causation issues that are central to this case.”

In his 11-page ruling, Enright wrote that the sides presented conflicting evidence on whether glyphosate causes cancer.

“From such conflicting evidence, a jury could reasonably infer that Monsanto willfully and consciously ignored the dangers inherent in Roundup and continued to sell and market the product and therefore acted with malice sufficient to warrant imposing punitive damages,” Enright wrote.

He added that Dennis had presented “substantial evidence” of injury and that Roundup was a probable contributor to his cancer. Enright also defended his decision to bar Monsanto from arguing Dennis’ past methamphetamine use could have caused his cancer. He wrote that this information could be “highly prejudicial” to jurors compared to the “probative value” it caused his health problems.

#377377

Malcolm Maclachlan

Daily Journal Staff Writer

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San Diego judge slashes 90% off \$332M verdict awarded to man in Roundup trial

 socalrecord.com/stories/655433228-san-diego-judge-slashes-90-off-332m-verdict-awarded-to-man-in-roundup-trial

February 29, 2024

Lawsuits

A San Diego County judge has sharply slashed the possible payout that Monsanto faces from a headline-grabbing jury verdict last fall at the close of a trial over a man's claims that Roundup herbicide caused his cancer.

On Feb. 26, San Diego County Superior Court Judge Kevin A. Enright declared a jury had gone too far in awarding plaintiff Mike Dennis \$332 million for his alleged injuries. He cut the actual award to a total of \$28 million.

While denying Monsanto's requests to toss out the verdict entirely or to grant a new trial, Judge Enright said the damages awarded by the jury were out of balance.

The judge did not upset the jury's award of \$7 million in compensatory damages.

He said he believed the evidence at trial showed Dennis had "presented ample evidence of Monsanto engaging in highly reprehensible conduct, including evidence of Plaintiff's physical harm and suffering."

But the judge said \$325 million in punitive damages - or damages awarded entirely to punish a defendant and perhaps deter them and others from engaging in similar conduct in the future - was far too high.

".. The Court is still convinced that Plaintiff's award of \$325 million in punitive damages violates due process by lacking a 'reasonable relationship' to the \$7 million in compensatory damages awarded to the Plaintiff and exceeds the constitutional threshold," Judge Enright wrote.

While noting that no California law or prior court decisions dictate what a "reasonable" ratio of punitive damages to compensatory damages may be, the judge said a 3-to-1 ratio in this case "strikes a balance" among various factors courts have used to calculate and set punitive damages. He set punitive damages at \$21 million, finding such an award "does not exceed the state's power to punish."

In a statement following the ruling, a Monsanto spokesperson said the company was "pleased" with the ruling, but still planned to appeal the judge's decision to allow the verdict to stand.

"We are pleased with the court's decision to significantly reduce the unconstitutionally excessive damage award by more than 90%, consistent with reductions made to damages overall in the first three Roundup trials," Monsanto said.

"However, we disagree with the court's ruling that allows the liability verdict to stand, as it is at odds with the extensive weight of scientific evidence and the consistent assessments of expert regulators and scientists worldwide.

"Monsanto will be filing an appeal as the Dennis trial was marred by significant and reversible legal and evidentiary errors that unfairly prejudiced the Company and distracted from the scientific causation issues that are central to this case. The Company has post-trial motions pending in other Roundup cases seeking to vacate these verdicts, or at a minimum, similarly reduce the excessive damages awarded in these cases or have the verdicts vacated."

In a statement emailed to The Southern California Record, attorney Scott Love, of the law firm of Clark Love & Hutson, who represented Dennis at trial, said: "Unfortunately, California has strict caps on punitive damage. The judge correctly applied the law and wrote a thoughtful opinion completely eviscerating Monsanto's grounds for appeal. We are very confident that the verdict will be sustained on appeal."

The judge's decision comes four months since the San Diego County jury verdict that generated headlines across the country.

The case was one of thousands filed against Monsanto and its parent company Bayer over Roundup exposure.

Across the country, juries have delivered wildly different verdicts. In California, juries have ordered the company to pay almost \$2.4 billion in damages.

The most recent U.S. roundup verdict at the end of January topped \$2.2 billion, ordered by a jury in Philadelphia. Other verdicts in Philadelphia, for instance, have ranged from \$3.5 million to \$175 million.

The dozens of trials have come after Bayer Monsanto agreed in 2020 to pay \$11 billion to settle most claims related to Roundup exposure.

The \$332 million verdict in the Dennis case came last fall at the conclusion of a three-week trial that began Oct. 9.

The verdict was hailed at the time by attorneys, including Adam Peavy, who represented Dennis.

"Monsanto has been selling chemicals that cause cancer for years," Peavy said at the time in a statement posted to his LinkedIn page. "After a long trial, the jury made them pay today."

Peavy has not posted a statement in response to the judge's reduction in damages. He also did not respond to a request for comment from The Southern California Record.

ORGANIZATIONS IN THIS STORY

California Superior Court - San Diego County

Emerging Plaintiffs Bar Closes Supreme Court Representation Gap

B

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- Fewer options for individuals litigating against big businesses
- Firms, laws school, non-profits working to close the gap

Two Gupta Wessler attorneys took the US Supreme Court lectern in February, adding to the growing number of arguments for the plaintiff-side boutique that now boasts six attorneys with high court experience.

The firm is part of an emerging plaintiffs' bar at the court that arose to fix the imbalance between representation for individuals versus big companies, and has achieved notable success even on a court dominated by conservatives.

Progressives for years have noted the disproportion is the result of an insular Supreme Court bar dominated by large law firms that are often conflicted out of going against corporations.

"Individuals in litigation with companies have more options than they used to," said Allison M. Zieve of Public Citizen, a nonprofit consumer advocacy group and longtime player at the high court that's worked to close the gap.

New public interest groups, law school clinics, and individual lawyers have stepped in. Still, Zieve said there's more work to be done.

The list of experienced attorneys who can adequately represent individuals is still "significantly shorter than a list of experienced lawyers representing corporate interests before the Court," she said.

Consumers, Workers

The two cases argued by Gupta Wessler's Jennifer Bennett and Jonathan Taylor perfectly illustrate the effort to bring plaintiffs' representation up to par with those of big business.

The firm, founded in 2012, was set up to represent only "consumers, workers, and rabble rousers," said founder Deepak Gupta, who's an alumnus of the consumer advocacy group Public Citizen.

The firm and its success shows that "it is possible to have this model and be sustainable," Gupta said.

Bennett made her third high court argument Feb. 20 in *Bissonnette v. LePage Bakeries Park St., LLC* representing workers in a wage-and-hour suit against Flowers Foods, the company behind Wonder Bread and other baked goods.

That's the third in a trio of arbitration cases that started off with Bennett's first argument at the Supreme Court. The unanimous ruling in 2018 in *New Prime Inc. v. Oliveira* was the first win for a party challenging arbitration after more than a decade of unbroken decisions for robust enforcement of arbitration provisions.

Taylor made his second Supreme Court appearance on Feb. 27, in *Cantero v. Bank of America*. Taylor represents borrowers in a preemption suit against the financial giant.

It's not "the sexiest of issues, but it can have a real impact on people's daily lives," Taylor said. "And that's the kind of work that the firm was founded to do."

Even before the current 6-3 conservative majority court, attorneys arguing on behalf of individuals suing large companies have been able to translate their arguments to wins. In two of the five cases decided by the justices so far this term, the court has unanimously sided with consumers and workers.

Public Citizen's Nandan Joshi won on behalf of individuals seeking to sue the federal government, acting as a lender, for false information on their credit reports, in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*.

And Easha Anand, of Stanford Law School's Supreme Court Litigation Clinic, secured a victory for a whistleblower who says he was illegally terminated by UBS Securities.

Court Specialists

Gupta Wessler and other plaintiff-side attorneys are playing catch up with large companies that long ago recognized the benefits of having a high court specialist argue on their behalf.

Justices have lamented the lack of specialized counsel, particularly for individuals.

"I can't tell you how often I'll look at Neil Gorsuch and I'll send him a note and say, 'I want to kill that lawyer,' because he or she didn't give up that case," Justice Sonia Sotomayor said at a Jan. 29 event at the University of California, Berkeley School of Law.

By "the time you come to the Supreme Court, it's not about your client anymore," Sotomayor said. "It's about how that legal issue will affect the development of law."

Daniel Geyser, a partner at Haynes and Boone who frequently represents individuals at the court, said the criticism isn't a "reflection that other people aren't phenomenal lawyers."

But “when you study the court, you have insight that others don’t,” Geyser said. “You have a better sense of what the court is looking for” and “what might help the court.”

Law school clinics, private attorneys like Geyser, and relatively new nonprofits like the Institute for Constitutional Advocacy and Protection now provide that expertise for individuals.

Geyser said that when he calls to offer his services to an attorney, it’s a “rare situation where you don’t hear that they’ve heard from 12 other qualified people.”

Not everyone accepts the help.

On Wednesday, David Harris made his Supreme Court debut representing consumers in their arbitration fight with cryptocurrency platform Coinbase Inc. Harris said he knows the case, *Coinbase, Inc. v. Suski*, better than any other lawyer.

During arguments, Harris seemed to make Sotomayor’s point that non-specialists often don’t understand the stakes of their arguments.

Why “are we litigating all the way to the Supreme Court of the United States up and down and up and down?” Justice Neil Gorsuch asked, suggesting that Harris could have saved a significant time by taking a different litigation tactic.

Harris said he won in the lower court and didn’t want to give his adversaries another chance. Gorsuch rolled his eyes, Justice Amy Coney Barrett threw up her hand, and Chief Justice John Roberts smirked at his colleagues.

“I think you just gave away your case,” Sotomayor told Harris, suggesting the court would return the case to the lower court after all.

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San Diego lawyer drops suit against consumer attorneys, plans to refile

DJ [dailyjournal.com/articles/377386-san-diego-lawyer-drops-suit-against-consumer-attorneys-plans-to-refile](https://www.dailyjournal.com/articles/377386-san-diego-lawyer-drops-suit-against-consumer-attorneys-plans-to-refile)

Contracts

Feb. 29, 2024

John H. Gomez, a prominent personal injury attorney in San Diego, accused the group of sullyng his reputation and said he will file a new complaint, adding parties.

Plaintiffs' attorney John H. Gomez has dropped the lawsuit he filed against the Consumer Attorneys of San Diego, accusing the group of sullyng his reputation with false statements. But Gomez said Wednesday he will file a new complaint.

"We are in the process of amending the complaint to add new claims and/or parties," said the founder and CEO of Gomez Trial Attorneys in an email. "Because we are well within the statute of limitations to file, because we are extremely busy with the work we do for clients, and because we continue our evaluation, we decided to dismiss the current complaint and refile the amended complaint at a later time."

Gomez submitted a request to dismiss the case without prejudice on Feb. 20, according to San Diego County Superior Court records. *Gomez v. Consumer Attorneys of San Diego*, 37-2023-00053715-CU-BT-CTL (S.D. Super. Ct., filed Dec. 11, 2023).

"We continue to have nothing to say about the matter," said Consumer Attorneys of San Diego Executive Director Bonnie R. Benitez when reached by email on Wednesday.

Gomez has long been one of the best-known personal injury attorneys in San Diego. The complaint he filed in December claimed that the attorneys' organization joined with several prominent southern California attorneys "to invent a collection of 'fantastic lies' and to fraudulently and maliciously attack, bully and harm" him and his firm. He claimed breach of contract and fiduciary duty, economic interference and infliction of emotional distress.

The complaint did not include any other defendants. But it was largely concerned with what it alleged were actions of other well-known attorneys, including Gary A. Dordick, Bibianne Fell, Deborah Chang, and Courtney and Nicholas Rowley.

Gomez claimed they were part of a letter-writing campaign to the organizations including the Consumer Attorneys of San Diego, the California State Bar, and the American Board of Trial Advocates detailing allegations he engaged in sexual harassment and abuse. This was designed to destroy his reputation and eliminate competition from his very successful firm, Gomez claimed in the complaint he signed on his own behalf.

Fell, now with Fell Law PC in San Diego and Athea Trial Attorneys in El Segundo, is a former attorney with Gomez's firm. "I'm not surprised that Gomez dismissed his complaint, but it does not undo the harm to everyone he attacked," Fell said in an email. "In my opinion, it was a shameful stunt that dishonors our profession."

"I am glad to hear John Gomez dropped his lawsuit. Lawyers need to focus their energy on fighting on behalf of their clients and not with each other," Dordick, the founder of Dordick Law Corporation in Beverly Hills, wrote in an email. "Unfortunately, his complaint still remains a public record with information we believe to be false and inaccurate."

The complaint includes extensive correspondence between the Consumer Attorneys of California Board of Directors and Gomez and members of his firm. The organization expelled Gomez, a former president, in September. In the complaint, Gomez wrote that none of the allegations against him have resulted in lawsuits, and that the consumer attorneys group continues to allow other male attorneys named in sexual harassment lawsuits to be members. Gomez also detailed letters he said the organization sent to members about allegations against him.

In the complaint, Gomez acknowledged two women sued him for sexual harassment in separate cases in 2014. But he wrote that he "today is remarried, a happy and faithful husband, committed father and devout Christian."

#377386

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Matt Levine's Money Stuff: Trading Stock Takes Time

By Matt Levine

Opinion

Bloomberg Law News 2024-02-29T10:39:15268338161-05:00

Matt Levine's Money Stuff: Trading Stock Takes Time

By Matt Levine 2024-02-28T14:17:32795-05:00

T+1

Say you are a big mutual fund and you own 1,000 shares of Stock X and you want to sell. You meet a pension fund that wants to buy 1,000 shares of Stock X, the pension fund comes to your office to negotiate a trade, and you agree on a price of, say, \$14 per share. The pension fund reaches into its bag of cash, pulls out \$14,000 in crisp \$20 bills and hands them to you. You open up your vault, pull out a stock certificate that says "1,000 Shares of Stock X" and hand it to the pension fund. "Pleasure doing business with you," you say; you shake hands with the pension fund and it walks out of your office holding the shares.

This is not quite an accurate description of how you trade stocks in 2024. For instance, in reality, you negotiate this trade anonymously and electronically on the stock exchange, the "stock" consists of an entry in an electronic database rather than paper certificates, and the "\$14,000" consists of an entry in a different electronic database. But those distinctions are not particularly important, and let's ignore them for now.

Instead let's just pretend that everything is done face to face with vaults and paper money, and talk about a different complication. That complication is: If you are a big mutual fund in 2024 and you own 1,000 shares of Stock X, you don't just keep the shares in your vault. No, what has actually happened is that, a month ago, a hedge fund came to you and said: "Hey, I hear you have some shares of Stock X sitting in your vault. I would like to borrow those shares from you, for my own purposes." And you sat down with that hedge fund and negotiated a trade — not a stock trade, but a stock *lending* trade. You didn't sell your stock, but you agreed to lend the hedge fund your stock certificates, and the hedge fund agreed to post some cash collateral to secure the loan, and the hedge fund agreed to pay you a fee — essentially, interest — for borrowing the stock. Also the loan has a term: Maybe you agreed that the hedge fund would return the stock certificates in 90 days, for instance, but much more likely you agreed to "open" term, where the hedge fund can return the shares to you whenever it wants, and you can demand them back whenever you want.

Why did the hedge fund want to borrow your stock? There's really only one possible answer: The hedge fund wanted to *short* Stock X; it wanted to sell shares of Stock X that it didn't own, betting that the stock would drop and it could buy the shares back cheaper later. To do that, of course, it needed shares of Stock X: In my slightly fanciful world of tangible face-to-face stock trades, a hedge fund can't "sell Stock X" without handing over actual certificates of Stock X. This is where you came in: You loaned the hedge fund some shares of Stock X, the hedge fund sold them, and it hopes to buy them back in the future for cheaper and return them to you to close out the loan.

Why did you agree to lend the hedge fund the shares, if you knew that the hedge fund was betting they'd go down? You *own* Stock X; you want it to go up; why would you help someone bet against it? Oh, reasons. You might think "this hedge fund is going to short the stock anyway by borrowing it from someone and paying a fee, so I might as well get the fee." You might think "this hedge fund thinks the stock will go down, but it is wrong, and I will profit from its folly." You might think "actually this hedge fund isn't *really* betting that the stock will go down, but doing some sort of market-neutral or options market-making or convertible arbitrage strategy, so there is nothing offensive about its shorting." You might think "I am actually an index fund paid to track an index, so I don't much care if my stocks go up or down, and getting a little stock-lending income can help me offset my expenses." Doesn't matter; the point is that you were happy to get some stock-lending income by helping a short seller out.

But now you want to sell the stock, and the nice pension fund is sitting in your office with its bag of cash, and you open your vault and there is no stock there. There's a pile of cash (the collateral from the hedge fund), and a little note saying "IOU 1,000 shares of Stock X." And so you turn to the pension fund and say "oh, sorry, I want to sell you this stock, and I *own* it, but I don't *have* it right now, can we meet back here in a couple of days and I'll give it to you?"

And the pension fund says “actually that’s fine, no problem. In fact, to tell you the truth, I was hoping you’d say that, because I don’t have any cash in my bag either. You see, as a pension fund, I have a fiduciary duty to maximize returns, and if I just carried around a bunch of \$20 bills in a sack I would not be earning any interest. So in fact I invest all my cash in a money-market fund, which pays a fairly risk-free interest rate, and when I need to buy stock I take cash out of the money-market fund to get the \$20 bills to pay for the stock. Right now all that’s in the bag is a piece of paper with my money-market fund account number on it. Tell you what, though: You go out and find those stock certificates that you own, and I’ll go get cash from my money-market fund, and we’ll meet back here in a couple of days and swap.”

And so you agree on a *trade* — a size and price, you sell 1,000 shares of Stock X to the pension fund for \$14 per share — and agree to come back in two days to *settle* the trade, that is, exchange dollars for shares. This is called “T+2 settlement.” And then in the intervening two days everyone is busy:

- 1. You call up the hedge fund and say “Hi, remember those 1,000 shares of Stock X I loaned you? I need them back. Can you come by my office tomorrow and return them?” And the hedge fund says “sure, we agreed to an open-term loan, and I honor my commitments, so I’ll be there tomorrow with your shares.”
- 2. But remember, the hedge fund *sold* your shares! It doesn’t *have* them. So it has to go out and find 1,000 shares of Stock X to return to you. Probably it will call some *other* investor and say “hey do you have 1,000 shares of Stock X I can borrow,” negotiate a new loan, and get the 1,000 shares just in time to meet you at your office tomorrow to return them.
- 3. But if it *can’t* find a new loan, in the worst case, it will have to go out and *buy back* the 1,000 shares so it can return them to you. But this is tricky, because what if *that* trade takes two days to settle? Then the hedge fund won’t have the shares in time to return them to you tomorrow!
- 4. Meanwhile, the pension fund goes to its money market fund manager and says “I need to cash out \$14,000 please.” And the money market fund manager gives it \$14,000 and cancels some of its shares.
- 5. Where does the money market fund get the \$14,000 from? Well, probably it owns a bunch of Treasury bills, and it goes and sells them in the market for cash, and it uses the cash to pay out the pension fund. That trade, too, has to settle: The money market fund has to deliver the bills, and the buyer has to deliver the cash.

And then if all goes well, you meet up two days later and exchange the \$20 bills for the stock certificates. But it is not *unheard of* for all not to go well. You *might* show up two days later with no stock certificates and say “look, I *own* that stock, I promise I’m *good for it*, but what happened is that I lent it out to a hedge fund, and I recalled it, and they couldn’t find anyone else to borrow it from, so they had to buy it back in, and they *did*, they bought the stock from another investor, but the person they bought it from hasn’t delivered it yet, but she said that she will tomorrow, and the hedge fund will run it over to my office as soon as they get it, so I should have it by 2 p.m. tomorrow at the latest, so let’s meet up then, really sorry for the inconvenience.” And the pension fund will be annoyed, but it will also be like “yeah that stuff happens in the stock market, so it goes, see you tomorrow.” This is called a “settlement fail.”

I am being deliberately silly, and obviously in the real modern world of electronic money and electronic stock and electronic trading platforms each of these steps is easier and faster and more automated than I am making it out to be, but also *this is essentially accurate*. Sometimes, you and I will agree on a stock trade (on the exchange) in which you have the stock (in a cash brokerage account) and I have the cash (at my brokerage) and we could in theory, using the magic of computers, swap them more or less instantly. But for lots of investors, and particularly institutional investors, that won't be the norm, because it is *inefficient*: They won't keep cash parked at their broker if they could be earning more interest in Treasury bills; they won't keep stock parked at their broker if they could be earning fees by lending it out. And so — even with the magic of computers and so forth — it will take time for them to swap stock for money to settle their trades.

And in recent years US stock trades have had T+2 settlement; that is, trades agreed on a Monday settle on a Wednesday. And now the market is moving to T+1 settlement, for various reasons. One reason is the 2021 GameStop fiasco, and the fact that the longer the settlement cycle is, the more risk there is that someone might default. (If I agree to meet you in two days to exchange stock for cash, I might disappear in the intervening days.) But I think another reason might be that, when you tell normal people “it takes two days to settle a stock trade,” they kind of don't believe you? Aren't the stocks on computers? Isn't the money on computers? Shouldn't it take roughly no time to exchange stock for money? And the answer is “well, kind of, but when you think about the need to line up financing, and to recall stock loans, and the chain of settlement issues that you get if the stock borrower needs to buy in shares and settle *that* trade, actually it can take a while and it's a little fragile.” That sounds sort of stupid but is also true.

Anyway Bloomberg's Katherine Doherty reports:

US regulators' plan to speed up settlement times in securities markets will come at a cost for investors around the world — more than \$30 billion annually, according to a new report from Bloomberg Intelligence.

Settling trades in one day instead of two — under a system dubbed T+1 — will strain the business of loaning and recalling shares used for short selling, require financing to ensure deadlines can be met and, along the way, risk telegraphing pending stock sales to people betting prices will fall, the researchers found.

The resulting impact could amount to about \$24 billion in securities lending costs, their report estimated. Investors in foreign-exchange markets could also face \$6.2 billion in added costs.

“The shorter settlement cycle pushes centralized costs, which the banks and the clearinghouses are now managing, onto institutional investors,” Larry Tabb, head of market structure research at Bloomberg Intelligence, said in an interview. “It's also leaking a lot of information to folks who borrowed securities as well as increasing operational pressure just to execute a trade.”

If you are a Bloomberg user, the report, by Tabb and Nicholas Phillips, is here. The biggest hit is from recalling stock loans; from the report:

The change in the settlement cycle will necessitate behavioral change in lenders, borrowers, custodians, broker dealers and service providers, because security lenders will have less time to recall securities on loan and borrowers less time to return them to settle a sale of loaned securities. Lenders will be required to recall loans by 11:59 p.m. on the trade date from 3:00 p.m. the day after trading, a reduction of 15 hours to ensure efficient return of stocks, which will be significantly less for European and Asian participants.

The window is so narrow that Phillips and Tabb argue that lenders will have to recall stock loans *before* selling the stock: In my example, if you are a mutual fund looking to sell Stock X, and you know that you'll need to deliver it to the buyer as soon as you agree on a trade, then you will *first* call up the hedge fund that you loaned it to, demand that they return the stock to you, wait until they do, and only *then* go out and try to find a buyer. That does solve most of the problems I laid out above: If the stock is in your vault before you trade, you don't have to worry about getting it back between trade and settlement. But it is a bit inefficient — there's some period in which you own the stock but are not earning fees from lending it out — and also has the problem that the hedge fund might get ideas:

Speeding up the recall process could cost investors \$17 billion a year in information leakage, we believe. Recalling securities before they're sold increases leakage by not only informing custodians that investors are preparing to sell, but also giving notice to the borrowers, who are already short the issue. Investors who short are typically the most sophisticated, and leaking information to them will only raise selling pressure and likely have an adverse impact on stock prices.

I don't think that any of this is *necessarily* true; you probably *could* build a fast-moving electronic marketplace in which stock loans can reliably be recalled (and replaced!) in the space of an hour, so that an asset owner could agree to sell stock, recall its stock loan, get the stock back and deliver it for settlement a day later. Magic of computers, etc. But that doesn't mean that that system currently exists: The current system is optimized for T+2 settlement, and moving to T+1 will cause some hiccups. And there will always be *some* delay, because stock settlement is not purely about moving entries around in computer databases. There are actual business decisions that need to be made between the time you agree on a trade and the time you settle it, and they do take time.

Meanwhile in Luxembourg:

Societe Generale SA is extending the hours of a night shift team to prepare for the US reducing the time to settle securities transactions to just one day.

Luxembourg-based settlement staff in the bank's securities services arm, which has around €4.9 trillion (\$5.3 trillion) of assets under custody, will work until midnight, from 10 p.m. local time previously, according to Mathieu Maurier, who heads the division's operations in the country. That's to help ensure trades go through smoothly ahead of the move to so-called T+1.

"Most of the transactions we are getting from clients are between 10 p.m. and midnight after the closure of the US market," he said in an interview. "We are anticipating with T+1 the need to capitalize on those two hours and to handle the pre-matching element."

Settling trades in a day will keep you busy!

Meme stock IR

The thing I learned in 2021 was that being fun on social media was a viable corporate finance strategy for public companies. AMC Entertainment Holdings was the great innovator here, though arguably Tesla Inc. paved the way: AMC did stuff like give out popcorn to shareholders and have its chief executive officer do a YouTube interview with no pants, and retail shareholders on social media responded by buying a lot of stock, at high prices, *from AMC*, which used the money to pay down debt and buy a gold mine. "A week ago," I wrote about AMC in January 2021, "it was not crazy to think this company was doomed; now it is entirely possible that it will survive and thrive and show movies in movie theaters for decades to come because everyone went nuts and bought meme stocks this week." But that was not (just) passive luck on AMC's part; AMC saw the meme-stock movement and took full advantage of it.

Lots of other people learned this lesson too, and for a while other companies — particularly companies that were struggling and did not have any obvious appeal to large fundamental investors — went around whispering "wait, can *we* be a meme stock? Can *we* raise money at high prices by doing funny stuff on social media?" Well, some could, but my sense is that the answer was *rarely* yes, that successfully pulling off a meme-stock investor relations strategy requires (1) authentic spontaneous meme-stock interest from social media plus (2) authentic online engagement with the meme-stockers from management. Just saying "let's be a meme stock" doesn't work.

I assume that there were several brief doomed efforts by public companies to become meme stocks, efforts that mostly died in internal investor relations presentations or casual what-if emails from CEOs. But probably some of them will end up in US Securities and Exchange Commission enforcement actions. Here's one:

The Securities and Exchange Commission [Tuesday] charged Paul A. Pereira, the former CEO and co-founder of Alfi, Inc., with making materially false and misleading statements on social media about the company's financial and performance metrics in an attempt to boost the now defunct company's stock price.

According to the SEC's complaint, while serving as the CEO of Alfi, a Florida-based advertising technology company, and under the pseudonym "Uptix12," Pereira allegedly posted shortly after Alfi's May 2021 initial public offering that he "wouldn't doubt" that Alfi "has \$10 mm to \$20 mm in revenues already in their back pocket," when, in reality, the company was set to report only \$17,450 in revenue.

From the complaint:

In the months following Alfi's May 4, 2021 IPO, the company received attention from members of the press and retail investors on social media, who began to describe Alfi as a so-called "meme stock." The term "meme stock" generally refers to equity securities that experienced extreme price volatility during the periods of 2020 and 2021 due, at least in part, to abnormally high volumes of buying and selling in the stock by retail investors. ...

Increasing Alfi's visibility on social media platforms with a large retail investor audience was a priority for Pereira. Pereira expressed concern to Alfi employees about the lack of attention being paid to Alfi on social media. He directed employees to post favorable information about Alfi to social media platforms, such as Stocktwits, a finance-focused social media platform popular among retail investors.

On or around May 18, 2021, Pereira created an account on Stocktwits under the moniker "Uptix12." Over the next five months, in violation of Alfi's social media policy, Pereira posted information on Stocktwits about Alfi multiple times per week and, often, multiple times per day.

Due to the pseudonymous nature of the "Uptix12" moniker, which did not identify Pereira, there was no way for Stocktwits users to determine that Pereira, the CEO of Alfi at the time, controlled the Uptix12 account. Through the account, Pereira often made posts praising Alfi's technology and strategy and, at times, he disparaged other Stocktwits users who criticized Alfi.

On June 3, 2021, Pereira posted the following materially false and misleading statement on Stocktwits about Alfi's reported revenues: "\$ALF Read between the CEO lines. Focused execution. They know exactly what they are doing. I wouldn't doubt that ALFI have [sic] \$10 mm to \$20 mm in revenues already in their back pocket!" ...

The day before his post, on June 2, 2021, Pereira received a near final draft of Alfi's first Form 10-Q, reporting revenues of only \$17,450 for the three-month period ending March 31, 2021. The final version of the Form 10-Q, filed with the Commission on June 10, 2021, also reported \$17,450.

If you want people talking about your stock on social media, one thing you can do is get on social media, start a pseudonymous account, and start talking about your stock. The most straightforward path to being a meme stock might be posting the memes yourself. I mean, I don't think it's all that likely to *work*, but it is straightforward, and it's no wonder that someone tried it. It just doesn't seem that likely to me that the number of public company CEOs who were anonymously posting nice things about their companies on Stocktwits or Reddit in June 2021 was *one*.

Private credit

I guess it is worth taking seriously the possibility that modern financial markets are *too informative*, that people prefer *not* to know what their investments are worth at all times, and that there is a good business in *not telling them*. Part of me has always wanted to offer that product in pure form, like, an investment account where (1) you give me \$1,000, (2) I invest it in index funds, (3) I don't have a website or monthly account statements or anything and (4) at the end of the year, or when you turn 65 or whatever, I say "surprise! You have \$1,216." And I charge a fee specifically for the service of not telling you your account's value until the end.

That product probably doesn't quite work, but lots of other financial products are bundles that include that service as a key component. (Surely part of the appeal of a defined-benefit pension is that you don't need to check the market value of your account all the time?) In particular, we have talked about how private equity and nontraded real estate investment trusts offer investors the service of *not having daily prices*: If you buy public stocks or REITs, some days they will go up and other days they will go down, and you will nervously check your account and maybe sell at the worst time. If you buy private equity or nontraded REITs, most days they will say "no fundamental changes, asset value is fine, all good," and you will sleep better and not be able to sell anyway.

If you are used to public markets, you might find this unsatisfying: If public stocks are down 20% this year, can it *really* be true that your private equity portfolio is up 2%? On the other hand, public markets probably *do* overreact to news; some amount of the volatility in public-market prices really is just noise, just mistaken, and if you can avoid that noise then maybe you really are offering your investors a better product.

Just from the name "private credit" you know that it's offering this bundle too. Bloomberg News reports:

The meteoric rise of private credit funds has been powered by a simple pitch to the insurers and pensions who manage people's money over decades: Invest in our loans and avoid the price gyrations of rival types of corporate finance. The loans will trade so rarely — in many cases, never — that their value will stay steady, letting backers enjoy bountiful and stress-free returns. This irresistible proposal has transformed a Wall Street backwater into a \$1.7 trillion market.

Now, though, cracks in that edifice are starting to appear. ... Suddenly, a prime virtue of private credit — letting these funds decide themselves what their loans are worth rather than exposing them to public markets — is looking like one of its greatest potential flaws.

Data compiled by Bloomberg and fixed-income specialist Solve, as well as conversations with dozens of market participants, highlight how some private-fund managers have barely budged on where they "mark" certain loans even as rivals who own the same debt have slashed its value. ...

"In private markets, because no one knows the true valuation there's a tendency to leak information into prices slowly," says Peter Hecht, managing director at US investment firm AQR Capital Management. "It dampens volatility, giving this false perception of low risk."

By the way, in addition to being pleasant for the investors, there is *some* argument that it is socially useful for *lenders* not to know what their loans are worth. We talked the other day about competition between private credit and bank lending, and part of the story there is that banks “were saddled with billions of dollars of losses on the deals they agreed to finance in 2022,” which “limited [their] interest in extending new loans” for a while. The public syndicated loan market is a fairly mark-to-market world these days, which makes it vulnerable to market cycles: If you make some loans, and then the market price of loans goes down, you have a big mark-to-market loss on your loans, which means that no one is going to let you deploy capital into new loans — even though, because the price of loans has gone down, you should be able to get good deals on new loans. If you can just blithely ignore mark-to-market losses, then you can keep making loans through the cycle.

Or that Bloomberg story cites payment-in-kind loans, “where a company chooses to defer interest payments to its direct lender and promises to make up for it in its final loan settlement”:

This option of kicking the can down the road is often used by lower-rated borrowers and while it doesn’t necessarily signal distress, it does cause anxiety about what it might be obscuring. ...

And yet the value of loans even after these deals is strikingly generous. According to Solve, about three-quarters of PIK loans were valued at more than 95 cents on the dollar at the end of September. “This raises questions about how portfolio companies struggling with interest servicing are valued so high,” says Eugene Grinberg, the fintech’s cofounder.

True. But a lender who *doesn’t have to mark down its loans* is more likely to *let a borrower defer interest payments*, which is nice for a borrower that runs into trouble. Lenders have more flexibility to work cooperatively with borrowers if they are not subject to market discipline. That is not obviously good — it can lead to zombie companies, misallocation of resources, etc. — but it has some advantages.

Elsewhere in overly informative public markets

I sometimes like to argue that the stock market should be open 15 or 30 minutes a day: Everyone could form their views about valuation at their leisure and then meet up, *briefly*, to trade stocks. The advantage of this is that a 15-minute trading session would not be vastly less informative than a 6.5-hour trading session, and would give traders more time with their families. The disadvantage is that sometimes you need to sell some stuff quickly to raise money or buy some other stuff, and you can’t necessarily wait until noon the next day. (See the first section above!)

Realistically, though, the trend is probably the other way, and people want to trade all night and on weekends. And so on Tuesday, 24X National Exchange LLC filed an application with the US Securities and Exchange Commission to become a national securities exchange and run around the clock, more or less. (“The Exchange will pause trading every day between 7:00 p.m. ET and 8:00 p.m. ET,” says its user manual, and also “each Saturday from 8 a.m. ET until 11 a.m. ET,” but still that’s a lot of trading.) We have talked about 24X Exchange before, in 2021, when it previously “filed key parts of its application,” and I guess it’s still doing that.

Things happen

Sam Bankman-Fried Makes His Last Stand. The heartland oil refiner fuelling Carl Icahn's empire. Trump Is Closer Than Ever to a Giant Truth Social Payday. China Tells Quants to Phase Out Strategy Blamed for Turmoil. U.S. Opens UnitedHealth Antitrust Probe. Big investors grow nervous about private credit boom. Measuring Treasury Market Depth. Use profits from frozen Russian assets to arm Ukraine, says Ursula von der Leyen. The Hail Mary Tactic to Pay Off Student Debt: Sports Betting.

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- 1. Which, to be clear, is a computer. You don't like go to the floor of the New York Stock Exchange.
- 2. More normally, the hedge fund posted cash collateral with you, the cash collateral earns interest, and you rebate some of the interest to the hedge fund and keep some of it (the lending fee) for yourself. Though in hard-to-borrow stocks there can be a "negative rebate," i.e. you keep all the interest and the hedge fund pays you some extra. Also in reality all of this will probably be done through brokers' stock lending platforms rather than face-to-face, but I am trying to keep the old-timey quaintness in the text.
- 3. In this parenthesis I am using the word "cash" in its brokerage-account sense, meaning "not margin." If you own stock in a margin account at a retail brokerage, your *broker* has probably loaned it out to a short seller and has to go find it for you.
- 4. This was not particularly true historically: It used to be that bank loans were made by banks, which could hold them on their books until maturity and not mark them down for temporary market fluctuations. That is, it used to be that "private lending" was largely done by banks. That has changed. But banks used to argue that this was good, that their relative insulation from market prices made them better long-term partners for their borrowers than flighty bond markets.

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SEC goes after bankrupt Terraform Labs' \$166 mln 'slush fund' for Dentons

 [reuters.com/legal/transactional/sec-goes-after-bankrupt-terraform-labs-166-mln-slush-fund-dentons-2024-02-28](https://www.reuters.com/legal/transactional/sec-goes-after-bankrupt-terraform-labs-166-mln-slush-fund-dentons-2024-02-28)

Dietrich Knauth

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

- SEC says "staggering" retainer undermines court oversight
- \$122 million could be clawed back to repay creditors, SEC says
- SEC pushes Dentons to return \$81 million or risk disqualification

Feb 28 (Reuters) - The U.S. Securities & Exchange Commission has argued that Terraform Labs should not be allowed to hire law firm Dentons or pay litigation costs for employees during its bankruptcy, taking aim at a \$166 million retainer payment to Terraform's lawyers.

The SEC said that Terraform had sent \$166 million to Dentons since the start of 2023, and that those transfers may have been intended to avoid paying a future judgment in the SEC's lawsuit accusing Terraform of defrauding its investors.

The money has been "siphoned" into an "opaque slush fund for its lawyers," to the detriment of the investors and creditors who will seek to be repaid in Terraform's bankruptcy, the SEC said.

Terraform Labs, which filed for Chapter 11 protection in January, has said that its bankruptcy will enable it to appeal a December ruling that granted partial victory to the SEC in its securities fraud case. A federal judge ruled that Terraform Labs and its founder Do Kwon violated U.S. law by failing to register two digital currencies whose collapse roiled cryptocurrency markets in 2022.

The judge has not yet determined the amount of damages that Terraform must pay, but Terraform Labs has said it could exceed its assets.

After filing for bankruptcy, Terraform asked the bankruptcy court for permission to hire Dentons as special litigation counsel, and to pay \$6.3 million in legal costs for employees and critical outside partners who are facing litigation. About \$3.25 million of that amount will be used to pay employees' legal bills, according to Terraform's court filings.

Terraform also seeks to pay about \$1.33 million to continue a UK lawsuit that aims to dig up evidence from a crypto trading company that Terraform says will help its defense of the SEC lawsuit.

The SEC said that none of those payments can be allowed without more oversight from the bankruptcy court, arguing Terraform's "staggering" retainer payment had served to undermine the bankruptcy court's visibility into Terraform's spending.

Most of the retainer payments, totaling \$122 million, were transferred in the 90-day period before Terraform filed for bankruptcy, according to the SEC. As a result, that money could ultimately be clawed back to repay Terraform's other creditors, creating a potentially disqualifying conflict of interest between Terraform and Dentons, the regulator argued.

Dentons should not be allowed to represent Terraform, its employees or vendors unless it returns \$81 million that remains in the retainer account and subjects its future fees to bankruptcy court oversight, SEC argued.

U.S. Bankruptcy Judge Brendan Shannon is expected to hear arguments on the dispute at a March 5 court hearing in Wilmington, Delaware.

Terraform and Dentons did not immediately respond to a request for comment.

Terraform's stablecoin TerraUSD, designed to maintain a constant \$1 price, caused widespread volatility in crypto markets after its price began to fall in 2022. TerraUSD and its sister coin Luna eventually lost all of their value, and the ensuing fallout contributed to the bankruptcies of FTX, Three Arrows Capital, Celsius Network, BlockFi, Voyager Digital and Genesis Global.

The case is In re Terraform Labs, U.S. Bankruptcy Court for the District of Delaware, No. 24-10070.

For Terraform Labs: Ronit Berkovich, Christine Calabrese and Jared Friedmann of Weil, Gotshal & Manges

For the SEC: Therese Scheuer and William Uptegrove

Read more:

Terraform Labs says bankruptcy will enable appeal of SEC lawsuit

Terraform Labs co-founder Do Kwon to miss start of US SEC fraud trial

Judge sides with US SEC, says Terraform Labs crypto founder Do Kwon violated law

Fact box: Crypto's string of bankruptcies

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Reporting by Dietrich Knauth in New York

Terraform Labs Gave Lawyers \$122 Million 'Slush Fund,' SEC Says

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWYxYmMtZDY0ZS1hZjlkLWY3ZmU1ZjA3MDAwMyIsImN0eHQiOiJTTE5XliwidXVpZCI6IiIhXUhtMIF3Q3VZNGptcEErWFkrTnc9PUxwUm5jTDRxOFg1dzF4K2dyV3F5WFE9PSIsInRpbWUiOiIxNzA5MjA4ODgxNTk5liwic2lnIjoieThwbUNXOVhGRVFjNU1PS0k3eWxTKzNDdTJvPSIsInYiOiIxIn0=

- Regulator says crypto firm paid bills of co-founder Do Kwon
- SEC says amount Terraform Labs gave lawyers is extraordinary

Terraform Labs Pte. transferred nearly \$122 million to its lawyers just before it filed for bankruptcy and used some of the money to cover legal expenses for criminally charged co-founder **Do Kwon**, according to the US Securities and Exchange Commission.

The SEC is challenging cash transfers to Terraform's top law firm, Dentons US, that occurred in the three months before the company filed for bankruptcy in January, court papers show. The firm behind the now-collapsed TerraUSD stablecoin said it filed Chapter 11 because it can't afford penalties sought by federal regulators.

Although the SEC said it doesn't oppose the company paying legitimate legal expenses, the "amount of funds at issue is extraordinary," according to the regulator. Terraform transferred \$166 million to Dentons in the full year before its Chapter 11 filing, more than \$5 million of which helped Do Kwon cover legal bills.

The SEC said the size and timing of the transfers are suspicious and that Terraform Labs must provide more documentation on them, saying the company transferred \$122 million into "an opaque slush fund for its lawyers."

Representatives for Dentons and Terraform Labs didn't immediately return messages seeking comment Wednesday.

Kwon is facing criminal charges in the US and South Korea over the 2022 implosion of the TerraUSD stablecoin, an event that wiped out \$40 billion in investor assets. The SEC separately sued Kwon and Terraform Labs and a New York federal judge ruled in December the company is liable for selling unregistered securities. Charges for securities fraud will be resolved at a trial set for March.

'Significant Liability'

Although no monetary judgment has been entered, Terraform Labs said when it filed bankruptcy it "faces significant liability" as a result of the ruling and filed Chapter 11 because the business could be forced to liquidate following the trial. Terraform Labs has denied

liability and said it will challenge any judgment.

In the months before bankruptcy, Dentons paid a criminal defense attorney representing Kwon in Montenegro, where he is being held, and \$5 million to lawyers who are representing him in the SEC lawsuit, the regulator said. Terraform Labs, through Dentons, is now seeking permission to pay Kwon's defense lawyers \$244,296 a month going forward, which the SEC said the company is not obligated to do.

The SEC said it's challenging the payments because it has a significant interest in protecting Terraform Labs' assets, which it said should be used to compensate the company's victims. Terraform Labs is seeking to spend tens of millions of dollars in defense costs, "potentially without providing creditors with transparency into how, when and why much of the money is spent," the regulator said. The regulator said Terraform Labs' request to pay Kwon's criminal defense costs was also extraordinary.

The SEC said Judge Brendan Linehan Shannon, who is overseeing Terraform Labs' bankruptcy, should deny the company's request to retain Dentons unless the law firm returns \$81 million, which roughly represents the amount of money that hadn't been spent as of Feb. 13.

Dentons should also be required to submit copies of its engagement letters and information on how funds in the law firms' possession should be used, the SEC said. The regulator is also seeking the appointment of an independent fee examiner.

The case is Terraform Labs Pte., 23-10070, US Bankruptcy Court for the District of Delaware (Willmington).

--With assistance from **Austin Weinstein** and Allyson Versprille.

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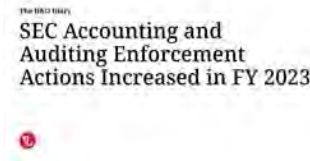
Jeremy Hill

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SEC Accounting and Auditing Enforcement Actions Increased in FY 2023

K [dandodiary.com/2024/02/articles/securities-enforcement/sec-accounting-and-auditing-enforcement-actions-increased-in-fy-2023](https://www.dandodiary.com/2024/02/articles/securities-enforcement/sec-accounting-and-auditing-enforcement-actions-increased-in-fy-2023)

February 28, 2024



By Kevin LaCroix on February 28, 2024
Posted in Securities Enforcement

CORNERSTONE RESEARCH

Largely as a result of an influx of new actions in the fiscal fourth quarter, new SEC accounting and auditing

enforcement actions increased in FY 2023 (which ended September 30, 2023) according to a new Cornerstone Research report. The number of new accounting and auditing enforcement actions increased by 22% in FY 2023, compared to the 8% increase in the overall number of enforcement actions during the fiscal year. While the number of accounting and auditing enforcement actions increased in FY 2023, aggregate monetary settlements in accounting and enforcement actions decreased 7% during the fiscal year.

The February 28, 2024, Cornerstone Research report, entitled “SEC Accounting and Auditing Enforcement Activity,” can be found [here](#). Cornerstone Research report’s February 28, 2024, press release about the report can be found [here](#).

According to the report, the SEC initiated 83 accounting and auditing enforcement actions in FY 2023, representing a 22% increase over the 68 actions filed in FY 2022, and greater than the average annual number of accounting and auditing enforcement actions filed during the period FY 2018-FY 2022 (66). The 83 accounting and auditing enforcement actions is the highest annual number of actions initiated since FY 2019. The 22% increase in accounting and auditing enforcement actions during FY 2023 outpaced the 8% increase in overall number of new enforcement actions brought by the SEC in FY 2023.

Over half of the FY 2023 accounting and auditing enforcement actions (44) were initiated in the fiscal year’s fourth quarter. 23 of the actions were initiated in September alone; the actions initiated in September presented 28% of the fiscal year total. The 44 actions initiated in 4Q FY 2023 was the highest quarterly total number of actions in any quarter during the period FY 2019-FY 2023.

Of the 83 accounting and auditing enforcement action brought in FY 2023, 71 (86%) were brought as administrative proceedings, up from 75% in FY 2022. The SEC also brought 12 accounting and auditing enforcement civil actions in FY 2023, down from 17 in FY 2022.

Of the 83 accounting and auditing enforcement actions initiated in FY 2023, 35 involved individual respondents only, while another 14 involved both individual and firm respondents. Of the individuals named as respondents, 14 (24%) held the title CEO, 13 (22%) held the title of CFO, and 14 (24%) held the title of auditor. Of the 45 individual respondents associated with SEC registrants, 17 were members of the board of directors, 12 of whom were also CEOs. About one-third of individual respondents (20) were Certified Public Accountants.

During FY 2023, the SEC initiated 11 accounting and auditing enforcement actions against non-U.S. respondents, up from the 5 such actions in FY 2022 and higher than the average number of actions per year against non-U.S. respondents during the period FY 2018-FY 2022. During FY 2023, the SEC brought actions involving respondents in Canada, the Netherlands, Ireland, the United Kingdom, Singapore, and Canada. Since FY 2018, the SEC has brought 57 accounting and auditing enforcement actions involving non-U.S. respondents. The most non-U.S. actions were brought against respondents in Canada (nine), The United Kingdom (seven), Japan (five), and Germany (five).

Of the 83 accounting and auditing enforcement actions initiated in FY 2023, 35 referred to announced restatements of financial statements, and 32 referred to announcements of material weaknesses in internal controls. Some of the actions referred both to restatements or announcements of control weaknesses; the total number of actions that referred to either a restatement or a control weakness was 41, the highest number in recent years. Of the 35 actions referring to restatements in FY 2023, 17 (49%) alleged improper revenue recognition.

119 respondents settled accounting and auditing enforcement action in FY 2023, up from 90 in FY 2022. Even though the SEC reported \$4.9 billion in total monetary settlements in FY 2023, the monetary settlements in accounting and auditing enforcement actions totaled \$583 million, representing a 7% decrease over the \$635 million in accounting and auditing enforcement action settlements in FY 2022 and 47% lower than the annual average total monetary settlements during the five-year period FY 2018-Fy 2022. Civil penalties accounted for 33% the total accounting and auditing enforcement action settlements in FY 2023, while disgorgement and prejudgment interest accounted for 67%.

Monetary settlements in accounting and auditing enforcement actions involving individuals totaled approximately \$50 million. The median monetary settlement for individual respondents in accounting and auditing enforcement actions in FY 2023 was \$75,000, higher than both the \$63,000 median in FY 2022 and the \$53,000 median in the period FY 2018-FY

2022. Of the 68 individual respondents who settled accounting and auditing enforcement actions in FY 2023, 34 (50%) were prohibited from acting as an officer or director and/or denied the privilege of appearing or practicing before the SEC, down from 62% of the individual respondents who settled in FY 2022.

The SEC acknowledged that 26% of the respondents (29 firms and two individual) of the 119 respondents who settled accounting and auditing enforcement actions in FY 2023 offered cooperation, undertook remedial efforts, and/or self-reported to the SEC, up from 24% in FY 2022. Cooperation, remedial efforts, or self-reporting by seven respondents resulted in no monetary settlements. The SEC also did not impose any non-monetary sanctions on five of these seven respondents.

Of the 119 respondents that settled accounting and auditing enforcement actions in FY 2023, 101 paid monetary settlements, while 18 resolved their actions without the imposition of a monetary settlement.

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<https://www.wsj.com/articles/audit-deficiencies-by-accounting-giants-grew-in-latest-inspections-u-s-regulator-says-c8fb4b2f>

CFO JOURNAL

Audit Deficiencies by Accounting Giants Grew in Latest Inspections, U.S. Regulator Says

The U.S. units of EY, Deloitte and PwC had an average 24% deficiency rate in their 2021 audits of public-company financials, up from 13%, according to the PCAOB's most recent data

By [Mark Maurer](#) [Follow](#)

Updated Feb. 28, 2024 10:07 pm ET



EY's U.S. unit had a deficiency rate of 46% based on the 54 audits the PCAOB reviewed. PHOTO: ALEXANDER CLEGG/ZUMA PRESS

Several U.S. accounting giants had greater deficiencies in their audits of public companies' 2021 financial statements compared to the previous year, according to annual inspection reports released Wednesday by the Public Company Accounting Oversight Board.

The regulator, which compiles its findings with a lag, inspected 215 audits conducted by the Big Four accounting firms in the U.S.—Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers—down from 220 a year earlier. Deloitte, EY

and PwC had an average deficiency rate of about 24%, up from roughly 13% a year earlier.

The PCAOB inspects portions of selected U.S. public-company audits to evaluate firms' state of compliance and assess the controls they use to test the quality of their work. A deficiency means the audit firm failed to obtain sufficient evidence to back up its opinion.

The PCAOB has been working to clear a backlog of inspections, but thus far its reports are arriving at a two-year remove.

KPMG's audit-deficiency rate was redacted from the PCAOB's inspection report on the firm. It couldn't be determined late Wednesday why it was redacted.

EY, Deloitte and PwC had previously disclosed these figures in their U.S. audit-quality reports. EY's U.S. unit had a deficiency rate of 46% based on the 54 audits the PCAOB reviewed, well up from 21%. Its audit shortcomings largely related to the testing of controls over revenue and related accounts, business combinations and inventory, the PCAOB said. In its December audit-quality report, EY called its 46% rate "unacceptable" and said it didn't reflect the firm's high standards.



Erica Williams, chair of the Public Company Accounting Oversight Board. PHOTO: SAMUEL CORUM/BLOOMBERG NEWS

Deloitte and PwC's U.S. units had rates of 17% and 9% on 53 and 54 audits in 2021, respectively, up from 13% and 4% a year earlier.

These deficiency rates are "unacceptably high," PCAOB Chair Erica Williams said, referring to the inspection reports for the Big Four and another 10 firms. Looking at firms beyond just the Big Four, the PCAOB said in July that it expected

deficiencies in 40% of public-company audits covering 2021, up from 34% in 2020 and 29% in 2019.

But preliminary inspection results for 2022 audits show a "modest improvement" in audit quality at some of the U.S. divisions of global accounting

firms, Williams said on Wednesday.

“It will take time for the quality-control improvements to take root, and firms will need to be diligent to ensure they translate into improvements in engagement performance,” she said.

The firms have said they are working to further strengthen audit quality. PwC is continuing to invest in its audit approach, people and technology, a U.S. spokeswoman said. In September, its U.S. unit said it would stop providing certain consulting work to its audit clients to avoid potential conflicts of interest.

KPMG remains focused on continuously improving its audit approach, a U.S. spokesman said. EY’s U.S. unit began an in-depth review of its audit practice after facing its 2021 rate, a spokesman said. “We have taken several transformative actions to enhance audit quality and improve inspection results and are strengthening our foundation to drive consistent execution across our practice,” he said.

Deloitte has made substantial, comprehensive investments to enhance audit quality, a U.S. spokeswoman said.

Write to Mark Maurer at mark.maurer@wsj.com

Corrections & Amplifications

KPMG’s U.S. audit-deficiency rate was redacted from the Public Company Accounting Oversight Board’s inspection report released Wednesday. Excluding KPMG, Deloitte, Ernst & Young and PricewaterhouseCoopers had an average deficiency rate of about 24% for the year, up from roughly 13% a year earlier. An earlier version of this article incorrectly said KPMG’s rate held steady at 26% and incorrectly counted that percentage as part of averages for the Big Four, saying the firms had an average deficiency rate of about 25%, up from roughly 16% a year earlier. A photo of a KPMG building has been removed from the article. (Corrected on Feb. 28)

KPMG's Audit Quality Shrouded by Redacted Inspections Report (1)

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- Audit deficiency rates hit 33% across the largest six firms
- Initial results for 2023 inspections show “modest” gains

In an unusual step, the US audit regulator didn't release KPMG LLP's full inspection findings for 2022, instead issuing a partially redacted report among the results of the 14 busiest US audit firms.

KPMG's report shows that the firm had 15 audits that didn't meet basic standards plus one that was redacted out of 54 audits the Public Company Accounting Oversight Board reviewed as part of its inspection. That's a slight increase from the 14 KPMG audits with violations the board reported the prior year.

The rate of flawed audits climbed not only at KPMG but among the firm's largest peers for the second year in a row, according to reports the PCAOB issued on Wednesday.

Violations across Deloitte & Touche LLP, Ernst & Young LLP, PwC LLP, BDO USA P.C. and Grant Thornton LLP rose more than 30% on average, compared to 20% the previous year.

The results stem from inspections conducted in 2022 that covered audit work for 2021 financial statements—a period that included the second year of the pandemic and predated rising interest rates and inflation.

Board Chair Erica Williams previously said the pandemic was no excuse for the mounting findings and has urged firms to “compete on quality.” Under Williams' leadership, the board has set a higher bar for firms through tougher enforcement penalties, an updated rulebook, and more detailed inspection reports.

KPMG has contested aspects of the firm's 2022 results, according to a source familiar with the firm's process.

Such appeals are rare. Auditors can appeal their inspection findings to the Securities and Exchange Commission under the Sarbanes-Oxley Act, the Enron-era law that also created the PCAOB. The SEC's process for handling those reviews calls for the board to publish its findings except for the contested details.

Both the board and KPMG declined to comment on why the report was redacted.

The firm stood by its work in a statement: “We are confident our investments in our people and technology, including and especially AI, will further empower our auditors to identify and respond to risks in the audit.”

Glimmers of a Turnaround

Despite the overall jump in violations, there are signs of a turnaround in quality.

Preliminary results for inspections completed last year show “modest” improvements among the largest US audit firms including a drop in violations related to internal safeguards meant to deliver effective audits. “Quality control improvements can often signal a step toward improving overall deficiency rates,” Williams said in a statement.

PCAOB inspections form the backbone of the regulator’s oversight and are meant to ensure that firms meet basic standards when they test corporate balance sheets and income statements. The results offer investors, regulators and corporate directors, tasked with overseeing the audit, an important gauge of how effective those checks are.

PwC continued to lead the pack with the strongest results with just five audits with violations out of 54 inspected, or 9%, according to the firm’s report. The firm along with Deloitte and EY reported expected findings ahead of the regulator.

Inspectors found fault with 17% of Deloitte’s audits—nine out of 53 audits reviewed—and 46% of EY’s audits—25 out of 54 examined.

In comparison, 31% of Grant Thornton’s inspected audits fell short of standards and 66% of BDO’s audits reviewed also missed the mark.

Like KPMG, its competitors, including Deloitte, PwC, BDO, Grant Thornton, and EY, defended their work but said they are taking steps to improve the quality of their auditing.

“The rate of findings does not reflect our high standards and is unacceptable to us,” EY said in a statement. Since the 2022 inspection cycle, the firm launched a review of its audit practice in a bid to improve the board’s findings and deliver “consistent execution across our practice.”

The board also released results for other Top 10 audit firms along with Marcum LLP and WithumSmith+Brown PC—firms known for their work with special purpose acquisition companies. The PCAOB released an extended version of Deloitte’s 2019 inspection as well.

(Updates with additional details in eighth paragraph and with firm responses in 17th paragraph.)

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<https://www.wsj.com/business/c-suite/chemours-shares-slide-premarket-as-execs-on-leave-amid-probe-b71da936>

BUSINESS | C-SUITE

Chemical Giant Chemours Suspends Top Executives, Opens Accounting Probe

Teflon maker's shares plunge 35% after its CEO and finance chief are put on administrative leave

By [Theo Francis](#) [Follow](#), [Kristin Broughton](#) [Follow](#) and [Bob Tita](#) [Follow](#)

Updated Feb. 29, 2024 12:39 pm ET



Chemours said it would delay its fourth-quarter earnings release. PHOTO: ANP/ZUMA PRESS

One of the biggest U.S. chemical companies is working on the formula for an accounting scandal.

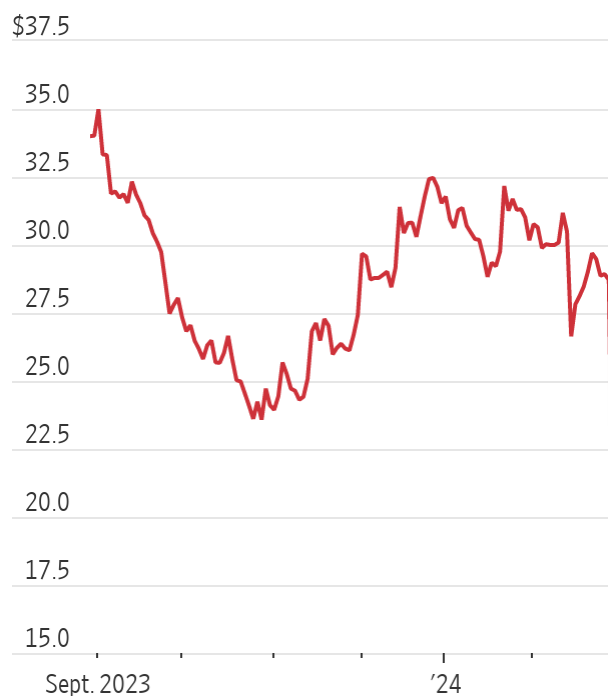
Chemours **CC -32.27%** ▼ shares fell more than 35% Thursday after the company said it was putting its top executives on leave and delaying its audited financial filings amid an internal investigation into its bookkeeping, compensation and ethics-hotline reports.

The announcement spooked investors who were expecting the Teflon maker to report its latest financial results. Instead, the company's board of directors said

it was working with a law firm to conduct an investigation. The stock's drop erased about \$2 billion in market value at the share's lowest price Thursday.

The company said it put Chief Executive Mark Newman on leave, as well as Chief Financial Officer Jonathan Lock and its chief accounting officer, Camela Wisel.

Chemours share price



Source: FactSet

Newman has been CEO since 2021 and had previously served as the first finance chief when Chemours was carved out of DuPont. Lock became finance chief in June 2023 after holding other executive roles at the company since 2018. Wisel became chief accounting officer in fall 2021 and was previously treasurer.

Delaware-based Chemours was spun out of DuPont about a decade ago and is known for making compounds used in industrial processes and consumer products, including nonstick cookware. It is a producer of so-called forever chemicals that have

long-lasting properties and some research has linked to health issues.

Chemours has opted to remain in the forever-chemicals business as competitors, including 3M, have announced plans to exit from the business amid liability claims. Newman has said there aren't adequate alternatives for the chemicals, which the company said are critical for semiconductors and electric vehicles. The chemicals—formally known as perfluoroalkyl and polyfluoroalkyl substances, or PFAS—account for about one-fifth of Chemours's annual sales.

In securities filings Thursday morning, Chemours said it is looking into reports made to its ethics hotline, how the company managed working capital, and how that in turn affected incentive compensation plans and custom metrics reported to investors and the Securities and Exchange Commission.

It also said the review, led by its audit committee, is taking into account “the ‘tone at the top’ set by certain members of senior management.”

Typically, when companies disclose internal reviews, the underlying issues stem from processes related to financial reporting, said Arun Viswanathan, a research analyst at RBC Capital Markets. “This appears that it’s a bit broader and deeper than that,” he said, pointing to the company’s review of its ethics hotline.

Chemours said it is evaluating one or more potential material weaknesses in its internal control over financial reporting, and that it would delay its earnings release.

The company expects to report 2023 sales of about \$6 billion, down from \$6.8 billion a year earlier, and a loss of \$225 million to \$235 million because of litigation and restructuring charges. It said it didn’t expect to file audited results within 15 days and cautioned investors not to place “undue reliance” on preliminary results.

Denise Dignam, president of one of the segments, has taken over as interim CEO, while Matt Abbott, the chief enterprise transformation officer, has stepped in as interim finance chief. Abbott had previously served as chief accounting officer and controller at Chemours.

Write to Theo Francis at theo.francis@wsj.com, Kristin Broughton at Kristin.Broughton@wsj.com and Bob Tita at robert.tita@wsj.com

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Securities Law

Feb. 29, 2024, 8:03AM PST

Chemours Sinks After CEO, CFO Suspended Amid Accounting Concerns

By Geoffrey Morgan

- Three executives placed on leave, results further delayed
- Disclosure 'completely derails' turning sentiment in the stock

Bloomberg Law News 2024-02-29T12:34:56380635279-05:00
Chemours Sinks After CEO, CFO Suspended Amid Accounting Concerns

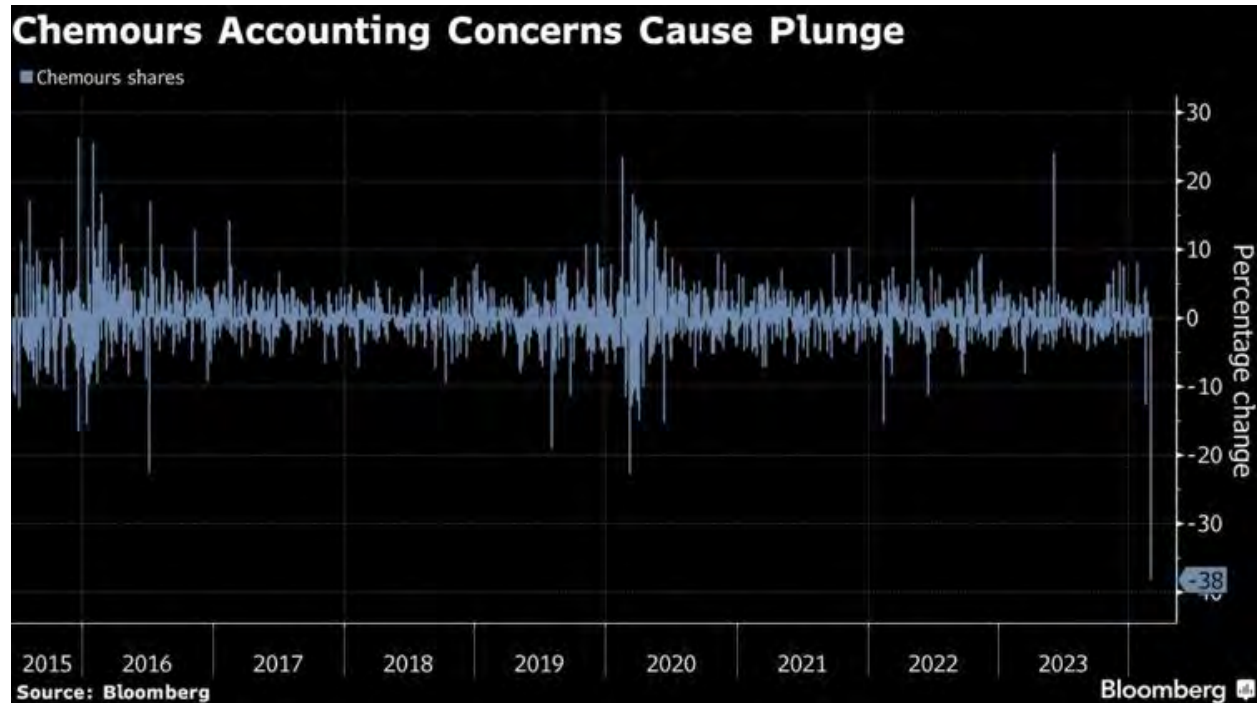
By Geoffrey Morgan2024-02-29T11:03:03647-05:00
Three executives placed on leave, results further delayed
Disclosure 'completely derails' turning sentiment in the stock

Chemours Co. stock plunged in its worst selloff on record after the company suspended its top two executives and put off reporting its fourth-quarter results for the second time this month.

Chemours shares sank as much as 47% Thursday, triggering trading halts for volatility as Wall Street soured on the titanium dioxide maker. Analysts cautioned that the most recent delay and the placement of its executives on administrative leave is a sign of more serious accounting problems than previously disclosed.

Chief Executive Officer **Mark Newman**, Chief Financial Officer **Jonathan Lock** and **Camela Wisel**, the firm's principal accounting officer, were placed on administrative leave as the company further extended the timeline needed to report its year-end results. **Denise Dignam** will take over as interim CEO.

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Sentiment in Chemours' corner of the chemicals market had been improving in recent weeks thanks to upbeat results from competitors including Tronox Holdings Plc. The accounting probe and placement of executives on leave "completely derails that," Bloomberg Intelligence analyst **Sean Gilmartin** said. "They're going to have a tough time telling their story to investors, I think, for quite a while."

After an initial delay to filing fourth-quarter results earlier this month, analysts are viewing this week's postponement as a more serious problem than previously disclosed. "This is now a clear issue with respect to their internal controls," Gilmartin said, adding that investors previously interpreted the company's delayed results as "maybe a slight accounting error."

Wall Street moved quickly to drop their price targets on the stock after the release. BMO Capital Markets analyst **John McNulty** double downgraded the stock to underperform from outperform and slashed his price target by more than half. Alembic Global Advisors pulled its overweight rating on the stock.

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Cristin Flanagan

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Xcel Drops as Law Firm Says Utility May Have Texas Fire Link

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Feb. 29, 2024, 9:23 AM PST

- Firm asked Xcel to preserve downed utility pole in fire zone
- Xcel already faces lawsuits over massive Colorado blaze

By Mark Chediak and Josh Saul

(Bloomberg) --

Xcel Energy Inc. fell the most in almost four years after it disclosed that a law firm representing property owners affected by the worst-ever Texas wildfire said the utility owner may be responsible for damages.

The unnamed firm asked the company to preserve as evidence a fallen utility pole located near the fire's potential area of origin, Xcel said in a regulatory filing. The company's shares fell as much as 8.9%, the most since March 2020 — a plunge that reflects concern about potentially "catastrophic" wildfire liabilities, Bloomberg Intelligence analyst Nikki Hsu said in a note to clients.

"We will cooperate with officials while conducting our own investigations to determine the causes of the fires," an Xcel spokesperson said in an emailed statement.

Xcel already faces lawsuits that accuse the company's utility of sparking the most destructive fire in Colorado history, which state officials concluded was caused in part by a power line that snapped during high winds. Xcel disputes that its equipment caused the ignition. The December 2021 blaze, known as the Marshall Fire, destroyed or damaged more than 1,000 structures and caused an estimated \$2 billion in property losses.

The Smokehouse Creek Fire is the largest-ever Texas wildfire, having charred more than 1 million acres along the state's panhandle. At least one person died due to the blaze — an octogenarian who was trapped in her home, according to multiple media reports. Tens of thousands of cattle already may have perished and entire ranches have been wiped out, said Texas Agriculture Commissioner Sid Miller.

Read More: Worst Texas Wildfire in History Imperils Thousands of Cattle

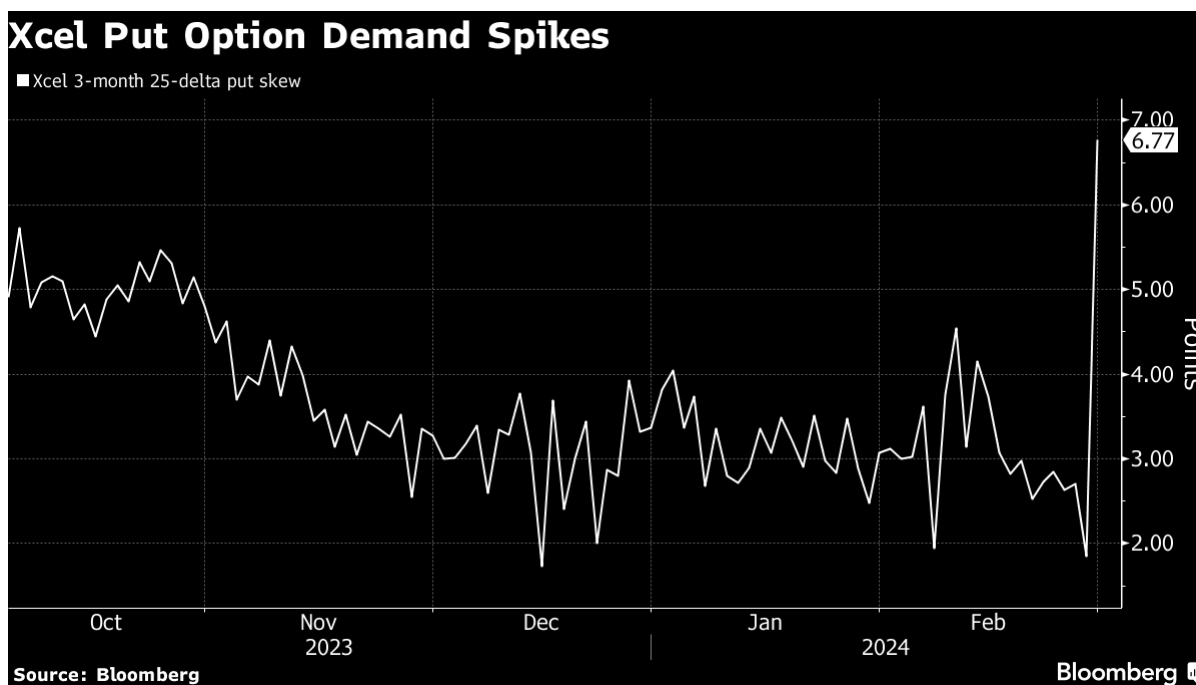
"Anytime you talk about utilities, wildfires and potential litigation, the initial reaction is going to be one of fear," said Paul Patterson, a utility analyst for Glenrock Associates LLC. "Investors are potentially skittish about wildfires."

Read More: Maui Fire Lays Bare Utility Missteps Mirrored Across the Country

Thursday's stock drop, which erased about \$1.9 billion of Xcel's market cap, is "an overreaction, albeit understandable given the overall anxiety around wildfire-specific risk among investors," Sophie Karp, a utility analyst for KeyBanc Capital Markets, said in a note to clients.

Karp, who has an "overweight" rating on the stock, added that no determination of the wildfire cause has been made, it is burning in a sparsely populated area and Xcel has about \$500 million in insurance.

Still, investors piled in to the Xcel options market for protection, pushing volume to almost 16,000 contracts — more than 30 times average — nearly all of them puts betting that the stock has further to fall. Puts expiring in September were the most actively traded, allowing the holders to sell more than 400,000 shares at \$45. The cost of puts increased almost five times as much as calls, signaling the demand for cover against a slide in prices.



(Story updates with analyst comment and background in fifth through ninth paragraph)

--With assistance from Carly Wanna and David Marino.

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Christine Buurma

Unabomber Prosecutor Tapped to Lead Fresh FTX Investigation

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news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWYxMjUtZDY0ZS1hZjlkLWY3N2YwODk4MDAwMyIsImN0eHQiOiJTTE5XliwidXVpZCI6InFaZ0xOTEtVSIzad1dRdFpLaDVlY1E9PUhZbmlWUFJFRVo2SGpFWjlhOFhsK0E9PSIsInRpbWUiOiIxNzA5MjA4ODgxNTk4liwic2lnIjoY0U5YldqK01yNlZ3Ti9jckdveWw3OUJnU01nPSIsInYiOiIxIn0=

- Justice Department picks Robert J. Cleary for outside inquiry
- Inquiry may review past investigations, FTX law firm and token

The US Justice Department's bankruptcy unit has picked a former federal prosecutor who led the government's case against the **Unabomber** to conduct a new outside investigation of FTX and its bankruptcy law firm.

Robert J. Cleary has been picked as an examiner to lead the inquiry by the Office of the US Trustee, an arm of the Justice Department that monitors corporate bankruptcies. Cleary is being asked to review potential conflicts of interest involving FTX's bankruptcy law firm Sullivan & Cromwell, according to a Tuesday court filing.

He is also being asked to look at past investigations by FTX's new management team, its creditors and government regulators, and to scrutinize if additional employees of **Sam Bankman-Fried's** failed crypto exchange were involved in fraudulent activity before its collapse in November 2022. Lastly, the US Trustee wants Cleary to review any investigations conducted around FTX's use of its native token, FTT, to inflate its value, and if further inquiries are needed.

Representatives for both FTX and Sullivan & Cromwell declined to comment.

Cleary's appointment and inquiry must be approved by Judge **John Dorsey**, who has previously said the investigation should be short and limited in scope so as to not disrupt FTX's ongoing Chapter 11 case. In Tuesday's filing, the US Trustee said the cost of the proposed investigation will be capped at \$1.6 million and could be wrapped in about 60 days. The results of the examination will be made public.

Cleary has previously served as the US Attorney for both the District of New Jersey and the Southern District of Illinois. While in federal law enforcement, he was appointed lead prosecutor in the case against the notorious killer known as the Unabomber, **Ted Kaczynski**, according to his current law firm Patterson Belknap Webb & Tyler.

Cleary has picked up white-collar criminal defense work since leaving government service to go into private practice. He also previously led the Southern District of New York's major crimes unit, according to court documents.

The US Trustee's pick to lead the inquiry was disclosed days after FTX investors accused Sullivan & Cromwell in a civil lawsuit of having "actively participated" in fraud that led to the company's downfall. Sullivan & Cromwell has denied wrongdoing and previously said it had a "limited and largely transactional relationship with FTX" before the firm filed bankruptcy.

The case is FTX Trading Ltd., 22-11068, U.S. Bankruptcy Court for the District of Delaware.

--With assistance from **Steven Church** and Justin Wise.

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Donald Trump's financial rescue has a hiccup

[A axios.com/2024/02/28/donald-trump-financial-rescue-truth-social](https://www.axios.com/2024/02/28/donald-trump-financial-rescue-truth-social)

February 28, 2024

24 hours ago - Business



Illustration: Sarah Grillo/Axios

Here's the good news for Donald Trump: His stake in the parent company of Truth Social could be worth more than \$3 billion, which is well more than his current legal penalties.

Here's the bad news for Donald Trump: There's yet another hiccup in the belabored effort to take Truth Social public.

By the numbers: Trump is facing a \$454 million penalty (including interest) for civil fraud in New York, plus the \$83.3 million he owes for defaming writer E. Jean Carroll. Not to mention all the associated legal fees.

He is expected to have around 79 million shares in Trump Media & Technology Group (TMTG), once taken public via a blank-check company called Digital World Acquisition (DWAC), whose shares opened Wednesday at nearly \$45.

Behind the scenes: DWAC late last week disclosed that TMTG co-founders Andy Litinsky and Wes Moss have threatened to try to block the merger unless they receive board seats to which they claim they're entitled.

Earlier in the month, DWAC also disclosed a compensation dispute with its own former CEO, Patrick Orlando, which it said "presents a risk to our ability to consummate the business combination on a timely basis (or at all)."

Look ahead: DWAC has scheduled a March 22 shareholder vote, having recently received SEC approval to merge, but has repeatedly delayed such votes in the past.

- If the vote occurs and succeeds, Trump still would need to obtain a lockup provision waiver if he wanted to sell shares within the first six months, as noted by the NY Times' Matthew Goldstein.
- That, of course, could get complicated by who's ultimately on the board.

The bottom line: This merger is as chaotic as the early days of the Trump administration and, in classic Trump fashion, involves former business partners claiming they're owed more than they're getting.

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Crypto News

Feb. 28, 2024, 2:04 PM PST

Winklevoss's Gemini Returns \$1.1 Billion in NY Settlement (1)

By Olga Kharif

- Settlement also requires Gemini to pay a \$37 million fine
- Gemini failed to protect Earn program customers, agency says

Bloomberg Law News 2024-02-29T10:24:32Z16079893-05:00

Winklevoss's Gemini Returns \$1.1 Billion in NY Settlement (1)

By Olga Kharif2024-02-28T17:04:23Z148-05:00

- Settlement also requires Gemini to pay a \$37 million fine
- Gemini failed to protect Earn program customers, agency says

Gemini Trust Co., the crypto exchange founded by twin entrepreneurs **Cameron and Tyler Winklevoss**, will return at least \$1.1 billion to customers through the Genesis Global Capital bankruptcy as part of settlement with the New York Department of Financial Services.

The New York-based firm will also pay a \$37 million fine for various compliance failures to the New York Department of Financial Services, Superintendent **Adrienne A. Harris** said in a statement Wednesday.

Gemini is returning the funds to customers who lost money through the Gemini Earn program that the exchange ran together with now-bankrupt lender Genesis Global. Gemini also agreed to contribute \$40 million to Genesis's bankruptcy for the benefit of Earn customers in coordination with the bankruptcy court.

"Gemini failed to conduct due diligence on an unregulated third party, later accused of massive fraud, harming Earn customers who were suddenly unable to access their assets after Genesis Global Capital experienced a financial meltdown," Harris said. "Today's settlement is a win for Earn customers, who have a right to the assets they entrusted to Gemini."

The Earn program, which was launched in early 2021, let more than 200,000 Gemini users — including almost 30,000 New Yorkers — lend out their coins through Genesis for yield. Genesis stopped withdrawals in late 2022, and filed for bankruptcy in early 2023. Gemini failed to conduct ongoing due diligence into Genesis, or to maintain adequate reserves throughout the running of Earn, the department said.

The agency said that outside of Earn, Gemini also “engaged in unsafe and unsound practices that ultimately threatened the financial health of the company.” Its affiliate, Gemini Liquidity LLC, collected hundreds of millions of dollars in fees that could have gone to Gemini, and that weakened the company’s financial condition. The department said it found various management and compliance deficiencies in its investigation of Gemini.

In a post on the X platform, Gemini noted that under the settlement “all Earn users” will receive “100% of their digital assets back in kind” if the Genesis bankruptcy is approved by the court. A Gemini representative didn’t immediately return a request for comment.

The settlement is the latest attempt by various governmental agencies, including the US Securities and Exchange Commission, the Justice Department and the Commodity Futures Trading Commission, to clean up crypto. Recent enforcement actions have included crypto exchanges Binance, Kraken and Coinbase Global Inc.

The SEC charged Gemini and Genesis for the unregistered offer and sale of securities through the Earn program in January 2023. The New York Attorney General recently revised a lawsuit seeking restitution for Earn users. Genesis recently settled with the state. Gemini, Genesis and its parent company Digital Currency Group are also involved in a legal battle.

The New York agency has the right to bring further action against Gemini if it doesn’t return at least \$1.1 billion to Earn customers after the resolution of Genesis’s bankruptcy.

The department authorized Gemini to engage in virtual currency business in 2015.

(Adds comment from Gemini in the seventh paragraph.)

--With assistance from **Jonathan Randles**.

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AdaptHealth, Ex-CEO Cut \$51M Deal To End Investor Fight

By **Dorothy Atkins**

Law360 (February 28, 2024, 3:46 PM EST) -- AdaptHealth and its former CEO have agreed to pay \$51 million to resolve a shareholder suit alleging the medical equipment company misled investors by retroactively inflating growth numbers ahead of a merger with special acquisition firm DFB Healthcare Acquisitions Corp., according to court documents filed in Pennsylvania federal court Tuesday.

In a memo supporting a motion to preliminarily approve the settlement, the investors asked U.S. District Judge Harvey Bartle III to preliminarily sign off on the deal, under which the company has agreed to pay shareholders \$50 million, and former AdaptHealth CEO Luke McGee has agreed to personally pay \$1 million, which is not funded by insurance or corporate funds.

The Plymouth Meeting, Pennsylvania-based company has also agreed to provide 1 million shares of common stock for the benefit of the class and to make corporate governance changes, according to the memo. Meanwhile, class counsel plans to request no more than 25% of the settlement, or \$12.75 million, in attorney fees and \$800,000 in expenses.

"This settlement, by any measure, is an excellent result for the settlement class," the memo says.

If approved, the deal would end shareholder litigation initially launched by investor Robert Charles Faille Jr. in 2021 on behalf of a proposed class of its investors who bought shares from November 2019 through July 2021.

The litigation accused the company and a dozen executives of materially overstating its financial prospects in its public statements regarding AdaptHealth's merger with DFB Healthcare, which was a SPAC — also known as a blank-check company — in violation of the Securities Exchange Act of 1934 and federal regulations.

Years after the deal closed, the purported truth of the company's financial performance was allegedly revealed in a July 2021 report published by Jehoshaphat Research, according to the suit. The report accused AdaptHealth and its executives of obscuring the methodology used to calculate the company's organic growth by retroactively changing past organic growth numbers to be higher, with no disclosure about the change, and publicly claiming AdaptHealth would grow 8-10% when in reality, the company was experiencing double-digit declines.

Following the report, AdaptHealth's stock price fell \$1.51 per share, or 5.93%, in one day to close at \$23.96 per share on July 19, 2021, according to the complaint.

In October 2021, Judge Bartle appointed Bucks County Employees' Retirement System and Delaware County Employees Retirement System as lead plaintiffs and Robbins Geller Rudman & Dowd LLP was selected as lead counsel.

The consolidated complaint additionally accused the company of hiding McGee's involvement in an alleged foreign tax fraud arising from certain past private activity. McGee resigned as co-CEO in June 2021, according to court documents.

After surviving a motion to dismiss, the case entered discovery and in July 2022, the investors asked the court to certify a class of investors, but before the court ruled on the motion, the parties struck a settlement in principle, according to court documents.

The deal includes a \$50 million payment from the company, which would be paid in part by the company's insurers, according to court documents. The memo also notes that the class includes the owners of common stock that ranged during the class period between 31.25 million to approximately 130 million shares.

A hearing on the motion has not yet been scheduled by the court. As of Wednesday, AdaptHealth's stock was trading around \$10.24 per share.

Counsel for the parties and representatives for AdaptHealth didn't immediately respond to requests for comment Wednesday.

The investors are represented by Douglas R. Britton, Kevin A. Lavelle and Joseph J. Tull of Robbins Geller Rudman & Dowd LLP and Andrew L. Zivitz and Helen J. Bass of Kessler Topaz Meltzer & Check LLP.

AdaptHealth is represented by Todd G. Cosenza, Zeh S. Ek Ono and Vincent P. Iannece of Willkie Farr & Gallagher LLP and Steven D. Costello of Saxton & Stump.

Luke McGee is represented by Dani R. James, Majorie E. Sheldon and Ryan Gander of Kramer Levin Naftalis & Frankel LLP and Francine Friedman Griesing and Melissa Hazell Davis of Griesing Mazzeo Law LLC.

The case is Delaware County Employees Retirement System et al. v. AdaptHealth Corp. f/k/a DFB Healthcare Acquisitions Corp. et al., case number 2:21-cv-03382, in U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Alyssa Miller.

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Amazon Sat On Texts In Alexa Recording Suit, Users Says

By **Rachel Riley**

Law360 (February 28, 2024, 7:18 PM EST) -- Plaintiffs accusing Amazon of illegally recording them with Alexa devices say the tech giant kept text messages from employees out of discovery, alleging while the company claimed to have never reviewed any texts as part of the suit, a former executive admitted his devices had been scanned.

The plaintiffs, a proposed class of unregistered Alexa users, say the executive's comments during a deposition revealed there were messages Amazon.com Inc. failed to flag when identifying various types of electronically stored records that could be responsive to information requests. The Alexa users raised the issue in one of a series of discovery-related motions filed Tuesday.

"Fact discovery is scheduled to close today," the plaintiffs said in **the motion**. "This deadline has been extended four times due to defendants' repeated failure to comply with their discovery obligations. Given the timing and defendants' refusal to reach any compromise, plaintiffs' only option is to seek relief from the court."

The suit, first filed in 2021, **claims** the Seattle-based company recorded, stored and shared communications the device captured from users who hadn't activated it using a "wake" word.

According to the Alexa users, during 2022 discussions following an initial request for production from the plaintiffs, Amazon identified three sources of potentially relevant electronic communications: emails as well as messages sent on platforms Slack and Amazon Chime. The company allegedly never mentioned any text messages.

The proposed class claims to have learned of the existence of potentially relevant text messages — either sent or received by any of the employees identified in discovery as custodians in the case — during the plaintiffs' Feb. 13 deposition of former Amazon Senior Vice President of Devices David Limp.

Limp allegedly confirmed his devices had been imaged for litigation purposes, though his exact remarks are redacted from the publicly available version of the motion.

The plaintiffs immediately followed up with Amazon to request any text messages, the motion says, but the company replied on Feb. 22 by saying it had never collected or reviewed any texts.

"Ignoring this inconsistency and standing on their refusal to produce text messages, defendants accused plaintiffs of manufacturing a last-minute discovery dispute and implied that plaintiffs were somehow to blame for defendants' failure to review or produce text messages," the Alexa users said in the motion.

The putative class argues the texts are likely to shed light on Amazon's "internal reasoning" related to Alexa devices that could be relevant to their Consumer Protection Act claim, including development and design choices, potential revenue from data streams, and privacy concerns.

U.S. District Judge Robert S. Lasnik **ruled** in October 2022 that Amazon must use specific search terms in its electronically stored information to produce relevant documents in the case, rejecting the e-commerce giant's contention that the search would be unduly burdensome.

Judge Lasnik has also **ordered** Amazon to provide the putative class with state-by-state information on the number of voice profiles and automatically recognized voices that the company has identified as belonging to Alexa devices, aside from the person who registered the device.

More recently, the federal judge ruled last September that the company failed to provide the plaintiffs with certain documents related to a Federal Trade Commission investigation into its alleged recording and retention of children's voices.

Though Amazon **had agreed** to pay \$25 million to resolve those claims as part of a larger deal with the FTC, Judge Lasnik rejected Amazon's contention that records of the regulatory probe were irrelevant to the putative class action.

"Amazon's insistence that it doesn't know what more plaintiffs want rings hollow when its failure to take the CPA claim into consideration and the lack of internal deliberative documents has been repeatedly called to its attention," Judge Lasnik wrote.

According to the Alexa users' Tuesday motion, Amazon initially produced about 2,600 documents it deemed relevant of roughly 2 million documents identified by the set of search terms; however, since the court's Sept. 15 order, the company has handed over nearly 700,000 additional records.

In another **motion** filed on Tuesday, the Alexa users requested in-camera review of a sampling of hundreds of documents that the company had allegedly produced and then clawed back. Two more motions by the plaintiffs were sealed.

An Amazon spokesperson declined to comment. Representatives for the plaintiffs did not immediately respond to a request for comment on Wednesday.

The Alexa users are represented by liaison counsel Byrnes Keller Cromwell LLP, co-lead counsel Labaton Keller Sucharow LLP and Robbins Geller Rudman & Dowd LLP, and interim counsel Bursor & Fisher PA, Zimmerman Reed LLP and Lockridge Grindal Nauen PLLP.

Amazon is represented by Brian D. Buckley, Monica Chan, Laurence F. Pulgram, Jedediah Wakefield, Tyler G. Newby, Armen N. Nercessian, Garner Kropp, Melissa Lawton and Esther D. Galan of Fenwick & West LLP.

The case is Garner et al. v. Amazon.com Inc. et al., case number 2:21-cv-00750, in the U.S. District Court for the Western District of Washington.

--Editing by Philip Shea.



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Amgen Seeks Dismissal Of Investor Action Over \$11B Tax Bill

By **David Hansen**

Law360 (February 28, 2024, 6:51 PM EST) -- Amgen had no obligation to disclose specific amounts of proposed adjustments to its taxes, the company told a New York federal court as it again demanded dismissal of a proposed class action alleging the company hid a \$10.7 billion tax bill from investors.

Far from hiding the facts, Amgen Inc. had told investors the company faced "significant" and "substantial" tax adjustments that "could have a material impact" on the firm's financial performance, it said Monday in a **motion to dismiss** the lawsuit. Generally accepted accounting principles also did not require the biotech company to report proposed tax adjustments, contrary to what investors have argued, Amgen said.

In the case, investor Roofers Local No. 149 Pension Fund filed suit last March on behalf of individuals and entities that purchased or acquired Amgen common stock between July 29, 2020, and April 27, 2022.

According to the complaint, Amgen was legally required to tell investors about its outstanding tax liabilities by the start of the class period. But instead, Amgen failed to reveal how much it owed to the U.S. government, causing its stock to trade at artificially high prices until the truth came to light, the pension fund said.

U.S. District Judge John P. Cronan determined in July that the Asbestos Workers Philadelphia Pension Fund's alleged losses of \$100,000 were the largest in the class and appointed the fund as lead plaintiff.

Amgen last year sought to **dismiss the action**, arguing it had no duty to disclose the amounts in proposed taxes and fines. The shareholders argued in their **opposition brief** filed in January that Amgen had a duty to tell the "whole truth" of the tax dispute. The amount at issue was huge — up to 139% of the company's cash and cash equivalents — and the vague use of "significant" and "substantial" could have described numbers far smaller than the known liability, they said.

But the company repeated its response in its dismissal motion that to be actionable, the alleged omission must be inconsistent with Amgen's public disclosure.

"[T]he amounts of the proposed adjustments were perfectly consistent with Amgen's disclosure that they were 'significant,' 'substantial,' and 'could have a material impact' on Amgen's financials," Amgen said.

Amgen had an independent duty under Accounting Standards Codification 450, the provision of generally accepted accounting principles governing the recognition and disclosure of loss contingencies, the shareholders said. Amgen had argued that ASC 740, addressing specific income tax positions, was the applicable provision. But once the Internal Revenue Service undertakes an audit, resulting in proposed adjustments, those adjustments constitute a loss contingency, governed by ASC 450, the shareholders said.

Amgen, however, argued the disclosures at issue involve transfer pricing, which ASC 450 expressly excludes from its scope because it is subject to ASC 740.

Amgen consciously disregarded the amount it owed in taxes and penalties, the shareholders argued. Amgen downplayed its exposure and omitted facts such as the amount it could owe, they said.

The company, however, said its management did not know the proposed taxes and penalties were final, nor did it have a duty to disclose them. Amgen cited clean EY audit opinions as further support that the company did not act improperly.

Asbestos Workers attorney Evan Jay Kaufman declined to comment. Representatives of Roofers Local No. 149 and Amgen did not respond to requests for comment.

The Asbestos Workers Philadelphia Pension Fund is represented by David A. Rosenfeld, Mark Millkey and Evan Jay Kaufman of Robbins Geller Rudman & Dowd LLP.

The Roofers Local No. 149 Pension Fund is represented by Brian Cochran and Samuel Howard Rudman of Robbins Geller Rudman & Dowd LLP.

Amgen and the other defendants are represented by Jay B. Kasner, Peter B. Morrison and Tansy Woan of Skadden Arps Slate Meagher & Flom LLP.

The case is Roofers Local No. 149 Pension Fund et al. v. Amgen Inc. et al., case number 1:23-cv-02138, in the U.S. District Court for the Southern District of New York.

--Editing by Roy LeBlanc.

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Objectors Want \$1M Atty Fees In \$5.6B Swipe Fees Settlement

By **Katryna Perera**

Law360 (February 28, 2024, 8:48 PM EST) -- Class members who initially objected to a \$5.6 billion settlement with Visa and Mastercard have told a New York federal judge they are seeking nearly \$1 million in legal fees for "enhancing the adversary process, sharpening the debate, and pursuing meritorious appeals in this litigation over the past eleven years."

Class members Unlimited Vacations and Cruises Inc., USA Pets LLC, Gnarlywood LLC and Quincy Woodwrights LLC filed a **motion for attorney fees** Wednesday in an antitrust suit in which a \$5.6 billion settlement was finalized last year.

Counsel for Unlimited Vacations and USA Pets sought \$663,845, plus \$6,786 in costs, and counsel for Gnarlywood and Quincy Woodwrights is asking for \$319,760, plus costs of \$6,455.

The multidistrict litigation, which lasted for over a decade, is based on allegations that Visa, Mastercard and several other banks maintained a series of network rules that enabled the companies to charge merchants higher transaction fees than the retailers would have tolerated in a competitive market.

The sides **first settled the case** in 2012 for \$7.25 billion, only to have the Second Circuit **upend the deal** in 2016 after finding issues with the same counsel representing merchants seeking damages and those seeking changes to the network rules moving forward.

Nevertheless, about \$5.4 billion had already been placed in escrow by the card companies and banks when they **inked a new deal** with merchants in September 2018 that would see them pay out up to **\$900 million more**.

The objectors now argue that they should be awarded attorney fees since they were "closely involved" in the court's review of the second settlement and its corresponding requests for attorney fees and incentive awards.

The objectors say their involvement **reduced** a portion of the sought-after \$900,000 service award to eight lead plaintiffs because some of it, according to the appeals court, reflected "lobbying for changes in law that do not benefit the class."

"While this resulted in only a relatively small financial benefit to the class, the result of objectors' efforts was the refinement of class action jurisprudence in the Second Circuit and an accurate and legally proper incentive award," Wednesday's motion states.

According to the objectors, they are also responsible for a \$14 million reduction in class counsel fees, from the requested \$537 million to a final figure of \$523 million.

"While objectors contended the fee should have been far less than the amount awarded, their fee objections caused the court to take a closer look at the fee request and reduce the percentage to an amount closer to the benchmark for billion-dollar settlements," the motion states.

Earlier this month, Visa and Mastercard asked a New York federal judge to **throw out** similar antitrust claims brought by Intuit and Square, arguing that the claims were released as part of the \$5.6 billion class action settlement.

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

Counsel for the merchant class declined to comment Wednesday, and representatives for the other parties did not immediately respond to requests for comment.

The objectors are represented by Kendrick Jan of Kendrick Jan APC and John J. Pentz.

The merchant class is represented by Alexandra S. Bernay of Robbins Geller Rudman & Dowd LLP, K. Craig Wildfang and Thomas J. Undlin of Robins Kaplan LLP, and H. Laddie Montague Jr., Merrill G. Davidoff and Michael J. Kane of Berger Montague.

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

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

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

–Additional reporting by Aaron Keller, Matthew Perlman and Jared Foretek. Editing by Michael Watanabe.

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TKO Reveals Ongoing Impact Of McMahon Issues In Filing

By **Elaine Briseño**

Law360 (February 28, 2024, 4:33 PM EST) -- WWE is not immune to the personal legal battles and controversies of disgraced founder Vince McMahon, who was recently accused of trafficking a former employee, according to a recent regulatory filing by parent company TKO.

McMahon, according to TKO Group Holdings Inc.'s Tuesday filing with the U.S. Securities and Exchange Commission, still controls a "significant portion" of the voting power despite recently stepping down as executive chair of WWE's board of directors. The filing details the company's current financial outlook.

TKO was formed as a result of the **April 2023** megamerger of Endeavor Group Holdings Inc. and World Wrestling Entertainment Inc.

McMahon has had a **string of allegations** leveled against him, and a special committee comprising independent directors from WWE's board was formed in June 2022 to investigate the alleged misconduct.

"Professional costs resulting from WWE's special committee's investigation have been significant and are expected to continue to be significant as the company continues to incur costs arising from ongoing and/or potentially new regulatory, investigative and enforcement inquiries, subpoenas, and demands and claims," Tuesday's filing said. "We expect Mr. McMahon to reimburse the company for reasonable expenses incurred in connection with the investigation."

McMahon's **resignation** as executive chair of WWE's board of directors came on Jan. 26, the day after former WWE employee Janel Grant **filed a graphic lawsuit** in Connecticut federal court accusing him of forcing her to have sex with him and others in exchange for employment, among other things.

Tuesday's filing warns investors that "any further allegations, claims or investigations may have an adverse financial and operational impact on our business performance."

McMahon stepped away as an employee of WWE in July 2022 but remained a controlling stockholder and served as executive chairman of the board from January 2023 to September. Despite his departure, the company noted it had "received, and may receive in the future, regulatory, investigative and enforcement inquiries, subpoenas, demands, and/or other claims and complaints" related to the controversies.

The exact impact of McMahon's troubles on the business is not yet known, but they could have an adverse effect and "exacerbate risks," TKO said.

"Although we are not aware that significant business has been lost to date, it is possible that a change in the perceptions of our business partners could occur as a result of the investigation or other matters described above," the filing said.

"In addition, as a result of the investigation, other matters described above or new claims or allegations, certain other operational changes — including, without limitation, other personnel changes — have occurred and may continue to occur in the future, which may have adverse financial and operational impacts on our business," it added.

TKO also released a statement Tuesday that summarized its 2023 financial results. Among these were a 34% increase in attendance for live WWE events and record-breaking viewership for live events.

The SEC filing was a stark contrast to this statement, in which McMahon was listed only once in a footnote.

McMahon's troubles are far from over even though he has stepped away from the spotlight. In addition to Grant's lawsuit, the Laborer's District Council and Contractors Pension Fund of Ohio, which is a former WWE stockholder, filed a proposed class action on behalf of itself and other stockholders on Nov. 17.

This was followed three days later by an additional WWE stockholder, Dennis Palkon, filing a similar suit. Both name McMahon, were filed in Delaware's Chancery Court and allege breaches of fiduciary duty.

--Editing by Philip Shea.

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SPAC Investor Says Energy Co. Merger Was Overhyped

By **Sydney Price**

Law360 (February 28, 2024, 6:30 PM EST) -- An investor of blank-check company Star Peak Energy Transition Corp. has sued several of its current and former directors and controllers, alleging the defendants protected their buy-ins while leaving public investors to suffer losses after the company merged with an energy storage company.

According to the suit filed by Ralph Hekscher in Delaware's Court of Chancery on Tuesday, Star Peak's directors and controllers had "perverse incentive" to complete a merger with energy company Stem Inc. in order to preserve the value of their shares. As a result, they made misleading statements to shareholders to convince them to approve the deal. Following the merger, Stem's business tanked, resulting in share declines, according to the suit.

Star Peak had two years from the closing of its August 2020 IPO to create an initial business combination, according to the suit. If it was unable to do so, Star Peak would be forced to liquidate, and the shares of the company's controllers would be worthless, the complaint states. On April 28, 2021, Star Peak completed the transaction with Stem after Star Peak's stockholders voted to approve the transaction the previous day.

The merger consideration was worth "far less" than \$10 per share, despite the representations of the defendants, the suit says. The suit alleges there was less than \$8 in net cash underlying each Star Peak share.

Because Star Peak's share value was inflated in the transaction, Stem correspondingly had to inflate its value with misleading statements about its business, the complaint alleges. For example, the suit claims that Stem's hardware sales did not produce gross margins of between 10% and 30% as the company's prospectus claims, but rather 5% or lower.

Following the merger, Stem's business suffered, Hekscher alleges, and on March 29, 2023, Stem announced a notes offering.

"In the press release, Stem's officers and directors explained that Stem intended to use the proceeds from the notes to purchase and surrender for cancellation a portion of Stem's 2028 convertible senior notes, to fund the cost of entering into certain capped call transactions, and for general corporate purposes," the suit states.

On the news, Stem's shares declined about 12% to close at \$5.50 on March 30, according to the complaint.

Analysts downgraded Stem shortly after the announcement on the grounds that the company depended on its lower-margin hardware and service business, and would not see the margins or profits that it promised from a high-margin automated software business, according to the suit.

Following the downgrades, Stem's shares declined 44 cents, or about 7%, to close at \$5.47 on March 30.

Hekscher's suit accuses the defendants of breaching their fiduciary duties and unjust enrichment. He seeks damages or a reopening of the redemption window for public stockholders who purchased Star Peak stock to allow the stockholders to exchange their shares for \$10 per share, plus interest.

Counsel for Hekscher and a representative of Star Peak did not immediately respond to requests for comment on Wednesday.

Hekscher is represented by Phillip Kim of The Rosen Law Firm PA and Seth D. Rigrodsky and Gina M. Serra of Rigrodsky Law Firm PA.

Counsel information for Star Peak and the individual defendants was not immediately available on Wednesday.

The case is Ralph Hekscher v. Michael C. Morgan et al., case number 2024-0175, in the Court of Chancery of the State of Delaware.

--Editing by Vaqas Asghar.

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Attys Get \$750K Fee Award In \$6M Med Tech Co. Deal

By **Leslie A. Pappas**

Law360 (February 28, 2024, 8:10 PM EST) -- Class attorneys for minority shareholders of Autonomous Medical Devices Inc. who secured a \$6 million settlement to resolve claims about a purportedly underpriced stock sale to an interest of Oracle founder Larry J. Ellison won court approval of the settlement Wednesday, along with a requested \$750,000 fee award.

In an 11-page order signed and docketed after a hearing in Georgetown, Delaware, Vice Chancellor Sam Glasscock III approved the settlement between shareholder plaintiff John Wear, AMDI, and defendants Ellison, Ellison-founded biotech venture capital firm Tako Ventures LLC, and AMDI directors Paul T. Marinelli, Nathan Haratani and Pramod Thummala.

The vice chancellor's order didn't elaborate beyond what was pre-filed with the court.

The settlement results in a \$6 million tender offer to AMDI's minority stockholders and the appointment of an independent director to AMDI's board for a period of three years, according to a court brief in support of the settlement.

"Because plaintiff faced a substantial risk of not prevailing at trial and because the settlement achieves meaningful, tangible benefits, the court should grant final approval of the settlement," said the brief, filed by Wear's attorneys at Grant & Eisenhofer PA.

The settlement ends the litigation and releases claims against all the defendants without any admission of wrongdoing, the order filed Wednesday says.

AMDI was founded in 2016 with the goal of developing a biosensor that could detect certain diseases and pathogens from small material samples. Ellison was an early investor in the business, according to the complaint. Tako Ventures was AMDI's controlling stockholder.

Wear filed the suit in October 2021, alleging that AMDI directors beholden to Ellison breached their fiduciary duties to stockholders by approving the sale of 45 million shares of common stock at \$2 per share to Tako Ventures.

The complaint alleged that a special committee that negotiated with Tako about making the investments did so in a way that was unfair to AMDI, and the price that Tako paid was also unfair.

The parties reached a settlement in principle in March 2023 and told the court in July 2023 that they had nailed down the settlement's terms.

Grant & Eisenhofer PA asked for the **\$750,000 fee award** in February.

None of the parties immediately responded Wednesday to Law360's request for comment.

Wear is represented by Michael J. Barry and Vivek Upadhyia of Grant & Eisenhofer PA.

The defendants are represented by Daniel A. Mason and Andrew G. Gordon of Paul Weiss Rifkind Wharton & Garrison LLP.

AMDI is represented by David J. Teklits of Morris Nichols Arsht & Tunnell LLP and Bruce A. Ericson of Pillsbury Winthrop Shaw Pittman LLP.

The case is John Wear v. Lawrence J. Ellison et al., case number 2021-0839, in the Court of Chancery of the State of Delaware.

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

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Attys To Receive \$291K After LendingTree Data Breach Deal

By **Emilie Ruscoe**

Law360 (February 28, 2024, 4:34 PM EST) -- Attorneys representing a proposed class of consumers in a data breach suit against online lending marketplace LendingTree will receive over \$291,000 for their work brokering an \$875,000 settlement, a North Carolina federal judge has decided.

In a Tuesday order, U.S. District Judge Frank D. Whitney granted the request for attorney fees that equal a third of the proposed settlement fund for a class counsel team comprising attorneys from Turke & Strauss LLP, the Rhine Law Firm PC and Milberg Coleman Bryson Phillips Grossman PLLC, saying that he found the requested sum reasonable.

The consumers' counsel will also receive over \$18,000 to reimburse certain litigation costs, the court said, noting that he declined to increase the award by roughly \$1,000 despite supplemental briefing requesting additional funds.

Two class representatives in the action will each receive \$3,000 service awards for their work on the case as requested, Judge Whitney said Tuesday.

The monetary determinations were part of Judge Whitney's order granting preliminary approval to the settlement deal, which the consumers requested in July.

In the approval bid, counsel for the proposed class of an expected 69,000 consumers described their proposed settlement as "fair, adequate and reasonable," noting that in addition to their share of the settlement fund, the deal would ensure consumers would be able to receive three years of credit monitoring services.

If granted final approval, the deal would end claims launched in July 2022 by Christopher Lamie, who took aim at the company with allegations that sensitive personal information such as Social Security numbers, dates of birth and home addresses were exposed when hackers breached the company's systems in February 2022.

In the latest version of the allegations, Lamie and co-lead plaintiff Amabel Lin accused the company of negligence, negligence per se, breach of an implied contract, unjust enrichment and violations of North Carolina's Unfair Trade Practices Act, contending personal data for at least 200,000 people — some of whom aren't even among the company's customers — were exposed in the breach.

Lamie and Lin claim the company has seen three such breaches since 2008 and accused LendingTree of failing to tighten its cybersecurity measures to properly protect consumers.

The proposed settlement came after Judge Whitney denied a dismissal bid in the matter.

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

Lamie and Lin are represented by Raina C. Borrelli of Turke & Strauss LLP, Joel R. Rhine and Martin A. Ramey of Rhine Law Firm PC, and Scott C. Harris and David K. Lietz of Milberg Coleman Bryson Phillips Grossman PLLC.

LendingTree is represented by Brandon C.E. Springer, Kristine M. Brown and Scott A. Elder of Alston & Bird LLP.

The case is Christopher Lamie v. Lending Tree LLC, case number 3:22-cv-00307, in the U.S. District Court for the Western District of North Carolina.

--Additional reporting by Sydney Price and Peter McGuire. Editing by Alyssa Miller.

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3rd Circ. Won't Rehear Pfizer Shareholder Suit Coverage Row

By **George Woolston**

Law360 (February 28, 2024, 3:02 PM EST) -- Pfizer won't get a second shot at arguing its insurer should indemnify it in a settlement stemming from a 2003 shareholder class action, with the Third Circuit on Wednesday declining the pharmaceutical company's request for an en banc rehearing.

Pfizer asked for the rehearing in early February following the circuit court's Jan. 19 decision affirming the award of summary judgment to one of its excess insurers, Twin City Fire Insurance Co.

The three-judge panel held that Pfizer failed to show how its claim for coverage met the policy's two conditions required for coverage: that the insurers ahead of Twin City admitted liability and paid the full amount of their respective liability.

"Here, Pharmacia has failed to show that both conditions to trigger Twin City's coverage were met. Regardless of whether the other insurers in the tower paid their policy limits, the record does not demonstrate that all of those insurers admitted liability," Circuit Judge Patty Shwartz wrote for the panel in its January ruling.

The dispute between Pfizer and Twin City stemmed from a 2003 proposed class action alleging Pharmacia, which Pfizer would acquire that same year, artificially inflated its stock by misrepresenting the results of a clinical drug study, according to the circuit court's January opinion.

After the case settled 10 years later, Pfizer sued Twin City in U.S. District Court alleging it owed a duty to pay its settlement and defense costs from the proposed class action.

Pfizer had an excess insurance policy from Twin City through a \$200 million insurance tower it purchased from 13 different brokers, the opinion said. The pharmaceutical company asked Twin City for coverage after the excess carriers ahead of it in the insurance tower paid their policy limits, the opinion said. Twin City declined, and was ultimately awarded summary judgment because six of the carriers ahead of it did not admit liability.

In the appellate court's Wednesday order denying Pfizer's petition for an en banc rehearing, Circuit Judge Shwartz said no judge on the panel who concurred in the decision asked for a rehearing and a majority of the judges of the circuit did not vote for a rehearing.

In its petition for a rehearing, Pfizer argued that the court's interpretation made recovery under the insurance "impossible."

"By holding that excess attachment required each underlying insurer to pay its limit and to separately and affirmatively 'admit liability' for the claim, the panel gave no regard to the practical implications of its interpretation that rendered recovery under the excess policy 'impossible,'" Pfizer said in its petition.

Counsel for Twin City declined to comment on Wednesday. Counsel for Pfizer and non-party defendants did not immediately respond to requests for comment on Wednesday.

Pfizer is represented by Robin L. Cohen, Marc T. Ladd and Adam Ziffer of Cohen Ziffer Frenchman & McKenna.

Twin City is represented by Douglas M. Mangel and Gabriela Richeimer of Werner Ahari Mange LLPI and Marianne G. May of Clyde & Co. LLP.

Arch Specialty Insurance is represented by Andrew I. Hamelsky of Stradley Ronon Stevens & Young LLP.

Liberty Mutual Insurance Co. is represented by Iram P. Valentin of Kaufman Dolowich.

The case is Pharmacia Corporation n/k/a Pfizer, Inc. v. Arch Specialty Insurance Company et al., case number 22-2586, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Patrick Reagan.

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9th Circ. Revives Suit Over Google's Cell Data Use In Androids

By **Gina Kim**

Law360 (February 28, 2024, 9:25 PM EST) -- The Ninth Circuit on Wednesday partially revived a putative class action by Android users accusing Google of illegally using their cellular data allotments to transmit information back to itself, finding they plausibly allege Google's "unauthorized transfer" could block customers from using data they purchased from their carriers.

In a seven-page unpublished **ruling**, a three-judge panel reversed a California federal court's order that permanently ended a complaint by Android users who asserted conversion and quantum meruit claims against Google, alleging the tech giant conducts "massive" data transfers using customers' data allotments without their permission or knowledge through the Android operating system.

On Sept. 30, 2022, U.S. Magistrate Judge Virginia K. DeMarchi of the Northern District of California threw out the case, **finding** the customers' allegations indicate that an Android user doesn't actually own or possess the cellular data until they send or receive a transmission of information.

The customers argued on appeal that the lower court wrongly decided that the cellular data they bought from their wireless carriers isn't considered property under Golden State Law.

On Wednesday, the Ninth Circuit agreed, finding the customers sufficiently pled the elements of conversion against Google and revived that cause of action. Even if cellular data is intangible, it allows access to a cellular network and can be limited by a user's data plan, the panel said.

Data can also be measured while it's being consumed, and can be linked to a user based on a unique identifier, the opinion said.

"Cellular data is also capable of exclusive possession or control," the panel said. "It can be 'valued, bought and sold,' ... users may transfer their interest in cellular data through mobile hotspots; and the right to transmit cellular data over a cellular network is by its nature restricted to the user."

The Android users also have a legitimate claim to exclusivity over their cellular data, as customers with cellular data plans have a reasonable expectation of their ability to access their carriers' cellular network, the panel added. The customers have also bought the right to transfer information over their mobile carriers' networks up to the allowable amounts under their plans, Wednesday's ruling said.

The plaintiffs also plausibly allege Google uses their data in a way that's inconsistent with their own property interests, the opinion said. Whenever Google transfers information from its own servers, the data that's spent during that transfer is allocated to the customer, and accordingly is treated by the wireless carrier as if it is data that the customers themselves used, the circuit judges said.

Accordingly, Google's transfer of the information using a customer's data allotment could possibly block the customer from using the data they bought from their wireless carriers, the panel added.

The customers also plausibly alleged they suffered damages whenever Google converts a cut of their cellular data, the opinion said.

"Like a 'forced sale,' Google's alleged surreptitious use of the cellular network through plaintiffs' data plans causes plaintiffs to experience an immediate, discrete loss of a specific sum of valuable cellular

data, which is charged against their data plans," the panel said. "Thus, the value of the converted cellular data is the measure of plaintiffs' resulting damages."

Wednesday's opinion comes **two weeks after** the Ninth Circuit heard oral arguments on the Android user's appeal of Judge DeMarchi's dismissal of their complaint against Google.

Counsel for the customers argued that the lower court "committed reversible error" when holding that the benefits of contractual rights can't be property capable of conversion as a matter of law. The lower court also missed the mark when ending their claim for quantum meruit — money expected for services or work done — saying they hadn't shown that the parties could expect payment from Google for their pilfered data.

Google countered that the lower court was correct to find the customers didn't allege any sort of loss directly related to the purported data transfers.

Korein Tillery, the counsel for the customers, also represent a class of Android mobile device users who filed a similar case against Google pending in Santa Clara County Superior Court. **In October**, the California state court granted the plaintiffs' motion to certify the class.

On Wednesday, the Ninth Circuit upheld the dismissal of the quantum meruit claim, finding the plaintiffs didn't allege they gave the cellular data to the defendant under any express or implied request by Google.

Representatives for Google did not immediately respond to inquiries seeking comment Wednesday.

Counsel for the Android users told Law360 on Wednesday afternoon they had no comment.

U.S. Circuit Judges Bridget Shelton Bade, Eric D. Miller and Lawrence J. VanDyke sat on the panel for the Ninth Circuit.

The customers are represented by Marc A. Wallenstein of Korein Tillery LLC and Glen E. Summers of Bartlit Beck LLP.

Google is represented by Kathleen Hartnett, Whitty Somvichian, Kelsey R. Spector, Max Bernstein and Liz Sanchez-Santiago of Cooley LLP.

The case is Joseph Taylor et al. v. Google LLC, case number 22-16654, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Bonnie Eslinger and Hailey Konnath. Editing by Dave Trumbore.



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Autonomy Founder's Fraud Trial Risks 'Morass,' Judge Warns

By **Bonnie Eslinger**

Law360 (February 28, 2024, 10:57 PM EST) -- The California federal judge overseeing the upcoming criminal fraud trial of Autonomy founder Mike Lynch over the software company's \$11.7 billion sale to Hewlett-Packard warned prosecutors and defense attorneys Wednesday about growing estimates for the trial's length, saying they're "going to lose [jurors] in the morass" of a monthslong trial.

Trial in the criminal case against Lynch and former Autonomy finance vice president Stephen Chamberlain is on deck to start March 18. According to a joint statement submitted to the court, the proceedings may go on for more than 10 weeks, pushing them into June.

At a pretrial conference Wednesday, Assistant U.S. Attorney Adam Reeves told U.S. District Judge Charles R. Breyer the trial would be "done by Juneteenth ... I just wanted to offer some reassurance."

Judge Breyer expressed concern about getting longer trial estimates.

"What's going on? You're going to lose these people in the morass," the judge said. "It's long enough. It doesn't have to be any longer."

British entrepreneur Lynch faces 17 counts of wire and securities fraud in the U.S., where it is alleged he inflated the value of Autonomy when he sold it to HP in 2011, meaning the U.S. tech giant paid an extra \$5 billion for his company.

He has denied wrongdoing, and his legal team told the court in January that there's evidence from after HP's acquisition of Autonomy that makes it clear Lynch is innocent. That includes evidence of HP mismanaging Autonomy, leading to substantial revenue target misses in 2012, which Lynch witnessed during his tenure as CEO of the HP-owned Autonomy until May 2012.

On Wednesday, a lawyer for Lynch, Reid Weingarten of Steptoe LLP, told Judge Breyer, "We're thinking very seriously about putting our client on the stand."

If Lynch testifies, he will have exculpatory evidence relating to the post-acquisition period, Weingarten said, suggesting that perhaps the evidence could be presented to the court ahead of trial.

"What we would like to do is lay it out with more specificity, and it's not my habit to give the government prosecutors direct examination of my client two weeks before trial," Weingarten said. "So what we'd like to do is offer it to you ex parte."

The judge said he needed time to think about the proposal.

"If I were to say 'I'm not going to allow X, Y and Z,' the defendant could very well say, 'In light of the fact that he's not allowing X, Y and Z, I'm not going to testify,'" the judge said. "And then it becomes an appellate point."

Weingarten later said he just wanted to make sure the court got the full picture of Lynch's evidence.

"Perhaps there's been a failure of advocacy on our part," Lynch's lawyer said. "We've not sufficiently explained why we think the post-acquisition evidence is so important and so relevant and so

exculpatory."

On the other hand, Reeves said Lynch's alleged crimes were committed by the time Autonomy was acquired by HP in October 2011.

Last year, an English court **upheld the extradition** of the British entrepreneur. That followed a 2022 decision from England's High Court that Lynch and Sushovan Hussain, then the chief financial officer of Autonomy, **fraudulently inflated** the company's value when it was sold to HP.

In its criminal case, the government charged Lynch with conspiracy to commit wire fraud, wire fraud and securities fraud. Chamberlain has been charged with conspiracy to commit wire fraud and wire fraud. The defendants have pled not guilty.

The DOJ **charged Lynch and others** in 2018. The announcement came months after the conviction of Hussain, also in California federal court, on wire and securities fraud charges also tied to the alleged accounting scheme.

During Wednesday's hearing, Judge Breyer also discussed Lynch's bid to preclude opinions from Christopher Yelland, an HP executive who became the chief financial officer of the Autonomy unit a few months after the acquisition.

The government had not requested that Yelland be qualified as an expert, the judge underscored.

"He's not been noticed as an expert. And so I don't see how he can give testimony" under the court rules of procedure, the judge said.

Perhaps Yelland could say he was given the responsibility of reviewing the financials that had been submitted by Autonomy in connection with the merger and later issued a restatement, Judge Breyer said, but the testimony would have to stop before Yelland could explain why he issued the revision, as that could enter expert opinion territory.

"Why did you include this as a receivable or reject that as a receivable?" I don't think he can say that because that calls for expert opinion," the judge said.

Under court rules, Judge Breyer said, if a party is going to have an expert, then their opinions have to be put in a report so the defense is in a position to cross-examine the expert.

"So my view is [Yelland] can only say very vanilla things about it," he said. "I don't think you can backdoor his expertise, [his] opinion."

Assistant U.S. Attorney Robert Leach said that while the government disagreed with the court, they will follow the court's instructions.

The judge later said he wanted the government to hand over a summary of Yelland's proposed testimony.

"Then we can look at it, and you can object to it," Judge Breyer said, referring to Lynch's legal team. "I can rule on it. We'll all know what it is, and we'll be able to handle it from that basis."

The government is represented by Robert S. Leach, Adam A. Reeves, Kristina N. Green and Zachary G.F. Abrahamson.

Michael Lynch is represented by Christopher J. Morvillo, Celeste L.M. Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Boxer Wolpert Nessim Dooks Lincenberg & Rhow PC.

The cases are U.S. v. Mike Lynch et al., case number 3:18-cr-00577, and U.S. v. Stephen Keith Chamberlain, case number 3:18-cr-00577, in the U.S. District Court for the Northern District of

California.

--Additional reporting by Richard Crump and Christopher Crosby. Editing by Lakshna Mehta.

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Indivior's \$385M Suboxone Antitrust Deal Gets Final OK

By **Katryna Perera**

Law360 (February 28, 2024, 7:43 PM EST) -- A Pennsylvania federal judge has granted final approval to Indivior's \$385 million settlement with direct purchasers in antitrust litigation over its opioid addiction treatment Suboxone and awarded roughly \$120 million in attorney fees to the purchasers' counsel.

U.S. District Judge Mitchell S. Goldberg issued an **opinion** on Tuesday saying the request for attorney fees, which represents approximately 32% of the settlement fund, is "fair, reasonable and commensurate with the skill of the attorneys, the amount of work they expended on this complicated litigation, and the results they achieved."

He also granted the attorneys' request for roughly \$7.5 million in litigation expenses and a \$100,000 incentive award for each named plaintiff — Burlington Drug Company, Rochester Drug Cooperative and Meijer Inc.

"According to class counsel, each of these representatives ... assisted greatly in the prosecution of this case by filing suit on behalf of the [direct purchaser plaintiff] class and undertaking all responsibilities involved in being a named plaintiff, including monitoring the progress of the case and responding to discovery requests," the opinion states.

"Each class representative executed broad document searches and collections that required time and effort by their employees. Each of the class representatives was also deposed, and they continued to expend time and effort over more than a decade," the judge added.

In granting final approval, Judge Goldberg said the **\$385 million deal** resulted from arms-length negotiations, occurred after significant discovery and received no objections from class members.

The judge also noted that continued litigation would have required "complicated pretrial proceedings, litigation of multiple motions in limine, weeks of fact witness testimony, and costly expert witnesses, all without guarantee of any recovery. Ultimately, the settlement eliminated these risks and provided immediate and guaranteed recovery."

The suit has been ongoing for over a decade, and with Judge Goldberg's Tuesday order, the last open track of the multidistrict litigation has been closed. Indivior previously announced a \$102 million settlement with various states and a \$30 million deal with end payor insurers over tactics the company allegedly used to prolong its monopoly over the opioid treatment drug's market.

Various states, insurers and buyers of the drug had accused Indivior of introducing a new dissolvable strip version of Suboxone to the market just as its exclusivity period over the tablet form of the drug was expiring in 2009, encouraging the "product hop" from tablets to strips by misrepresenting to the U.S. Food and Drug Administration that the tablets posed a risk to children of accidental consumption.

A coalition of 42 states settled their claims last June, and the end payors reached a deal in August. The case was divided into separate classes for end payors like customers, insurers and direct purchasers, including healthcare providers and wholesalers, in 2019.

Indivior, which was spun off from Reckitt Benckiser Group PLC in 2014, introduced Suboxone tablets

to treat opioid addiction in 2002, and the FDA offered the company seven years of so-called orphan drug market exclusivity ending in October 2009.

As the exclusivity period came to a close, however, the company worked to launch a patent-protected dissolvable film version of Suboxone, which goes by the generic name buprenorphine, in what the plaintiffs argued was a bid to prevent generic versions of the drug from claiming bioequivalence.

To bolster their new product while squelching potential competition from generic tablets, the plaintiffs say, the company jacked up prices on its own tablets and eventually raised questions about the safety of tablets in general by pointing to the potential for accidental pediatric overdoses.

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

The direct purchasers are represented by Garwin Gerstein & Fisher LLP, Faruqi & Faruqi LLP, Hagens Berman Sobol Shapiro LLP, Odom & Des Roches LLC, Smith Segura Raphael & Leger LLP, Heim Payne & Chorush LLP, Berger Montague PC, Taus Cebulash & Landau LLP, and Sperling & Slater PC.

Indivior is represented by Jonathan B. Berman and Tiffany D. Lipscomb-Jackson of Jones Day and Justin W. Bernick, N. Thomas Connally, Virginia A. Gibson, Ilana Kattan and Jillian C. Beck of Hogan Lovells.

The case is In re: Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation, case number 2:13-md-02445, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Matthew Santoni. Editing by Vaqas Asghar.

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Musk, Ex-Twitter Staff Fail To Reach Deal In Severance Dispute

By **Henrik Nilsson**

Law360 (February 28, 2024, 10:08 PM EST) -- Settlement talks between X Corp., formerly known as Twitter, and a group of former employees have fallen apart, the parties told a Delaware federal judge on Wednesday, asking the judge to lift a stay in their dispute over severance compensation.

X and the former employees told U.S. District Judge Jennifer L. Hall that extending the stay on all deadlines wouldn't be necessary because the parties failed to reach a deal after engaging in settlement talks. The joint status report also said X and its CEO, Elon Musk, were renewing their motion to dismiss the case.

Judge Hall **paused the case** last week until Tuesday, requiring the parties to provide the court with a status update by Wednesday.

The parties discussed a resolution to claims that X and Musk defrauded workers, breached both the federal and multiple state-level versions of the Worker Adjustment and Retraining Notification, or WARN, Act and ignored contractual severance obligations when it fired thousands of Twitter employees after Musk's takeover in October 2022.

According to court records, the parties **underwent** a full-day mediation session in early February. That session prompted a mediator to compose a proposed settlement to their dispute, the parties told the court.

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

In a May complaint, six former Twitter employees said the social media giant and Musk **concocted bogus excuses** to deny them the severance pay they were promised as an inducement to stay in their jobs through Musk's acquisition of Twitter.

Rather than lay them off and pay those awards, the workers say the company ordered many employees to stiff vendors and landlords and otherwise behave unethically. The workers say those instructions forced several employees to resign in protest, acts which they said equated to constructive discharges, while others were fired for disobeying orders or for no reason at all.

X asked the court in July to toss the suit, saying the workers who sued are "neither parties to it nor intended third party beneficiaries" under the merger agreement and therefore their severance benefits claims should fall.

The company also argued that the workers failed to support all the other claims in their suit.

Musk also asked the court to toss the suit, saying in his own July **motion** that he was not a signatory to the section of the deal relating to continuing employee benefits and that the promises at issue were made before the merger closed. Musk also argued that state and federal laws governing mass layoffs do not provide for individual liability or a private right of action.

The plaintiffs are represented by Joseph L. Christensen of Christensen & Dougherty LLP.

Musk and X Corp. are represented by Jody C. Barillare of Morgan Lewis & Bockius LLP.

The case is Wolfram Arnold et al. v. X Corp. et al., case number 1:23-cv-00528, in the U.S. District Court for the District of Delaware.

--Additional reporting by Irene Spezzamonte, Caleb Drickey, David Minsky and Bonnie Eslinger.
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Securities Group Of The Year: Gibson Dunn

By **Jessica Corso**

Law360 (February 28, 2024, 5:36 PM EST) -- The securities litigation team at Gibson Dunn & Crutcher LLP played a central role in winning a unanimous U.S. Supreme Court decision in favor of Slack Technologies LLC, putting in place new barriers to shareholder suits against companies that go public via direct listings, winning it a spot on **Law360's 2023 Securities Practice Groups of the Year**.



The firm's securities litigation practice group is so big and geographically dispersed it is helmed by three co-chairs: Brian Lutz, Monica Loseman and Craig Varnen.

"We are very much a national practice group, and I think it makes sense for us to have leaders from different geographies bringing different kinds of expertise and perspective," Lutz said. "So that was the three of us: Craig is resident in our L.A. office, Monica is in Denver, and I'm in San Francisco."

The team racked up several high-profile victories last year, perhaps none of which was more impactful than the **high court's ruling** in **Slack v. Pirani** 📌, according to Lutz.

Slack was sued in 2020 based on allegations it deceived prospective investors by failing to alert them to vulnerabilities that led to service disruptions and a subsequent \$8.2 million credit payout to customers.

While the Supreme Court doesn't agree to hear many securities disputes, Gibson Dunn was able to identify the uniqueness of the Slack case from the get-go, Lutz said.

"We told the client in the pitch: This is a very interesting issue. It's not really resolved. It needs

clarity. This is a case that could make it [to the Supreme Court]. And we were prescient," according to Lutz.

The high court's ruling called into question some of the claims against the company because of the unique way in which Slack went public — through a direct listing. Unless investors can demonstrate they purchased shares registered by a company and not those belonging to former employees or other stockholders, they cannot sue under a provision of the securities laws known as Section 11, the court ruled.

Slack insists lead investor Fiyyaz Pirani cannot sue, saying both registered and unregistered shares in a directly listed company become available on the first day of trading, unlike in a traditional initial public offering. But the justices said the parties could argue that point in a lower court.

Still, the Gibson Dunn team was able to lean on the Slack ruling to win dismissal last year of a proposed shareholder class action filed against Danimer Scientific Inc., a bioplastics company whose claims of environmental friendliness were challenged in media reports.

Relying in part on language from the Supreme Court's Slack decision, U.S. District Court Judge Hector Gonzalez in September dismissed the case against Danimer, which also took a less traditional route to going public by merging with a special-purpose acquisition company.

That ruling is on appeal in the Second Circuit.

Another pivotal victory for the Gibson Dunn securities litigators came when a Delaware Chancery Court issued a ruling that **reduced the amount of money** a hedge fund would have made off a merger between Pivotal Software Inc. and VMware Inc.

Gibson Dunn represented VMware in the case and also guided it through a \$42.5 million **settlement** with a class of Pivotal stockholders in 2022. The firm also worked with a special committee of VMware's board of directors on **structuring the underlying deal** that the Delaware court found was more than fair, demonstrating Gibson Dunn's "soup to nuts" approach when it comes to representing clients, Varnen said.

A case that Loseman said she was excited about is one that could determine the course of shareholder proposals involving environmental, social and governance issues. The firm is leading the charge on behalf of Exxon Mobil Corp. in its lawsuit challenging an investor proposal to speed up the timeline for reducing the company's greenhouse gas emissions.

The case is seen as an **indirect challenge** to the U.S. Securities and Exchange Commission, which has been more permissive in recent years in allowing proposals on environmental and social issues to move forward to shareholder votes.

The case has "garnered quite a bit of attention in terms of its uniqueness and skipping the SEC comment-letter process on activist investor proposals," Loseman said. "We are very excited to see how that litigation proceeds."

--Editing by Philip Shea.



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'You Gave Away Your Case': Crypto Win Wilts At High Court

By **Jeff Overley**

Law360 (February 28, 2024, 10:22 PM EST) -- The U.S. Supreme Court on Wednesday leaned toward letting a technical tug-of-war continue in litigation accusing the cryptocurrency platform Coinbase Inc. of running a sketchy sweepstakes, as multiple justices suggested the Ninth Circuit overlooked key issues when it sided with aggrieved consumers.

Question Presented in Coinbase Inc. v. Suski

Where parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?

At several points during oral arguments, justices indicated the Ninth Circuit erred by **failing to decide** if the sweepstakes rules supplanted earlier user agreements that clearly delegated disputes to an arbitrator. Coinbase and lead plaintiffs in a proposed class action have acknowledged that the circuit court didn't fully address that issue, and Justice Brett Kavanaugh seized on that acknowledgment early in Wednesday's arguments.

"Are you all saying the same thing there?" Justice Kavanaugh asked. "And if you both agree that the Ninth Circuit's analysis is wrong and should be remanded, are we done?"

Hogan Lovells partner Jessica L. Ellsworth, counsel to Coinbase, replied that "we do both agree that the Ninth Circuit's analysis was wrong," and that "we do both agree that this should be remanded."

The case against Coinbase began when lead plaintiff David Suski and other sweepstakes entrants in 2021 launched a putative class action. According to an amended complaint, Coinbase bogusly "represented to millions of consumers that they were required" to purchase Dogecoin — a cryptocurrency that takes its name from a Shiba Inu meme — in order to enter the sweepstakes, when in fact, they could enter for free.



Named after a Shiba Inu meme, the Dogecoin cryptocurrency debuted roughly a decade ago. (Court Documents)

In an exchange Wednesday with David J. Harris Jr. of Harris LLP, counsel for the consumers, Justice Elena Kagan elaborated on Justice Kavanaugh's inquiry by asking, "Do you think that the Ninth Circuit decided whether the official rules supplant the original arbitration agreement's delegation clause?"

"No. And that's where I think they went wrong, if anywhere," Harris responded, adding that the circuit judges at the time concluded they "don't even have to reach the official rules, because we're just looking at the clause, the delegation clause, and we're looking at the arbitrability dispute, and we're saying we don't think this was meant to cover this."

Justice Sonia Sotomayor quickly pounced on that response, addressing Harris and declaring, "I think you just gave away your case."

"[Coinbase] came in saying vacate and remand because [the Ninth Circuit] didn't address delegation and whether the ... sweepstakes agreement superseded that," Justice Sotomayor added. "And you're saying the Ninth Circuit didn't do that."

Harris replied that the circuit judges "didn't necessarily have to, because they asked whether the delegation clause was applicable to this arbitrability dispute about the sweepstakes. They looked at the delegation clause, and they said this wasn't intended to cover this particular arbitrability dispute."

But Justice Neil Gorsuch soon jumped in and told Harris that "you've just conceded over and over again that the first agreement says those questions go to the arbitrator, and it's broad in scope, and it covers everything, all relationships

with Coinbase."

"So you want us to vacate and remand for more proceedings in the Ninth Circuit on whether that first agreement modifies the second," Justice Gorsuch said.

Harris replied, "I mean, remand is not our first request."

But in recent briefs, Coinbase and the consumers have each signaled that remand would be acceptable. Coinbase, for instance, wrote that "because the Ninth Circuit did not decide whether the sweepstakes' official rules displaced the delegation clause, this court could vacate the judgment below and instruct the Ninth Circuit" to apply certain standards under the Federal Arbitration Act.

And while the consumers simply want to preserve their win, they have suggested that the justices as an alternative "should remand this case to the Ninth Circuit to more thoroughly consider whether the [sweepstakes] rules partially modified the user agreements' delegation clauses." The consumers added that "this remand option, however, is undesirable because it would prompt a fourth or fifth year of arbitrability proceedings in this case."

At one point Wednesday, Ellsworth urged the justices to not only remand but also give guidance on several "important principles that the Ninth Circuit went astray on." But Justice Sotomayor swiftly voiced skepticism, averring that Ellsworth was proposing "huge changes" that went far beyond the "very narrow question" in the case, which focuses on whether an arbitrator or a court should decide if an arbitration agreement is narrowed by a later contract.

The case has attracted considerable interest from outside groups. On the pro-Coinbase side, an amicus brief from the U.S. Chamber of Commerce, the American Bankers Association, the Cato Institute and other entities warned of "widespread adverse consequences" if the Ninth Circuit's ruling is affirmed. Businesses often enter multiple contracts with the same parties, but arbitration agreements often exist in only one of the contracts, and so "decisions like the one below create traps for the unwary," the groups contended.

On the pro-consumer side, Public Citizen wrote in an amicus brief that "a court may not require that [a] later agreement use any particular form of words to supersede or modify the delegation clause" in an earlier agreement.

Separately, in a strongly worded supplemental brief this week, the consumers contended that Coinbase had threatened to charge them with "millions of dollars" in attorney fees and costs. "This sets a new high-water mark for blackmail settlement pressure against a party," the supplemental brief asserted.

The Supreme Court last year **decided another arbitration issue** involving multiple cases against Coinbase; the Suski case was among them, but that case became moot during the proceedings.

A decision in the case argued Wednesday is expected by late June.

Coinbase is represented by Jessica L. Ellsworth, Neal Kumar Katyal and Nathaniel A.G. Zelinsky of Hogan Lovells and by Kathleen Hartnett and Bethany Lobo of Cooley LLP.

Suski and the proposed class are represented by David J. Harris Jr. and Gerilyn R. Harris of Harris LLP.

The case is Coinbase Inc. v. Suski et al., case number 23-3, in the Supreme Court of the United States.

--Editing by Andrew Cohen.