

Carvana Wins Reprieve from Class Action Over Its Growth Strategy

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XDHJ3C0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XDHJ3C0000000)

Carvana Co., its top executives, and underwriters won a US judge's dismissal of a shareholder lawsuit alleging that the e-commerce car dealer downplayed issues with its growth strategy.

Shareholders in the online used car retailer alleged that the company failed to disclose the mounting costs and complexities of operations, but the proposed class action didn't adequately show which disclosures were misleading, according to the order filed Thursday in US District Court for the District of Arizona.

Carvana touted its status as a high-quality buyer that closely assesses used vehicles, overstating the sustainability of its growth model, according to the complaint. But these allegations weren't clearly or concisely expressed in the consolidated complaint filed in February 2023, Judge Michael Liburdi said in his order.

The complaint references more than 29 corporate statements over a span of 200 paragraphs, but the judge found it doesn't provide detail on which of them contain the alleged misrepresentations or false information, and what information the company, its executives, and its underwriters allegedly knew when making them.

Carvana disclosed an 8% decline in car sales in its third quarter financial results on Nov. 3, 2022, the complaint says. The consolidated complaint's highlighted stock drops included a nearly 39% fall on Nov. 4, 2022, its biggest single-day decline ever, according to data compiled by Bloomberg.

During the period of alleged misrepresentations between May 2020 and November 2022, Carvana's stock closed as high as \$370.10 per share in August 2021. The Nov. 7, 2022 closing price of \$7.39 represented a more than 97% decline from that peak in the class period, according to the complaint.

Plaintiffs have 30 days to file an amended complaint that clarifies the "impermissible puzzle pleading" in question, Liburdi said.

Robbins Geller Rudman & Dowd LLP and Bonnet Fairbourn Friedman & Balint PC represent the plaintiffs and the proposed class.

Fennemore Craig PC and Latham & Watkins LLP represent Carvana, its executives, and underwriters Citigroup Global Markets Inc. and J.P. Morgan Securities LLC. Paul Weiss Rifkind Wharton & Garrison LLP also represents the underwriters. DLA Piper LLP and

Greenberg Traurig LLP represent co-founder Ernest Garcia II.

The case is In re Carvana Co. Sec. Litig. , D. Ariz., No. 2:22-cv-02126, 2/29/24 .

To contact the reporter on this story: Ben Miller in New York City at
bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

[Litigation](#)

Feb. 29, 2024, 10:35 AM PST; Updated: Feb. 29, 2024, 12:32 PM PST

Children's Place Allegedly Hid Big Promos Before Stock Swing (1)

By Ben Miller

- **COURT:** D.N.J.
- **TRACK DOCKET:** [2:24-cv-01182](#)

Bloomberg Law News 2024-03-01T10:12:57254125501-05:00

Children's Place Allegedly Hid Big Promos Before Stock Swing (1)

By Ben Miller 2024-02-29T13:35:17000-05:00

- **COURT:** D.N.J.
- **TRACK DOCKET:** [2:24-cv-01182](#)

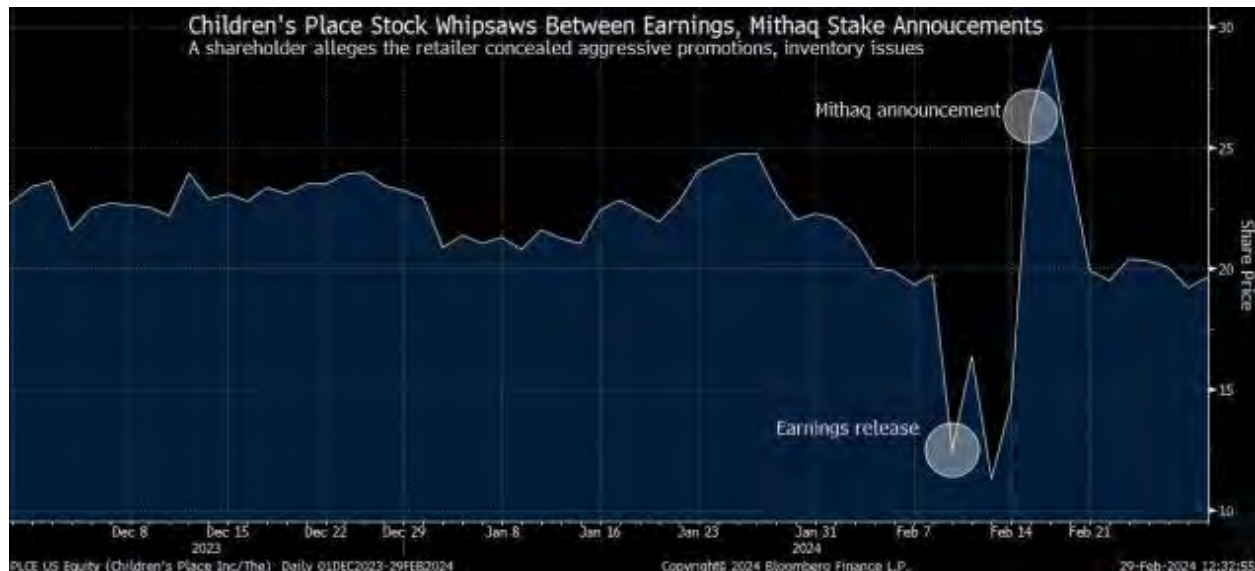
The Children's Place Inc. and its top executives allegedly concealed "aggressive" use of promotions to boost sales and overstated inventory values before the stock's biggest selloff since 1997, a proposed class action complaint says.

The kids apparel retailer misled investors for nearly a year, touting its targeted marketing strategy and focus on inventory management before announcing this month that it expected net sales to fall short of its prior guidance, according to the complaint filed Wednesday in US District Court for the District of New Jersey.

The day that The Children's Place said it is working to improve its liquidity position and disclosed a preliminary operating loss for the fourth quarter its share price fell 37% to \$12.51 on Feb. 9. That was the stock's biggest single-day drop since 1997, according to data compiled by Bloomberg. The complaint also points to lower than expected merchandise margins in the preliminary results from the aggressive promotional efforts to maximize sales and inventory valuation adjustments.

The Children's Place also reported preliminary net sales of \$454 million to \$456 million for the quarter, below the \$460 million to \$465 million range it forecasted.

Less than a week later, the retailer saw its share price more than double after announcing that Mithaq Capital owns 54% of its outstanding stock and requested to enter financing talks. The Children's Place's stock jumped more than 81% on Feb. 15 to \$26.29, the stock's biggest increase ever, according to data compiled by Bloomberg.



Shareholder Randeep Singh Khalsa seeks to recover damages for a class of “hundreds or thousands” of investors who acquired The Children's Place stock between March 16, 2023 and Feb. 8, 2024. He alleges that the company, CEO Jane Elfers and Sheamus Toal, chief financial officer and chief operating officer, violated the Securities Exchange Act. He also seeks legal fees, the complaint says.

The Children's Place and Mithaq, which is not named as a defendant, didn't respond to requests for comment.

Glancy Prongay & Murray LLP, Carella, Byrne, Cecchi, Brody & Agnello PC, and Howard G. Smith, who practices in Bensalem, Pa. represent the plaintiff and the proposed class.

The case is Khalsa v. The Children's Place Inc. , D.N.J., No. 2:24-cv-01182, complaint filed 2/28/24 .

((Updates paragraph four to reflect figures from preliminary financial results announcement. A previous version corrected Sheamus Toal's title.))

To contact the reporter on this story: Ben Miller in New York City at bmiller2@bloombergindustry.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bristol-Myers Again Beats Claim It Misled Investors About Payout

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XERB27U0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XERB27U0000000)

Bristol-Myers Squibb Co., for a second time, won the dismissal of a proposed class action alleging it misled investors about a payout dependent on the Food and Drug Administration's approval of a cancer therapy drug tied to its 2019 acquisition of another pharmaceutical company, Celgene.

A federal court dismissed the claims Thursday for failure to plead scienter—that the company or its officers intended to deceive, manipulate, or defraud. But it granted the plaintiffs leave to file an amended complaint.

The plaintiffs' amended complaint, alleging violations of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, fails because there is still no showing of scienter, Judge Jesse M. Furman of the US District Court for the Southern District of New York ruled Thursday.

The plaintiffs in the consolidated litigation alleged that BMS intentionally delayed FDA approval to avoid a \$6.4 billion payout on "contingent value rights"—a security payable only if a future event occurs.

As part of the merger, BMS issued contingent value rights to Celgene investors payable contingent on approval of three drugs by the FDA by specific deadlines. Because the FDA approved one of the three drugs after the deadline—its lymphoma drug Liso-cel—the CVRs expired and were worthless.

Dismissing the claims with prejudice, Furman said the plaintiffs failed to address the deficiency in their second amended complaint against BMS, the company's Chief Executive Officer Giovanni Caforio, and Chief Medical Officer Samit Hirawat.

To establish scienter, the plaintiffs needed to show either that the defendants had motive and opportunity to commit fraud or "strong circumstantial evidence of conscious misbehavior or recklessness," Furman said, citing a 2007 Second Circuit ruling.

With respect to motive and opportunity, the plaintiffs still fail to allege that the individual defendants "benefitted in some concrete and personal way from the purported fraud," Furman said, citing a 2009 Second Circuit opinion.

The plaintiffs' new argument that Bristol's corporate structure "ensured that its leadership," was aware of "the Liso-cel submission and approval failures," is also insufficient to establish strong circumstantial evidence, Furman said.

The plaintiffs' contention that the individual defendants served on committees with oversight authority relating to the drug approval process, and the Celgene integration, doesn't show recklessness, Furman said.

And the factual new allegations don't "support Plaintiffs' assertion 'that numerous senior Bristol executives,' including Dr. Caforio, 'were in *direct communication* with the FDA regarding the Liso-cel approval process, and knew through both Bristol's FDA submissions and the direct communications from the FDA in response thereto' of the various alleged missteps during the approval process," Furman said.

The amended complaint's inclusion of expert opinions "suggesting generally that in circumstances like the ones here, pharmaceutical executives would be aware of and be able to avoid the missteps that allegedly befell the Liso-cel approval process," are also insufficient, Furman said. The opinions "do not speak to the knowledge of the individual Defendants specifically," he said.

Finally, Furman said, the addition of statistical analysis "purporting to show that no alternative explanation for the delay in Liso-cel approval is more plausible than knowing misconduct on the part of Defendants," is insufficient to show "a strong inference of scienter."

"Instead, they more likely support an inference of corporate (or government agency) 'mismanagement,'" he said.

Cohen Milstein Sellers & Toll PLLC represents lead plaintiff Mangrove Partners Master Fund Ltd., and Ehab Khalil. Labaton & Sucharow LLP and Entwistle & Cappucci LLP represent SM Merger/Arbitrage L.P., SM Investors L.P., and SM Investors II L.P. DLA Piper US LLP represents Bristol-Myers Squibb and the individual defendants.

The case is In re Bristol-Myers Squibb Co. CVR Sec. Litig. , 2024 BL 66662, S.D.N.Y., No. 21-cv-8255, 2/29/24 .

To contact the reporter on this story: Peter Hayes in Washington at PHayes@bloombergindustry.com

To contact the editor responsible for this story: Blair Chavis at bchavis@bloombergindustry.com

Microsoft, Activision Ordered to Face Lawsuit Over Merger (1)

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4IDHGIK000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4IDHGIK000000)

Microsoft Corp. and Activision Blizzard Inc., the video game studio it bought last year for \$69 billion, lost their bid Thursday to end a pension fund's lawsuit challenging the transaction.

A Delaware judge let the shareholder case move forward, saying it's "reasonably conceivable" Activision's board violated corporate laws by approving only a rough version of the merger agreement that left open key terms, including how much it could pay out in dividends during the deal's lengthy regulatory review.

The Swedish state-owned pension fund leading the case "has adequately alleged that the merger was invalid," Chancellor Kathaleen St. J. McCormick said in a 24-page ruling. But even if the transaction may technically have violated certain statutory provisions, "Delaware law offers solutions for missteps," she wrote.

McCormick, chief of Delaware's Chancery Court, is the same judge who in January struck down Elon Musk's \$55 billion pay package at Tesla Inc. She ordered the two sides of the Activision case to "meet and confer on a path forward." The proposed class action seeks damages on behalf of former Activision stockholders.

The lawsuit, filed in 2022, initially took direct aim at what was then a stalled deal, saying Activision CEO Bobby Kotick and other corporate leaders engineered the transaction to protect themselves from the beleaguered gaming giant's sexual harassment scandal. Microsoft, meanwhile, exploited the crisis to acquire the "weak and wounded" Activision at a fire sale price, according to the original court complaint.

Over more than a year of litigation, the case's focus narrowed to a dispute over the technical requirements of Section 251, the Delaware statute covering mergers. In the meantime, the transaction closed in October after a nearly two-year fight with global antitrust regulators that finally signed off on it, subject to certain conditions.

'Essentially Complete'

McCormick steered clear Thursday of allegations about Activision's "frat house culture." She also punted on a novel claim raised by the Swedish pension fund, Sjunde AP-Fonden, a private equity-style asset manager doing business as AP7. The fund has argued that statutory provisions mandating board approval of mergers require corporate directors to sign off on an "execution-ready" version of the agreement.

On the one hand, “highly experienced transactional attorneys negotiate and finalize disclosure schedules up until the moment a deal closes, if not beyond,” McCormick wrote. At the same time, where market practice runs afoul of Delaware’s corporate laws, “then market practice needs to check itself,” she said.

But the judge said there was no need to decide if the board has to approve a final version of the merger agreement because the allegations, if true, suggest Activision’s directors didn’t even sign off on an “essentially complete” draft.

“There is no straight-faced argument that requiring a board to approve an essentially complete version of a merger agreement is commercially unreasonable,” McCormick said. “That’s just the basic exercise of fiduciary duties, not to mention good corporate hygiene.”

AP7 is represented by Prickett, Jones & Elliott PA and Kessler Topaz Meltzer & Check LLP. Activision and its board are represented by Skadden, Arps, Slate, Meagher & Flom LLP. Microsoft is represented by Young Conaway Stargatt & Taylor LLP and Simpson Thacher & Bartlett LLP.

The case is *Sjunde AP-Fonden v. Activision Blizzard Inc.*, Del. Ch., No. 2022-1001, 2/29/24 .

—With assistance from Jennifer Kay.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/03/spins-roulette-wheel-moelis-and-openai.html

Friday, March 1, 2024

***spins roulette wheel* Moelis and OpenAI!**

By Ann Lipton

I had so many choices for what to blog about this week. The dispute about Donald Trump's Truth Social SPAC? Chancellor McCormick's conclusion that the Activision/Microsoft merger might have violated Delaware law? VC Laster's *Moelis* decision? Musk's lawsuit against OpenAI?

I ultimately decided to go with *Moelis and OpenAI* because they actually are fundamentally kind of the same thing, and this way I kill two birds with one stone.

So, earlier this week, it seemed like the big business law news was VC Laster's holding in *West Palm Beach Firefighters' Pension Fund v. Moelis*, issued last Friday, invalidating the shareholder agreement that Ken Moelis reached with Moelis & Co. when he took it public, and that allowed him to functionally remain in control of the business even when his voting stake dropped below a majority. VC Laster held that the contract violated DGCL 141(a), which requires that corporations be managed by their boards of directors.

VC Laster recognized that every time a corporation enters into any kind of contract at all, the board's choice set becomes more limited, but – using a word that I personally had never heard before and don't know how to pronounce – concluded that there is a spectrum, starting with ordinary commercial contracts and ending with arrangements that ultimately intrude so far into corporate governance that they leave the realm of the commercial and raise a Section 141(a) issue. Relying on *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956), he explained that the validity of a contract therefore depends on two inquiries: first, is it a governance arrangement at all? If not, we're done. A number of factors go into determining whether the contract implicates corporate governance, including whether the contract involves some kind of commercial exchange, and whether it restricts the actions of internal corporate actors, namely, boards and shareholders.

If the contract *does* implicate corporate governance, it will be invalid if it substantially restricts the board's ability to manage the company. In this case, the *Moelis* contract fit both bills: there was no commercial exchange, and the contract limited the board's choices at every turn. (My personal fave: The board was not permitted to discard the "Moelis" name without Moelis's approval, even though name changes aren't usually subject to a shareholder vote at all).

Among other interesting questions raised by the opinion are – what are the nondelegable functions of a corporate board? DGCL 141(a) requires that corporations be “managed by or under the direction of a board of directors,” but in practice boards take advantage of the “under the direction of” piece and delegate most of those responsibilities to others. What are the definitional board responsibilities that must remain with the board itself? Certainly, merger negotiations fall into this category. And in the *Caremark* context, *Marchand v. Barnhill*’s concept of “mission critical” risks is, functionally, a delineation of compliance responsibilities that are definitionally part of the board’s job and cannot be delegated to others. The *Moelis* case also circles around the idea of core board functions that cannot be outsourced without violating Section 141(a).

Laster explains, however, that – though there are still outer limits imposed by the DGCL – many restrictions that would be prohibited in a stockholder agreement may still be permissible if they are contained in the corporate charter, or even in a new preferred stock issuance whose terms become part of the charter by operation of law. And that’s the thing that grabs me.

Why does it matter whether something is in a shareholder agreement, versus a preferred share issuance?

Well, we can talk about transparency, and procedures for amendment – topics covered by Jill Fisch in her paper, *Stealth Governance: Shareholder Agreements and Private Ordering*. I can also point out that now, after *Moelis* is already listed on the New York Stock Exchange, issuing new preferred stock that undermines the governance rights of existing shareholders may not be possible (does it count as a disparate reduction or restriction on shareholder rights if a shareholder agreement that existed at the IPO stage was invalidated and reconstituted in the form of a preferred share issuance? I dunno). But also, as I explain in my paper, *Inside Out*, preferred share terms are treated as internal affairs matters, subject to the law of the state of incorporation. But *shareholder agreements* are ordinary contracts, and subject to ordinary choice of law. Indeed, it’s not uncommon for shareholder agreements to contain a choice of law provision that is *different* from the state of incorporation. (Yeah, that’s right, I answer to “Cassandra” now).

So the difference between putting it in a shareholder agreement and a preferred share issuance may be choice of law.

EXCEPT.

VC Laster, when explaining how to test for whether a shareholder agreement addresses governance matters (again, remember the mere fact that it addresses such matters does not invalidate it; you need to go to the second step of degree of constraint), he repeatedly referred to “internal affairs” and “internal governance.” He didn’t mention choice of law, but

the implication? was kind of? that a contract containing such restrictions might not, in fact, be subject to ordinary choice of law after all? And might be deemed to be subject to the law of the state of organization?

Which brings us, hilariously, to Elon Musk's suit against OpenAI. The gravamen of which, as I understand it, is that Sam Altman had an idea for developing AI for the benefit of "humanity," pitched this to Musk, and Musk donated a bunch of resources while Altman organized multiple (Delaware) entities to effectuate the vision. Generally speaking, those entities consist of a Delaware nonprofit corporation, OpenAI, Inc., which has a number of Delaware for-profit LLC subsidiaries. Musk now claims various California breach of contract and analogous claims because, in his view, OpenAI, Inc. and its subsidiaries have failed to operate in accordance with the original humanity-focused set of promises. "This case is filed to compel OpenAI to adhere to the Founding Agreement and return to its mission to develop AGI for the benefit of humanity," is an actual allegation at ¶33.

I will leave it to the nonprofit folks to talk about the standing of a donor to sue when a nonprofit fails to operate in accordance with expectations, though the fact that the complaint cites the relevant statute as "*E.g.* Cal. Bus. & Prof. Code § 17510.8" does not inspire confidence (the "eg" means "for example," which I interpret as, there is no direct statute on point). I will leave it to the contract folks to talk about whether promises of benefitting humanity are enforceable, or whether you can even cobble together a contract from the multiple conversations, emails, and organizational documents Musk cites.

Instead, I'll talk about the fact that, in addition to disgorgement and damages, Musk seeks specific performance in the form of:

1. An order requiring that Defendants continue to follow OpenAI's longstanding practice of making AI research and technology developed at OpenAI available to the public, and
2. An order prohibiting Defendants from utilizing OpenAI, Inc. or its assets for the financial benefit of the individual Defendants, Microsoft, or any other particular person or entity;

In other words, Musk claims that he has a contract, formed under California law, that allows Musk to dictate the governance choices of a Delaware organized (nonstock) corporation, and further, that a California court should order that this Delaware corporation conduct itself in accordance with his contract.

Now, as a nonprofit, OpenAI is subject to jurisdiction not only of the Attorney General of its state of organization, but also the Attorney General of the states where it operates. And I have no idea whether it has violated the legal rules governing nonprofits in those states – that's up to the AGs.

But Musk is not invoking AG authority; he's claiming a contractual right to dictate the governance of a Delaware-organized (nonstock) corporation. So, especially in light of *Moelis*, if OpenAI wanted to take this as a serious threat, it could file a declaratory judgment action in Delaware to the effect that these "contracts" – if they even exist – are in fact contracts concerning *internal affairs matters governed by Delaware law*. And, under Delaware law, at least at the corporate (OpenAI, Inc.) level, they are illegal intrusions into the board's authority.

Trump's \$4 Billion SPAC Deal Hit by Wave of Lawsuits Over Shares

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XDHU0460000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XDHU0460000000)

March 1, 2024, 7:00 AM PST

Chris Dolmetsch

Bloomberg News

- Former 'Apprentice' contestants are suing over stake dilution
- Deal is financial lifeline as Trump faces massive liability

Former President Donald Trump's potential \$4 billion windfall from a blank-check merger involving the company that runs his social media platform could be derailed by a flurry of legal disputes with his co-founders.

Three lawsuits filed this week over the deal's share allocation threaten to at least postpone the already long-delayed plan to have Digital World Acquisition Corp. acquire

, the vehicle for Trump's Truth Social platform. The proposed special purpose acquisition company deal is set for a shareholder vote on March 22.

At least one of the suits is requesting that a judge block the deal until the issues are resolved, and Digital World said other claimants had also suggested they might make a similar request. If such an order is granted, the legal back and forth could drag on for weeks or even months.

Donald Trump's Truth Social account

Photographer: Jakub Porzycki/NurPhoto/Getty Images

Digital World's stock has soared this year, making Trump's stake worth billions, at least on paper. It's a possible financial lifeline for the former president, who is facing massive penalties from two legal cases. Earlier this week, he

that he may not have the resources on hand to post an appeal bond to cover the \$454 million New York asset-fraud verdict issued against him. Writer **E. Jean Carroll** is also demanding he pay an \$83 million defamation award.

In one of the SPAC suits, Trump Media co-founders Andy Litinsky and Wes Moss, both former contestants on *The Apprentice*, suggested that the huge amount Trump owes in legal judgments makes the merger a possibly "existential" liquidity event for him and might be

motivating a “last-minute stock grab” at their expense.

Read More:

Digital World was trading at just over \$40 a share on Friday morning, down slightly for the second day in a row. At that price, Trump’s stake is worth around \$3.2 billion. He could get another \$1.3 billion if the shares meet certain performance targets.

Two of the suits are between Digital World and sponsor ARC Global Investments LLC. Digital World sued first, asking a Florida court on Tuesday to declare that the founders’ shares held by ARC should be converted to common shares at a ratio of 1.34 to one. ARC itself sued in Delaware Chancery Court on Thursday, asking for the conversion ratio to be set at 1.78. It asked that the Digital World merger be blocked until the ratio and other “misstatements” were fixed.

Increasing the conversion ratio would dilute Trump’s stake, though not by a huge amount. In its Feb. 14 Securities and Exchange Commission registration statement, Digital World said ARC would have around 7.4 million converted shares using a 1.34 ratio. Applying a 1.78 ratio to the figure stated in filing would increase the number of ARC’s converted shares to roughly 9.8 million.

By comparison, Trump has nearly 79 million shares.

‘The Lion’s Share’

While Litinsky and Moss’ suit in Delaware was filed under seal Wednesday, an accompanying request for the judge to expedite the case outlines their claims. They said Trump had empowered himself to issue up to a billion additional shares in Trump Media ahead of the merger.

According to the pair, there was no “legitimate business purpose” for such an issue other than to massively dilute their 8.6% stake and allow Trump, who already holds a 90% interest, to “take the lion’s share of the merger consideration for himself.”

In its registration statement, Digital World said it believed Litinsky and Moss’ claims were based on an agreement that had already been declared void. The SPAC said the two had threatened to block the merger if their demands, which also included the right to appoint two directors, were not met.

Digital World also said in its SEC filing that it had denied a recent request by ARC managing member Patrick Orlando, who’s also the SPAC’s former chief executive officer, for additional compensation, leading to a breakdown in their relationship. In its Florida suit, Digital World

said that Orlando was largely to blame for previous delays in bringing the merger to fruition, including an earlier SEC probe.

“Mr. Orlando’s avarice, incompetence, and general refusal to act in DWAC’s best interests has caused extensive reputational harm, resulted in protracted delays in the merger process, and imposed massive costs and expenses on DWAC and its shareholders, and interfered with the merger,” Digital World said.

The cases are: United Atlantic Ventures v Digital World Acquisition Corp., 2024-0184, Delaware Court of Chancery; Arc Global Investments II LLC v Digital World Acquisition Corp., 2024-0186, Delaware Court of Chancery; and Digital World Acquisition Corp. v Arc Global Investments II LLC, 2024-CA-001061-NC, Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida.

--With assistance from **Bailey Lipschultz**.

To contact the reporter on this story:

Chris Dolmetsch in Federal Court in Manhattan at cdolmetsch@bloomberg.net

To contact the editors responsible for this story:

Anthony Lin at alin364@bloomberg.net

Anthony Aarons, Misyrlena Egkolfopoulou

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

Amazon Sued for Records Over Claims It Tricks Users to Buy Prime

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X9SC521C000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X9SC521C000000)

Litigation

An Amazon delivery truck.

Photographer: Darren Staples/Bloomberg

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0192

An investor is suing Amazon.com Inc. over claims that the e-commerce giant uses “dark patterns” to trick users into signing up for Amazon Prime subscriptions.

The lawsuit, filed Thursday, seeks internal files from Amazon to investigate allegations that corporate leaders pushed to retain a Prime enrollment process that they knew misled consumers into signing up for a recurring bill they didn’t want or need.

“Amazon and its leadership have knowingly duped millions of consumers” with “manipulative, coercive, or deceptive language and user-interface designs” and a “labyrinthine cancellation process,” according to the complaint in Delaware’s Chancery Court.

Amazon didn’t immediately respond to a request for comment Friday.

The lawsuit seeks documents from the company under a law giving shareholders broad access to corporate records if they credibly suspect wrongdoing. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The investor leading the case, DM Cohen Inc., is represented by Cooch & Taylor PA and Johnson Fistel LLP. Amazon hasn’t yet made a court appearance.

The case is DM Cohen Inc. v. Amazon.com Inc. , Del. Ch., No. 2024-0192, complaint filed 2/29/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

[Browse More Stories in Litigation](#)

Circuit revives class action against Google for cellular data misuse

DJ [dailyjournal.com/articles/377403-circuit-revives-class-action-against-google-for-cellular-data-misuse](https://www.dailyjournal.com/articles/377403-circuit-revives-class-action-against-google-for-cellular-data-misuse)

Mar. 1, 2024

The nationwide damages could be as much as \$2.7 billion.

Alphabet Inc. faces the possibility of paying billions of dollars in damages after a 9th U.S. Circuit Court of Appeals panel reversed a magistrate judge's order dismissing a nationwide class action by Android users who claim Google's technology appropriates their cellular data.

In an unpublished decision, the panel revived the conversion claim by a class of non-California plaintiffs, remanding it back to district court.

Meanwhile, in Santa Clara County Superior Court, a California class is awaiting trial in December in a parallel case.

The damages in the state case are estimated to range from \$136 million to \$452 million, according to plaintiffs' firm Korein Tillery LLC. The nationwide damages could be as much as six times that, up to \$2.7 billion.

The circuit panel, in an unsigned ruling, reversed a decision by U.S. Magistrate Judge Virginia K. DeMarchi of San Jose dismissing the conversion claims in the complaint.

"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 circuit judges wrote.

"Thus, the value of the converted cellular data is the measure of plaintiffs' resulting damages," added the panel, comprised of 9th Circuit Judges Eric D. Miller, Bridget S. Bade and Lawrence VanDyke, all appointees of President Donald Trump. *Taylor et al. v. Google LLC*, 22-16654 (9th Circ., filed Oct. 26, 2022).

The panel concluded that the plaintiffs' conversion claims had been pleaded properly and remanded the case to DeMarchi.

In the state court case, Santa Clara County Superior Court Judge Sunil R. Kulkarni rejected Google's motions to dismiss claims for conversion and quantum meruit and certified the class last year. *Csupo et al. v. Google LLC*, 19CV352557 (Santa Clara Co. Sup. Ct., filed

Aug. 9, 2019).

The federal and state lawsuits both involve allegations that Google uses the plaintiffs' cellular data allowances for their own benefit.

"While plaintiffs' Android devices were in their purses and pockets, and even while sitting seemingly idle on plaintiffs' nightstands as they slept, Google's Android technology appropriated technology paid for by plaintiffs – without plaintiffs' knowledge or consent – [to] send or receive all sorts of information," the state complaint stated.

In the 9th Circuit appeal, Marc A. Wallenstein, a Korein Tillery partner who represents the plaintiffs along with Bartlit Beck LLP, argued that DeMarchi was wrong when she ruled against their conversion claims.

"Unbeknownst to consumers, defendant Google consumes significant amounts of Android users' cellular data for its own benefit, including to closely monitor user behavior, in order to better enable Google to sell lucrative targeted advertisements," he wrote.

Cooley LLP partner Whitty Somvichian, who represents Google, countered that the plaintiffs "seek to manufacture liability against Google for unobtrusive, commonplace practices involving their cellular devices," including updated security protocols and Google applications such as Maps and Gmail.

"The contractual right to access a cellular network is not a recognized form of property and does not meet the basic requirements of property that can be subject to conversion," he added.

The 9th Circuit panel affirmed DeMarchi's decision rejecting the plaintiffs' quantum meruit claims.

Wallenstein declined to comment Thursday on the 9th Circuit ruling. Somvichian and a Google representative could not be reached.

#377403

Craig Anderson

Daily Journal Staff Writer
craig_anderson@dailyjournal.com

Ford Motor's Recall Renders Defective Car Part Class Action Moot

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X3N8CENS000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X3N8CENS000000)

Class Action

The steering wheel of a Ford Motor Co. F-150 Lightning electric vehicle on July 28, 2021.

Photographer: Al Drago/Bloomberg

Feb. 29, 2024, 12:23 PM PST

Tre'Vaughn Howard

- NHTSA's oversight of recall makes claims prudentially moot
- Claims also lack evidence of actual post-recall injuries

Ford Motor Company won its bid to dismiss a proposed class action after a federal court determined its recall properly addressed the fire risk from cracked fuel injectors in Escape and Bronco Sport model vehicles.

Twelve individuals in states from across the country sued Ford, alleging a defect that risked engine fires in the model year 2020-2023 Ford Escapes and 2021-2023 Ford Bronco Sports. The recall included updating the engine control software and installing a drain tube to redirect fuel onto the ground in case an injector cracked, along with a one-time fix for a cracked fuel injector or reimbursement to owners who already spent money on fixing it.

The US District Court for the Eastern District of Michigan said the recall rendered the 12 plaintiffs' case prudentially moot because the National Highway Safety Administration will ensure that Ford carries out the recall measures. The doctrine of prudential mootness applies when a plaintiff has a promise from a government branch to provide the relief sought, Judge Shalina D. Kumar wrote.

The plaintiffs argued they still have "actual or imminent" injury because the undisclosed defective fuel injectors at the time of sale still diminished their vehicles' value. Kumar rejected this argument since the plaintiffs didn't respond to Ford's assertion that a vehicle with a "failure-proof fuel injector is not part of each plaintiff's bargain" with the company.

Further, Kumar said plaintiff Kellie Gillian's experience of an engine fire four days after her vehicle had undergone Ford's recall repair didn't show post-recall injuries since she doesn't allege that a cracked fuel injector caused the fire.

“The court cannot properly make such an inference where the complaint shows that very few fuel injectors ever crack and other parts may cause fires in the class vehicles,” Kumar wrote. Also, Ford’s recall doesn’t promise to prevent all vehicles fires only to eliminate the safety risk of cracked fuel injectors causing engine fires, Kumar added.

Kumar also rejected the plaintiffs’ claim that their potential environmental and safety concerns about leaking fuel were post-recall injuries, finding that such problems were only hypothetical.

Hagens Berman Sobol Shapiro LLP and Miller Law Firm PC represented the plaintiffs.

BSP Law represented Ford.

The case is Letson v. Ford Motor Co. , E.D. Mich., No. 4:23-cv-10420, 2/28/24 .

To contact the reporter on this story: Tre’Vaughn Howard at
thoward@bloombergindustry.com

To contact the editor responsible for this story: Patrick L. Gregory at
pgregory@bloombergindustry.com

Browse More Stories in Class Action

© 2024 Bloomberg Industry Group, Inc.
All Rights Reserved

Class action alleges microplastics in Evian's 'natural' water

DJ [dailyjournal.com/articles/377392-class-action-alleges-microplastics-in-evian-s-natural-water](https://www.dailyjournal.com/articles/377392-class-action-alleges-microplastics-in-evian-s-natural-water)

Mar. 1, 2024

A 2022 report by the Australian non-profit Minderoo Foundation estimated corporate liabilities from plastics litigation to hit \$100 billion by 2030.

A 2022 report estimated corporate liabilities from plastics litigation to hit \$100 billion by 2030.
(New York Times News Service)

A class complaint in Los Angeles County Superior Court accuses the maker of Evian of falsely labeling its bottled water as "natural spring water" even though it allegedly contains microplastics.

The complaint, filed Tuesday on behalf of a Los Angeles resident, asserts two causes of action: violation of Sections 17500 and 17200 of California's Unfair Competition Law.

The plaintiff's attorneys, Todd M. Friedman and Adrian R. Bacon of the Law Offices of Todd M. Friedman seek to be certified class and sub-class counsel for all people in California who purchased the products at issue within the four years prior to the filing of the lawsuit.

"During the class period defendant sold Evian bottled water ... labeled, marketed, and advertised as "Natural Spring Water" but which contained microplastics," Friedman wrote in the complaint.

"Microplastics are not naturally occurring. Instead, microplastics are typically made from polypropylene, polyethylene, polystyrene, and other synthetic polymers. Microplastics can leach into the water from the bottle, and consumers are exposed to additives, processing aid, and unreacted monomers," Friedman continued. Michael Dotson v. Danone Waters of America LLC, 24STCV04928 (L.A. Super. Ct., filed Feb. 27, 2024).

Evian's parent company, Danone, did not respond to an emailed request for comment.

The complaint cites studies to build its case: A 2018 study performed at the Mason lab at State University of New York at Fredonia, Department of Geology & Environmental Sciences found that 93% of bottled water tested from 11 brands from 19 locations in nine countries were contaminated with microplastics. A 2019 study traced the origin of microplastics in bottled water to the bottle necks and bottle caps, which tend to degrade and release microplastics into the bottle by frequent opening and closing.

The abundant use of plastics in manufacturing and packaging means that microplastics are found seemingly everywhere on earth, from oceans to remote islands.

An international consensus has not been reached regarding the definition of microplastics as well as the size cutoff and materials involved, but in general, they are synthetic polymers that are 5 millimeters (about 0.2 inches) or smaller, according to the National Institutes of Health.

Microplastics, when airborne, can be inhaled. They can also be ingested through food, water and beverages. The accumulation of microplastics in the body can lead to cell and tissue damage, neurotoxicity and a host of reproductive problems, according to the medical research agency.

The Food and Drug Administration considers “natural” to mean that nothing artificial or synthetic has been added to the product.

A July 2022 post on the American Bar Association’s website says that the effects of microplastics ingestion remains an open question.

“Microplastics present the dual concerns of environmental cleanup and remedial considerations, as well as the specter of potential human health effects that could lead to future toxic tort exposure,” the post states.

“Rumblings that microplastics may be the next mass tort litigation may seem a bit premature, but environmental litigation is already afoot using traditional common law theories of public nuisance and violations under federal statutes,” it continues.

“When (perceived) risk exceeds regulation, litigation often fills the gap. This is partially due to public perception traveling faster than the science. Solutions are often complex, and therefore take longer than the public wants, creating a need for resolution,” it adds.

A 2022 report by the Australian non-profit Minderoo Foundation estimated corporate liabilities from plastics litigation to hit \$100 billion by 2030.

“The nature of plastics litigation is likely to differ between countries. In the U.S., with a well-funded plaintiff bar strengthened by an active market for third party litigation funding, damages claims are the paramount forms of redress,” the report states.

The ubiquity of plastic pollution makes it particularly complex: There are many actors involved in the supply chain; there are many points of exposure; and other environmental factors can be linked to similar harms.

The New York attorney general sued Pepsi in November alleging that its single-use plastic containers were polluting the Buffalo River, contaminating groundwater and harming wildlife.

Despite Inspector General Demand, EPA Refuses to Re-Do Review of Seresto Flea and Tick Collar Implicated in Thousands of Pet Deaths

 nakedcapitalism.com/2024/03/despite-inspector-general-demand-epa-refuses-to-re-do-review-of-seresto-flea-and-tick-collar-implicated-in-thousands-of-pet-deaths.html

March 1, 2024

Yves here. We are running this post as a two-fer: a public service announcement of sorts, as well as a vignette of regulatory corruption. The post below discusses Seresto tick collars, which have been the subject of not mere thousands but over 100,000 FDA incident reports, including over 3,000 pet deaths. Recall that the Chinese melamine pet food scandal started with reports from what Wikipedia calls veterinary organization of a mere 100 deaths, although admittedly Canadian importer Menu Foods confirmed the toxicity in test animals and issued a recall. Here, the FDA looks unwilling to take on Seresto, even with the Office of the Inspector General finding the FDA review to be deficient and directing the agency to perform a new, more rigorous examination.

This smells of the FDA trying to protect a producer rather than consumers and users. This sort of behavior is pervasive in bank regulation, where too often the authorities bend over backwards to protect banks rather than make them shape up. And too often that extends to coddling incompetent and/or corrupt bank executives.

But banks really are essential to the economy, like it or not. One bank failing or being put down by regulators, even if entirely warranted, can set off runs in similar-looking banks even if they are in better condition. And regulators want banks to be profitable so they can put enough aside for loss reserves and increases in capital.

So bank regulators have conflicting priorities and lack good theories and guidelines as to what “adequately profitable” might amount to, which also makes them easy marks for industry blather like, “If we aren’t making pretty good dough, we can’t pay enough to keep that oh so important ‘talent’ paid well enough to stick around.”

In other words, bank regulators at least have a colorable excuse for their intellectual capture. The FDA has none. So what is going on here?

By Johnathan Hettinger. Originally published at The New Lede

The Environmental Protection Agency (EPA) has not properly reviewed the safety of a popular flea and tick collar that has been linked to more than 3,000 pet deaths, according to the agency’s top watchdog.

The EPA's Office of Inspector General (OIG), an independent office in the agency tasked with holding the agency accountable, published a report on Thursday calling on the EPA to make a proper, science-based decision on the Seresto product and improve its processes for making safety determinations for pet products..

The report found that the agency has not conducted or published animal risk assessments as it promised to do, and continues to rely on an inadequate 1998 companion animal safety study.

Seresto pet collars work by releasing two active ingredients, the pesticides flumethrin and imidacloprid. The OIG found that the EPA has failed to properly review those active ingredients, including in a new analysis last year.

Pet Deaths

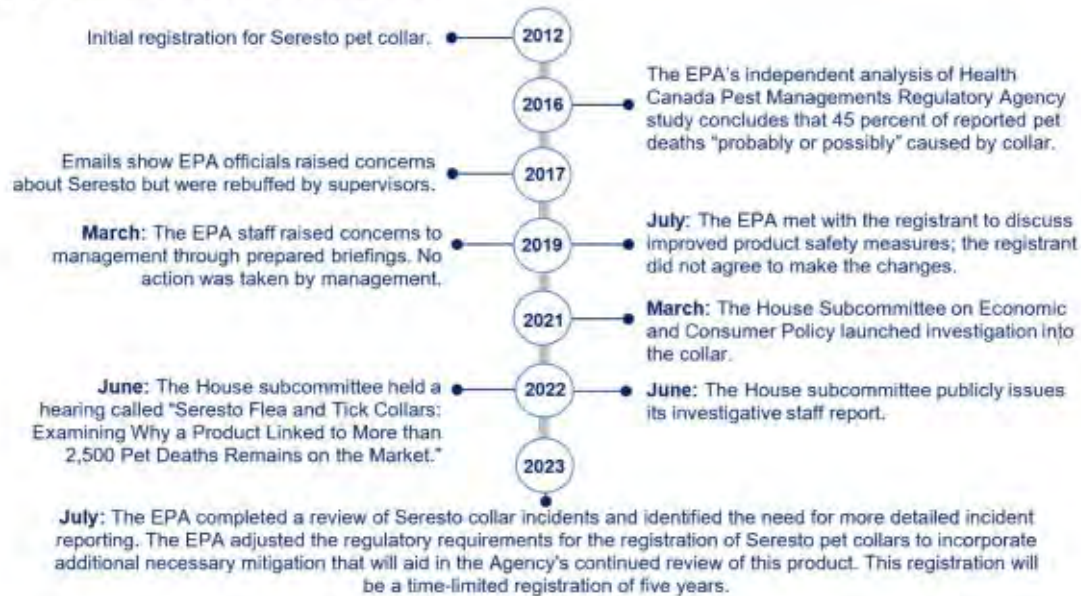
At a Congressional hearing in June 2022, pet owner Faye Hemsley, of Pennsylvania reported that her dog, Tigger, began to suffer from neurological issues, including his head drooping and a loss of energy, before dying five days after she first put the Seresto collar on him.

Thomas Maiorino, of New Jersey, also testified at the hearing that his family's dog, Rooney, suffered neurological issues and eventually a seizure, after wearing Seresto. They eventually decided to put the dog down. Many other pet owners reported neurological issues in their animals, including seizures, as well as pet deaths.

The collars have been the subject of more than 105,354 incident reports, including the 3,000 pet deaths, more than any other EPA regulated product in history, according to the EPA's incident database. From 2012 through 2022, the EPA received more than 100,000 incident reports related to the collars, including more than 2,500 pet death reports and nearly 900 reports of human pesticide incidents related to the Seresto pet collars.

"The EPA's response to reported pesticide incidents involving Seresto pet collars has not provided assurance that the collars can still be used without posing unreasonable adverse effects to the environment, including to pets," the OIG report states.

The collar has been under sharp scrutiny in recent years, after USA Today and Investigate Midwest published an investigation spotlighting the high number of incident reports about Seresto. The US House of Representatives Committee on Oversight and Government Reform, which is now the Committee on Oversight and Accountability, Subcommittee on Economic and Consumer Policy, launched an investigation and subsequently determined that the EPA knew for years that Seresto was linked to a high number of pet deaths but took no action and recommending that the EPA take it off market.

Figure 1: Seresto pet collar timeline

Source: OIG analysis of EPA information. (EPA OIG image)

The OIG report recommends that the EPA issue a new decision on the chemicals, but the agency disagrees. In a response to the OIG, Michal Freedhoff, the EPA's assistant administrator for the Office of Chemical Safety and Pollution Prevention, wrote that its 2023 investigation satisfied requirements under the Federal Insecticide, Fungicide and Rodenticide Act, which is the law regulating pesticides.

Freedhoff said there was a lack of evidence to tie the pesticides in the collars to the pet deaths.

"In many of the death-related incidents, critical details of the incident were often missing, preventing the Agency from determining the cause of the death," Freedhoff's response states.

"The only reported deaths that were found to be 'probably' or 'definitely' related to Seresto product use were associated with mechanical strangulation or trauma caused by the collar, often associated with a failure of the release mechanism. In addition, the rate of deaths reported for Seresto was similar to that for other pet products reviewed."

But the OIG found that the EPA's July 2023 investigation was fundamentally flawed and said the agency needs to improve assessments of adverse effects to pet health and update inadequate animal safety guidelines to align with international standards.

Lacking Regulatory Rigor EPA proposed transferring all regulation of pet products to the Food and Drug Administration.

The OIG also recommended the EPA implement standard operating procedures for how to conduct domestic risk assessments, measurable standards to determine when a product poses unreasonable adverse effects. The OIG also recommended EPA implement better data requirements both pre-approval and for incident reporting.

“EPA product registration signals to the public that this product has undergone rigorous scrutiny and is deemed safe for public use,” EPA Inspector General Sean W. O’Donnell said in a press release. “Registration reviews must be conducted at the highest standard to safeguard public trust and protect human health, pet health, and the environment.”

Ninth Circuit Denies DOJ Bid to Freeze Youth Climate Lawsuit

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XEI27DS8000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XEI27DS8000000)

Litigation

Kelsey Juliana, a lead plaintiff in *Juliana v. United States*, speaks during a news conference outside the Supreme Court in Washington, D.C., U.S., on Wednesday, Sept. 18, 2019.

Photographer: Al Drago/Bloomberg

- Panel turns down request for stay in *Juliana*
- Mandamus petition is still awaiting a decision

The Ninth Circuit won't temporarily pause a national youth climate lawsuit while the Justice Department works to get it dismissed.

The panel denied the Biden administration's stay request in an order handed down on Thursday. The government is trying to quash *Juliana v. US* through a Feb. 2 writ of mandamus petition, which claims that a lower Oregon court was wrong to allow the case to proceed to trial.

Justice Department attorneys pushed for a stay in efforts to have the lawsuit paused at the US District Court for the District of Oregon while the mandamus petition moved forward in the US Court of Appeals for the Ninth Circuit. That petition will be "referred to the next available motions panel," according to Thursday's order.

Judges Richard R. Clifton, Consuelo M. Callahan, and Holly A. Thomas were on the panel.

The 21 youth plaintiffs of *Juliana* sued the government in 2015, alleging that their constitutional rights to life were violated through federal fossil fuel promotion. The case was dismissed by the Ninth Circuit in 2020, but resurrected and eventually greenlit for trial under an amended complaint at Oregon district court.

The case is *United States v. U.S. Dist. Court for the Dist. of Or., Eugene*, 9th Cir., No. 24-684, Order 2/29/24.

To contact the reporter on this story: Jennifer Hijazi in Washington at jhijazi@bloombergindustry.com

To contact the editors responsible for this story: Maya Earls at mearls@bloomberglaw.com; JoVona Taylor at jtaylor@bloombergindustry.com

Perdue, Sanderson to settle with distributors in chicken price-fixing cases

 [reuters.com/legal/litigation/perdue-sanderson-settle-with-distributors-chicken-price-fixing-cases-2024-03-01](https://www.reuters.com/legal/litigation/perdue-sanderson-settle-with-distributors-chicken-price-fixing-cases-2024-03-01)

Mike Scarcella

A truck laden with chicken leg quarters leaves Sanderson Farms poultry processing plant enroute to Mexico, in Palestine, Texas, U.S., January 17, 2018. REUTERS/Jason Lange
Purchase Licensing Rights , opens new tab

March 1 (Reuters) - Perdue, Sanderson and other chicken suppliers have agreed to settle claims that they conspired for years to fix poultry prices, costing food distributors millions of dollars in overcharges.

Plaintiffs' lawyers representing a class action of direct purchasers of chicken said in a court filing , opens new tab on Thursday that they will ask a Chicago federal judge to preliminary approve the new round of settlements.

The terms of the agreements were not immediately disclosed. The companies have denied any wrongdoing.

Sanderson and lawyers for the plaintiffs declined to comment on the settlements. Perdue did not immediately respond to a request for comment.

Perdue and other defendants included in Thursday's settlement filing won a pre-trial ruling June knocking out the plaintiffs' claims against them. Sanderson, which merged last year to form Oakwood, Georgia-based Wayne-Sanderson, in October prevailed at the first trial in the chicken price-fixing litigation. The plaintiffs had been contesting both results.

Consumers, direct purchasers of chicken and commercial plaintiffs such as restaurants and grocery stores in the coordinated cases accused the defendants of conspiring for years to keep prices artificially high by curbing production and sharing nonpublic data about supply and demand.

The plaintiffs have inked more than \$284 million in prior settlements with other chicken producers.

The direct-purchaser plaintiffs include Maplevale Farms in New York, Pennsylvania-based John Gross & Company and New Jersey's Ferraro Foods.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

Among some of the food distributors' earlier settlements, Tyson agreed in 2021 to pay \$80 million to the direct purchaser plaintiffs. Pilgrim's Pride that year settled for \$75 million.

In 2023, Koch resolved claims against it for \$47.5 million, and House of Raeford Farms paid \$27.5 million.

The settling companies denied any liability.

The case is In re: Broiler Chicken Antitrust Litigation, U.S. District Court for the Northern District of Illinois, No. 1:16-cv-08637.

Read more:

Jury sides with chicken producer Sanderson in US price-fixing trial

US chicken producers ordered to face price-fixing claims

Chicken price-fixing plaintiffs can proceed as classes

Get the latest legal news of the day delivered straight to your inbox with The Afternoon Docket [↗](#), opens new tab.

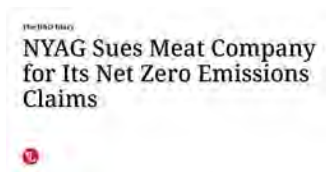
Reporting by Mike Scarcella

Read Next / Editor's Picks

NYAG Sues Meat Company for Its Net Zero Emissions Claims

K [dandodiary.com/2024/02/articles/esg/nyag-sues-meat-company-for-its-net-zero-emissions-claims](https://www.dandodiary.com/2024/02/articles/esg/nyag-sues-meat-company-for-its-net-zero-emissions-claims)

February 29, 2024



By Kevin LaCroix on February 29, 2024

Posted in ESG



It is not news that ESG has become a battleground issue, with prominent ESG efforts now facing an anti-ESG backlash. And while in the recent past institutional investors and advocacy groups tried to push publicly traded companies to establish their ESG credentials, the

ESG-related litigation (such as it has been, so far at least) has primarily been filed not against ESG laggards, but rather against companies that have tried to promote their sustainability efforts and other climate-friendly measures.

In the latest example of litigation against a company in connection with its efforts to promote its ESG qualifications, the New York Attorney General, Letitia James has filed a fraud lawsuit in New York state court against the U.S. subsidiary of JBS, a Brazil-based meat and poultry producer, alleging that its sustainability claims and its publicized goal of achieving net zero greenhouse gas emissions by 2040 misled consumers. A copy of the New York Attorney General's February 28, 2024, press release about the lawsuit can be found [here](#). The NYAG's February 28, 2024, complaint can be found [here](#).

Background

JBS USA Food Company and JBS USA Food Company Holdings are U.S. operations of the Sao Paulo, Brazil based JBS, S.A. (referred to collectively in the complaint as the JBS Group). The U.S. operations were built in part through acquisitions over the past two decades, including of Swift Foods and a majority stake in the U.S.'s second-largest poultry producer, Pilgrim's Pride. The JBS Group is the world's largest beef producer, and its U.S. operations are responsible for 50% of the group's revenue.

Beginning as early as 2015, the complaint alleges, the JBS Group has pursued to a program to publicize the company's supposed sustainability efforts. The complaint alleges that this effort reflects the company's recognition, as evidenced by the company's own public

statements, that consumers attach value to companies' environmental reputations and that consumers are even willing to pay more for products of companies they perceive as environmentally friendly.

As part of this campaign, the company has made public statements and paid for advertisements that make several sustainability claims on behalf of the company. The NYAG alleges that the company has publicly made a commitment to reduce its greenhouse gases and to achieve net zero carbon emissions by 2040.

However, the NYAG alleges, the company has "no viable commitment" to meet its Net Zero by 2040 commitment. The NYAG alleges further that the JBS Group made the Net Zero commitment "without having calculated the vast majority of greenhouse emissions from its supply chain," which includes the fact that the company's emissions are linked to deforestation in the Amazon basin.

The NYAG also alleges that even if the JBS Group had a net zero plan, JBS, whose "estimated greenhouse gases" were in 2021 greater than that of the entire country of Ireland, "could not feasibly meet its pledge because there are no proven agricultural practices to reduce its greenhouse gases to zero at the JBS Group's current scale."

In a recent proceeding of the National Advertising Division (NAD) of the Better Business Bureau, the NYAG alleges, the NAD allegedly determined that the JBS Group's net zero claims were "unsubstantiated and misleading to consumers" and "recommended that the JBS Group stop making the claim." The NAD's appellate body allegedly upheld the decision.

The Lawsuit

On February 28, 2024, the NYAG filed a lawsuit in the New York (New York County) Supreme Court against JBS USA Food Company and JBS USA Food Company Holdings. The complaint alleges that the company "repeatedly and persistently" made "unsubstantiated and misleading environmental marketing claims," doing so "even after the NAD and the Review Board found such claims to be unsubstantiated" and recommended that the JBS Group stop making them.

The NYAG brought this action to enjoin JBS USA from violating New York's consumer protection statutes, General Business Law Sections 349 and 350, and pursuant to Executive Law Section 63(12) to stop JBS's "fraudulent and illegal environmental marketing practices."

The NYAG also seeks an order awarding civil penalties for the alleged statutory violations; requiring disgorgement of all "profits and ill-gotten gains" realized by JBS's violation of New York's consumer protection statutes; and requiring an audit of JBS's compliance with New York's consumer protection statutes.

Discussion

Some may wonder if JBS has supposedly been engaging in these allegedly fraudulent practices since 2015, why the NYAG is just bringing these claims now. One could surmise that the NYAG only acted after the NAD proceedings and their appeal, in which it was found that the JBS Group was making “unsubstantiated and misleading” claims to consumers. One could also surmise that the timing has something to do with the JBS Group’s plan to complete an IPO on the NYSE. (The JBS Group, whose ADRs are already traded in the U.S., initially filed for an IPO in 2023, but because of market conditions the planned offering was postponed until this year.) Indeed, the *Wall Street Journal* expressly noted that the lawsuit “comes as environmentalists have joined to oppose the company’s planned listing on the New York Stock Exchange.”

It might also be questioned about whether or not as a general matter sustainability claims can actually amount to consumer fraud. The NYAG anticipated this concern by arguing that the JBS Group launched its sustainability claims in part because of its publicly stated awareness that consumers will not only prefer to choose the products of a company they perceive as environmentally friendly, they will even pay more for its product — thus, it will be argued, the incentive to defraud consumers about sustainability issues.

Moreover, the NYAG is not relying just on New York’s consumer protection statutes. She is also relying on New York’s Executive Law Section 63(12). If that law sounds familiar, it is because it is the same law on which the NYAG recently relied in pursuing her business fraud action against Donald Trump and the Trump Organization. The law gives the NYAG the power to seek to enjoin any person who engages “repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business.” In other words, the NYAG’s lawsuit is not only dependent on the supposed consumer fraud allegations. This is a fraud lawsuit of a particular kind – that is, a New York law fraud lawsuit.

It is worth highlighting the fact that this lawsuit, like so many of the prior ESG-related lawsuits, have involved allegations that the defendants engaged in so-called “greenwashing” – that is, a marketing claim that makes false or misleading claims about a company’s environmental efforts. There is now a long line of civil suits and SEC enforcement actions based on greenwashing allegations (as illustrated, here). A greenwashing-type claim like, for example, this one, embodies the principle I have discussed numerous times on this blog, that is, that many or even most of the ESG-related lawsuits that have been filed so have not been filed against ESG laggards that are paying insufficient attention to ESG matters, but instead have been filed against companies that, for whatever reason, have tried to establish their ESG credential and to portray themselves as good ESG citizens (as discussed further, here).

The problems that have caught up many companies with respect to their claimed sustainability credentials have caused other companies to just go radio-silent on ESG related issues – a practice that commentators have referred to as “greenhushing,” about which refer here.

As is the case here, often the companies that wind up having problems find themselves hung up on the very aspirational goals or targets they set for themselves. Here, the company’s commitment to net zero emissions sounds like a worthy objective; the company might have been better served sticking to statements of what the company has done so far to reduce carbon emissions, or what specific steps the company has put in process to try to achieve reduced emissions, rather than setting lofty aspirational goals.

As I have said in the past when trying to point out the reality of ESG-related litigation so far, the reason these litigation characteristics matter is because without a recognition about what kind of lawsuits are actually being filed, the ESG-risk conversation can be focused on risks and concerns that are not just beside the point, but actually irrelevant.

This lawsuit has only just been filed and it remains to be seen how it will fare. I will say that I was struck reading this complaint by the fact that the company has not yet failed to meet the aspirational goals it has set. The NYAG might think there is no way that the JBS Group can meet its Net Zero 2040 goal – but doesn’t it seem wildly premature now to try to ding the company for something that it will either do or fail to do 16 years from now?

The other thought I had about this lawsuit is that it is calculated to reach a particular audience – say, a certain kind of New York voter that is predisposed to think ill of meat producers, and their products, and even of the very practice of eating meat in general. This lawsuit wouldn’t appeal to a significant swath of the population in, say, Texas, or even here in Ohio where I am based, but it is straight from the East Side Manhattan Choir Hymnal in New York.

If the JBS Group sounds vaguely familiar, that is because JBS previously was the target of a bribery-related securities class action lawsuit in the U.S., as discussed here. (JBS has Level I ADRs that trade OTC in the U.S.). The case was one of a host of bribery-related securities suits filed several years ago against South and Central American companies. The JBS lawsuit ultimately settled – prior to a ruling on the defendants’ motion to dismiss – for \$5.467 million.

The SEC is Watching ESG Disclosures, Too: In a February 23, 2024 speech at an Ohio State Law Journal symposium, SEC Enforcement Director Gurbir S. Grewal emphasized that the SEC is scrutinizing companies’ ESG disclosures with a particular concern whether the disclosures are truthful.

Grewal said “ESG issues are increasingly material to investors. It is therefore crucial that when companies speak about the host of issues that may fall under the rubric of ESG – whether climate, social, corporate governance or others – they do so in a way that’s not materially false or misleading.” Grewal raised concerns that investor interest in ESG may tempt issuers to make false statements about their ESG compliance. Grewal said the SEC will be looking out for misleading disclosures on ESG matters and detailed for the audience a number of SEC enforcement actions showing the SEC’s focus on the truthfulness of ESG-related claims.

The Largest FCPA Enforcement Actions Involving Healthcare Related Companies

 fcpaprofessor.com/largest-fcpa-enforcement-actions-involving-healthcare-related-companies-3

March 1, 2024

In large part due to the expansive FCPA enforcement theory that physicians, lab personnel and others associated with most foreign healthcare systems are “foreign officials” under the FCPA (first brought to the FCPA context in 2002 – see [here](#) for the prior post), healthcare related companies have resolved numerous FCPA enforcement actions.

This post highlights the twenty largest FCPA enforcement actions (as measured by settlement amount) involving healthcare related companies (broadly speaking pharmaceutical, medical device, life sciences, and diagnostic companies as well as those selling health related products).

Company	Amount	Year
1. Teva Pharmaceutical	\$519 million (DOJ – \$283 million) (SEC – \$236 million)	2016
2. Novartis	\$347 million (DOJ – \$234 million) (SEC – \$113 million)	2020
3. Fresenius Medical Care	\$231.7 million (DOJ – \$84.7 million) (SEC – \$147 million)	2019
4. Avon	\$135 million (DOJ – \$67.6 million) (SEC – \$67.4 million)	2014

5.	Johnson & Johnson	\$70 million (DOJ – \$21 million) (SEC – \$49 million)	2011
6.	Phillips	\$62.2 million (SEC – \$62.2 million)	2023
7.	Pfizer / Wyeth	\$60 million (DOJ – \$15 million) (SEC – \$45 million)	2012
8.	Stericycle	\$59 million (DOJ – \$35 million) (SEC – \$24 million)	2022
9.	Bio-Rad Laboratories	\$55 million (DOJ – \$14.5 million) (SEC – \$40.5 million)	2014
10.	Zimmer Biomet	\$30.4 million (DOJ – \$17.4 million) (SEC – \$13 million)	2017
11.	Eli Lilly	\$29.4 million (SEC – \$29.4 million)	2012
12.	Sanofi	\$25.2 million (SEC – \$25.2 million)	2018
13.	Novartis	\$25 million (SEC – \$25 million)	2016

14.	Biomet	\$22.8 million (DOJ – \$17.3 million) (SEC – \$5.5 million)	2012
15.	Olympus Latin America	\$22.8 million (DOJ – \$22.8 million)	2016
16.	Smith & Nephew	\$22.2 million (DOJ – \$16.8 million) (SEC – \$5.4 million)	2012
17.	Alexion Pharmaceuticals	21.5 million (SEC – 21.5 million)	2020
18.	GlaxoSmithKline	\$20 million (SEC – \$20 million)	2016
19.	Analogic / BK Medical	\$14.9 million (DOJ – \$3.4 million) (SEC – \$11.5 million)	2016
20.	Bristol-Myers	\$14.7 million (SEC – \$14.7 million)	2015

Yost urges regulator to curtail queries into nuclear bailout scandal

B [toledoblade.com/local/politics/2024/03/01/yost-urges-regulator-to-curtail-queries-into-nuclear-bailout-scandal/stories/20240301102](https://www.toledoblade.com/local/politics/2024/03/01/yost-urges-regulator-to-curtail-queries-into-nuclear-bailout-scandal/stories/20240301102)



Jim Provance

The Blade

jprovance@theblade.com

Mar 1, 2024

8:49 AM

COLUMBUS — A week after Ohio's utilities regulator resumed its shelved investigations into the bribery scandal surrounding a \$1.3 billion bailout of two nuclear power plants, the state's top lawyer has asked it to slow down.

In a letter dated Thursday, Attorney General Dave Yost's office suggested such an investigation could harm the state's recently filed case against the former chairman of the Public Utilities Commission of Ohio and two fired FirstEnergy Corp. executives.

"If the PUCO were to enforce subpoenas requiring Samuel Randazzo, Charles Jones, or Michael Dowling to produce documents or testify regarding any of the transactions at issue in ongoing criminal proceedings, these individuals would claim transactional immunity [under Ohio law]," wrote Carol O'Brien, deputy attorney general for law enforcement.

"Such a claim could then result in the dismissal of criminal charges," she said.

She pointed to a law stating that while no one can refuse to cooperate in a PUCO investigation on Fifth Amendment grounds that their testimony could incriminate them. But with that comes the promise that no one would be subsequently prosecuted or subjected to forfeiture based on the information they provide.

Stopping short of asking for another full suspension of the PUCO's investigation, Ms. O'Brien urged the PUCO to refrain from the still critical element of enforcing subpoenas requiring these three defendants to testify or produce documents.

Mr. Randazzo faces separate bribery, embezzlement, and related charges in federal and state courts for allegedly taking a \$4.3 million bribe from the Akron-based utility in exchange for his help in passing House Bill 6, the bailout law, and for steering PUCO decisions to benefit FirstEnergy.

The former PUCO chairman was indicted in U.S. District Court in December and earlier this month in Summit County, where FirstEnergy is based.

Mr. Jones and Mr. Dowling are accused of steering the scheme as FirstEnergy's CEO and vice president of external affairs, respectively. The corporation later fired both men and paid a \$230 million fine as it blamed them for the \$61 million scheme to pass House Bill 6.

The state charges are the first filed anywhere against any decision-maker at FirstEnergy.

Mr. Randazzo was appointed PUCO chairman in 2019 by Gov. Mike DeWine despite his FirstEnergy connections. He resigned a year later after the FBI searched his Columbus home and FirstEnergy admitted in a financial filing that what was initially described as a \$4.3 million settlement of a Randazzo consulting contract was actually a bribe.

Mr. Randazzo, Mr. Jones, and Mr. Dowling have pleaded not guilty to all charges. They are now wearing GPS ankle monitoring bracelets and have had their travels restricted to Ohio pending trial.

The PUCO had placed its own four investigations on hold at the request of the U.S. Attorney's office that has already won the racketeering convictions of former House Speaker Larry Householder, sentenced to 20 years in prison, and former Ohio Republican Party Chairman Matt Borges, sentenced to five years.

Two other associates pleaded guilty to racketeering charges and are awaiting sentencing.

But the U.S. Attorney's requested stay expired last week, and the commission announced the investigations would resume.

"As we have stated in the past, the commission will follow the facts wherever they lead, taking care to not interfere with the ongoing criminal investigations," PUCO spokesman Brittany Waugaman said Friday. "The commission will issue a ruling on responding to Attorney General Yost's letter as soon as possible."

Ohio Consumers' Counsel Maureen Willis, who had been pushing for such investigations, now said the PUCO should not proceed.

"The Ohio Attorney General's request to curtail discovery is a game changer," she said. "While OCC will not give up on its fight for answers for consumers, for now it's time to pull back to avoid interfering with the active criminal cases."

Ohio AG Dave Yost makes a big save and blocks a get-out-of-jail-free card for former FirstEnergy execs: Today in Ohio

 [cleveland.com/news/2024/03/ohio-ag-dave-yost-makes-a-big-save-and-blocks-a-get-out-of-jail-free-card-for-former-firstenergy-execs-today-in-ohio.html](https://www.cleveland.com/news/2024/03/ohio-ag-dave-yost-makes-a-big-save-and-blocks-a-get-out-of-jail-free-card-for-former-firstenergy-execs-today-in-ohio.html)

March 1, 2024

1. News

- Updated: Mar. 01, 2024, 11:01 a.m.]
- Published: Mar. 01, 2024, 10:50 a.m.

Today in Ohio, the daily news podcast of cleveland.com and The Plain Dealer.

By

Laura Johnston, cleveland.com

CLEVELAND, Ohio -- The Ohio Attorney General's office is warning the Public Utilities Commission of Ohio that their investigations into FirstEnergy's alleged bribery schemes could imperil the criminal investigations.

We're talking about Dave Yost's great save on Today in Ohio.

Listen online here.

Editor Chris Quinn hosts our daily half-hour news podcast, with editorial board member Lisa Garvin, impact editor Leila Atassi and content director Laura Johnston.

You've been sending Chris lots of thoughts and suggestions on our from-the-newsroom text account, in which he shares what we're thinking about at cleveland.com. You can sign up here: <https://joinsubtext.com/chrisquinn>.

You can now join the conversation. Call 833-648-6329 (833-OHTODAY) if you'd like to leave a message we can play on the podcast.

Here's what else we're asking about today:

This story is just too great not to start a Friday episode. We talked about leaplings yesterday – the people who were born on Feb. 29 in Leap years – but today we have the most odds-defying leapling story of all time. What are the details?

The Lordstown Motors story has been a long journey, always carrying a cloud of falsity, and now we have clear evidence that much of it was a sham. What did the Securities and Exchange Commission announce Thursday that makes clear Lordstown Motors was dishonest in its claims as it tried to lure investors?

Voter turnout in August and November 2023 was much higher than predicted. Has the trend continued in the early voting period for the March 19 primary?

It's not \$2 billion, but airlines have stepped up to pay for a nice piece of Cleveland's big airport plans. What did the airlines agree to on the path to a \$2 billion overhaul of Cleveland Hopkins International Airport?

What is going on with the city department that collects fees from people who use the city's EMS ambulance services? Why has collection dropped so much, and why is City Council impeding efforts to change the trend?

Donald Trump killed a clean air rule affecting Ohio when he was president, something the EPA fullied carried out after he left office. Why is the EPA reinstating the rule now?

January of 2023, the first month of legal sports betting in Ohio, saw the sports books take in a staggering \$1.1 billion. Has the betting fever tempered? How much did the sports books take in in January of 2024?

Connie Schultz is the Pulitzer-Prize winning former columnist for The Plain Dealer who has written books in recent years. She just wrote her first children's story, and it sounds delightful. What is it about, and how did it come to be?

A whole bunch of female artists are among the nominees for the latest Rock Hall induction class, and the museum has an exhibit starting to celebrate revolutionary women in music. What's the theme about, and who will be at an edition of Rock Hall Nights to launch the exhibit?

We have an Apple podcasts channel exclusively for this podcast. [Subscribe here.](#)

Do you get your podcasts on Spotify? [Find us here.](#)

RadioPublic is another popular podcast vehicle, and we are [here.](#)

On Google Podcasts, we are [here.](#)

On PodParadise, find us [here.](#)

And on PlayerFM, we are [here.](#)

Read the automated transcript below. Because it's a computer-generated transcript, it contains many errors and misspellings.

Chris (00:01.543)

We thought we knew what we'd be talking about today at five o'clock yesterday. And then the whole world changed. The news stories that popped last night were a week's worth of news as Laura said later. So we got plenty to discuss on today in Ohio, the news podcast discussion from cleveland.com and the plane dealer. I'm Chris Quinn. I'm here with Lisa Garvin, Laura Johnston, and Leila Tasi on this, the first day of March. Laura Davios, the Ohio attorney general might've had the

biggest save of the year in catching something involving the investigation for HB6. He might have stopped the people who were indicted recently from getting out of jail free. What happened?

laura (00:43.328)

Yeah, this is pretty incredible. And it was one of those stories that dropped late Thursday. And we recently reported that the Public Utilities Commission of Ohio was going to start up their investigation again into House Bill six into Sam Randazzo, their former chief and to the first energy executives who were recently indicted in Summit County. And this seemed like, OK, the Southern District federal prosecutor's office had lifted any.

Lisa (01:05.038)

This seems like, okay, southern business.

laura (01:12.06)

restriction on investigation. So let's go do this. But what Adios sent last night basically says, hey, I found this spot in the Ohio Revised Code in the law that says if you force someone to testify, you subpoena them and produce documents, then they will have what is called transactional immunity. And you wouldn't be able to prosecute them for whatever they said and whatever they produced in the PUCO hearing. So he says...

that if PUCL were to enforce the subpoenas requiring Sam Rendauso, Chuck Jones, or Michael Dowling to testify or produce these documents, they could get off. There's criminal proceedings.

Lisa (01:49.362)

they could get off. There's criminal proceedings. Yeah, this would have been a disaster. Because everybody's been waiting for these guys to come out. They undid this bribery, the agency utilities are admitted to it. And the minute they would be brought in to be questioned, they don't, can't charge them anymore. And Yoast caught that. The conspiracy theorist in me wonders because the PUCO has been so

Chris (01:53.511)

Yeah, this would have been a disaster because everybody's been waiting for these guys to be held to account. They funded this bribery scheme, which the utility has already admitted to. And the minute they would be brought in to be questioned, they don't, you can't charge them anymore. And Yoast caught that. The conspiracy theorist in me wonders because the PUCO has been so much in the pocket of first energy of Chuck Jones, of Dowling. You think they did that intentionally?

laura (02:20.064)

I mean, I wouldn't put it past them. We've been waiting for three and a half years for these indictments. They finally come not from federal court, but from state court. So I don't know what's going on in the background for all of these things. The way that this is happening is weird.

Chris (02:35.635)

But think about it, right? They have all worked cozily together. The money that changed hands between all these guys. I mean, Randazzo was the head of the PUCO. And the minute the PUCO interviewed him, they'd all get out of jail free. Chuck Jones and Dowling would have loved being able to appear before him to talk because then they don't wear their orange jumpsuits. So I don't know. I mean, shouldn't the PUCO know this?

laura (02:41.532)

Mm-hmm.

Right.

laura (02:55.87)

Right?

Chris (03:00.547)

If you're the PUCO, isn't this your business? Aren't you supposed to be expert on the law pertaining to you? How could they have screwed this up so badly? Which raises the question, were they in bed with them? And Yoast did the save. Way to go, Dave Yoast.

laura (03:15.072)

Well, I know I love his language of this letter that says the language of RC 4903 appears to grant transactional immunity. Like this is the state attorney general and he's not 100% clear on this. So, you know, he's just acting what he says out of caution. And he says they can keep investigating this not to subpoena those three people. But you're right. It feels like this could have just skirted under and then too late we would have been like.

Oh my gosh, the biggest fish in this investigation just swam away.

Chris (03:46.959)

Well, when does the PUCL ever be accountable? I mean, they haven't been accountable ever throughout this thing. They are behind the biggest scam that we've ever seen. Their top guy was the one getting bribes, right? So they should be accountable. Somebody should ask them, how could you have not known this? How could you endanger the criminal prosecution of your former chairman?

Lisa (03:54.055)

They are behind the big-ass scam, the other two. They're not the guys. They're not the guys, right? So they should be handled. So you should ask them, how could you right now know this? And if you're not, the danger is a little far from you. It's just over the table. Obviously, we're talking about a few things in the fifth of the case, but there were so many times when you were the best neighbor about those incitement that there was chaos back and forth about allowing rape in people's sex. Got it?

laura (04:02.844)

Right. And it's not.

laura (04:09.072)

Obviously we're talking about HB6 in this specific case, but there were so many times when we looked at that Sam Randazzo indictment that there was payoffs back and forth about allowing rate increases that got sent on to all of Ohioans paying these bills so that Randazzo, according to the prosecutors, could get a big paycheck. This is very focused on this one investigation, first energy, \$60 million in bribes.

This was happening over and over and over again. So when you are being suspicious of the PUCO, I totally get it. They've never been sticking up for Ohioans. They are in the pocket of all the different gas and oil companies and energy companies in the state. And they are fishy. But we're stopping it right now. The statement from the Ohio Consumers Council said, we

cannot in good hunches push forward on this investigation. The OCC is not giving up on spite for answers for consumers, but you gotta pull back to avoid interfering with the active criminal cases.

Lisa (04:50.135)

at energy. They are fishing. But we're stopping it right now.

Chris (04:53.147)

Yeah.

Chris (05:06.675)

I wish we would get some kind of constitutional amendment going that just got rid of the PUCO and created a citizen-based agency to see through this. We all pay huge amounts of money to utilities. This commission is supposed to represent us, and they're not representing us. They're an abject failure every time you turn the page, and this is the latest example. You just wonder if you got into their email if they knew about this.

laura (05:24.029)

Now.

laura (05:36.148)

Right.

Chris (05:36.255)

If there was some paper trail that shows that our PUCO continues to do the wrong thing, this should not have come this close. It shouldn't take the attorney general to be like, whoa, what are you doing? He's the only one that's doing the right thing. He's the one that brought them to justice. You're listening to Today in Ohio. The Lordstown Motor story has been a long journey, always carrying a big cloud about it. And now we have clear evidence that much of it was a sham. Surprise, surprise.

Leila, what did the Securities and Exchange Commission announce Thursday that makes clear Lordstown Motors was dishonest in its claims as it tried to lure investors?

Leila (06:17.231)

The SEC is charging Lordstown Motors with misleading investors and customers about its all-electric truck, the Endurance. In a statement yesterday, the agency said Lordstown exaggerated the number of pre-orders it had for the truck and how quickly they could get it to

customers. These were also observations that were made in 2021 by the Hindenburg Research Investment Firm, which led to the SEC investigation. So according to the SEC, Lordstown Motors claimed

It had more than 100,000 pre-orders for the Endurance, but these were orders that were non-binding. And most of the orders came from companies that didn't operate fleets or intend to buy the truck for their own use. The SEC also said Lordstown Motors failed to account for production delays that kept pushing back the launch of the Endurance truck.

which the company had originally said would be in 2020. It wasn't until November of 2022 that the company could start sending out the trucks. And even then, just 18 were delivered to customers by May of 2023. The SEC says Lordstown Motors, without admitting or denying any of the findings, has agreed to a cease and desist order and has agreed to pay \$25.5 million, which would be paid to the parties.

that are now suing Lordstown Motors.

Chris (07:41.339)

Yeah, we talked about this so many times on this podcast and at every juncture, we've talked about that this stinks all going all the way back to the beginning. This seemed like a put up job from the beginning to help Donald Trump and his reelection after the auto plant closed. Remember they brought one to the White House lawn and Rob Portman was there. That's before one caught on fire, I think. Yeah. And, and, and every time you looked at it,

Leila (08:00.719)

Yeah, right. That's what I remember about this.

Chris (08:06.899)

They it seemed fake. Like they said, oh, we got all these orders. And then it turned out they weren't really orders. And then they said they had this money and then they didn't have the money. They thought they had a partner. But when the partner looked closely at him, they said, this isn't for real. And it seems like today it was never for real that it never had any traction. It was all kind of phony baloney. And clearly now they agree there's no debating. They're saying we're not admitting wrongdoing, but they agreed to pay the money.

Leila (08:11.857)

Yeah.

Chris (08:35.399)

They misled everybody from the beginning.

Leila (08:36.68)

Right.

laura (08:37.161)

Doesn't it feel a little bit like Theranos at Elizabeth Holmes?

Chris (08:40.791)

Yeah. But you do wonder how that how it took so long. I mean, this seemed to almost anybody that looked at it from the start, like total BS. Nobody bought this. And yet it took how many years? It's you know, eight years later, we're still talking about the thing or four years later, we're still talking about the thing.

Leila (08:41.556)

Oh, right.

Leila (08:58.711)

Right, right. And I mean, since the investigation began, they ousted their CEO, they sued the company, it sold its manufacturing plant too. They filed for bankruptcy. I mean, it's just been falling apart all around them. So this isn't very surprising.

Chris (09:17.031)

It's not surprising. It's just nice to get final confirmation. Yes, it was a scam. You're listening to Today in Ohio. All right, big story number three of five. Notre Dame College dropped the bombshell late Thursday. It's closing. Lisa, what is going on?

Lisa (09:23.906)

today in Ohio.

Lisa (09:33.106)

Yeah, this is kind of, well, it didn't really come out of the blue, but the statement was pretty jarring nonetheless. So Notre Dame College, which is on Green Road in South Euclid, is closing for good at the end of the spring semester. Now, this comes after months of speculation and talk about a possible merger with Cleveland State University. Interim President John Smetanka says they're doing all they can to make it a smooth transition for their students.

 [Manage Subscription](#)

By Simon Casey

The filing suggests that a zero-sum outcome to ADM's investigation "is becoming increasingly likely," Morgan Stanley analyst **Steven Haynes** said in a note, adding it's still not clear how much earnings will be shifted from the nutrition unit to the other company businesses.



ADM's shares rose as much as 3.1% on Friday, but are still down almost 25% this year.

The probe has also thrown the spotlight on the decade-long push, largely under the leadership of Chief Executive Officer **Juan Luciano**, to lessen ADM's dependence on its legacy agricultural commodities trading business.

Read More: [ADM Probe Highlights Struggle to Expand Beyond Crop Trading](#)

ADM expanded the nutrition business with its \$3 billion purchase of European natural ingredient maker Wild Flavors a decade ago, its biggest-ever acquisition. It also spent almost \$1.8 billion buying out French animal feed maker Neovia.

But profits have so far failed to live up to initial expectations due to weak demand, including for plant-based food and animal feed ingredients.

The unit also played an outsized role on recent executive bonuses even as it accounted for a relatively small part of the agribusiness giant's business.

Read More: [ADM Unit Being Probed Helped Make Leaders Over \\$70 Million](#)

ADM said its form 10-K, which was originally expected in February, will be filed by March 15, within the extension period allowed under US rules. It anticipates correcting certain inter-segment sales that "were not recorded at amounts approximating market."

ADM also said it's working to remediate the material weakness, which will be explained further in its annual report.

(Updates with ADM shares in fifth paragraph, company statement in last.)

--With assistance from **Ilena Peng**.

To contact the reporters on this story:

Simon Casey in New York at scasey4@bloomberg.net;

Gerson Freitas Jr. in New York at gfreitasjr@bloomberg.net

To contact the editors responsible for this story:

Simon Casey at scasey4@bloomberg.net

Latest ChatGPT lawsuits highlight backup legal theory against AI platforms

 [reuters.com/legal/transactional/column-latest-chatgpt-lawsuits-highlight-backup-legal-theory-against-ai-2024-02-29](https://www.reuters.com/legal/transactional/column-latest-chatgpt-lawsuits-highlight-backup-legal-theory-against-ai-2024-02-29)

Alison Frankel

Figurines with computers and smartphones are seen in front of ChatGPT logo in this illustration taken, February 19, 2024. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

Feb 29 (Reuters) - In the plethora of copyright lawsuits against artificial intelligence developers, a pair of complaints filed on Wednesday against OpenAI and related defendants stands out.

Unlike most of the authors, artists and news organizations that have sued AI developers, The Intercept Media , opens new tab and Raw Story Media , opens new tab are not alleging straightforward copyright infringement claims. The media companies are instead asserting only that OpenAI and its co-defendants violated the Digital Millennium Copyright Act, or DMCA, deliberately undermining their copyrights by stripping identifying information out of articles used to train the AI system behind the popular chatbot ChatGPT.

As my Reuters colleague Blake Brittain reported on Wednesday, the 1998 federal DMCA statute prohibits the removal of information that can help copyright holders detect infringement, including article titles, author names and copyright dates.

The new Intercept and Raw Story lawsuits posit that OpenAI intentionally stripped that information out of training materials so that ChatGPT's responses to user prompts would create the impression that "it is an all-knowing, 'intelligent' source of the information being provided, when in reality, the responses are frequently based on copyrighted works of journalism that ChatGPT simply mimics."

In a press release , opens new tab that accompanied the new lawsuits, plaintiffs' lawyers from Loevy & Loevy said their DMCA theory offers an alternative path to recovery that does not require news organizations to shell out money to register their copyrights.

But the theory also allows plaintiffs to circumvent a primary defense argument in copyright cases against AI developers: that AI training materials make fair use of copyrighted content to create new products that do more than simply recreate the protected works.

Fair use, as Brittain has reported for Reuters, has been a centerpiece of AI defense arguments. You can see as much from the brief , opens new tab OpenAI filed this week in a copyright infringement case brought by The New York Times. OpenAI's lawyers at Morrison & Foerster called for the case to be tossed, arguing that fair use principles will ultimately vindicate AI training with copyrighted materials because "it is perfectly lawful to use

copyrighted content as part of a technological process that (as here) results in the creation of new, different, and innovative products.”

Or, as OpenAI argued flatly in a 2023 motion [\[link\]](#), opens new tab to dismiss most of a San Francisco federal court case by authors including the comedian and actress Sarah Silverman: “Fair use is not infringement.”

By claiming DMCA violations rather than traditional infringement, The Intercept and Raw Story likely won’t face those arguments, according to their counsel. “We believe the fair use defense would not apply to our cases,” said plaintiffs’ lawyer Jon Loevy.

That’s the good news for Loevy and his clients. The bad news: OpenAI and other defendants have lots of other arguments to combat DMCA allegations.

Neither OpenAI nor Morrison & Foerster responded to my query about the latest lawsuits, which were filed in Manhattan federal court. Microsoft (MSFT.O) [\[link\]](#), opens new tab, which is named as defendant in The Intercept’s complaint, also did not respond to a request for comment. But, as I’ll explain, OpenAI and other artificial intelligence developers have previously addressed DMCA allegations in other cases – and have persuaded judges in two California suits to curtail the claims.

The Intercept and Raw Story, it turns out, are not the only plaintiffs to assert DMCA claims against AI developers, although they appear to be the first to allege only DMCA violations. The New York Times, the authors who sued OpenAI in San Francisco federal court, and three artists who sued image generator Stability AI all included DMCA allegations in their lawsuits, albeit as secondary to their copyright infringement claims. (Interestingly, a separate group of authors who sued OpenAI in Manhattan federal court did not bring DMCA claims in their Feb. 5 consolidated complaint [\[link\]](#), opens new tab.)

AI defendants have primarily argued in motions to dismiss DMCA claims that plaintiffs cannot show AI developers deliberately stripped copyright-identifying information from the content that trained their models. The statute requires plaintiffs to prove that defendants intentionally deleted identifying information in order to make it harder for copyright holders to track infringement. (The classic example is an internet site that crops a photographer’s name and copyright from a misappropriated image.) OpenAI and other defendants contend they did not use such subterfuge in their training models.

They’ve also argued that plaintiffs can’t show they intended to omit copyright-identifying information from their output. In this week’s motion to dismiss The New York Times suit, for instance, OpenAI said ChatGPT, at worst, reproduces excerpts or snippets from Times stories. It does not reproduce entire stories shorn only of identifying copyright information, OpenAI said – which is the conduct Congress had in mind when it enacted the DMCA.

Out of curiosity, I asked ChatGPT to write a brief moving for the dismissal of DMCA claims. The chatbot larded its response with warnings that it could not provide legal advice but suggested arguments that plaintiffs did "not provide specific details regarding the alleged removal" of copyright-identifying information and that any removal of such information "was unintentional and without malice."

OpenAI noted in its dismissal brief in the Times case that two federal judges have already endorsed AI defendants' DMCA arguments. Last October, U.S. District Judge William Orrick of San Francisco ruled [here](#), opens new tab that the artists who sued Stability AI failed to allege the removal of copyright identifying information from any specific works used to train the AI model. It was not enough, Orrick said, to claim wholesale alteration of images to delete information such as watermarks and artists' signatures. Plaintiffs, he said, had to allege specific alterations of particular works.

Similarly, U.S. District Judge Araceli Martinez-Olguin of San Francisco dismissed [here](#), opens new tab authors' DMCA claims against OpenAI earlier this month, holding that plaintiffs failed to show that defendants systematically deleted copyright-identifying information from training content.

Martinez-Olguin said the premise was undermined by ChatGPT's output, which included references to authors' names and book titles. The judge also said it was significant, in the context of DMCA claims, that the authors' books were not reproduced in full in ChatGPT responses.

Journalists who claim that ChatGPT essentially plagiarizes their work in its entirety presumably won't have that problem, but precedent suggests The Intercept and Raw Story will have to come up with plausible allegations that OpenAI removed or altered information from training content specifically to hide its reliance on copyrighted material.

That won't be easy.

Read more:

OpenAI says New York Times 'hacked' ChatGPT to build copyright lawsuit

OpenAI hit with new lawsuits from news outlets over AI training

How copyright law could threaten the AI industry in 2024

Jumpstart your morning with top legal news delivered straight to your inbox from The Daily Docket [here](#), opens new tab.

Reporting By Alison Frankel

Our Standards: The Thomson Reuters Trust Principles. [here](#), opens new tab

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

Bloomberg Law
Research Trail
My Work
000888
Help
Account

Securities Law
Search Securities Law
Select Sources
Go

Home
Practice Centers
Litigation
Transactional
Business
Practitioner Tools
News & Analysis
Laws & Regulations
Secondary Sources

[Manage Subscription](#)

Securities Law

March 1, 2024, 9:51AM PST

Matt Levine's Money Stuff: OpenAI Isn't Open Enough for Elon

By Matt Levine
Opinion

Bloomberg Law News 2024-03-01T13:16:25269195017-05:00

Matt Levine's Money Stuff: OpenAI Isn't Open Enough for Elon

By Matt Levine 2024-03-01T12:51:27207-05:00

Elon vs. OpenAI

I [wrote yesterday](#) about reports that the US Securities and Exchange Commission might be looking into whether OpenAI or its founder and chief executive officer, Sam Altman, might have misled its investors. Late last year, OpenAI's board briefly [fired Altman](#) for not being "consistently candid," and then reversed course and fired itself instead. So there is some reason to believe that somebody wasn't candid about something.

I had my doubts that it would rise to the level of securities fraud, though. For one thing, OpenAI is a nonprofit organization, and even its for-profit subsidiary, OpenAI Global LLC, which *has* raised money from investors, isn't all *that* for-profit. I wrote:

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.

But that wasn't quite right, was it? Nonprofits *can* defraud their donors. Generally that sort of fraud is not about *financial results*; it is about the nonprofit's mission, and whether it is using the donors' money to advance that mission. If I ask you to donate to save the whales, and you give me \$100,000 earmarked to save the whales, and I spend it all on luxury vacations for myself, I probably will get in trouble. I suppose if Altman was not candid about OpenAI's mission, or its pursuit of that mission, that really could have been a kind of fraud on OpenAI's donors. I mean investors. It could have been donation/securities fraud on the donors/investors.

Here's [one of them](#) !

Elon Musk sued OpenAI and its Chief Executive Officer Sam Altman, alleging they violated the artificial intelligence startup's founding mission by putting profit ahead of benefiting humanity.

The 52-year-old billionaire, who was a co-founder of OpenAI but is no longer involved, said in a lawsuit filed late Thursday in San Francisco that the company's close relationship with Microsoft Corp. has undermined its original mission of creating open-source technology that wouldn't be subject to corporate priorities.

Musk, who is also CEO of Tesla Inc., has been among the most outspoken about the dangers of AI and artificial general intelligence, or AGI. The release of OpenAI's ChatGPT more than a year ago popularized advances in AI technology and raised concerns about the risks surrounding the race to develop AGI, where computers are as smart as an average human.

"To this day, OpenAI Inc.'s website continues to profess that its charter is to ensure that AGI 'benefits all of humanity,'" the lawsuit said. "In reality, however, OpenAI Inc. has been transformed into a closed-source de facto subsidiary of the largest technology company in the world: Microsoft."

Here is Musk's complaint. It is essentially a complaint for breach of contract: Musk argues that he founded OpenAI with Altman and Greg Brockman, that they had a deal about how OpenAI would operate, and that Altman and Brockman have now gone back on the deal. The contract said that OpenAI would be a nonprofit, that it would be run for the benefit of humanity, that it would build artificial general intelligence and give it away for free, and that it would build open-source software (thus the name) and explain to the public how its models operate. But now OpenAI is run for profit, for the benefit of Microsoft and its other investors rather than humanity. It has built artificial general intelligence and is hoarding it for its own enrichment rather than giving it away.

One problem with this claim is that the contract doesn't *quite* exist. Musk's lawsuit says that OpenAI has breached "the Founding Agreement" of OpenAI, capitalized like that, as though he, Altman and Brockman sat down and signed a piece of paper with "Founding Agreement" at the top, setting out how OpenAI would operate. But they didn't. From the complaint:

This Founding Agreement is memorialized in, among other places, OpenAI, Inc.'s founding Articles of Incorporation and in numerous written communications between Plaintiff and Defendants over a multi-year period. ...

That is: There is no document titled "Founding Agreement"; despite being wealthy sophisticated repeat startup founders who know a lot of lawyers, the founders never sat down and signed a contract. Instead, the "Founding Agreement" has to be inferred from other documents. Musk cites two:

- 1. There's a June 2015 email from Altman to Musk, with five numbered bullet points setting out a plan for building AI. "The mission would be to create the first general AI and use it for individual empowerment – i.e., the distributed version of the future that seems the safest," the first bullet point begins. "I think ideally we'd start with a group of 7-10 people, and plan to expand it from there," says the second, and "we have a nice extra building in Mountain View they can have." The third bullet point proposes a five-person governance board including Musk and Altman, and "we'd have an ongoing conversation about what work should be open-sourced and what shouldn't." In the fourth bullet point, Altman asks Musk to "be involved somehow in addition to just governance"; maybe he could "come by and talk to them about progress once a month or whatever." Musk replied to the email "Agree on all."
- 2. There is the December 2015 certificate of incorporation of OpenAI Inc., the nonprofit corporation that ultimately controls OpenAI. "The specific purpose of this corporation is to provide funding for research, development and distribution of technology related to artificial intelligence," it says. "The resulting technology will benefit the public and the corporation will seek to open source technology for the public benefit when applicable. The corporation is not organized for the private gain of any person. ... No part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person."

And Musk donated money to OpenAI, the nonprofit, over the years: In 2016 and 2017, he was the biggest donor to OpenAI, and "all told, Mr. Musk contributed more than \$44 million to OpenAI, Inc. between 2016 and September 2020." He also did other stuff for OpenAI: He helped with recruitment, paid rent on its offices, "regularly visited," and "was present for important company milestones." He ultimately left his role with OpenAI in 2018.

You can sort of wave your hands at all this and say “Musk had a contract with OpenAI in which he agreed to donate money and in exchange OpenAI explicitly agreed to be an open-source nonprofit forever,” but I don’t think that’s exactly right? The email from Altman was an initial proposal, not a detailed contract setting out the permanent terms of their deal; it promised not to open-source the software forever but only to “have an ongoing conversation about what work should be open-sourced and what shouldn’t.” Money was not mentioned.

And the certificate of incorporation was not a contract between Musk and OpenAI: He didn’t sign the certificate, and he wasn’t a shareholder, because there were no shares (it’s a nonprofit). OpenAI’s fiduciary duties are not to him, as a co-founder, but to humanity. The evidence of a *specific deal* between Musk and OpenAI is pretty thin.

Still, I sympathize? OpenAI Inc., the top-level company that controls OpenAI’s business, really is incorporated as a nonprofit. It really was formed to work for the benefit of humanity and not “for the private gain of any person.” And it really did take donations from Musk and use them to build its team. But it eventually set up a for-profit subsidiary, OpenAI Global LLC, which has managed to raise money from investors at an \$86 billion valuation, and those investors (and OpenAI’s employees – though not Altman) expect some (capped) financial return on that investment. OpenAI says that “it became increasingly clear that donations alone would not scale with the cost of computational power and talent required to push core research forward, jeopardizing our mission”: It had to raise money from investors, by promising them returns, to achieve its mission. (It raised something like \$130.5 million in total donations; it has raised something like [\\$13 billion](#) in investment commitments from Microsoft.)

I am sure OpenAI had good lawyers when it set up this structure, and I assume that as a technical matter none of this violates the certificate of incorporation or the nonprofit mission: A portion of the profits of *OpenAI Global LLC* can go to employees and venture capitalists and Microsoft, even though “no part of the net income or assets of” *OpenAI Inc.* can. Still that is rather technical, and Musk has a point here:

In 2017, Mr. Brockman and others suggested transforming OpenAI, Inc. from a nonprofit to a for-profit corporation. After a series of communications over several weeks, Mr. Musk told Mr. Brockman, Dr. Sutskever, and Mr. Altman “[e]ither go do something on your own or continue with OpenAI as a nonprofit. I will no longer fund OpenAI until you have made a firm commitment to stay or I’m just being a fool who is essentially providing free funding to a startup. Discussions are over.”

That was before OpenAI launched its for-profit subsidiary, though. When it did, Musk sort of grudgingly tolerated it :

On March 11, 2019, OpenAI, Inc. announced that it would be creating a for-profit subsidiary: OpenAI, L.P. Prospective investors were notified of an “important warning” at the top of the summary term sheet that the for-profit entity “exists to advance OpenAI Inc.’s [the nonprofit’s] mission of ensuring that safe artificial general intelligence is developed and benefits all of humanity. The General Partner’s duty to this mission and the principles advanced in the OpenAI Inc. Charter take precedence over any obligation to generate a profit.” Accordingly, investors were expressly advised that “[i]t would be wise to view any investment in OpenAI LP in the spirit of a donation.”

Following the announcement, Mr. Musk reached out to Mr. Altman asking him to “be explicit that I have no financial interest in the for-profit arm of OpenAI.” However, Mr. Musk continued to support OpenAI, Inc., the non-profit, donating an additional \$3.48 million in 2019.

But at that point he was just providing free funding to a startup, wasn’t he?

So Musk argues that they had a deal, and that OpenAI breached it in three ways. First, it licenses GPT-4, its most powerful model so far, to Microsoft. OpenAI, in its public statements and its charter and its deal with Microsoft, has said that it will seek to build *artificial general intelligence* for the benefit of humanity, but that it can license lesser forms of artificial intelligence to Microsoft. So the question is: Is GPT-4 artificial general intelligence? Musk says yes:

GPT-4 is not just capable of reasoning. It is better at reasoning than average humans. It scored in the 90th percentile on the Uniform Bar Exam for lawyers. It scored in the 99th percentile on the GRE Verbal Assessment. It even scored a 77% on the Advanced Sommelier examination. ...

GPT-4 is an AGI algorithm, and hence expressly outside the scope of Microsoft's September 2020 exclusive license with OpenAI.

...

Under its new Board, it is not just developing but is actually refining an AGI to maximize profits for Microsoft, rather than for the benefit of humanity.

Seems like a stretch, though Musk quotes "Microsoft's own researchers" saying that GPT-4 "could reasonably be viewed as an early (yet still incomplete version of an artificial general intelligence (AGI) system."

Second, GPT-4 is not open-source:

GPT-4's internal design was kept and remains a complete secret except to OpenAI—and, on information and belief, Microsoft. There are no scientific publications describing the design of GPT-4. Instead, there are just press releases bragging about performance. On information and belief, this secrecy is primarily driven by commercial considerations, not safety. Although developed by OpenAI using contributions from Plaintiff and others that were intended to benefit the public, GPT-4 is now a *de facto* Microsoft proprietary algorithm, which it has integrated into its Office software suite.

Again, there doesn't seem to be any actual agreement between OpenAI and Musk (or anyone else) promising to make everything open-source, but, sure, it's annoying that they built a model partly using his money and now won't let him see it.

Third, Musk objects to OpenAI "permitting Microsoft, a publicly traded for-profit corporation, to occupy a seat on OpenAI, Inc.'s Board of Directors and exert undue influence and control over OpenAI's non-profit activities." Microsoft is [just an observer](#) on the board, not a voting member, but, right, its interests in OpenAI are probably not particularly *charitable*.

And Musk is asking the court, not for his donations back, but for an order making OpenAI do what it supposedly promised to do: Open up GPT-4's source code, make it freely available to the public, end Microsoft's exclusive license and board rights, and generally stop OpenAI's for-profit work.

Obviously one should be pretty cynical here. *Musk runs a for-profit artificial intelligence company*, xAI, which competes with OpenAI and has [raised money](#) by [citing OpenAI's commercial success](#). Blowing up that competitor's commercial prospects, as this lawsuit is trying to do, could help xAI. He also runs other companies – Tesla Inc., Twitter/X – that make use of AI. I suppose Musk's companies would benefit from reading OpenAI's source code and "scientific publications describing the design of GPT-4," so why not sue OpenAI and try to make that information public? Musk's protests about OpenAI's unseemly pursuit of AI profit for investors do look a little insincere, since he's doing the same thing.

But he does have kind of a reasonable gripe? OpenAI was founded as a nonprofit, raised a bunch of money from him as a donor to a nonprofit, and is now somehow an enormously valuable tech startup owned by people who are not him. After OpenAI fired Altman last November, but before it brought him back, it looked as if OpenAI's *for-profit investors* – Microsoft, but also some venture capitalists, and the employees who owned quasi-equity – had lost a bunch of value. I [wrote at the time](#) :

I feel like the lesson here is ... "don't invest in nonprofits at an \$86 billion valuation." Which I think has never come up before? Like as far as I can tell no one in human history has ever purchased shares in a nonprofit at an \$86 billion valuation? Because purchasing shares in a nonprofit, at any valuation, is not a coherent thing to do? But then OpenAI made it happen, for the first time, and probably also the last.

But it turns out the investors were fine, and the correct lesson might be the opposite one: Don't *donate money* to a nonprofit that is selling shares at an \$86 billion valuation! You might be skeptical about putting an \$86 billion valuation on a nonprofit, but probably you should be even more skeptical that a business with an \$86 billion valuation is a nonprofit.

HBS Ponzi

Oh man, I kind of wish I had thought of this:

An alleged Ponzi scheme run by a Harvard MBA who solicited money from fellow alumni of the prestigious US business school has been shut down by a New York court after collecting more than \$2.9mn.

New York attorney-general Letitia James said Thursday her office had secured the court order to freeze funds controlled by Vladimir Artamonov, after being alerted of the suicide of one of his clients who lost \$100,000.

"That guy was my Harvard Business School classmate" is such a powerful vetting mechanism: You get to rely on the gatekeeping function of HBS ("that guy is probably smart"), the reputational capital it confers ("that guy probably isn't running a Ponzi because that would be a waste of the value of his Harvard MBA") and also the weak ties of the alumni network ("that guy sat in front of me in Marketing, he seemed fine"). From James' press release:

Artamonov identified many of his investors through the HBS alumni network. Many of his investors did not have a close personal relationship with him and only knew him as an acquaintance. ...

Since 2021, Artamonov has secured at least \$2.9 million from at least 29 individual investors and engaged in a Ponzi scheme by paying the existing investors with the new investors' funds. ... Artamonov also used his investors' money to fund unauthorized personal expenses for vacations, shopping, and dining.

Also his pitch was wild:

The OAG alleged that Artamonov lured clients by claiming that he could learn which investments Berkshire Hathaway would make ahead of the market by examining public state insurance filings. Artamonov boasted to his investors that it is like "having a private time machine" and "getting tomorrow's newspaper today," and projected returns of 500-1,000 percent. In reality, Artamonov used his investors' money to buy short-term options that expired within days of purchase and appeared to have no relation to Berkshire Hathaway or its investment activities. Artamonov lost millions of investors' funds by investing in these short-term options, but did not disclose the loss to his investors. To cover up the losses, Artamonov told the investors that it had been a "quiet" month and to just wait and see.

"Berkshire Hathaway is required to publicly disclose its investments in state insurance filings before it discloses them in SEC filings, and I will read the insurance filings to make informed trades" is ... *wrong*, sure, but it has the vague shape of something that could be true. But what about "... and those informed trades will generate projected returns of 1,000%"? What are they teaching kids at Harvard these days? I feel like if I were pitching a Ponzi scheme to the Harvard Business School alumni, I would be promoting fake returns of, like, 35% with a high Sharpe ratio. You know: *good*, but not *obviously fake*. But apparently "I have a time machine that gives me guaranteed 1,000% returns" works on Harvard MBAs too.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Daniel Niemi at dniemi1@bloomberg.net

- 1. The fifth bullet point is about a proposed open letter to the US government on AI safety and regulation, which the complaint says was eventually published in October 2015 "and signed by over eleven thousand individuals, including Mr. Musk, Stephen Hawking and Steve Wozniak."
- 2. "Elon Musk claims he was offered shares in OpenAI at 'various points' but says it 'seemed unethical/illegal to accept them,'" Business Insider noted last month, and "Musk added it wasn't clear to him how the company's structure was legal."
- 3. This is now OpenAI Global LLC, more or less. See page 17 of the complaint on "OpenAI's Shifting Corporate Structure."
- 4. Until this lawsuit.
- 5. This is subtly different from the case of donating to Harvard. Also, to be clear, Musk stopped donating in about 2020, before OpenAI's valuation got *that* high.

New legal AI venture promises to show how judges think

 [reuters.com/legal/transactional/new-legal-ai-venture-promises-show-how-judges-think-2024-02-29](https://www.reuters.com/legal/transactional/new-legal-ai-venture-promises-show-how-judges-think-2024-02-29)

Sara Merken

Figurines with computers and smartphones are seen in front of the words "Artificial Intelligence AI" in this illustration taken, February 19, 2024. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

Feb 29 (Reuters) - A new venture by a legal technology entrepreneur and a former Kirkland & Ellis partner says it can use artificial intelligence to help lawyers understand how individual judges think, allowing them to tailor their arguments and improve their courtroom results.

The Toronto-based legal research startup, Bench IQ, was founded by Jimoh Ovbiagele, the co-founder of now-shuttered legal research company ROSS Intelligence, alongside former ROSS senior software engineer Maxim Isakov and former Kirkland bankruptcy partner Jeffrey Gettleman.

The company said on Thursday that it raised \$2.1 million in a pre-seed funding round co-led by venture capital firms Maple and Haystack. Law firms Cooley, Fenwick & West and Wilson Sonsini Goodrich & Rosati or their affiliated investment vehicles were among the investors, which also included Kirkland partners and other individuals and funds, the company said.

Bench IQ said in Thursday's launch announcement that it uses large language model-based AI technology to offer "comprehensive insights into the decision-making patterns of judges, covering 100% of their rulings" — not just their written opinions.

Ovbiagele, the company's CEO, said additional details about the technology and the scope of the company's dataset was confidential, citing pending patents.

In addition to its law firm investors, Bench IQ counts 12 large law firms as "pilot" customers, Ovbiagele said. He said the company will offer both "on-demand," per-hour pricing and annual subscription plans depending on the size of the firm and their billing rates. He declined to share a cost range or identify customers.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

Marty Waters, a San Diego-based partner at Wilson Sonsini, said in an emailed statement that understanding judicial decision-making "is critical for formulating winning strategies." The firm is a pilot customer.

Cooley did not immediately comment. A Fenwick spokesperson did not immediately respond to a request for comment.

Ovbiagele said the company employs him, Gettleman and Isakov for now but plans to hire rapidly.

The trio will be competing in a growing field of artificial intelligence-based companies catering to lawyers. Some have attracted high-profile investors, such as Harvey, which is backed by Sequoia Capital and the OpenAI Startup Fund, and EvenUp, which has raised funds from Bessemer Venture Partners and Bain Capital Ventures.

Bench IQ is also not alone in marketing research on judges. Ovbiagele said his company differs from others by giving insight into judges' legal reasoning beyond statistics, describing Bench IQ as "explanatory" rather than "descriptive."

Gettleman said he thought up the concept for the company at Kirkland. "All attorneys are in the same position: they are forced to use a one-size-fits-all approach with most judges they encounter," he said in an email.

ROSS, Ovbiagele's former company, said in December 2020 that it would shut down operations amid litigation with Thomson Reuters, which had accused Ross of unlawfully copying content from its legal-research platform Westlaw to train a competing artificial intelligence-based platform. ROSS denied the claims and the case is set to go to trial as soon as this year.

Thomson Reuters is the parent company of both Reuters and Westlaw.

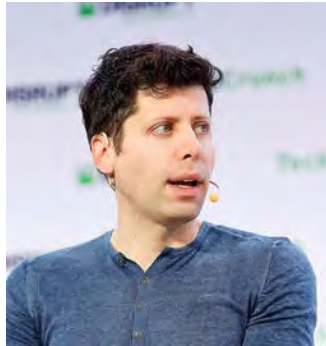
Ovbiagele said ROSS is "non-operational" but active for the purpose of defending against the Thomson Reuters copyright case and pursuing antitrust counter-claims. Thomson Reuters has denied the counter-claims.

Get the latest legal news of the day delivered straight to your inbox with The Afternoon Docket , opens new tab.
Reporting by Sara Merken

OpenAI's Board May Not Have Been Able To Do Anything About CEO's 'Lack of Candor,' But The SEC Might

D dealbreaker.com/2024/02/openais-board-may-not-have-been-able-to-do-anything-about-ceos-lack-of-candor-but-the-sec-might

Jon Shazar



Even self-professed good guys like Sam Altman are subject to securities law.

- Jon Shazar
- Feb 29, 2024

TechCrunch, CC BY 2.0 <<https://creativecommons.org/licenses/by/2.0>>, via Wikimedia Commons

OpenAI founder Sam Altman and his sugar-daddies at Microsoft rather comprehensively won their battle with the artificial intelligence company's board last year. That board, dedicated to OpenAI's non-profit mission, canned Altman after deciding he'd been a bit slippery with the truth. In the face of Microsoft's unhappiness (and hiring of Altman) and a revolt among its staff members, that board relented and essentially fired itself after rehiring Altman, removing any checks on his power to decide that OpenAI's products—whatever they might one day be—could lavishly enrich all involved and didn't have to worry too much about whether they'd lead to a human extinction event, near-universal poverty or any other such.

Thing is, that former board may have been onto something, at least as far as Gary Gensler is concerned.

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.... The SEC enforces laws that forbid people from misleading investors, regardless of whether fundraisers seek capital in public or private markets....

The SEC probe adds to a growing list of government and legal challenges confronting OpenAI.... 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.... That criminal investigation is ongoing....

SEC Investigating Whether OpenAI Investors Were Misled [WSJ]

For more of the latest in litigation, regulation, deals and financial services trends, sign up for Finance Docket, a partnership between Breaking Media publications Above the Law and Dealbreaker.

© 2024 Breaking Media Inc.

Musk's X won't settle ex-workers' lawsuit seeking \$500 million in severance pay

 [reuters.com/technology/musks-x-wont-settle-ex-workers-lawsuit-seeking-500-million-severance-pay-2024-02-29](https://www.reuters.com/technology/musks-x-wont-settle-ex-workers-lawsuit-seeking-500-million-severance-pay-2024-02-29)

Daniel Wiessner

[1/2] Tesla and SpaceX's CEO Elon Musk attends political festival Atreju organised by Italian Prime Minister Giorgia Meloni's Brothers of Italy (Fratelli d'Italia) right-wing party, in Rome, Italy, December 16, 2023. REUTERS/Guglielmo Mangiapane/File Photo Purchase Licensing Rights , opens new tab

Feb 29 (Reuters) - Settlement talks have failed in a lawsuit accusing X and owner Elon Musk of refusing to pay more than \$500 million in severance to employees who were laid off after he acquired the company, according to a court filing.

Lawyers for X and former engineer Chris Woodfield, who filed the proposed class action last year, said in a joint filing in Delaware federal court on Wednesday that talks failed to lead to an agreement earlier this month.

The social media company, formerly known as Twitter, made an identical filing in the same court in a separate case that was brought by six former senior managers at the company who are also seeking severance pay.

The lawsuits were paused in December so X and the plaintiffs' lawyers could pursue settlement negotiations. The stays expired on Tuesday.

X and lawyers for the plaintiffs did not immediately respond to requests for comment.

Both lawsuits claim that the company promised employees severance pay if they were laid off at various times, including when they were hired and after Musk acquired the company for \$44 billion in 2022.

But after Musk culled the company's workforce, ultimately laying off more than half of the employees, those payments were never made, the plaintiffs allege.

Musk rebranded Twitter as X last July. The company has denied wrongdoing and has moved to send the proposed class action case to individual arbitration, a tactic it has employed in several other lawsuits stemming from the mass layoffs.

Hundreds of laid off employees, in turn, have accused X of stalling arbitration cases by refusing to pay initial filing fees.

Former Twitter employees have accused the company of targeting women, minorities and workers with disabilities for layoffs, failing to give the advance notice required by federal and state laws, and refusing to pay promised bonuses, among other claims. The company has generally denied wrongdoing.

US judge signals Elon Musk's X may lose case against hate speech watchdog

 [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 signaled he may dismiss X Corp's lawsuit against a nonprofit group 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 causing tens of millions of dollars in damages through a "scare campaign" to drive away advertisers.

According to X, the nonprofit breached its user contract by improperly scraping and cherry-picking data to create false and misleading reports that Musk was letting X become a haven for hate speech, extremism and other misinformation.

U.S. District Judge Charles Breyer was skeptical that when the nonprofit entered the standard user contract governing all Twitter and X users, it could have foreseen that Musk would buy Twitter for \$44 billion in 2022 and welcome back users it had banned for posting hateful content.

"You're telling me ... it was foreseeable that Twitter would change its policy and allow these people to have access," the San Francisco-based judge told X's lawyer Jon Hawk in a video conference.

"I am trying to figure out, in my mind, how that's possibly true, because I don't think it is."

Hawk said the nonprofit could have left X if it didn't like Musk's changes. "When CCDH agreed to stay on the platform, it agreed to successors' versions of the policy," he said.

Musk, the world's second-richest person , opens new tab, also runs the electric vehicle maker Tesla (TSLA.O) , opens new tab, which has faced several lawsuits claiming it tolerated the harassment of workers. Tesla has denied those allegations.

FREE SPEECH INTERFERENCE

John Quinn, a lawyer for the Center for Countering Digital Hate, said X's lawsuit violated California's so-called anti-SLAPP law, or strategic lawsuits against public participation, which was meant to stop lawsuits intended to silence critics.

He also called it "implausible" to suggest the nonprofit engaged in scraping, and said it could not be liable for advertisers' "independent" decisions not to work with X.

"CCDH used a tool that runs searches for certain people to see what public tweets are being put out, and then they commented on it," Quinn said. "X didn't have any issues with that until advertisers reacted to the content of the report."

Quinn also said giving Musk and X "the power to say, anybody who uses our search function and looks at tweets, if you use an automated tool in any way, we can come after you, sue you, drag you into court ... runs straight into speech principles."

Hawk said that wasn't why X sued.

"I understand CCDH does not like some of the content it may see," he said. "This is about the security of data."

Breyer did not say when he would rule, or if X could file an amended complaint if he dismissed the case.

EUROPEAN NONPROFIT

X also sued the European Climate Foundation, a nonprofit based in The Hague, Netherlands that promotes efforts to mitigate climate change, accusing it of conspiring with the Center for Countering Digital Hate to illegally gather data.

A lawyer for the European nonprofit said it should be dismissed from the case because the court lacked jurisdiction.

Since buying Twitter, Musk has since faced wide criticism that he fired too many people who policed misinformation, and from civil rights groups for allowing more harmful and abusive posts.

In November 2023, Musk endorsed an antisemitic post on X that said members of the Jewish community were stoking hatred against white people, saying the user spoke "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.

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 and David Gregorio

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<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 7:10 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 1.65%** ▲ 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.

Chemours said the audit committee’s review includes the company’s use of financial measures that fall outside U.S. generally accepted accounting principles, also called non-GAAP measures.

In mid-December, the Securities and Exchange Commission queried Chemours about several non-GAAP measures in its securities filings, a few of which the company has used when setting executives’ incentive pay. Lock, the CFO now on leave, signed the company’s Dec. 22 response to the agency.

It couldn’t be determined if the non-GAAP metrics that the SEC was pressing Chemours about were the same non-GAAP metrics the company was referring to when describing its internal review.

For years, executive-pay critics have argued that some kinds of adjustments made to calculate non-GAAP financial results are susceptible to manipulation by

executives in ways that can increase the executives' pay, including by timing operating transactions carefully.

—Jonathan Weil contributed to this article.

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

Appeared in the March 1, 2024, print edition as 'Chemours Suspends Its Top Executives'.

Bankrupt Lordstown Motors to Pay \$26 Million to Settle SEC Probe

B

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThkLWY2ZGUtZDY0ZS1hZjklWY2ZGUxYWMyMDAwMyIsImN0eHQiOiJTTE5XliwidXVpZCI6IjFrb0hUeVZvbktNTVEw0VhNFb3VVRWc9PXVEZFNiNmpXTTF1TXF0MHQ5L3EzTEE9PSIsInRpbWUiOiIxNzA5Mjk1MjI0MjYyYliwic2InIjoic2NLVTJ3aDdaRGFRNHE1RGx1UjBFaVQ4V3NjPSIsInYiOiIxIn0=

Bankruptcy Law News

Feb. 29, 2024, 1:52 PM PST

Austin Weinstein

Bloomberg News



- Regulator alleges that automaker misstated demand for EV truck
- Ohio-based automaker filed for bankruptcy in June 2023

Bankrupt electric vehicle manufacturer Lordstown Motors Corp. agreed to pay \$25.5 million to settle US Securities and Exchange Commission allegations that the firm exaggerated the demand for its electric pickup truck.

The automaker made misleading statements about its pre-orders for the truck, called the Endurance, and misrepresented how quickly it could deliver the trucks, according to the SEC. The firm rose to prominence after former US President Donald Trump hailed it for saving auto-maker jobs.

Donald Trump during a tour of the Lordstown Motors 2021 Endurance electric pickup truck on the South Lawn of the White House in 2020.

Photographer Ken Cedeno/Sipa/Bloomberg

Read More: Lordstown Plunges on Bankruptcy Filing as Foxconn Deal Collapses

A lawyer for the Lordstown, Ohio-based company declined to comment. The automaker didn't admit to or deny the SEC's findings as part of the settlement.

"In a highly competitive race to deliver the first mass-produced electric pickup truck to the U.S. market, Lordstown oversold true demand for the Endurance," Mark Cave, an associate director of enforcement at the SEC, said in a statement.

The company filed for bankruptcy in June 2023 and later sold the last of its assets to the company's founder, Steve Burns. Nasdaq delisted the company's shares last July. The \$25.5 million fine will be deemed satisfied through payments the company plans to make to settle two class-action lawsuits.

To contact the reporter on this story:

Austin Weinstein in Washington at aweinstein18@bloomberg.net

To contact the editor responsible for this story:

Ben Bain at bbain2@bloomberg.net

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

- All Rights Reserved

Accountancy**Investors left in the dark after US companies fail to file on time**

ADM, Chemours, Mattel and NYCB are among groups admitting weaknesses in controls delayed financial reports



Mattel, maker of Barbie dolls, said it had found weaknesses in its internal controls over financial reporting. © REUTERS

Stephen Foley in New York 27 SECONDS AGO



Get ahead with daily markets updates. **[Join the FT's WhatsApp channel](#)**



The number of large US companies missing deadlines to file their annual reports has spiked this year, leaving investors in the dark as executives and their auditors wrestle with accounting problems and weaknesses in their financial controls.

The annual rush to sign off on financial statements has this week exposed issues at companies ranging from the chemicals giant Chemours to the toymaker Mattel.

Chemours, the maker of Teflon, put its chief executive and two most senior finance executives on administrative leave on Thursday while it investigates financial practices that may have affected executive bonuses.

The agricultural products group [Archer Daniels Midland](#), which put its chief financial officer on leave in January while it investigated accounting practices at its food ingredients business, said on Friday that it could take another two weeks to finalise its audited figures for 2023.

Shares in [New York Community Bancorp](#) were meanwhile down sharply on Friday after the regional lender delayed its annual report, saying it had found material weaknesses in the internal controls that guide how it reviews loans.

Mattel, the toy company, said on Thursday that it had also found weaknesses in its internal controls over financial reporting, and that it would need more time to get its annual report out.

According to the data provider AlphaSense, 16 companies with market capitalisations over \$1bn have said so far this year that they would miss deadlines to file annual reports, which is 60 days after the financial year-end for large companies. That is almost double the number from last year, when nine companies said they needed extra time.

The auditors of large US companies are required not just to sign off on the annual figures themselves but also on the internal controls and systems that a company used to produce them. Regulators require that weaknesses in those controls are prominently flagged to investors.

Chemours said it was examining “one or more” potential material weaknesses in its internal controls, and a series of other issues including how whistleblower complaints are handled and whether senior executives had set the right “tone at the top”.

As well as chief executive Mark Newman, the company placed chief financial officer Jonathan Lock and controller Camela Wisel on leave.

Chemours, which was spun out of Dupont in 2015, said it was examining how working capital was managed, and how that affected financial metrics on which executive bonuses were based. Its shares slumped 32 per cent on the news, wiping \$1.4bn from its market value. In afternoon trading on Friday, they were up 2.8 per cent on the day but still 30 per cent below Wednesday’s level.

 **Manage Subscription**

By Jo Constantz

There Are 340,000 Fewer CPAs, and Companies Are Paying the Price

By Jo Constantz2024-03-01T10:29:36782-05:00

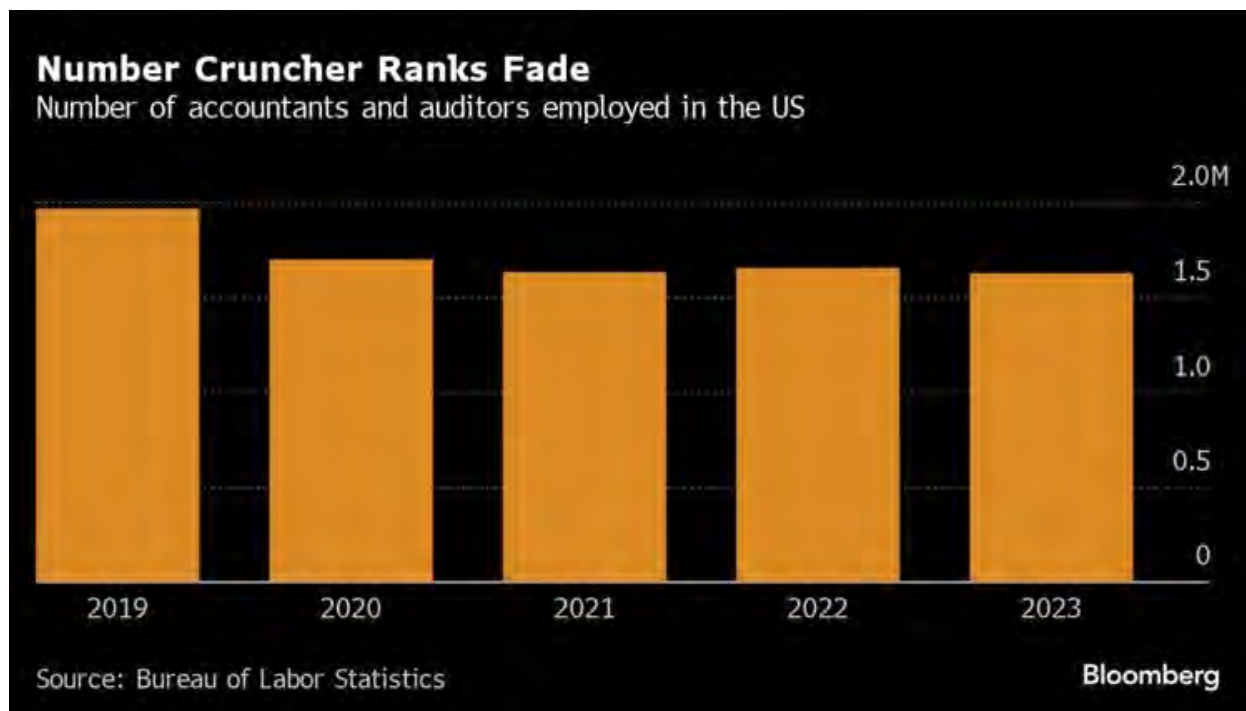
Mistakes continued to pile up this earnings season in the wake of Lyft Inc.'s [market-roiling typo](#) : Planet Fitness Inc., Mister Car Wash Inc. and Rivian Automotive Inc. all [had to correct their quarterly earnings](#) statements. These types of errors shake investor confidence and in extreme cases can result in heavy fines from the US Securities and Exchange Commission.

While it's unclear what exactly led to the mistakes in each of these cases, one major risk factor has reached crisis levels: a shortage of certified public accountants.

Seasoned practitioners are retiring while the profession isn't drawing the next generation of workers entering the labor market. The lack of help means current accountants' hours and workloads can be grueling, upping the odds of mistakes and burnout.

"If the people preparing the financials are overworked, or there's not enough of them, you will have errors," said Joshua Khavis, assistant professor of accounting and law at the University at Buffalo School of Management, whose research has documented links between auditor turnover, long working hours and mistakes.

Last year more than 720 companies, from Advance Auto Parts Inc. to online legal services provider LegalZoom.com Inc., cited insufficient staff in accounting and other departments as a reason for potential errors. That's up 30% from 2019, according to an analysis by equity research firm Hudson Labs for Bloomberg News.



Yet despite the plentiful job openings, students aren't racing to major in accounting. For many, the typical entry-level job doesn't pay enough to make the needed fifth year of college tuition worth it.

Accountant jobs are now the second-most posted on student placement site Handshake, doubling since 2020 and outnumbered only by general administrative support positions, according to a new report shared exclusively with Bloomberg News. While the share of accounting majors on the platform has ticked up recently after several years of declines, experts say this won't be enough to solve a worsening shortage.

This could come down to simple cost-benefit analyses: Aspiring accountants essentially need five years of college to earn a Certified Public Accountant license. That requirement, the "150-hour rule," has become increasingly expensive to satisfy given steadily rising tuition costs.

For many 22- to 27-year-olds, known as Generation Z, their average student debt of more than \$20,000 and the lure of higher-paying Wall Street and Silicon Valley firms means the time and effort required to become a CPA doesn't pencil out.

Last year, the median salary for full-time entry-level accounting jobs was roughly \$62,500, up from about \$50,000 in 2020, according to Handshake data. The median pay advertised for entry-level management consulting and financial analyst roles, by contrast, was \$70,000 and \$75,000, respectively. For software engineers, the median entry-level pay was \$93,000.

To attract people to accounting, the profession must "own up" to stagnant wages, Paul Munter, chief accountant to the SEC, told an American Institute of CPAs conference in December.

The strain on CPAs

The demand for fresh talent has become so intense that Jacqueline Burke, a professor of accounting at Hofstra University's Zarb School of Business, says more and more firms are turning to undergraduates to bridge gaps, leading to many students taking on full-time internships on top of their full-time studies. "The number of students doing that – it's unheard of," she said.

Burke said employers constantly email her for guidance on how to fill their open roles. Her first piece of advice: raise starting salaries. "I tell them, 'You're just not going to compete with what you're offering,'" she said.

Companies have also experimented with other ways to defray certification costs. Consulting firm PricewaterhouseCoopers LLP, for example, is piloting a program with Saint Peter's University in New Jersey to allow students to count full-time, paid work at the firm toward their credit hours. Isainay Richardson, a participant in the pilot and a first-generation college graduate, said the opportunity to save money and start her career right away was a definite draw.

Though Richardson is passionate about film and art, she was drawn to accounting as a way to maximize her future career opportunities. Stability and the ability to give back to her family and community were important considerations. "Almost every company or organization needs someone with financial skills, so I know that my accounting background can help me if I ever want to explore a career in the creative industry," she said.

More students are drawn to the profession's reputation of stability, especially as [half of US college graduates struggle](#) to find suitable jobs. And more tech majors are now applying for accounting roles as layoffs continue to dominate headlines in that field, according to Handshake data.

But some employers are looking for other ways to broaden their appeal to Gen Z. A growing share of job openings emphasize the positive social impact accountants can make, from supporting sustainability efforts to engaging with local communities, according to Handshake. The tactic is effective: listings that do so draw 80% more applications, on average.

Recent graduate and career-changer Melinda Barnes was excited to get an offer from AT&T Inc. to join its newly created Accounting Leadership Development Program. The flexibility to work while continuing to study for her CPA exams was appealing. Barnes also liked the idea of having the chance to network and explore contributions she could make in different kinds of roles. "I want to be able to make some sort of impact," she said.

Ultimately, though, some experts argue the best way to get more young people into the profession is to drop the 150-hour requirement entirely, especially since research has shown the requirement doesn't necessarily lead to better accountants.

"You're talking about the opportunity cost of working full-time for a year and the cost of tuition," said Ralph Polimeni, an accounting professor at Hofstra. "If I were entering now into the profession, I don't think I would've gone into accounting."

To contact the author of this story:

Jo Constantz in New York at jconstantz@bloomberg.net

To contact the editor responsible for this story:

Anne Cronin at acronin14@bloomberg.net

Nicole Bullock

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

**Bloomberg
Law**

Request a Demo

Login

[Environmental, Social & Governance \(ESG\)](#)

Feb. 29, 2024, 1:07 PM PST

Celsius Snafu Gave a Sneak-Peek to Rally-Fueling Earnings Report

By Carmen Reinicke

- Celsius's earnings report was available hours before schedule
- The stock surged to a record high after release on Thursday

Bloomberg Law News 2024-03-01T09:46:34453371948-05:00

Celsius Snafu Gave a Sneak-Peek to Rally-Fueling Earnings Report

By Carmen Reinicke2024-02-29T16:07:46196-05:00

- Celsius's earnings report was available hours before schedule
- The stock surged to a record high after release on Thursday

Celsius Holdings Inc.'s quarterly results were sitting online, waiting to give anyone who looked a sneak peek at the earnings that would set off a 20% rally in the energy-drink company's stock price.

Not many people, it seems, knew they were there.

The company, which has a market value of about \$19 billion, was scheduled to release its fourth-quarter and full-year results at 6 a.m. New York time on Thursday.

But they appeared on Celsius's website Wednesday night shortly after 7 p.m., with screenshots later circulating on X. The stock edged higher around that time, but on featherweight volumes. Trading picked up right at 6 a.m. Thursday, with shares falling more than 5% premarket before surging during the regular session by the most since August. They ended the day at an all-time high.

A spokesperson for Celsius declined to comment.



Read More: Earnings Gaffes Pile Up a Week After Lyft Typo Roiled Shares (1)

It appears to be the latest blunder of what's been a fairly gaffe-heavy earnings season, with notable clerical errors in reports from Lyft Inc., Planet Fitness Inc., Mister Car Wash Inc. and Rivian Automotive Inc. The companies had to issue corrections, and the changes in some cases sent shares swinging.

And, this week, Cava Group Inc. released its own fourth quarter results a day early after a news outlet published a story on their earnings Monday afternoon. Cava had been scheduled to report results Tuesday after market close.

Of course, even if investors did see Celsius's report when it became available Wednesday night, they may not have been able to trade on it at the time and would've waited until Thursday's premarket session, said **Kenneth Polcari**, chief market strategist at Slatestone Wealth LLC.

"I think it's just sloppy," Polcari said of the early release. "But I don't think anyone was disadvantaged."

Regulators do not often consider honest mistakes made by companies to be securities fraud. But, in recent years, the US Securities and Exchange Commission has put increased scrutiny on the systems and procedures in place at companies that are designed to prevent errors.

--With assistance from **Austin Weinstein**, **Katrina Compoli** and **Janet Freund**.

To contact the reporter on this story:

Carmen Reinicke in New York at creinicke@bloomberg.net

New York AG opens probe into AT&T wireless outage

 [reuters.com/technology/new-york-ag-opens-probe-into-att-wireless-outage-2024-02-29](https://www.reuters.com/technology/new-york-ag-opens-probe-into-att-wireless-outage-2024-02-29)

David Shepardson

Cybersecurity

By David Shepardson

February 29, 2024 10:19 AM PST Updated 20 hours ago

The company logo for AT&T is displayed on a screen on the floor at the New York Stock Exchange (NYSE) in New York, U.S., September 18, 2019. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, Feb 29 (Reuters) - New York Attorney General Letitia James said Thursday her office is investigating the cause of last week's AT&T (T.N) , opens new tab wireless outage for up to 12 hours as well as the telecom firm's response.

The Federal Communications Commission is also investigating the Feb. 22 outage. AT&T said Saturday it would provide \$5 billing credits for consumers who were impacted but has not disclosed how many customers temporarily lost service. The outage impacted some emergency 911 calls, local officials said.

An initial AT&T review found the outage was caused by the application and execution of an incorrect process while working to expand the network, the company said, ruling out a cyberattack. AT&T says its 5G network reaches around 290 million people across the United States.

"Nationwide outages are not just an inconvenience, they can be dangerous, and it's critical that we protect consumers when an outage occurs," James said.

AT&T did not immediately comment.

Reporting by David Shepardson, Editing by Nick Zieminski

Read Next

● LIVE UPDATES

Stock Market Today: New York Community Bancorp Shares Tumble

Nasdaq gains after hitting new record, S&P 500 holds steady

Last Updated: March 1, 2024 at 11:48 AM EST

< [Live Coverage Feed](#)

● Updated 1 hour ago ★

NYCB Stock Sinks After Bank Finds 'Material Weaknesses' in Loan Reviews



By [Eliot Brown](#), Reporter



Alessandro DiNello has taken over as chief executive of New York Community Bancorp. (Anthony Lanzilote/Bloomberg News)

New York Community Bancorp's woes continue.

Shares sank after the regional lender late Thursday replaced its [chief executive](#), took a \$2.4 billion charge and said it had found problems with internal controls.

The bank's stock has already tumbled this year, partly on [concerns about its holdings of commercial real estate](#). NYCB, which has more than \$100 billion in assets, [also has struggled](#) since absorbing the assets of failed lender Signature Bank and an earlier merger with Flagstar Bank.

New York Community Bancorp's stock price



Source: FactSet

Key points from Thursday's filings:

- The lender said it had found “material weaknesses” in internal controls for reviewing loans, stemming “from ineffective oversight, risk assessment and monitoring activities.”
- NYCB logged a \$2.4 billion goodwill impairment—an accounting charge writing down the value of old acquisitions.
- Longtime CEO Thomas Cangemi stepped down. His replacement is Sandro DiNello, the former Flagstar Bank CEO who was named NYCB's executive chairman early last month.

New York Community Bancorp Inc

New York Community Bancorp shares sink after flagging problems with internal controls

US regional lender replaces chief amid continued investor concern about commercial property exposure



NYCB said Alessandro DiNello would immediately replace Thomas Cangemi as chief executive © Bing Guan/Bloomberg

Joshua Franklin in New York 3 HOURS AGO



New York Community Bancorp shares lost more than a fifth of their value on Friday after the regional lender disclosed it had replaced its chief executive and identified “material weaknesses” in internal controls that guide how loans are reviewed.

The company’s shares dropped as much as 31 per cent shortly after Wall Street’s opening bell and having disclosed the moves late on Thursday. The decline moderated to leave shares down 22 per cent in mid-morning trading and down 64 per cent so far this year amid worries about the US regional lender’s exposure to the commercial property market.

Higher than expected losses from real estate loans for [NYCB](#) have revived concerns about potential defaults. The bank also cut its dividend this year to meet tougher regulatory requirements. The pressures on NYCB come almost a year after the failures of Silicon Valley Bank and other regional banks unsettled the US banking industry.

The latest hit to NYCB did not have a significant impact on other regional bank stocks, with the industry's index trading down about 1.4 per cent early on Friday.

In a regulatory filing, NYCB said the weakness in its internal controls resulted from "ineffective oversight, risk assessment and monitoring activities", noting that it would disclose a remediation plan in an annual report filing that will now be delayed.

In a separate statement, the bank said Alessandro DiNello, who was [named executive chair](#) just over three weeks ago, would replace Thomas Cangemi as chief executive, with effect immediately.

Cangemi will stay on as a member of NYCB's board of directors. NYCB said one member of its board, Hanif Dahya, had resigned because he did not support DiNello's appointment as chief executive.

In a separate statement on Friday, NYCB said it had appointed George Buchanan, an executive at Regions Bank, as its new chief risk officer. NYCB [parted ways with its previous CRO](#) shortly before it reported the larger than expected loan losses in January. The bank also named Colleen McCullum as chief audit executive, joining from United Community Bank.

"While we've faced recent challenges, we are confident in the direction of our bank and our ability to deliver for our customers, employees and shareholders in the long term," DiNello said in a statement. "The changes we're making to our board and leadership team are reflective of a new chapter that is under way."

NYCB grew swiftly with two rapid-fire deals to buy Flagstar Bank and most of the deposits at [failed lender Signature Bank](#) in 2023. Its increased size required NYCB to hold a higher level of minimum capital under US banking rules, a shift that led to the dividend cut.

"The management changes aren't overly surprising, but the material weakness is a tough headline and contributed to the sell-off post close today," wrote KBW analysts in a research note on Thursday.

Jan Marsalek

Wirecard fugitive Jan Marsalek recruited by Russian intelligence in 2014, says report

Executive at fraudulent German financial services company led a double life



A wanted poster in Germany for Jan Marsalek © EPA-EFE

Dan McCrum in London and **Sam Jones** in Berlin 18 MINUTES AGO



Wirecard fugitive Jan Marsalek was recruited by Russian intelligence at a meeting on a yacht in July 2014, sparking a decade-long association with the country's security services, according to new reports that have sparked calls for a German special investigator.

[An investigation](#) by The Insider, Spiegel, ZDF and the Austrian Standard found Marsalek's entanglement with the GRU, Russia's notorious military intelligence service, long predated Wirecard's June 2020 collapse.

Marsalek was the group's chief operating officer, responsible for the elaborate arrangements with business partners used to fabricate the sales and profits that made [Wirecard](#) Germany's most valuable fintech before it was exposed as a fraud.

Among new details of his long-standing double life is that [Marsalek](#) subsequently took shelter in Moscow having adopted the identity of an orthodox priest.

According to the investigation, Marsalek's early infatuation with Russia came in the form of a relationship with a Russian erotic actress connected to the country's security services with whom he partied, travelled and took joyrides in MiG fighter jets.

At her 30th birthday party aboard a luxury cruiser in Nice, she introduced Marsalek to Stanislav Petlinsky, a Russian former special forces operative known as "Stas". Spiegel reports he then told others he handed the enthusiastic Austrian over to the GRU to manage.

Petlinsky remained a close associate of the Wirecard executive for several years, part of a crowd of Libyan and Austrian spies involved in Marsalek's schemes who congregated at a villa opposite the Russian consulate in Munich.

The Financial Times has previously [reported](#) that Marsalek used the villa to pitch a plan to use a humanitarian mission in Libya as cover to develop a militia force that could control the flow of migrants from north Africa towards Europe. A former colonel in the GRU was to act as a consultant in the venture.

Marsalek had obtained interests in Libyan cement plants, which became a local base of operations for the RSB mercenary group under a contract for mine clearing. According to the new investigation, Marsalek's aspirations to control a militia force were more than aspirational: he secretly purchased the RSB organisation via shell companies, using cash delivered by private jet.

While the extent of Marsalek's spying activities remains unknown, he used contacts in Austrian intelligence to investigate people likely to be of interest to the Russian state, while Wirecard also provided some payment services to German security services.

In 2017 Marsalek is said to have met a senior member of the Wagner mercenary group in Munich, before they flew to Syria for a sightseeing tour of Palmyra with Petlinsky, who said the Austrian guest was shown the correct technique for firing a rocket-propelled grenade towards positions held by Isis.

Certain relatives of Petlinsky are also said to have assisted Marsalek in attempts to protect Wirecard from scrutiny by the FT, whose reporting over several years exposed the group's accounting fraud. According to The Insider, one relative oversaw a group of hackers targeting reporters, using the email address FTraid@gmail.com.

The head of the German parliamentary body with oversight of the country's intelligence agencies on Friday called for the appointment of a special investigator to co-ordinate inquiries into Marsalek.

“[The case] is such a relevant security issue . . . for other listed companies, for the German economy and for German politics,” Konstantin von Notz, Green party chair of the Bundestag Control Committee, told public broadcaster ZDF.

“The indications are becoming increasingly clear that this is about espionage [and] influence . . . and I believe that German security authorities should also take these indications very, very seriously.”

The committee exercises extensive powers of oversight over Germany's main intelligence agencies, which are obliged to disclose important information to it on demand.

“The suspicion arises that Wirecard was tailor-made to obtain information” for Russia under Marsalek's stewardship as chief operating officer, said Roderich Kiesewetter, the committee's deputy chair from the CDU.

A German government spokesperson declined to comment on the revelations, citing rules around intelligence disclosures.

Wirecard collapsed into insolvency in June 2020 after it was forced to admit that €1.9bn in cash linked to its Asian operations did not exist, and Petlinsky is said to have orchestrated Marsalek's subsequent escape.

The investigation said Marsalek flew from Vienna to Belarus, where he travelled into Russia and on to occupied Crimea, before the trail went cold.

According to British authorities, Marsalek continued to be useful. He is alleged to have directed the activities of six Bulgarian nationals resident in the UK who have been charged with spying for Russia.

This article has been updated to remove an incorrect reference to the Russian embassy

[Copyright](#) The Financial Times Limited 2024. All rights reserved.



Sergei Sumlenny, LL.M. @sumlenny · 6h

Germany's chancellor Scholz was reportedly involved in allowing Russian GRU agent **Marsalek** to set up his payment company Wirecard in Germany, even being included into Germany's main stock index. Do your math why Scholz supports Russia now. Scholz is a security risk and must go.



Michael Weiss @michaeldweiss · 8h

NEW: Jan Marsalek, the fugitive COO of disgraced company Wirecard, wasn't just behind Germany's biggest financial fraud in history. @InsiderEng can now reveal he was also a GRU agent for a decade. theins.press/en/politics/26...



Michael Weiss @michaeldweiss · 8h

Replying to @michaeldweiss

Marsalek been living in Russia for more than four years, using a passport that belongs to an Orthodox priest from Lipetsk, Father Konstantin Baiazov. We have the fake passport.



4

198

826

61K

61K



Dave Troy
@davetroy

...

GRU agent Marsalek advising folks to buy Tesla stock is consistent with other chatter observed in the info space suggesting Tesla's share price growth after 2020 was, perhaps, less than organic in nature.



Michael Weiss @michaeldweiss · 53m

father and son. As the evening wore on, Marsalek talked about his interests, his fascinations with technology and security, name-dropping as he went. He'd met Elon Musk, he said, and was a firm believer in Tesla: 'Buy that stock and tuck it away,' he advised them.

10:03 AM · Mar 1, 2024 · 4,205 Views



5



51



101



7



Post your reply

Reply



Dave Troy @davetroy · 43m

...

And the same is very likely happening with Bitcoin.



6



5



39



1.2K



Dave Troy @davetroy · 36m

...

And it should be obvious that Tesla's sharp rise in share price after 2020 has enabled much of the shenanigans we observe now; i.e. acquisition of this platform.

What whales may have laundered money from foreign states into the stock? 🤔



1



17



40



1.4K





Nexy 🇺🇸🇯🇲 @Pufferfish420 · 11m

That might explain why Elon [#has](#) tons or millions of inorganic fanbots...



9



ShShSh @SamHarp65562239 · 38m

Russia, China, Saudi Arabia



Eric Garland ✓
@ericgarland

"Elon Musk needs the fentanyl-poisoning human traffickers who massacre Uyghurs; they need him. The relationship is complicated."



wsj.com

**Elon Musk Needs China. China Needs Him.
The Relationship Is Complicated.**



2

34



SEC Calls Terraform's Dentons Retainer 'Opaque Slush Fund' in Bankruptcy Court

 [law.com/nationallawjournal/2024/02/29/sec-calls-terraforms-dentons-retainer-opaque-slush-fund-in-bankruptcy-court](https://www.law.com/nationallawjournal/2024/02/29/sec-calls-terraforms-dentons-retainer-opaque-slush-fund-in-bankruptcy-court)

The U.S. Securities and Exchange Commission has objected to Terraform Labs hiring Dentons as special counsel in its Chapter 11 proceedings, calling the \$166 million retainer with the firm an attempt to avoid paying a judgment in an enforcement action.

Terraform filed an application to retain Dentons as special counsel on Feb. 13, asking the court to approve the firm's involvement in resolving litigation. Currently, that includes an SEC action against Terraform and co-founder Kwon Do Hyeong in the Southern District of New York, another case against the company in a Singaporean court, and various other ongoing matters involving Terraform and its employees. That application says Dentons' position as a global law firm and its history working with Terraform justifies the retainer.

"The amount of funds at issue is extraordinary—nearly \$166 million worth of prepetition transfers from the debtor's estate of which more than \$84 million appears to have already been spent in litigation expenses," the SEC stated in one of its filings. "Given the lack of appropriate disclosures, the failure to comply with the Bankruptcy Code and the SEC's significant interest in protecting these assets for the benefit of the defrauded victims, the SEC objects to the application on the terms set forth therein."

The SEC has asked Judge Brendan Linehan Shannon to deny the application unless Dentons returns to Terraform the \$81 million still available from its retainer and files engagement letters and agreements about payment with the court.

The SEC's interest in the money Terraform spends during its bankruptcy proceedings is linked to the agency's allegations in multiple court proceedings that Terraform and Kwon participated in a crypto-selling scheme that led to billions of dollars in investor losses.

After those cases were filed in early 2023, Terraform allegedly transferred \$166 million into an advance payment retainer for Dentons counsel before filing for bankruptcy, with \$122 million of that transferred within three months of the Chapter 11 petition. The SEC called the retainer an "opaque slush fund" that Terraform "siphoned as a war chest to bankroll its continuing defense against the SEC (and others)."

The SEC claims in its filings that the "highly unusual payment system" may have been an effort by Terraform to avoid paying a judgment in an enforcement action proceeding and states the money could be proceeds from illegal activity that should be part of the bankruptcy estate, putting Dentons' interests at odds with the estate's.

Terraform petitioned for Chapter 11 in January, and Weil, Gotshal & Manges and Richards, Layton & Finger are serving as its bankruptcy counsel. A hearing on the objections has been set for March 5 in Wilmington.

A spokesperson for Dentons did not immediately respond for comment.

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

Bankrupt Endo To Pay \$465M To Resolve Opioid Claims

By **Stewart Bishop**

Law360 (February 29, 2024, 12:20 PM EST) -- Drugmaker Endo International has agreed to pay as much as \$465 million to resolve criminal and civil claims stemming from its sale and marketing of a powerful opioid, and will turn over its assets to a group of secured lenders who will operate the company under a new corporate structure.



A bottle of Opana ER, an opioid painkiller manufactured by Endo International, is pictured on the right. Under a new deal it reached with the government, Endo will settle roughly \$2 billion in criminal and civil claims stemming from its role in the nationwide opioid crisis by paying between \$200 million and \$465 million. (AP Photo/Rich Pedroncelli, File)

The U.S. Department of Justice said an Endo affiliate has agreed to plead guilty to one misdemeanor count of violating the Federal Food, Drug, and Cosmetic Act over its sales of misbranded drugs, and the global settlement agreement will resolve nearly \$2 billion of criminal and civil fraud, healthcare and tax claims against the company.

Those financial penalties, which include a \$1.086 billion criminal fine, forfeiture of \$450 million and a False Claims Act settlement of \$475.6 million will be satisfied by Endo's payment of \$364.9 million over 10 years, plus a contingent payment of up to \$100 million, depending on how well the restructured business performs.

Or the settlement can be resolved by Endo's payment of \$200 million immediately upon its exit from bankruptcy.

The deal is subject to approval by a New York bankruptcy court.

Endo — an Irish company with its U.S. headquarters in Pennsylvania — sought Chapter 11 protection in August 2022 for itself and some subsidiaries, aiming to deal with \$8 billion in debt and thousands of lawsuits over its sale of opioid painkillers and other products.

It was among several pharmaceutical companies that U.S. states, cities and counties sued in recent years over widespread opioid abuse, which leads to the deaths of roughly 80,000 Americans every 12 months, according to the Centers for Disease Control and Prevention.

As part of its plea deal, Endo affiliate Endo Health Solutions Inc. admitted that in 2012 and 2013, it marketed its prescription opioid pill Opana ER as being resistant to crushing, and thus less susceptible to abuse, despite warnings by the Food and Drug Administration against any such claims of the drug's purported abuse deterrence or tamper resistance properties.

Endo was also accused of engaging in an aggressive marketing campaign that targeted health care providers who were high-volume prescribers of opioids, including providers whom Endo knew were prescribing Opana ER and other opioids for non-medical uses.

Endo said Thursday that since 2013, it has been proactively strengthening its U.S. compliance program.

Prosecutors say when Endo filed for Chapter 11, it proposed a deal that ran afoul of bankruptcy law, and would have left the federal government with almost nothing, despite the fact that other creditors' claims were of lower or equal priority to that of the U.S.

"Bankruptcy protections are not a free pass to evade responsibility for criminal misconduct, civil fraud or taxes," U.S. Attorney for the Southern District of New York Damian Williams said in a statement. "Today's settlement ensures that Endo takes responsibility for its past misconduct."

The deal resolves claims by other federal agencies as well, including the Internal Revenue Service, which filed "substantial" tax claims against Endo, based on audits concerning its valuation of assets it transferred to a foreign affiliate and a tax deduction it sought in connection with a loan prepayment penalty.

The government is represented by Jean-David Barnea, Peter Aronoff and Tara Schwartz of the U.S. Attorney's Office for the Southern District of New York.

Endo and affiliates are represented by Paul D. Leake, Jason M. Liberi and Abigail E. Davis of Skadden Arps Slate Meagher & Flom LLP, Sean Berkowitz and Garrett Long of Latham & Watkins LLP and Carole Rendon and Sarah Spring of Baker Hostetler LLP.

The case is In re: Endo International PLC et al., case number 7:22-bk-22549, in the U.S. Bankruptcy Court for the Southern District of New York.

--Additional reporting by Yun Park. Editing by Alyssa Miller.

Update: This story has been updated with additional details.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chancery Preserves Class Suit Over Microsoft-Activision Deal

By **Leslie A. Pappas**

Law360 (February 29, 2024, 9:18 PM EST) -- An Activision Blizzard shareholder that sued in Delaware's Court of Chancery over the company's \$68.7 billion sale to Microsoft Corp. got the nod Thursday to move forward with the proposed class action that alleges the merger process may have violated Delaware law.

In a **24-page memorandum opinion** and a **six-page letter** docketed Thursday, Chancellor Kathaleen St. Jude McCormick denied most of the motions from Microsoft and Activision leaders to dismiss the complaint.

Plaintiff Sjunde AP-fonden, an Activision stockholder that is part of Sweden's pension system, **sued in November 2022**, naming Activision's board, Microsoft, Microsoft's board, and Microsoft's merger subsidiary Anchorage Merger Sub as defendants.

The suit accuses leaders at Activision — which makes popular games like Call of Duty and World of Warcraft — of plotting with Microsoft to give Activision investors a raw deal, allegedly violating Delaware law on the corporate merger process.

Microsoft's buyout of Activision was **announced in January 2022** and closed in October 2023 after regulatory authorities in the U.S. and Europe signed off on it.

The complaint asserts claims for conversion, breach of fiduciary duty, aiding and abetting, and conspiracy.

The memorandum opinion on Thursday resolved certain aspects of the defendants' motion to dismiss, and the six-page letter filed separately resolved other outstanding issues.

In the opinion, Chancellor McCormick denied the defendants' motion to dismiss Sjunde AP-Fonden's claim that the draft merger agreement violated Section 251(b) of Delaware General Corporation Law, which lays out what kind of information should appear in a merger agreement.

A valid merger can only be accomplished if the agreement of merger conforms to the requirements of Section 251 and is approved in the way Section 251 requires, the chancellor wrote.

"And the language of Section 251(b) places special significance on the agreement of merger," she wrote. "It expressly provides that 'the board ... shall adopt a resolution approving an agreement of merger.' It does not say that the board can get away with approving the gist of the merger."

At bare minimum, Section 251(b) requires a board to approve "an essentially complete" version of the merger agreement, the chancellor went on to say.

The chancellor said she found it "reasonably conceivable" that Activision's board failed to satisfy those minimal requirements. "There was a lot of important stuff missing from the draft merger agreement," she wrote.

The complaint also accuses Activision's board of failing to include enough information in the notice of the merger, a claim Chancellor McCormick also allowed to survive.

She also let survive a claim that the Activision board violated Delaware law by delegating negotiations over a dividend provision in the merger agreement to an ad hoc board committee.

Section 141(c)(2) requires that no board "shall have the power or authority in reference to ... (i) approving or adopting, or recommending to the stockholders, any action or matter ... expressly required by this chapter to be submitted to stockholders for approval," the chancellor wrote.

But she dismissed a claim that related to the board's decision to extend the termination date in the merger agreement without a stockholder vote, finding it didn't violate Delaware's code.

In the six-page letter, Chancellor McCormick dismissed the Section 251 and Section 141 claims against Microsoft and its merger subsidiary, saying Sjunde AP-Fonden didn't allege that the Microsoft defendants did anything in connection with those issues.

But she upheld a conversion claim against the Microsoft defendants.

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

Sjunde AP-Fonden is represented by Michael Hanharan, Stacey A. Greenspan, Corinne Elise Amato, Kevin H. Davenport and Christine N. Chappelle of Prickett Jones & Elliott PA and Lee D. Rudy, Eric L. Zagar and J. Daniel Albert of Kessler Topaz Meltzer & Check LLP.

Activision and its board are represented by Edward B. Micheletti, Lauren N. Rosenello, Michelle L. Davis, Peyton V. Carper and Claire K. Atwood of Skadden Arps Slate Meagher & Flom LP.

Microsoft and Anchorage Merger Sub are represented by Elena C. Norman and Daniel M. Kirshenbaum of Young Conaway Stargatt & Taylor LLP and Stephen B. Blake, Laura Lin and Sareen K. Armani of Simpson Thatcher & Bartlett LLP.

The case is Sjunde AP-Fonden v. Activision Blizzard et al., case number 2022-1001, in the Court of Chancery of the State of Delaware.

--Editing by Janice Carter Brown.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Chancery Rejects Leadership Bid Over Lack Of Del. Counsel

By **Rose Krebs**

Law360 (February 29, 2024, 4:28 PM EST) -- A Delaware vice chancellor has denied a three-firm leadership bid in stockholder litigation over alleged mismanagement at a medical clothing company because no First State attorneys were on the proposed lead counsel team.

Vice Chancellor Nathan A. Cook on Wednesday rejected the bid by attorneys from Glancy Prongay & Murray LLP, Pomerantz LLP and Shuman Glenn & Stecker to serve as co-lead counsel in the Figs Inc. stockholder derivative litigation "because the list of proposed co-lead counsel does not include any Delaware counsel."

The vice chancellor did agree to consolidate the two Chancery Court suits filed by investors Lloyd Kimmen and Cameron Carter.

Attorneys included on the list are from New York, Los Angeles, Denver, and Ardmore, Pennsylvania, according to a stipulated order submitted to the court for consideration.

The vice chancellor's denial comes as Chancery Court judges over the past few months have **raised concerns** about a dip in decorum during proceedings in recent years, which some Delaware attorneys have blamed on out-of-state counsel.

The court has been trying to stay ahead of the problem using a "carrot and stick" approach, ranging from updating court guidelines to imposing sanctions when behavior gets out of line, Vice Chancellor J. Travis Laster previously told Law360.

One example of such sanctions occurred in November when Chancellor Kathaleen St. J. McCormick took attorneys for global automotive parts manufacturer First Brands Group LLC **to task** for their "obstructive" conduct during a deposition of the company's CEO amid litigation with engine parts manufacturer Walbro LLC.

The chancellor — Chancery's top judge — shifted fees in connection with the deposition onto First Brands and demanded that Delaware counsel for both sides in the litigation attend the additional deposition time she ordered. The chancellor said it seemed that Delaware counsel didn't appear at the initial deposition.

Having Delaware counsel help steer proceedings is strongly preferred in Chancery Court, a venue that places heavy emphasis on what is commonly referred to as "the Delaware Way," or an expectation that matters be handled in a respectful and constructive manner.

The court's rules include a requirement that "all filings in civil actions in the Court of Chancery must be electronically filed ... by an attorney licensed to practice in Delaware," the state judiciary's website says.

And the "Guidelines to Help Lawyers Practice in the Court of Chancery," which were last updated in August 2021, make clear the expectations of the court.

"The concept of 'local counsel' whose role is limited to administrative or ministerial matters has no place in the Court of Chancery," the guidelines say. "The Delaware lawyers who appear in a case are responsible to the court for the case and its presentation."

Non-Delaware counsel is not to "directly make filings or initiate contact with the court, absent extraordinary circumstances," the guidelines say.

"If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyer who is taking the positions set forth therein and making the representations to the court," according to the guidelines. "It does not matter whether the paper was initially or substantially drafted by a firm serving as 'Of Counsel.'"

The Chancery Court, which is the nation's preeminent corporate law venue, is also undergoing a **yearslong effort** to modernize its rules to more closely align with the Federal Rules of Civil Procedure and make them more user-friendly for litigants.

In addition to rejecting the leadership bid, Vice Chancellor Cook's Wednesday order also took issue with stipulated language that "purports to apply to as-yet unidentified actions."

"If another action should be consolidated with this action, the parties may then file a stipulation to that effect or a party may move for consolidated treatment of that action with this proceeding," the vice chancellor wrote.

Kimmen filed his derivative suit **in January** seeking to recover, for the company, alleged mismanagement losses and massive unfair trading gains benefiting controlling investors and directors.

The investor said Figs' troubles were partly tied to misleading claims about strategies that purportedly allowed the company to reliably predict clothing supply decisions by healthcare companies and workers, minimizing inventory costs and the expenses of shipping from manufacturers in China.

Those achievements touted by management, however, were illusory, with costly truths undisclosed, Kimmen said.

Those singled out in the Chancery complaint include Figs co-founders and co-CEOs Heather Hasson and Catherine Spear, as well as Thomas Tull, who is founder, chair and CEO of Tulco Holdings, which controlled 51% of the clothing company's voting power prior to its IPO. Together, the trio held 78.3% of Figs' votes before the company went public, according to the complaint.

Kimmen leveled claims of breaches of fiduciary duty against the medical scrubs maker's directors and officers, Tull and Tulco, as well as insider trading and unjust enrichment claims against Hasson, Spear, Tull and Tulco.

Just days after Kimmen's suit, Carter filed a complaint that lodged similar claims. The two investors agreed to consolidate the actions as they "challenge the same alleged conduct by the same company directors and officers and involve substantially the same questions of law and fact," the court said.

The defendants took "no position regarding the appointment of co-lead counsel," according to the order.

Counsel for Figs declined to comment on Thursday.

Counsel for the other parties didn't immediately respond Thursday to a request for comment.

The investors are represented by Ryan M. Ernst of Bielli & Klauder LLC, Gustavo Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP, Rusty E. Glenn and Brett D. Stecker of Shuman Glenn & Stecker, and Benjamin I. Sachs-Michaels, Robert V. Prongay and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Figs Inc., its former or current directors or executives are represented by D. McKinley Measley of Morris Nichols Arsht & Tunnell LLP and Koji Fukumura of Cooley LLP.

Tulco LLC and Tull are represented by Paul J. Lockwood of Skadden Arps Slate Meagher & Flom LLP.

The case is In re: Figs Inc. Stockholder Derivative Litigation, case number 2024-0014, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Leslie A. Pappas. Editing by Orlando Lorenzo.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Children's Clothing Co. Overstated Sales Prospects, Suit Says

By **Sydney Price**

Law360 (February 29, 2024, 8:42 PM EST) -- Children's clothing retailer and wholesaler The Children's Place artificially inflated stock prices by overstating sales guidance and concealing its promotion strategy, damaging investors when disappointing financial results and a guidance-cut announcement led to a share decline, according to a recent proposed class action.

In a **complaint filed Wednesday**, Randeep Singh Khalsa said The Children's Place Inc. gave positive financial updates to investors for months while failing to disclose it was aggressively promoting products in an attempt to maximize sales, which resulted in lower merchandise margins.

In addition to The Children's Place, its CEO Jane Elfers and Chief Financial Officer Sheamus Toal are also named defendants in the suit.

On March 16, 2023, The Children's Place released guidance for 2023, stating that input cost reductions toward the end of 2023, combined with a "strong focus on expense and inventory management," should drive double-digit operating margins in the third and fourth quarters of 2023.

Throughout the rest of the class period — March 16, 2023, through Feb. 8, 2024 — the defendants continued to affirm its strong guidance for the end of 2023.

But on Feb. 9, 2024, The Children's Place released preliminary fourth quarter 2023 financial results that contradicted its previous projections, the suit states. The company revealed it was now expecting net sales in the range of \$454 million to \$456 million — down from earlier projections of \$460 million to \$465 million, according to the suit. The company also said it heavily pushed promotions to maximize sales, which resulted in an operating loss in the fourth quarter.

On this news, the company's shares declined \$7.25, or about 37%, to close at \$12.51 on Feb. 9, the suit said.

"Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing The Children's Place's financial well-being and prospects from the investing public and supporting the artificially inflated price of its securities," Khalsa said.

The suit claims The Children's Place and the individual defendants acted with scienter, or actual knowledge, of wrongdoing or reckless disregard, and violated the Securities Exchange Act of 1934. Khalsa seeks damages with pre- and post-judgment interest.

Counsel for Khalsa and a representative of The Children's Place did not immediately respond to requests for comment Thursday.

Khalsa is represented by Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP, Howard G. Smith of Law Offices of Howard G. Smith, and Donald A. Ecklund and Kevin G. Cooper of Carella Byrne Cecchi Brody Agnello PC.

Counsel information for The Children's Place was not immediately available on Thursday.

The case is Khalsa v. The Children's Place Inc. et al., case number 2:24-cv-01182, in the U.S. District Court for the District of New Jersey.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Diamondback Board Conflicted In OK'ing \$26B Deal, Suit Says

By **Sydney Price**

Law360 (February 29, 2024, 6:30 PM EST) -- Shareholders of Diamondback Energy Inc. have hit the company and its directors in Delaware's Chancery Court with a proposed class action, claiming its board members wrongfully voted in their own self-interest when approving Diamondback's \$26 billion acquisition of another energy company with terms that will give the board members control over their reelection.

According to the suit filed Wednesday by investors Plymouth County Retirement Association and Kenneth Webb, Diamondback **agreed to acquire** privately held oil and gas company Endeavor Energy Resources LP on Feb. 12 for \$26 billion in a cash-and-stock deal.

Although the deal would significantly expand Diamondback's business, the investors say Diamondback's directors drew up a deal that issued 40% of the company's stock to the founder of Endeavor, Autry Stephens, and his family, who would be contractually obligated to support incumbent directors and management, practically guaranteeing the board's reelection. The suit names Diamondback and its nine directors as defendants.

"The board is using the potential attractiveness of the acquisition itself as a lever to achieve a personal benefit — voting power and entrenchment — that the stockholders cannot vote upon directly," the suit says.

According to the suit, the proposed deal would require that the Stephens family vote all of their Diamondback shares in favor of the board's director recommendations.

The agreement also prohibits the Stephens family from transferring the shares to "significant" activist investors, soliciting proxies or "influencing any voting of Diamondback common stock," the complaint says.

"At bottom, the powerful entrenchment mechanisms embedded in the stockholders agreement cannot be justified," the suit says.

The suit accuses the defendants of breaching their fiduciary duties. The proposed class includes all holders of Diamondback's common stock apart from the defendants. The suit seeks an injunction on enforcing the incumbent voting requirement and the anti-activism transfer restrictions.

Counsel for the plaintiffs and a representative of Diamondback did not respond to requests for comment on Thursday.

Plymouth County Retirement Association and Webb are represented by John Vielandi, Ned Weinberger, Mark D. Richardson and Brendan W. Sullivan of Labaton Keller Sucharow LLP and Jeremy Friedman, David Tejtzel and Lindsay La Marca of Friedman Oster & Tejtzel PLLC.

Counsel information for the defendants was not immediately available Thursday.

The case is Plymouth County Retirement Association et al. v. Stice et al., case number 2024-0183, in the Court of Chancery of the State of Delaware.

--Editing by Adam LoBelia.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Real Estate Tech Co. Opendoor Beats Investor Suit, For Now

By **Katryna Perera**

Law360 (February 29, 2024, 9:39 PM EST) -- Real estate marketplace giant Opendoor Technologies Inc. has beaten, for now, a suit accusing it of misleading investors about its artificial-intelligence-powered algorithm and ability to remain profitable, with an Arizona federal judge ruling that many of the challenged statements in the suit are not actually false or misleading.

U.S. District Judge Michael T. Liburdi issued an **order** Tuesday tossing the suit but giving plaintiffs Indiana Public Retirement System, Oakland County Employees' Retirement System and Oakland County Voluntary Employees' Beneficiary Association leave to amend their claims.

The pension funds **filed suit** in 2022, alleging that Opendoor's public offering documents falsely claimed its artificial intelligence algorithm could accurately make offers on homes.

The pension funds say they lost more than \$1 million due to the false and misleading statements, and they claim there was actually an undisclosed human-driven process used at the company to make offers.

Judge Liburdi said Tuesday that many of the challenged statements in the complaint were not false and would not have misled a reasonable investor. The statement about machine learning driving pricing decisions at the company "does not suggest that Opendoor personnel lack any significant role in that process," the judge said, and it is not likely that a reasonable investor would believe that the entire process was driven solely by the algorithm.

It is also unpersuasive that a reasonable investor would "ever believe that a particular business model, even one premised on impressive technology, is guaranteed to be profitable in all circumstances," the judge added.

The judge also tossed the suit's scienter claims against Opendoor co-founder and former CEO Eric Wu and other executives, saying the amount and timing of Wu's share sales do not indicate knowledge of wrongdoing, and the other defendants' knowledge of core operations of the company falls short of alleging scienter.

Despite tossing the suit, Judge Liburdi said statements about Opendoor's ability to remain profitable "in any housing market," while not generally misleading, do "reflect an impression that Opendoor's algorithm was, at the very least, generating roughly accurate initial offers."

Analysts at the time reported favorably on Opendoor's algorithm, according to the order. If it is true, as the pension funds suggest, that the algorithm was not generating accurate initial offers, then the analysts were incorrect in their conclusions, which were based on misleading statements made by Opendoor about the efficacy of the algorithm.

"Because '[t]he perceptions of analysts are an acceptable measure of what reasonable investors would have understood' ... the court finds that these six challenged statements are actionably misleading because they would have led a reasonable investor to conclude that Opendoor's algorithm was accurately pricing homes and adjusting to changes within the market when the statements were made."

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

The pension funds are represented by Daniel P. Thiel of Clark Hill PLC, Michael P. Canty, James T. Christie, Guillaume Buell and Nicholas Manningham of Labaton Sucharow LLP, Aaron L. Castle of Vanoverbeke Michaud & Timmony PC and by Casey E. Sadler of Glancy Prongay & Murray LLP.

Opendoor and the other defendants are represented by John C. Gray of Lewis Roca Rothgerber Christie LLP and Adam S. Hakki and Lyle Roberts of Shearman & Sterling LLP.

The case is In re Opendoor Technologies Incorporated Securities Litigation, case number 2:22-cv-01717, in the U.S. District Court for the District of Arizona.

--Additional reporting by Brent Godwin. Editing by Rich Mills.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Two More Cos. Hit With 'In Concert' Delaware Bylaw Suits

By **Katryna Perera**

Law360 (February 29, 2024, 9:59 PM EST) -- The number of class actions targeting companies' boards of directors and allegedly "coercive" bylaw provisions continues to grow, as two new investor suits were filed in Delaware's Court of Chancery against Massachusetts payments software company Flywire Corp. and California subscription software company Zuora Inc.

The suit against Flywire and its seven-member board was filed on Wednesday by Aaron Jones, and the suit against Zuora and its nine-member board was filed on Thursday by Eric Johnson.

Both actions seek to nullify the companies' advance notice bylaw provisions that allegedly preclude stockholders' ability to successfully wage a proxy contest.

Both complaints follow other, almost parallel actions filed recently against Peloton Interactive Inc., Alcoa Corp., Wish, and Bill Holdings Inc.

Like in the other suits, Jones and Johnson are represented by attorneys from Block & Leviton and Abbott Cooper PLLC.

According to the complaints, Flywire and Zuora, like many other companies, have an advance notice bylaw requiring any stockholder seeking to nominate a candidate to the board to provide advance notice of the nomination.

However, the difference in Flywire's and Zuora's cases, and the focus of the suits, is the incorporation of a definition of "acting in concert" that the suing shareholders say renders the advance notice bylaws "preclusive and coercive."

"Incorporating an 'acting in concert' definition with a 'daisy chain' into the advance notice bylaw — which requires the nominator to make extensive disclosures on myriad topics not just with respect to himself or any nominee, but also anyone acting in concert there with — makes compliance realistically unattainable," Jones' complaint states.

The shareholders say that since compliance with the advance notice bylaw is a precondition for stockholders attempting to engage in a proxy contest, the incorporation of the "acting in concert" definition hinders their ability to wage such a contest for two reasons.

First, the definition of "acting in concert" creates "uncertainty" about what information a stockholder must disclose because it assumes that stockholders are acting in concert with one another even without an express agreement, arrangement or understanding.

"As a result, a stockholder cannot, as a practical matter, distinguish between a mere concurrence of self-interest with another stockholder, on the one hand, and a legally significant connection impacting a stockholder's nomination obligations, on the other," the complaints state.

Second, the definition includes both a "wolf pack" and "daisy chain" provision. According to the complaints, the "wolf pack" provision deems stockholders to be acting in concert with one another if they act "in substantial parallel" with each other, and the "daisy chain" provision deems two stockholders to be acting in concert if they are both working with the same third party, regardless of whether they know about each other's existence.

"Because stockholders may be acting in concert with other stockholders without any knowledge of doing so, it is impossible, as a practical matter, for a stockholder to submit a notice of nomination that complies with the advance notice bylaw or reasonably believe that their notice of nomination complies with the advance notice bylaw," the complaints state.

"These provisions serve as an unlawful deterrent to those seeking to meaningfully participate in the nomination process — a fundamental right of stockholders of a Delaware corporation," the shareholders add.

Prior to Jones and Johnson's actions, Bill Holdings and its board members were the most recent to be hit with **an action** over the advance notice bylaw.

In December, stockholders of online commerce site Wish **sued** its parent company, ContextLogic Inc., and shareholders of Peloton also **launched a proposed class action** citing wolf-pack and daisy chain provisions.

Additionally, aluminum product manufacturer Alcoa Corp. was **hit with a Chancery suit** from a proposed shareholder class making similar allegations last week.

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

Jones and Johnson are represented by Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax, Daniel M. Baker, Robert Erikson and Jason Leviton of Block & Leviton LLP and by Abbott Cooper of Abbott Cooper PLLC. Jones is also represented by Saranna Soroka of Block & Leviton LLP.

Counsel information for Flywire and Zuora was not immediately available.

The cases are Aaron Jones v. Alex Finkelstein et al., case number 2024-0178, and Eric Johnson v. Omar P. Abbosh et al., case number 2024-0191, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie A. Pappas and Jeff Montgomery. Editing by Vaqas Asghar.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Trump's Truth Social Merger Deal Lands In Del. Chancery

By **Leslie A. Pappas**

Law360 (February 29, 2024, 5:34 PM EST) -- Plans to take former President Donald Trump's social media platform Truth Social public came under fire in two Delaware Chancery Court lawsuits Wednesday, with investors on both sides of the deal alleging that the long-delayed merger would cheat them out of their shares.

The first case, filed late Wednesday, came from United Atlantic Ventures LLC, which holds an 8.6% equity stake in the company that owns Truth Social, Trump-controlled Trump Media & Technology Group Corp.

The second suit, filed Thursday morning, came from ARC Global Investments II LLC, sponsor of Digital World Acquisition Corp., the special purpose acquisition company that is seeking to merge with TMTG.

The lawsuits come just two weeks after the proposed merger finally **won regulatory approval** from the U.S. Securities and Exchange Commission. Digital World shareholders are scheduled to vote on the merger March 22.

Trump founded TMTG in 2021. Digital World **went public in September 2021** after completing a \$250 million initial public offering, and announced in October of that year that it would **take the social media platform public** in a deal that was then valued at \$1.7 billion.

The SPAC raised **\$1 billion for the effort in May 2022** in a PIPE deal — a private investment in public equity — but the financing package to support the deal has dwindled as investors pulled their financial commitments.

In December, Digital World disclosed that cancelations from the PIPE **totaled \$484.5 million**.

TMTG **sued** more than a dozen news organizations in Florida state court last year, alleging a "coordinated media campaign" to sink the merger.

In regulatory filings last week, Digital World Acquisition Corp. **warned investors** about a "potential dispute" between TMTG and United Atlantic Ventures LLC, which partnered with Trump to build the social media platform.

The filing also mentioned multiple risk factors that could cause problems for the merger, such as the **recent judgment** of a New York state court that requires Trump, his family, and affiliated businesses to disgorge \$364 million, plus interest, in ill-gotten gains.

In its Delaware lawsuit filed Wednesday, UAV alleges that its shares of TMTG are being diluted ahead of the merger through a recent authorized stock increase of common stock from 120 million to one billion common shares.

"This wrongful 11th hour, pre-merger corporate maneuvering can serve only one purpose: to dilute UAV before the merger and misappropriate UAV's merger consideration for Trump," UAV's motion to expedite says.

Court papers say that United Atlantic Ventures was co-founded by Andy Litinsky and Wes Moss, two

former "Apprentice" contestants who say they helped Trump launch Truth Social in 2021 in exchange for equity in Trump Media & Technology Group.

Trump owns 90% of the Trump Media & Technology Group, and the remaining 1.4% is held by former Trump lawyer Bradford Cohen, according to the motion to expedite.

UAV alleges that Trump and TMTG's board, who it says are all beholden to Trump, are planning to issue 900,000,000 TMTG shares to Trump, his associates, and his children — diluting UAV's equity share from 8.6% to less than 1%.

UAV is urging the Chancery Court to expedite the case and nullify the share authorization, which it says was not presented to shareholders for a vote.

"UAV will not have an adequate remedy at law because traditional disgorgement will not be available due to the fact that Trump faces nearly a half-billion dollars in existing judgments," UAV says in its court papers.

On the other side of the pending Digital World merger is the SPAC's sponsor, which alleges in its lawsuit that the merger would improperly convert its shares.

ARC Global, which holds 76.4% of Digital World's outstanding Class B Common Stock, alleges that the SPAC is planning to convert B shares using an improper conversion ratio that would exclude certain securities.

"As a direct consequence of this breach, ARC's shares of Class B Common Stock will be converted into less shares of Class A Common Stock than it is entitled to," ARC says in a motion to expedite that was attached to the complaint.

ARC sued Digital World and its directors, Eric S. Swider, Frank J. Andrews, Edward J. Preble, and Jeffrey A. Smith, alleging breaches of the company's charter and fiduciary duty.

ARC is seeking a preliminary injunction to block the merger until the SPAC updates its calculations and corrects what it says are misstatements in the company's proxy.

None of the parties responded to Law360's request for comment about lawsuits.

United Atlantic Ventures LLC is represented by Richard I. G. Jones Jr., David B. Anthony, and Harry W. Shenton IV of Berger McDermott LLP and Christopher Clark and Benjamin Dozier of Clark Smith Villazor LLP.

ARC Global Investments II LLC is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud, and Rae Ra of Richards Layton & Finger PA.

Counsel information for Trump Media & Technology Group Corp. and Digital World Acquisition Corp. was not immediately available.

The cases are United Atlantic Ventures LLC v. Trump Media & Technology Group Corp., case number 2024-0184, and ARC Global Investment II LLC v. Digital World Acquisition Corp., case number 2024-0186, both in the Court of Chancery of the State of Delaware.

--Additional reporting by Elaine Briseño, David Minsky, Tom Zanki, Elise Hansen and Al Barbarino. Editing by Peter Rozovsky.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Securities Group Of The Year: Latham

By **Parker Quinlan**

Law360 (February 29, 2024, 2:02 PM EST) -- Latham & Watkins successfully helped Oracle, company executive Lawrence J. Ellison and CEO Safra Catz beat a derivative challenge to a \$9.4 billion acquisition deal, one of the largest challenges against a corporate deal to go to trial before the Delaware Court of Chancery, earning it a spot among **Law360's 2023 Securities Groups of the Year**.



Shareholders had alleged founder and Chief Technology Officer Larry Ellison used undue influence at the company to get it to pay nearly \$3 billion too much for NetSuite Inc. in 2016, while misleading a special board committee headed by Catz to oversee the purchase.

Global vice chair of Latham's securities practice Blair Connelly told Law360 in an interview the case was about more than money, however, and that his clients, particularly Ellison and Catz, saw the suit as a challenge to their reputations and legacy at Oracle.

"The court found that Safra Catz had acted at all times in Oracle's best interest, and that in fact everything she did was designed to ensure that Oracle paid the lowest price they possibly could," Connelly said. "Ultimately at trial, it was proven that neither of them had done anything wrong and that Larry had completely and properly recused himself from the process."

Connelly said much of their defense strategy involved showing how the move to buy NetSuite made business sense for Oracle, demonstrating how software as a service, or SaaS, is structured — and why NetSuite's product was different from what Oracle already had.

Earlier this month, stockholders lost a bid to recover nearly \$5 million in legal fees after losing the

suit, with the Chancery Court rejecting claims that shareholders deserved the award for compelling Oracle to appoint two new independent directors.

Latham also successfully defended social media company X, formerly known as Twitter, this year — securing dismissal of an investor class action challenging 34 statements made by the company that allegedly caused stock prices to tumble.

Global chair of the firm's securities practice, Andrew Clubok, described the X lawsuit as part of a larger trend of "puzzle pleading" suits in which plaintiffs point to a constellation of different corporate statements in an attempt to identify a violation of securities laws.

"What I think this firm has been particularly good at is simplifying an incredibly complex stuff-against-the-wall case so that you can put it into the right buckets, lay it out thematically for the court," Clubok said. "In the Twitter case, we used every single arrow in the quiver in the securities defense: We argued they had not properly pled false statements, so-called lost causation, and they hadn't pled scienter."

X shareholders were reprimanded by California U.S. District Court Judge Mark C. Scarsi last August for their use of a rambling 110-page complaint, which attempted to allege they were misled about potential security concerns on the platform.

Colleen Smith, who is also global vice chair with Latham's securities practice based in San Diego, told Law360 that in derivative suits such as the X case, plaintiffs often have a difficult time proving how the statements are connected to underlying fraud.

"Securities fraud requires intent and recklessness, and oftentimes, their allegations in terms of the motives and individuals involved are incredibly thin and don't make sense," Smith said. "Absent motive, or a reason to do it, it doesn't make sense, and in fact in most typical cases, people are motivated to do the opposite — and to keep their investors informed."

Clubok said part of Latham's success as a securities practice comes from opportunities given to younger attorneys and a push for greater diversity across the practice. Junior attorneys at Latham are often allowed to argue motions as part of high-stakes litigation, which facilitates their career growth while helping build a solid bench at the firm, Clubok said.

He also cited gender diversity as an asset for Latham, which he said has led to women comprising nearly half of all attorneys in the firm's securities practice group.

Latham's emphasis on both gender and age diversity in the last decade has allowed both the firm and securities practice to rely on attorneys who may not have been given the same opportunities at other firms, according to Clubok.

"We're not doing it to be 'woke' — it is the right thing to do, and it's also the smart thing to do," Clubok said. "You're way more effective if you're speaking with lots of different kinds of voices when you're talking to different kinds of judges or people in a jury."

--Editing by Goodwin Anim.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Google Attys' 'Fake Privilege' Comments Cited In Search Suit

By **Dorothy Atkins**

Law360 (February 28, 2024, 4:52 PM EST) -- The U.S. Justice Department and states accusing Google of monopolizing the online-search market have asked a D.C. federal judge to consider internal chats disclosed in Epic Games' antitrust lawsuit that revealed Google's lawyers discussing "fake privilege" — a practice of unnecessarily involving a lawyer to make an exchange confidential.

In a motion filed Tuesday, the Justice Department and states asked U.S. District Judge Amit P. Mehta to take judicial notice of the two Google-written exhibits that **were produced** in Epic Games litigation in November in a jury trial challenging Google's app store commissions.

The DOJ and states argued that the exhibits should be considered by the court for the limited purpose of determining whether Google abused privilege and hid documents relevant to the antitrust issues in the government's litigation against the tech giant by making bogus privilege assertions.

"The two Epic trial exhibits for which plaintiffs seek the court to take judicial notice are directly related to the proposed findings of fact in this case and neither were produced in this litigation," the motion said. "The court's taking judicial notice of the existence and content of these records may assist the court in evaluating plaintiffs' claims regarding Google's use of privilege."

The motion noted that Google has indicated that it plans to oppose the request, and said that although the government doesn't seek to specifically add the exhibits as evidence in the case, the court should still take judicial notice of their existence and contents — "namely, that Google's own inside counsel used the term 'fake privilege' when referring to an email on which she was copied and which discussed Google business."

The two exhibits include a chat exchange between Google in-house attorneys, Emily Garber and Tristan Ostrowski, in January 2021 in which Garber discusses an email on which she was "looped [in] for fake privilege" regarding a conflict between the Google Play team and the Google Ads team, according to the brief.

The other exhibit is a March 2022 exchange in which Garber again refers to "fake privilege" in relation to Google lawyers during a longer discussion with Ostrowski, the brief said, adding that the documents weren't produced in the current litigation because Garber is not a Google custodian in the case.

The motion comes three months after the high-stakes, 42-day trial against Google wrapped in November, with Judge Mehta setting closing arguments for May, allowing the parties to submit over 1,000 pages of post-trial briefs and saying he had **"no idea"** how he would ultimately rule.

The government's claim that Google's agreements with smartphone manufacturers and web browsers — through which it has paid billions of dollars to ensure that it's the default search engine on Apple devices and browsers Firefox and Safari — illegally ensured its market dominance and boxed out would-be competitors like Bing and DuckDuckGo.

But Google argued in its defense that those agreements date back to Android's infancy as a mobile operating system and when Apple and Mozilla first released their Safari and Firefox browsers, respectively. At the time, the company **argued in its closing brief**, "only a tiny fraction of online search queries originated from these browsers and devices."

The other litigation against Google was launched by Fortnite game-maker Epic Games Inc. in 2020, accusing Google and Apple in **separate lawsuits** of violating antitrust laws by restricting app stores and charging up to 30% commissions on app and in-app purchases.

Epic Games' case went to a jury trial last year, and in December jurors in San Francisco dealt Google a **devastating blow** after just hours of deliberations, ruling that the search giant illegally restrained trade in the market for Android app distribution and billing services, and setting the stage for a possible court-ordered injunction.

Google has since **vowed to fight the verdict** in post-trial motions and on appeal, but evidence disclosed at trial offered a rare glimpse into the tech company's **internal preservation practices**.

Before the Epic Games trial wrapped in December, U.S. District Judge James Donato, who has presided over the antitrust litigation in California, told counsel that he's **concerned** Google's willful destruction of evidence and "bogus" privilege assertions constitute a "frontal assault on the administration of justice" and that jury instructions in the newly wrapped trial will reflect the company's "deeply disturbing" behavior.

Google declined to comment Wednesday, and representatives for the government didn't immediately respond to requests for comment.

The government is represented by Kenneth M. Dintzer, Karl E. Herrmann and Erin Murdock-Park of the U.S. Department of Justice's Antitrust Division.

The states are represented by their respective attorneys general and William F. Cavanaugh Jr. of Patterson Belknap Webb & Tyler LLP.

Google is represented by John E. Schmidlein, Benjamin M. Greenblum and Colette T. Connor of Williams & Connolly LLP, Wendy Huang Waszmer, Susan Creighton and Franklin M. Rubinstein of Wilson Sonsini Goodrich & Rosati PC and Mark S. Popofsky and Matthew L. McGinnis of Ropes & Gray LLP.

The D.C. antitrust cases are U.S. et al. v. Google LLC, case number 1:20-cv-03010, and Colorado et al. v. Google LLC, case number 1:20-cv-03715, in the U.S. District Court for the District of Columbia. The California antitrust cases are In re: Google Play Store Antitrust Litigation, case number 3:21-md-02981, and Epic Games Inc. v. Google LLC et al., case number 3:20-cv-05671, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger, Brian Koenig and Jared Foretek. Editing by Rich Mills.