

Ernst & Young Unit's Wirecard Fraud Suit Victory Draws Appeal

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A logo sits on the Ernst & Young LLP offices in London on April 15, 2019.

Photographer: Simon Dawson/Bloomberg

US investors in the now insolvent financial-services company Wirecard AG are appealing a judgment for Ernst & Young Global Ltd.'s accounting affiliate in Germany on claims the auditor failed to catch a €1.9 billion fraud.

The investors, who sued the affiliate on behalf of a proposed class, notified the US District Court for the Eastern District of Pennsylvania March 1 that they're taking the case to the US Court of Appeals for the Third Circuit.

- Lead plaintiffs Thanh Sam and Lawrence Gallagher alleged Wirecard was able to perpetrate a scheme involving fictional escrow accounts only with the auditor's complicity or "egregious refusal to see the obvious"
- Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft won dismissal of the claims in December 2023 on jurisdictional grounds in a ruling by Judge Anita Brody
- Proceedings against Wirecard in the district court case are stayed pending the outcome of the company's bankruptcy case

Hagens Berman Sobol Shapiro LLP and **Robbins Geller** Rudman & Dowd LLP are lead counsel for the investors. Williams & Connolly LLP represents EY Germany.

The case is In re Wirecard Sec. Litig. , E.D. Pa., No. 2:20-cv-03326, notice of appeal 3/1/24 .

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[Litigation](#)

March 1, 2024, 9:28 AM PST; Updated: March 1, 2024, 12:47 PM PST

Carvana Wins Reprieve from Class Action Over Growth Strategy (2)

By Ben Miller

- Judge grants car dealer's bid to dismiss, with leave to amend
- Shareholders filed 'impermissible puzzle pleading,' per judge

Bloomberg Law News 2024-03-04T10:19:52295906857-05:00

Carvana Wins Reprieve from Class Action Over Growth Strategy (2)

By Ben Miller 2024-03-01T12:28:00000-05:00

- Judge grants car dealer's bid to dismiss, with leave to amend
- Shareholders filed 'impermissible puzzle pleading,' per judge

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.

"We are pleased with Judge Liburdi's well-reasoned opinion dismissing the Exchange Act and Securities Act claims against Carvana," said Latham & Watkins LLP partner Susan Engel, who represents the company and its executives.

Carvana disclosed an 8% decline in car sales, its first year-over-year retail sales decline, 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.

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

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

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

(Updates paragraph five to add Carvana lawyer's comment. An earlier version of this story was corrected to accurately state which parties are represented by Latham & Watkins.)

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March 4, 2024, 2:00 AM PST

This Week in Chancery Court: Meta Pushes to Dismiss Abuse Claims

By Jennifer Kay

Bloomberg Law News 2024-03-04T10:17:59125732187-05:00

This Week in Chancery Court: Meta Pushes to Dismiss Abuse Claims

By Jennifer Kay 2024-03-04T05:00:58000-05:00

Meta Platforms Inc. will ask the Delaware Court of Chancery this week to dismiss a lawsuit alleging that Mark Zuckerberg, other senior corporate officers, and members of the tech giant's board have deliberately ignored child sexual exploitation on Facebook and Instagram.

Here's a look at what else is coming before the court:

Monday: Valhalla Partners II LP v. Vistar Media Inc., Del. Ch., No. 2019-0202, trial 3/4/24.

At issue: Digital advertising startup Vistar Media Inc. was ordered in 2019 to face claims that it tried to cut out early investors by preventing them from converting promissory notes into common stock. In a September 2023 bench ruling, Vice Chancellor Sam Glasscock III denied cross motions for summary judgment from Vistar and the group of venture capital investors suing them. The parties now go to trial over the investors' claims that Vistar prevented them from converting notes totaling \$1.3 million into equity, according to a joint pre-trial brief. Vistar, which seeks \$3.5 million in damages, argues in its own brief that the investors breached the notes when they "improperly rejected payment."

Court action: A five-day trial opens Monday in Georgetown, Del.

Vistar Media Loses Bid to Nix Suit Over Note-Equity Conversions

Tuesday: Emp. Ret. Sys. of R.I. v. Zuckerberg, Del. Ch., No. 2023-0304, oral argument 3/5/24.

At issue: The amended complaint filed by a group of investment funds last August depicts a business that's dragging its feet when police, prosecutors, and victim advocacy groups seek its assistance to remove abusive content and break up child sex trafficking networks. Meta's attorneys argue "no corporate trauma has occurred," and the investment groups can't back up their claims that there's been a failure of oversight by Meta's senior leaders, according to a brief supporting the company's motion to dismiss. If the court won't dismiss the lawsuit, the case should be stayed pending resolution of litigation in other venues over claims of child sexual exploitation on Facebook, the company said. Attorneys for the investment groups said in a letter to the court that they may play video from Zuckerberg's testimony from a Jan. 31 US Senate hearing to support their case.

Court action: Oral arguments on the motion to dismiss will be held in Wilmington, Del.

Meta Still Facilitating Child Sex Trafficking, Updated Suit Says

Wednesday: In re Weber Inc. S'holder Litig., Del. Ch., No. 2023-0993, hearing 3/6/24.

At issue: Former Weber Inc. investors initially filed a lawsuit last October challenging the grill maker's \$2.3 billion take-private sale to billionaire investment banker Byron Trott. Chancellor Kathaleen St. Jude McCormick now must decide who will take the lead in consolidated litigation, out of three potential lead plaintiffs. Three investors known as the Costner group argue they have the best case because their complaint focuses on "how the merger price is unfair based on a discounted cash flow analysis" by a valuation expert. Two other investors say their complaint should prevail because the "only impediment to proceeding with discovery has been the delayed filing of other complaints by other plaintiffs with lesser economic interests at stake." One last investor, Michael Levine, argues his case "has demonstrated the most vigor," having successfully prosecuted a books and records action "which resulted in the production of critical documents and information that informed the superior allegations and additional claims in the complaint."

Court action: Oral arguments on the leadership applications will be heard in Wilmington, Del.

Byron Trott, Weber Board Sued Over \$2.3 Billion Buyout Deal (1)

Friday: Jeffries v. Abercrombie & Fitch Co., Del. Ch., No. 2023-1211, oral arguments 3/8/24.

At issue: Former Abercrombie & Fitch Co. CEO Michael Jeffries seeks to fast-track his claims against the apparel retailer, demanding that it cover legal fees he's set to incur defending himself against sexual assault allegations raised by a federal lawsuit last October. Jeffries alleges that Abercrombie has ignored multiple requests for it to front his legal fees and expenses in connection with the proposed class action, which also targets the business. Abercrombie denies his allegations. Jeffries also filed a motion for summary judgment, which Abercrombie opposes, arguing the claims Jeffries faces in the federal lawsuit are not indemnifiable since they "are inherently personal in nature and not corporation-related."

Court action: Oral arguments on the motion to expedite will be heard in Wilmington, Del.

Abercrombie Sued by Ex-CEO Facing Sexual Assault Allegations

Friday: Ky. Downs Mgmt. Inc. v. Ky. Downs LLC, Del. Ch., No. 2021-0251, hearing 3/8/24.

At issue: The ex-owners of the Kentucky Downs racetrack filed a lawsuit in 2021 against the track's purchasers, alleging they refused to honor a provision in the sales agreement to turn over part of the deal price held back to cover pending litigation over gambling on "historical horse racing," which resembles slot machine betting. "Despite favorable subsequent legal developments and their continued, uninterrupted ability to collect increasing HHR revenues at Kentucky Downs," the buyers are holding onto a "windfall, protracting this litigation with arguments that contravene the plain language of the governing contract and common sense," the ex-owners said in a brief supporting their motion for summary judgment. The ex-owners are "reasoning that subsequent legislative action by the Kentucky Legislature justifies a different triggering mechanism" for the holdback provision despite the plain language of the sales agreement, the buyers said in their own brief.

Court action: A hearing on the parties' cross-motions for summary judgment will be held in Wilmington, Del.

Kentucky Downs Ex-Owners Stiffed After Racetrack Sale, Suit Says

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Two-Fer: SPAC-Merged Company Hit With COVID-Related Securities Suit

K [dandodiary.com/2024/03/articles/securities-litigation/two-fer-spac-merged-company-hit-with-covid-related-securities-suit](https://www.dandodiary.com/2024/03/articles/securities-litigation/two-fer-spac-merged-company-hit-with-covid-related-securities-suit)

March 3, 2024



By Kevin LaCroix on March 3, 2024
Posted in Securities Litigation



As readers know, in recent years I have been tracking two securities class action litigation filing trends: the filing of SPAC-related lawsuits, and the filing of COVID-related lawsuits. In a noteworthy development, a

securities suit filed last week embodies *both* of these filing trends. That is, a company that was formed through a SPAC merger has been hit with a securities suit based on COVID-related allegations. As discussed below, the new lawsuit has several interesting features. A copy of the February 28, 2024, complaint can be found [here](#).

Background

Khosla Ventures Acquisition Co. II was a special purpose acquisition company (SPAC). Khosla completed an IPO on March 26, 2021. On July 6, 2021, Khosla announced its plan to merge with Nextdoor Private. The merger was completed on November 5, 2021, with the surviving company named Nextdoor Holdings, Inc.

Nextdoor maintains an internet platform permitting neighbors, public agencies, and businesses to connect in a “neighborhood network.” The platform enables users to exchange information, services, and goods. The company’s primary revenue source is through sales of advertising on its platform. The company’s two primary business metrics are Weekly Active Users (WAU) (number of users in a defined time period) and Average Revenue Per Weekly User (APRU).

Beginning in 2020, due to pandemic-related shelter-in-place mandates, usage on the company’s platform increased significantly. In July 2021, amidst these favorable trends, the proposed merger with Khosla was announced. In the merger announcement, the companies stated that Nextdoor’s growth was poised to continue; that the company had a huge runway ahead; that its addressable market was “large and still untapped”; and that its revenue

growth “could be sustained into the future.” In the run up to the shareholder vote on the merger, many of these favorable statements concerning Nextdoor’s continued growth potential were repeated.

However, on March 1, 2022, when Nextdoor announced its financial results for the fourth quarter and full year 2021, the company announced that its revenue growth and ARPU had both actually declined significantly. According to the complaint, the company’s shares declined 14% on this news. The complaint further alleges that the company would go on to report three consecutive quarters of disappointing financial and operational results. Among other things, and contrary to the various prior statements that the company was poised for significant future growth, the company ultimately reported that its ARPU declined for full year 2022. The complaint alleges that the price of the company’s common stock declined from a high to \$18.59 shortly after the merger to \$2.06 at the end of the class period.

The Lawsuit

On February 28, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Northern District of California against Nextdoor; certain of the former SPAC’s directors and officers; certain individuals who served as directors and officers of both the SPAC and of the post-merger company; the SPAC sponsor; and the sponsor’s venture capital financial backer. Certain of the individuals named as defendants also served as directors or officers of the SPAC sponsor and/or the sponsor’s financial backer. The complaint purports to be filed on behalf of persons who purchased securities of Nextdoor, or, prior to the merger, securities of the SPAC, between July 6, 2021 (the date the merger was announced) and November 8, 2022 (the date on which Nextdoor filed with the SEC its quarterly report on Form 10-Q for the third quarter 2022).

The complaint alleges that the defendants failed to disclose: “(a) that Nextdoor’s financial results prior to the Merger had been temporarily inflated by the ephemeral effects of the COVID-19 pandemic, which had pulled forward demand for Nextdoor’s platform and cannibalized future advertising revenue growth; (b) that, rather than being sustained, such growth trends had already begun reversing at the start of the Class Period; (c) that Nextdoor’s total addressable market was materially smaller than the 312 million households represented to investors; (d) that, by the start of the Class Period, Nextdoor’s most important market – the U.S. market – was already substantially saturated, impairing the Company’s ability to monetize users and increase its ARPU or U.S. WAUs; (e) that, as a result of (a)-(d) above, Nextdoor’s revenue guidance for fiscal year 2022 had not reasonable basis in fact and the Company was tracking tens of millions of dollars below the revenue trajectory provided to investors.”

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover alleged damages on behalf of the putative class.

Discussion

The thing that jumped out at me about this complaint – other than the fact that the complaint is, as I noted at the outset, a two-fer – is the end date of the proposed class period. The proposed class period ends on November 8, 2022, nearly a year and a half ago: well within the statute of limitations, but in terms of the time frames within which securities litigation typically gets filed, it is ancient history.

The belated filing of this lawsuit has significance for me because of the fact that this case embodies, as I also noted at the outset, two filing trends that I frankly thought had just about run their course. I fully expected that after the end of 2023, we likely would not be seeing much or even any securities litigation relating to SPACs or relating to COVID-19. Yet here is the lawsuit that embodies both of these trends. Moreover, this case is not the first of 2024 to reflect one or the other of these two trends.

Thus, as I noted in a recent post (here), even before the filing of this new lawsuit, and even though we are just about to enter the fifth year since the initial COVID outbreak in the U.S., there had already been three COVID-related lawsuits filed in 2024. This new lawsuit makes it four COVID-related lawsuits filed this year (and a total of 75 since the initial coronavirus outbreak in the U.S. in March 2020). In addition, this new lawsuit is also the second SPAC-related securities suit to be filed this year (and the 68th overall since January 1, 2021).

It is in the context of thinking about the fact that these kinds of lawsuits are still be filed that the long-ago class period end date here seems particularly relevant. The fact that this lawsuit, relating to a relatively long-ago class period, is only now just getting filed does put the question of what we may expect for further lawsuits relating to either of the two now long-lived filing trends; for example, if there other belated lawsuits like this one still in the pipeline, the seemingly played-out filing trends could wind up rolling on for much longer than I anticipated.

One final note with respect to the COVID-related allegations. Two of the three COVID-related lawsuits previously filed in 2024, like this one, relate to companies that initially prospered at the outset of the pandemic, but whose fortunes waned as the pandemic progressed. That is certainly the case here, as well as in the lawsuits filed earlier this year against BioNTech (discussed here) and Dick's Sporting Goods (here). I emphasize this point because this may suggest an area of interest as insurance underwriters try to assess whether an insurance applicant may carry a latent continuing COVID-related litigation risk or otherwise represent a continuing risk for a related COVID-related claim.

SEC Charges Lordstown Motors with Misleading Investors: As detailed in a recent guest post on this site ([here](#)), the SEC has launched a number of SPAC-related enforcement actions. These SPAC-related actions are continuing to work their way through the system. On Thursday, the SEC announced a settled enforcement action against the bankrupt electric vehicle company, Lordstown Motors. Lordstown became a publicly traded company through a merger with a SPAC.

As reflected in the SEC's February 29, 2024, press release ([here](#)), the SEC alleged that Lordstown misled investors by claiming that the company had received over 100,000 binding "pre-orders" for its electric truck, the Endurance, from commercial vehicle fleet customers. In reality, the SEC alleged, the pre-orders came from companies that did not operate fleets or intend to buy the truck for their own use.

Lordstown agreed to a cease-and-desist order and disgorgement of \$25.5 million, which will be deemed satisfied by payments of up to \$25.5 million by Lordstown and other defendants to resolve pending securities class actions against them.

As noted [here](#), the separate securities litigation that figured into the resolution of the SEC enforcement action was itself an example of a SPAC-related securities class action lawsuit, as discussed [here](#).

Musk Sues Open AI, Sam Altman Over the Firm's Profit: Given the clash of the titans aspect of the lawsuit, it is easy to overlook the fact that the complaint that Elon Musk filed last week against Open AI, its CEO and founder Sam Altman, and its co-founder Greg Brockman, is also a D&O lawsuit. Musk was one of the founding investors in Open AI. In his new lawsuit, Musk alleges that the firm and its co-founders breached the firm's founding agreement by giving priority to profit over the benefits to humanity.

The complaint in the lawsuit (a copy of which can be found [here](#)) was filed on Thursday in California state court in San Francisco. The complaint asserts claims for breach of contract; promissory estoppel; breach of fiduciary duty; unfair competition; and for an accounting. Basically, Musk alleges that Open AI has violated its founding principles through its relationship with Microsoft and its willingness to allow Microsoft (and Open AI) to profit from the firm's AI product.

One can only speculate on what Musk hopes to achieve in bringing the lawsuit, but I will say this, the lawsuit represents some kind of a milestone; it is the very unusual kind of lawsuit where an early investor in a start-up technology venture sues the start-up's founders for *making a lot of money*.

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March 4, 2024, 9:25 AM PST
Ventyx Allegedly Overstated Drug Prospects Before 80% Stock Drop
By [Ben Miller](#)
Documents

- [Complaint](#)
- [Docket](#)
- [Judge Andrew G. Schopler](#)

- COURT:** S.D. Cal.
- TRACK DOCKET:** [3:24-cv-00415](#)

Bloomberg Law News 2024-03-04T13:42:00138901095-05:00
Ventyx Allegedly Overstated Drug Prospects Before 80% Stock Drop

By [Ben Miller](#) 2024-03-04T12:25:12000-05:00
COURT: S.D. Cal.
TRACK DOCKET: [3:24-cv-00415](#)

Ventyx Biosciences Inc. overstated the effectiveness of its inflammatory disease treatment, as well as clinical and commercial prospects for the drug candidate after the company’s initial public offering, according to a proposed shareholder class action.

The drugmaker failed to disclose that its VTX958 clinical product candidate was less effective in treating plaque psoriasis than the company had led investors to believe until last November, when Ventyx announced it would terminate the drug’s trial process, the complaint filed March 1 in US District Court for the Southern District of California said.

Ventyx stock plummeted more than 80% in a single day to close at \$2.73 per share on Nov. 7, the day after the company disclosed it would terminate the drug’s trials for treatment of plaque psoriasis and psoriatic arthritis. That was the stock’s biggest decline ever, according to data compiled by Bloomberg.

In the press statement filed Nov. 6, the company said it wasn’t terminating trials for VTX958 treatment of Crohn’s disease, which it said it expects to continue into the first quarter of this year.

Two weeks later, Ventyx disclosed in a filing with the Securities and Exchange Commission that William Sandborn would no longer serve as the company’s president and chief marketing officer, according to the complaint.

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Ventyx had touted the potential of VTX958 to address a broad range of diseases beyond psoriasis including inflammatory bowel disease and lupus ahead of its October 2021 IPO date, noting that each represented “substantial market opportunities,” the complaint says. After its market debut, the alleged misrepresentations continued, with the company overstating its ability to develop and commercialize effective product candidates and inflating its business prospects.

Shareholder Omer Yuksel seeks to recover damages for a class of “hundreds or thousands” of investors who acquired Ventyx stock issued in connection with the company’s Oct. 21, 2021 IPO, as well as those who invested in the company between Oct. 21, 2021 and Nov. 6, 2023, alleging that the company, its executives, and directors violated the Securities Act and the Securities Exchange Act. He also seeks legal fees, the complaint says.

Ventyx didn’t immediately respond to a request for comment.

Pomerantz LLP represents the plaintiff and the proposed class

The case is Yuksel v. Ventyx Biosciences Inc. , S.D. Cal., No. 3:24-cv-00415, complaint filed 3/1/24 .

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Lawyers who voided Elon Musk's pay as excessive want \$6 billion fee

 [reuters.com/legal/legal-team-who-voided-musks-tesla-pay-see-fee-worth-595-bln-2024-03-01](https://www.reuters.com/legal/legal-team-who-voided-musks-tesla-pay-see-fee-worth-595-bln-2024-03-01)

Tom Hals

Elon Musk, CEO of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023. REUTERS/Gonzalo Fuentes/File Photo Purchase Licensing Rights , opens new tab

WILMINGTON, Delaware, March 1 (Reuters) - The lawyers who voided Elon Musk's \$56 billion compensation as excessive on Friday sought a record a \$6 billion legal fee, payable in the electric car maker's stock.

"We recognize that the requested fee is unprecedented in terms of absolute size," the three law firms said in a filing with the Court of Chancery in Delaware.

The fee works out to an hourly rate of \$288,888, they said.

Musk blasted the request as "criminal," posting , opens new tab on his X platform that "the lawyers who did nothing but damage Tesla want \$6 billion."

Tesla and Musk's attorney did not immediately respond to requests for comment.

The company (TSLA.O) , opens new tab would pay the lawyers who represented Richard Tornetta, a shareholder who sued Musk in 2018 over the pay package, which a Delaware judge nixed in January.

The electric vehicle maker is being asked to pay the fee because it benefited from the return of Musk's pay package, which the legal team said will result in the return to the carmaker of 266 million shares.

"This structure has the benefit of linking the award directly to the benefit created and avoids taking even one cent from the Tesla balance sheet to pay fees," the lawyers wrote, adding that the fee would be tax-deductible to Tesla.

Judge Kathaleen McCormick, who is overseeing the case and will decide on the fee, called Musk's pay "unfathomable" in her ruling.

The company may object to the fee, as it has a fee request in a similar case over the pay for its directors.

The largest settlements in shareholder cases have occurred in federal court. The biggest fee was \$688 million in 2008 for the legal team that obtained a \$7.2 billion settlement in a securities fraud case over the failure of Enron Corp.

The Tesla fee request comes as the Delaware Supreme Court considers an appeal of a \$267 million fee in a case that settled for \$1 billion involving Dell Technologies (DELL.N) [↗](#), opens new tab.

Delaware judges have said that pursuing cases deep into litigation, through depositions and toward trial, should get a higher percentage of the recovery to reflect the risk and effort. The Musk pay case went to a one-week trial.

Opponents of this approach argue that as settlements and judgments grow in size, attorneys should collect a declining percentage to avoid overcompensation. The legal team said the requested fee worked out to about 11% of the judgment.

Musk's pay package consisted of stock options that allowed him to buy Tesla stock at heavily discounted prices and required him to hold the stock for five years. The legal team said they were seeking stock without restrictions on selling it.

The shareholder's legal team comprised three law firms, Bernstein Litowitz Berger & Grossmann and Friedman Oster & Tejtel, both based in New York, and Andrews & Springer of Wilmington.

Reporting by Tom Hals in Wilmington, Delaware, Additional reporting by Gnaneshwar Rajan in Bengaluru; Editing by Leslie Adler, Diane Craft and William Mallard

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



Tom Hals
Thomson Reuters

Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

Lawyers seek over \$288K per hour in attorney fees, payable in Tesla stock, for suit toppling Elon Musk's compensation

 [abajournal.com/news/article/lawyers-seek-288k-an-hour-in-attorney-fees-payable-in-tesla-stock-for-suit-toppling-elon-musks-pay](https://www.abajournal.com/news/article/lawyers-seek-288k-an-hour-in-attorney-fees-payable-in-tesla-stock-for-suit-toppling-elon-musks-pay)

Law Firms

By Debra Cassens Weiss

March 4, 2024, 1:28 pm CST

The three law firms that successfully sued to overturn SpaceX owner and Tesla CEO Elon Musk's \$55.8 billion Tesla compensation package are seeking attorney fees payable in company stock worth more than \$5.6 billion. (Photo by Hannibal Hanschke via the Associated Press)

The three law firms that successfully sued to overturn SpaceX owner and Tesla CEO Elon Musk's \$55.8 billion Tesla compensation package are seeking attorney fees payable in company stock worth more than \$5.6 billion.

The lawyers are seeking about 11% of Tesla shares worth more than \$51 billion that were freed up as a result of the litigation, according to the brief supporting the fee application. They are also seeking more than \$1 million for litigation expenses.

Law360, Reuters, Fortune and the New York Post have coverage of the fee request.

The fee request amounts to more than \$288,000 per hour, according to the 127th footnote in the brief.

"These implied hourly rates and lodestar multiples are admittedly unprecedented," the brief says. "But that is a function of the gargantuan size of the tort underlying this action, and plaintiff's counsel's achievement of an unprecedented, total victory in challenging that tort."

The three firms seeking the fees are Bernstein Litowitz Berger & Grossmann; Friedman Oster & Tejteli; and Andrews & Springer.

The record for a fee award in a shareholder case was \$688 million in 2008, which was awarded to lawyers who sued over the collapse of the Enron Corp., according to the news coverage.

Judge Kathaleen McCormick of Delaware's chancery court had ruled Jan. 30 that Musk's \$56 billion pay package was unfair to shareholders, Reuters previously reported.

The name plaintiff in the case is stockholder Richard Tornetta, who was at one time the drummer in the band Dawn of Correction, according to the New York Post.

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Lawyers Who Killed Musk's Pay Plan Seek \$6 Billion in Stock (3)

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March 2, 2024, 8:00 AM PST

Jef Feeley

Bloomberg News



Lawyers for a Tesla Inc. investor who persuaded a judge to throw out Elon Musk's \$55.8 billion pay package are making an unusual request to have their legal fees paid in the form of about \$6 billion of stock in the electric-car maker.

Attorneys for the Tesla investor who challenged Musk's executive-compensation award – the largest ever given to a corporate titan – filed the request Friday in Delaware state court.

The attorneys for shareholder Richard Tornetta argued in a court filing they deserve more than 29 million Tesla shares. They explained why they prefer stock to cash.

"We are prepared to 'eat our cooking,'" according to the filing. "This structure has the benefit of linking the award directly to the benefit created and avoids taking even one cent from the Tesla balance sheet to pay fees. It is also tax-deductible by Tesla."

Read More: Elon Musk Meets His Match in Shakespeare-Quoting Judge

Musk responded late Friday on X, his social-media platform: "The lawyers who did nothing but damage Tesla want \$6 billion," he wrote. "Criminal."

Austin-based Tesla, with a \$645 billion valuation, is among the largest companies in the world by market cap.

Ann Lipton, a corporate law professor at Tulane University, said it's the largest attorney fee request she's ever heard of.

"Now, to be fair, the case involved the largest compensation award ever to an executive," she said.

Lipton had her own theory for why the lawyers prefer stock.

"I assume the plaintiffs' attorneys figured if they sought \$6 billion in cash in fees it could cripple Tesla," she said. "Since the case involved a stock award to Musk, they thought it would be appropriate to ask for the fee in shares so it wouldn't be as rough for Tesla shareholders. That makes a lot of sense to me."

Because Tornetta brought the case on behalf of shareholders, about 267 million shares that were promised to Musk in his pay plan will be returned to Tesla as a result of the investor's victory, according to the filing.

The filing is the latest step toward finalizing Delaware Chancery Court Chief Judge **Kathleen St. J. McCormick's** conclusion that Tesla directors gave Musk the excessive compensation plan because they were handcuffed by conflicts of interest. The judge also faulted Tesla's public disclosure about the pay package.

Once McCormick enters a final judgment in the case, Musk then has 30 days to decide whether to appeal her ruling under Delaware law.

Musk has signaled to Tesla's board that he'd like to arrange another massive stock award for him, years after he sold a significant chunk of his shares in the company to acquire the social-media company once-known as Twitter.

The billionaire has said he is "uncomfortable growing Tesla to be a leader in AI & robotics without having ~25% voting control." Some experts have questioned whether Musk's focus on Tesla will be weakened without another super-sized pay package. Tesla directors cited that fear in approving the package that McCormick voided in January.

Musk also has moved all his companies except Tesla out of Delaware for incorporation purposes in the wake of McCormick's ruling. He's encouraged other business owners to shift their incorporations out of the state, which is still the corporate home to more than 70% of Fortune 500 companies.

The case is Tornetta v. Musk, 2018-0408, Delaware Chancery Court (Wilmington).

(Updates with Musk response in fifth paragraph.)

--With assistance from **Kelly Gilblom**.

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March 1, 2024, 11:14 AM PST

McDermott Securities Class Should Be Denied Again, Judge Says

By Peter Hayes

- Not all plaintiffs owned CB&I shares during class period
- Magistrate proposes refiling certification with two subclasses

Bloomberg Law News 2024-03-04T10:20:24591357999-05:00

McDermott Securities Class Should Be Denied Again, Judge Says

By Peter Hayes 2024-03-01T14:14:14000-05:00

- Not all plaintiffs owned CB&I shares during class period
- Magistrate proposes refiling certification with two subclasses

A proposed class of McDermott International Ltd . shareholders alleging the company misled investors about its \$6 billion merger with Chicago Bridge & Iron Co. should be denied certification for a second time, but with leave to amend, a federal magistrate said.

The shareholders allege they lost money when the value of McDermott stock declined due to misrepresentations it made in connection with merger.

Certification is inappropriate because all plaintiffs who are former shareholders of CB&I, including proposed class representative Nova Scotia Health Employees' Pension Plan, have a fundamental conflict with the rest of the proposed class, US Magistrate Judge Andrew M. Edison of the US District Court for the Southern District of Texas said.

Nova Scotia alleges that it purchased McDermott stock at artificially inflated prices "and was damaged upon the revelation of Defendants' fraud." Nova Scotia, however, acquired all of its McDermott stock by converting its CB&I shares at the time of the merger.

"Unlike the inflation in McDermott's stock, which unquestionably harmed all class members, the inflation in CB&I's stock prior to the Merger was a *benefit* to CB&I shareholders," Edison said. "The very potential of this unaccounted-for benefit from the alleged fraud renders Plaintiff an unsuitable class representative," he said.

"The inflationary effect of the alleged fraud on CB&I's stock simply does not concern purchasers of McDermott stock who never owned CB&I shares during the Class Period," Edison said. As a result, Nova Scotia "has a fundamental conflict with purchasers of McDermott stock who never held CB&I shares during the Class Period," he said.

Edison therefore recommended that the plaintiffs file a new certification motion that includes two subclasses: "one subclass of purchasers and acquirers of McDermott stock who held CB&I shares during the Class Period, and one subclass of purchasers and acquirers of McDermott stock who never held CB&I shares during the Class Period."

Nova Scotia alleges that McDermott and certain executives falsely convinced investors the company could overcome its liquidity problems, even as it careened toward bankruptcy.

McDermott and CB&I announced in 2017 that they would merge in a \$6 billion all-stock deal combining two major engineering and construction companies with a focus on the energy industry.

Two months after the merger with CB&I closed, McDermott reported a \$221 million change in cost estimates for four large construction projects in CB&I's contractual backlog. Negative disclosures continued in the next quarter, prompting McDermott's share price to fall by nearly 40% in October 2018.

Edison on Sept. 11, 2023, recommended the denial of class certification and found a different plaintiff lacks standing to bring derivative claims against the engineering company.

Pomerantz LLP, Briscoe Law Firm PLLC represent Nova Scotia Health. Reynolds Frizzell LLP, Kendall Law Group PLLC, Wolf Popper LLP, Bernstein Litowitz Berger & Grossmann LLP, and Chambers Law Group LLC represent other plaintiffs. Baker Botts LLP represents McDermott.

The case is *Edwards v. McDermott Int'l Inc.*, 2024 BL 67045, S.D. Tex., No. 18-cv-04330, 2/29/24 .

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March 1, 2024, 11:12 AM PST

Opendoor Gets Dismissal of Investors' Suit Over Price Algorithm

By Martina Barash

- Investors alleged house-pricing algorithm presented risk
- Fraudulent intent, loss causation insufficiently pleaded

Bloomberg Law News 2024-03-04T10:19:27221573401-05:00

Opendoor Gets Dismissal of Investors' Suit Over Price Algorithm

By Martina Barash 2024-03-01T14:12:43000-05:00

- Investors alleged house-pricing algorithm presented risk
- Fraudulent intent, loss causation insufficiently pleaded

Opendoor Technologies Inc. shareholders didn't adequately allege the home-buying company committed securities fraud or made misleading statements about its pricing algorithm in its offering documents, a federal court ruled, rejecting a proposed class action.

Most alleged misrepresentations aren't actionable, and the investors didn't show intent or a connection between disclosures and a drop in Opendoor's stock price, Judge Michael T. Liburdi said for the US District Court for the District of Arizona. Liburdi gave the investors a chance to re-plead their complaint.

Zillow Group Inc., also embroiled in shareholder litigation over its "instant buying" house-flipping business, lost a dismissal bid in December 2022 and is in the midst of document exchanges related to class certification.

That case is distinguishable, Liburdi said, because Zillow allegedly made offers above the prices its algorithm generated while publicly saying it relied on the algorithm.

By contrast, Opendoor sufficiently disclosed its alleged practices of adjusting offers after human analysts reviewed home-buying deals and failing to refund deductions for unnecessary repairs, he said.

The opinion addressed a contested legal issue playing out in cases targeting registration statements—namely, whether a heightened federal pleading standard applies to the claims, brought under Section 11 of the Securities Act of 1933. Here, the Section 11 claims sound in fraud and must be pleaded with particularity, Liburdi said.

The investors said in their complaint that Opendoor's algorithm couldn't "accurately adjust to changing house prices across different market conditions and economic cycles," increasing the company's risk.

A September 2022 Bloomberg report brought to light data that showed Opendoor lost money on 42% of its flipped-home sales the previous month, they said. Opendoor's stock price declined 12% over the next two days, and allegedly landed at a point 89% below its first closing price after its merger with a special purpose acquisition company.

Liburdi said the Bloomberg article didn't constitute a corrective disclosure because the underlying information was publicly available. That and other factors prevented the investors from showing the connection between the alleged misstatements and their losses, he said.

Derivative litigation against Opendoor's board, also pending before Liburdi, was voluntarily dismissed in June 2023.

Opendoor's first-quarter 2024 revenue forecast missed the average analyst estimate, Bloomberg News reported Feb. 15.

Labaton Sucharow LLP represents the investors. Shearman & Sterling and Lewis Roca Rothgerber Christie LLP represent Opendoor.

The case is *Alich v. Opendoor Techs. Inc.*, 2024 BL 65479, D. Ariz., No. 22-cv-01717, entered 2/28/24.

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March 1, 2024, 2:54 PM PST

Gatos, Investors Proceed With \$21 Million Class Action Deal

By Mike Vilensky

- Court gives early nod to company, investor agreement
- Class may include 30,000 who acquired stock between 2020-2022

Bloomberg Law News 2024-03-04T10:20:49700134849-05:00

Gatos, Investors Proceed With \$21 Million Class Action Deal

By Mike Vilensky 2024-03-01T17:54:18000-05:00

- Court gives early nod to company, investor agreement
- Class may include 30,000 who acquired stock between 2020-2022

Gatos Silver Inc. and investors who sued the public company persuaded a federal judge to preliminarily approve a proposed \$21 million class action settlement, bringing the litigation closer to an end.

The lead plaintiffs estimate 30,000 people who acquired Gatos stock between 2020 and 2022 could join the class. Members will receive pro rata shares of the settlement fund based on their losses in transactions of Gatos securities.

"[I]t is evident that the parties believe that the settlement agreement is fair and reasonable," Judge Philip A. Brimmer, of the U.S. District Court for the District of Colorado, said in his order Thursday. "Certifying the class will allow the Court to determine whether there are other members of the class who challenge the fairness of the parties' proposed settlement agreement."

Investors allege the silver and zinc mining company made misleading comments and omissions in its 2020 IPO, July 2021 offering, and other US Securities and Exchange Commission filings and oral statements. They argue the misstatements relied on a 2020 Gatos report that allegedly overestimated Gatos' mineral reserve's metal content by 30% to 50% and wasn't corrected until 2022. The investors sued in 2022 for violations of the US Securities Act and US Exchange Act. Gatos denies wrongdoing.

Lead plaintiffs filed an unopposed motion for preliminary settlement approval in July. “Gatos’s financial condition—with limited cash on hand and mineral reserves that will run out within five years—heightened the risk that Gatos could not fund a meaningfully larger resolution, much less satisfy any hypothetical judgment Plaintiffs might eventually obtain,” the motion argued.

Under the preliminarily approved proposal, the parties would notify potential class members by mail and a website, using a list from Gatos’ securities transfer agent, among other ways. They would also publish in the *Investor’s Business Daily* and online.

“The Court is satisfied that the parties’ proposed notice is reasonably calculated to apprise the absent class members of the action,” Brimmer said.

Lead counsel would seek fees of no more than 28% of the settlement fund, the court said.

Glancy Prongay & Murray LLP represent the investors. Davis Polk & Wardwell LLP and Foster Graham Milstein & Calisher LLP represent Gatos.

The case is *Bilinsky v. Gatos Silver, Inc.*, D. Colo., 1:22-cv-00453, 2/29/24 .

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Sri Lanka Asks New York Judge to Keep Bondholder Suit on Hold

By Chris Dolmetsch

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Sri Lanka Asks New York Judge to Keep Bondholder Suit on Hold

By Chris Dolmetsch2024-03-01T15:49:55632-05:00

Sri Lanka is seeking a five-month hold on a lawsuit filed by a bondholder over the country's historic debt default, telling a New York federal judge that it wants more time to negotiate with private creditors.

The island nation was sued in July 2022 by Hamilton Reserve Bank Ltd., which sought full payment on more than \$250 million of Sri Lanka's dollar bond that was due that month. The bank says it holds more than 25% of the bonds, which would likely enable it to block any modification of the notes.

On Friday, Sri Lanka sought an extension of a delay of the lawsuit that was granted in November. Hamilton Reserve opposed the new request, saying that the country has kept the bank "in the dark" about the negotiations despite repeated requests for information.

The island nation is prioritizing restructuring obligations to its private creditors as it seeks to fast-track a debt overhaul and exit a sovereign default, the foreign minister told Bloomberg last month.

The case is Hamilton Reserve Bank v. Sri Lanka, 22-cv-5199, US District Court, Southern District of New York (Manhattan).

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COMMENTARY

Arguing Class Actions: Why the Catalyst Theory Matters

Arguing Class Actions is a monthly column for the National Law Journal written by DiCello Levitt's Adam J. Levitt.

March 04, 2024 at 06:00 AM

Class Actions

By Adam J. Levitt | March 04, 2024 at 06:00 AM



The story presents a conundrum. Plaintiffs file a class action, which the defendant initially resists. Plaintiffs counsel spends hundreds of thousands of dollars (or more) in lodestar and costs prosecuting the case, but after potentially years of hotly contested litigation, the defendant issues a recall or announces a refund program that fixes the problem and then argues that the case is moot. The question: Should those who filed this case, and consequently induced (or “catalyzed”) the defendant to fix the problem, be paid?

The right answer is obvious. Of course the plaintiffs lawyers should be paid. Without plaintiffs counsel’s actions and active litigation threat, the defendant would have never changed its behavior, ultimately for consumers’ benefit. The law routinely rewards those who confer benefits on others, even in the absence of, say, a contractual guarantee (as with the doctrine of quantum meruit). In short, nobody works for free.

Nobody, as some would have it, except plaintiffs lawyers.

The Rise and Fall of the Catalyst Theory

Rewarding lawyers for catalyzing a change used to be noncontroversial. See, e.g., *Marbley v. Bane*, 57 F.3d 224 (2d Cir. 1995) (“a plaintiff whose lawsuit has been the catalyst in bringing about a goal sought in litigation, by threat of victory ... has prevailed for purposes of an attorney’s fee claim...”); *Pembroke v. Wood Cnty., Texas*, 981 F.2d 225, 231 (5th Cir. 1993) (recognizing viability of catalyst theory); *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 132 (3d Cir. 1991) (same).

But the law became murkier in May 2001, with the U.S. Supreme Court’s decision in *Buckhannon Bd. & Care Home v. W. Virginia Dep’t of Health & Hum. Res.*, 532 U.S. 598 (2001). There, an assisted living facility sued West Virginia, arguing that a regulation violated the Fair Housing Amendments Act. After the suit was filed, the Legislature removed the regulation, mooting the case.

In a 5-4 decision, the Supreme Court ruled that the plaintiff was not a “prevailing party” for purposes of the applicable fee-shifting statute. Discarding the “catalyst theory,” it ruled that: “A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change” sufficient to make the plaintiff a “prevailing party.” *Id.* at 605. As Justice Ruth Bader Ginsburg explained in her dissent, the *Buckhannon* decision frustrates the goals of the catalyst theory because it “allows a defendant to escape a

statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint." Id. at 622 (Ginsburg, J., dissenting).

The Catalyst Theory Today

Notwithstanding the *Buckhannon* decision, the catalyst theory remains a powerful tool outside of *Buckhannon*'s specific context.

First, *Buckhannon* has no bearing on state causes of action. In California, Cal. Code Civ. Proc. §1021.5 allows a court to award fees to a "successful" party. The California Supreme Court has explained it takes a "broad, pragmatic view of what constitutes a 'successful party,'" *Graham v. DaimlerChrysler*, 34 Cal. 4th 553, 565 (2004), and explicitly endorsed the "catalyst theory [as] an application of the ... principle that courts look to the practical impact of the public interest litigation in order to determine whether the party was successful." Id. at 566. In short, it disagreed with the U.S. Supreme Court regarding what it means to "prevail" or "succeed" in a litigation.

The catalyst theory has also largely survived in the context of favorable settlements. For example, in *Mady v. DaimlerChrysler*, 59 So.3d 1129 (Fla. 2011), the Supreme Court of Florida considered an award of attorney fees to a consumer who accepted *defendant's* offer of judgment, an offer that neither conceded liability nor plaintiff's entitlement to fees, in a case filed under the Magnuson Moss Warranty Act (MMWA), which guarantees fees to a "prevailing party." Id. at 1131. Explicitly considering and distinguishing *Buckhannon*, the court found that a party may "prevail" with a settlement. In doing so, it rearticulated the logic underpinning the catalyst theory:

[The plaintiff] achieved the same result with a monetary settlement only after being forced to bear all of the costs and expenses associated with litigation and facing the statutory penalty if the offer of judgment had not been accepted. DaimlerChrysler could have resolved this dispute during the "informal dispute settlement" phase, but instead waited until after [plaintiff] was forced to commence this action and incur the expenses of this litigation. Id. at 1133.

Further, even in federal court, attorney fees may be awarded under statutes other than those limiting such awards to "prevailing" parties. For example, in *Templin v. Indep. Blue Cross*, 785 F.3d 861 (3d Cir. 2015), the Third Circuit explained that a fee may be awarded for an Employee Retirement Income Security Act claim under the catalyst theory, because ERISA does not limit fee awards to the "prevailing party." 785 F.3d at 865. Including the Third Circuit, at least five circuits have endorsed the catalyst theory under such statutes: *Scarangella v. Group Health*, 731 F.3d 146, 154–55 (2d Cir. 2013); *Ohio River Valley Env'l Coalition v. Green Valley Coal*, 511 F.3d 407, 414 (4th Cir. 2007); *Sierra Club v. Env'l Protection Agency*, 322 F.3d 718, 726 (D.C. Cir. 2003); *Loggerhead Turtle v. Cty. Council*, 307 F.3d 1318, 1325 (11th Cir. 2002).

Despite the ongoing recognition of the catalyst theory in many contexts, there remains the risk that courts may apply the catalyst theory narrowly, or that defendants may find a way around it. Consider *Gordon v. Tootsie Roll Indus.*, 810 F. App'x 495, 496 (9th Cir. 2020), a "slack-fill" case in which the plaintiff alleged that the defendant's boxes of Junior Mints were mostly air. After the plaintiff moved for class certification, the defendant changed the box's label. The plaintiffs dismissed and moved for fees.

The fee application was denied because "*Gordon's* theory of the case was that the size of the box was itself misleading, and that Tootsie Roll should either fill the Products' box with more candy to account for the size of the box ... or shrink the box to accurately represent the amount of the candy product therein[, and] Tootsie Roll did not make either of these changes." Id. at 497 (internal quotation omitted). Considering the disincentives (or, conversely, the moral hazards) that arise from this type of narrow application of the catalyst theory, courts should take a decidedly more equitable view when adjudicating this important issue.

A Way Forward

For practitioners, a few lessons come out of this case law and history. First, in writing their complaint, attorneys must think through the various paths that a company might take to remedy the purported harm. Recall that in *Gordon*, the plaintiff focused entirely on the misleading box, but not on the misleading labeling. Second, favorable settlements and offers of judgment remain viable tools, and may support a catalyst theory attorney-fee payment even if the defendant resists paying fees in the settlement itself. Finally, despite *Buckhannon*, the catalyst theory remains readily available under a host of statutes (state and federal). In relying on citing those statutes, plaintiffs should not shy away from the catalyst theory’s compelling logic. Courts understand that basic fairness requires that attorneys be paid if their lawsuit ultimately confers a significant benefit. Nobody should work for free. Not even plaintiffs lawyers.

Thank you to DiCello Levitt senior counsel Daniel Schwartz for contributing to this column.

Adam J. Levitt is a founding partner of DiCello Levitt, where he heads the firm’s class action and public client practice groups. He can be reached at alevitt@dicellolevitt.com.

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ANALYSIS

Four Years In: How Federal Forum Selection Clauses Have Fared Following Delaware’s Landmark Decision in ‘Salzberg’

In March 2020, the Delaware Supreme Court issued a landmark ruling in 'Salzberg v. Sciabacucchi'. This article addresses developments that have occurred over the past four years since the ruling and highlights key takeaways for practitioners.

March 04, 2024 at 10:00 AM

Securities Litigation

By Michael Bongiorno, Susan Muck, Timothy Perla, Jessica Lewis and Megan Barriger | March 04, 2024 at 10:00 AM



Four years ago, in March 2020, the Delaware Supreme Court issued a landmark ruling in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020). In it, the court upheld the validity of provisions included in a Delaware corporation’s certificate of incorporation that require shareholders of that corporation to sue in federal court, rather than state court, over alleged violations of the Securities Act of 1933 (the Securities Act); these claims arise most frequently in the initial public offering (IPO) context. These provisions, referred to as federal forum provisions (FFPs) are essentially contractual provisions between a corporation and its shareholders.

The *Salzberg* ruling was widely viewed as giving corporations a valuable tool in managing litigation, allowing them to reduce duplicative litigation and ease some of the administrative burdens of defending against sprawling securities actions by steering these complex cases to federal courts.

But how valuable this tool would prove to be had yet to be determined in the immediate aftermath of the *Salzberg* decision. In a previous article, we explored the potential reach of *Salzberg* and identified open questions, including: Would state courts enforce FFPs? What would happen to underwriters, who fall outside the contractual FFP relationship? Would FFPs be given the same effect if they were enacted in bylaws as opposed to certificates of incorporation? (See Michael G. Bongiorno, et al., “[Open Questions After the Landmark Decision in ‘Salzberg’](#)”, New York Law Journal, May 11, 2020).

While questions remain, including how key jurisdictions such as Delaware and New York will apply *Salzberg*, where the landscape has evolved, it has favored public corporations and includes promising decisions from securities litigation strongholds like California and emerging markets such as Utah.

This article explores those developments and highlights the key takeaways for practitioners.

Question: Will FFPs be enforced?

Short Answer: Yes, state courts have enforced FFPs throughout the country.

One limitation to the *Salzberg* decision was that the court had before it a facial challenge—in other words, the court only considered whether there were any possible scenarios in which FFPs could be permissible. This left FFPs subject to challenge in specific cases in addition to more general challenges, including constitutional challenges. Here's how those challenges have arisen, and been resolved, to date:

- No challenges have reached any state supreme court.
- No New York or Massachusetts state appellate courts have taken on the question of FFPs' enforceability and Delaware has not revisited the vitality of *Salzberg*'s holding. At least one New York trial court has dismissed an action based on an FFP. *Hook v. Casa Systems*, Index No. 654548/2019, NYSCEF Doc. No. 124 at 7 (N.Y. Sup. Ct. Sept. 15, 2021). In Massachusetts, a trial court noted only in dicta that an FFP likely required dismissal under *Salzberg* but “declin[ed] to resolve” the question and dismissed the complaint on other grounds. *Shen v. Casa Systems*, 2020 WL 8839637, at *4 (Mass. Super. Ct. Jan. 11, 2020).
- In New Jersey, Utah and California, state courts granted motions to dismiss Securities Act claims and each relevant state's appellate court has affirmed the decision.
- California courts have seen the most rigorous challenge to FFPs, where *Salzberg* has been challenged on three separate occasions at the appellate level and FFPs have emerged unscathed.

The three key appellate cases in California merit a closer look:

First, in *Wong v. Restoration Robotics*, plaintiffs sued a Delaware robotics company headquartered in California under the Securities Act after its stock dropped following its IPO. 78 Cal. App. 5th 48, 56–57 (Cal. Ct. App. 2022). The company moved to dismiss based on the FFP in its certificate of incorporation, citing *Salzberg* extensively. Plaintiffs opposed, arguing that the FFP was contrary to the Securities Act, violated both the Commerce Clause and Supremacy Clause of the U.S. Constitution, and was invalid and unenforceable under California law. The lower court granted the motion to dismiss, and plaintiffs appealed.

In a lengthy published opinion, the Court of Appeal for the First District affirmed, holding that the FFP reflected “a contractual agreement between the corporation and its shareholders.” Per the court, the FFP, which still allowed plaintiffs to file suit in federal court, did not violate the removal bar or anti-waiver provisions of the Securities Act.

The court then rejected plaintiffs' challenge to the constitutionality of Delaware's General Corporate Law, which permits FFPs, and rejected plaintiffs' assertion that “only the corporation benefits from an FFP...shareholders do not.” It noted that the company's shareholders had approved of the FFP and, citing *Salzberg*, stated that “the avoidance of inefficiencies and unnecessary costs in litigation is a benefit to companies and shareholders alike.”

Finally, the court rejected plaintiffs' arguments that the FFP was unenforceable or unconscionable because plaintiffs “had no bargaining power to negotiate it, and it was hidden in a prolix amendment to the registration statement.” The court reasoned that “provisions of a certificate of incorporation are typically not negotiable, and prolixity is a common characteristic of registration statements[.]”

Second, a month after the *Restoration Robotics* decision, the California Court of Appeal issued another decision addressing FFPs in *Simonton v. Dropbox*, 2022 WL 1514619 (Cal. Ct. App. May 13, 2022). There, the court upheld dismissal of a case arising out of the IPO of Dropbox, a Delaware company headquartered in California, following the reasoning of *Restoration Robotics*.

Third, and most recently, in an unpublished decision, *Pham v. Arlo Technologies*, another appellate district affirmed the dismissal of a Securities Act case arising out of the IPO of Arlo Technologies Inc., another Delaware corporation headquartered in California. 2023 WL 3265558 (Cal. Ct. App. May 5, 2023). The *Pham* court followed the reasoning of

Restoration Robotics and *Dropbox*.

Since these decisions, the current state of play in California is as follows:

- In all three California cases, plaintiffs filed writs of certiorari to the California Supreme Court, which have been denied.

Challenges in New Jersey and Utah met a similar fate, though notably neither decision involved Constitutional challenges such as those raised in California. The key takeaways from those decisions are as follows:

- In New Jersey, the Appellate Division affirmed the dismissal of Securities Act claims filed in state court against electroCore, a Delaware corporation based in New Jersey. *Kuehl v. electroCore*, 2023 WL 3444383, at *1, *6 (N.J. Super. Ct. App. Div. May 15, 2023). ElectroCore had an FFP in its certificate of incorporation at the time it went public. Like California, the New Jersey court rejected plaintiffs' arguments that the FFP was unreasonable, contrary to New Jersey public policy, and contravened the Securities Act. The court emphasized that New Jersey courts "look to Delaware courts for guidance on matters of corporate law" and viewed *Salzberg* to be "dispositive."
- In Utah, a state appellate court similarly ruled in favor of defendant Domo Inc., a Delaware corporation, when it dismissed Securities Act claims arising out of the company's IPO. *Volonte v. Domo*, 528 P.3d 327, 333 (Utah Ct. App. Mar. 9, 2023). The *Volonte* court found persuasive California's decisions in *Restoration Robotics* and *Dropbox*.

Question: What about underwriters, who are often named in Securities Act litigation but are not parties to the "contract" between a company and its shareholders?

Short Answer: The news is good for underwriters in decisions where courts have reached the issue.

The most informative opinion on this question is the Utah appellate court decision in *Volonte*.

First, the court acknowledged a potential divide between Utah and Delaware law, applied the "most significant relationship" test, and concluded that Delaware, not Utah, had the most significant relationship to the question of whether the underwriters could rely on the FFP. *Volonte*, 528 P.3d at 346-48.

To reach this conclusion, the court considered that the dispute was primarily national in nature, rather than local, and observed that corporations "frequently elect to incorporate out-of-state, and their choices are concentrated in the state of Delaware, in part so as to achieve a great degree of uniformity in the law that govern the business sector" (internal quotation marks omitted).

Next, the court considered *Salzberg's* recognition of the "need for uniformity and predictability relating to judicial decisions regarding FFPs," and that the adoption of FFPs was a response to the duplicative litigation corporations experienced when federal and state courts had concurrent jurisdiction. The fact that Domo and the underwriter defendants had entered into an indemnification agreement for losses arising from securities litigation suggested to the court that both parties saw "their interests as being linked with respect to this kind of Securities Act claim."

Finally, the court went on to determine that Delaware law permitted non-signatory defendants to enforce FFPs against a signatory plaintiff in certain circumstances. Where a party to the contract, like the shareholder plaintiff, effectively sought an "end-run around an otherwise enforceable forum selection provision in his suit against third-party beneficiaries," like the underwriters, enforcing the FFP was appropriate, and the underwriters were entitled to dismissal.

In addition to the *Volonte* opinion, New York's trial court likewise resolved this question favorably for underwriters in *Hook v. Casa Systems*. Index No. 654548/2019, NYSCEF Doc. No. 124. In *Hook*, the court reasoned that under both Delaware and New York law, non-signatories could be bound by or enforce a forum selection clause, and additionally the language of the FFP applied to "any complaint asserting a cause of action arising under the Securities Act," which the court reasoned would include non-signatories.

Though the case law is thin on this question, the key takeaway for underwriters is:

- FFPs have benefited underwriters when the language of the FFP is broad and covers any complaint asserting a cause of action arising under the Securities Act and when contractual indemnity rights expressly cover losses arising from securities litigation.

Question: Will FFPs in bylaws, which are generally easier to amend than certificates of incorporation, be given equal effect?

Short Answer: Yes, as it currently stands, it appears that FFPs in bylaws will be given equal effect.

To date, both Utah and California have upheld FFPs in bylaws. Here's the breakdown:

- In **Utah**, the court in *Volonte* explained that both Utah and Delaware law made clear that “the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.” *Volonte*, 528 P.3d at 340. Thus, the court found no meaningful difference between the enforceability of an FFP in bylaws versus a certificate of incorporation.
- Similarly, in the **California** decision *Dropbox*, the court noted in a footnote that the case was not distinguishable on the basis that the FFP appeared in the company's bylaws as it “is well established that a party purchasing stock in a Delaware company agrees to be bound by the company's bylaws.” *Dropbox*, 2022 WL 1514619, at *4, n.4.

A Final Reflection: After four years, where does this leave corporations?

Our Concluding Thoughts:

- The *Salzberg* decision remains a significant victory for corporations by giving them the flexibility to manage potential Securities Act litigation arising from their IPOs.
- While there is still some uncertainty around the margins, the initial report, at the decision's four-year anniversary, is uniformly positive across key jurisdictions, including California, Utah and New Jersey.
- Given the precedent discussed here, we anticipate that more and more courts will reiterate and embrace the reasoning of the *Salzberg* decision and that FFPs will become standard in both certificates of incorporation and corporate bylaws.

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Benchmarking Divides Judges Juggling Flood of 401(k) Lawsuits

By Jacklyn Wille

- Courts lack consensus on when to weigh 401(k) fund benchmarks
- Solid benchmarks possible with some effort, attorneys say

Bloomberg Law News 2024-03-04T10:12:00844542551-05:00

Benchmarking Divides Judges Juggling Flood of 401(k) Lawsuits

By Jacklyn Wille 2024-03-04T05:45:29000-05:00

- Courts lack consensus on when to weigh 401(k) fund benchmarks
- Solid benchmarks possible with some effort, attorneys say

The recent influx of 401(k) plan litigation has attorneys and courts weighing how to best compare particular investments or fee structures against potential alternatives—a choice that could mean the difference between a case failing at the outset or advancing.

As judges make their way through the more than 250 proposed class actions filed by retirement plan participants since 2020, differences have emerged in how carefully they scrutinize the comparisons made between a specific plan's fees and investments and the alternatives held up as better options. These comparisons, typically called benchmarks, attempt to evaluate a given fund or fee structure by looking at how it stacks up against similar alternatives.

Benchmarking investments is a common practice for retirement plan fiduciaries, who have a legal obligation to ensure their plans offer prudent investments and charge reasonable fees. The plaintiffs' bar as well relies on benchmarks to argue that a particular plan doesn't meet federal legal standards.

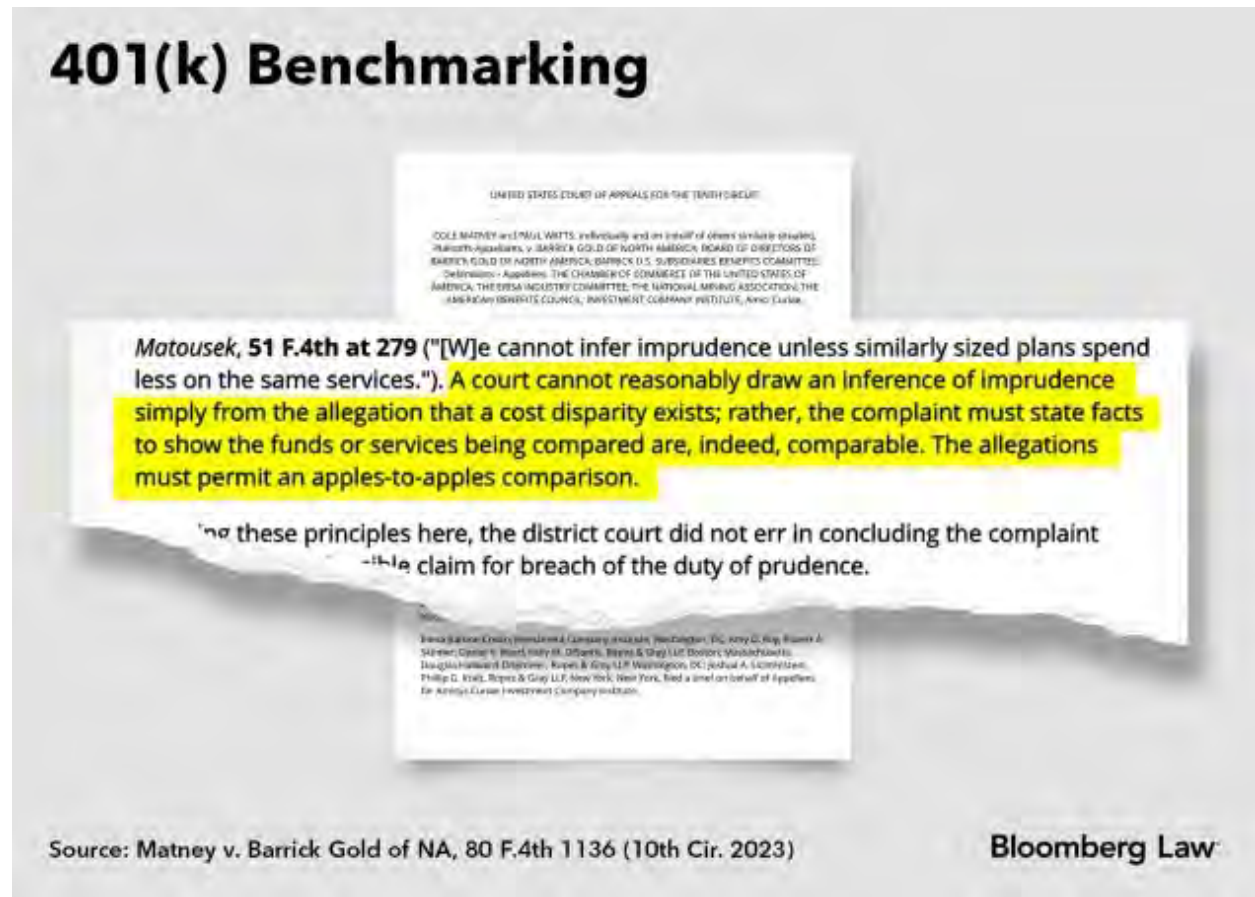
Taking a strict approach, the US Courts of Appeals for the Sixth, Eighth, and Tenth circuits have rejected challenges that lacked detailed comparisons to funds with similar strategies, objectives, and risk profiles. Some district judges have done the same.

Other courts have allowed cases to advance without looking closely at benchmarks. According to federal district judges in New York, Texas, and Florida, among others, passing judgment on a benchmark is something courts do after more information has been surfaced through the discovery process.

Finding the right benchmarks for a lawsuit is possible if plaintiffs are willing to put in some effort, according to attorneys interviewed by Bloomberg Law.

Making Comparisons

Benchmarking is useful because it provides a “standard against which to judge the thing you own,” Shannon Zimmerman, director of manager selection at Morningstar Inc., said. It allows investors to understand how a fund behaved in comparison to how it was expected to behave when initially selected, he said.



Court document.

A good benchmark is a fund that has similar goals, risks, and potential rewards to that of the investment being assessed, Charles Field, managing partner at Sanford Heisler Sharp LLP's San Diego office, said.

Benchmarking can also be done to assess the fees a retirement plan pays for administrative and recordkeeping services, which are frequently challenged in court alongside plan investments. Recordkeeping benchmarks should look at plans of similar size, in similar industries, and with similar demographic characteristics, Christopher Giambrone, co-founder of CG Capital, said.

Not Impossible

Some courts have been skeptical of 401(k) lawsuits that use aggregated data or industry-wide averages as benchmarks.

The Eighth Circuit's recent decision in *Matousek v. MidAmerican Energy Co.* rejected investment challenges that rested on comparisons to a collection of "peer group" funds because the challengers didn't explain what types of funds fell into each group. The lawsuit was "missing details" about the securities, investment strategies, and risk profiles of the investments being compared, the court said.

Peer group comparisons are often insufficient, Field said, because these groups sometimes include funds with different management styles or other salient differences.

A better benchmark is one "the plan itself uses," he said. The annual statements plans send to participants typically include an explanation of how the plan's funds performed relative to a stated benchmark, Field said.

Using this information is a "pretty good indication that you've got a decent benchmark, because the plan and its fiduciaries found it was appropriate," Field said.

Another good place to look is in a mutual fund's prospectus, which will identify the benchmark the offering company uses to gauge performance, he said.

If they're willing to put some work into it, attorneys bringing 401(k) challenges can learn a lot about a plan's funds and how they stack up against similar alternatives, Erin Haldorson Weber, a partner in Winston & Strawn LLP's Chicago office, said.

"These are things that with a little bit of work can be determined pretty easily," she said.

Closer Scrutiny

The courts that more carefully scrutinize 401(k) benchmarks may be trying to tamp down on the flood of "cookie-cutter" complaints that challenge investments using "practically word-for-word" language, Weber said.

"I think it's become apparent at least to some courts and appellate courts that there needs to be some kind of real analysis and work that has to go into these complaints in order for them to survive," she said.

Some recent lawsuits have tried to compare a given plan's funds to the "absolute best performance" that could be found using hindsight, which isn't the correct standard for liability under federal law, Daniel Aronowitz, president of Encore Fiduciary, said.

"You can always find something that did better, but the only fair way to compare funds are with apples-to-apples comparisons," he said.

Some cases that fared poorly were centered on comparisons between actively managed funds—those in which investment managers handpick underlying funds—and passive funds, which typically track a predetermined set of investments and generally carry lower fees.

But that’s “just not a good comparison,” Sanford Heisler’s Field said.

National Standard

Even with some courts looking more closely at benchmarks, more 401(k) lawsuits are advancing to discovery than not, according to Aronowitz.

He called the different approaches used by courts a “crapshoot” that fails to properly weed out the many illegitimate cases that are filed.

“There needs to be one national pleading standard and then plan sponsors can know what they’re doing,” Aronowitz said.

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March 1, 2024, 1:07 PM PST



Correspondent



- Born out of funding from the Harvard Innovation Lab in 2020, Qanlex is “more of a technology company than investment fund,” said co-founder Fernando Folgueiro.

Case Miner has been so successful that company leaders at times have had to halt using the tool because they could not handle the amount of leads it created for them, said co-founder Yago Zavalia Gahan, who is also an engineer and programmer.

Using artificial intelligence to predict the value and length of a case is tricky because of a dearth of publicly available data. While many court dockets are online, settlement amounts are often confidential, leaving the most vital data point for funders out of reach.

Legalist exclusively relies on its technology to find cases to fund. It then sends automated outreach to potential clients, which are typically the law firms representing plaintiffs but at times are the claimants themselves.

“It does not do things that an underwriter would normally do,” said the CEO, Shang. “There’s still a very important human component.”

Photo courtesy of Dennis Webber at Legalist Inc

"It is a relationship-based business," Gahan said. "We just use technology to be extremely efficient and let's say leapfrog a few stages."

UK-based Apex Litigation Finance advertises the use of AI on its website and the ability to predict case outcomes, timelines, and settlement amounts. But in reality, Apex CEO Maurice Power said, the data available is quite poor and the ability to predict is limited.

“For any AI predictive analytics model to be really effective, it’s only as good as the data that it has available to it,” he said.

Apex, which funds small to midsize commercial claims in the UK, began to explore AI four years ago with a company called CourtQuant. The model was to gather information on every recorded judgment in the high courts in the UK and through predictive analytics forecast the likely outcome of a case.

CourtQuant eventually shut down, so Apex employed people to build a similar model.

Right now, Power said, it’s more of a negative assessment tool that helps identify cases they don’t want to invest in. Apex doesn’t make funding offers or commit capital on what the AI tells them without running it through the company’s internal assessment team.

AI for Research

Burford Capital, one of two publicly traded legal finance firms, experiments with AI on its closed cases to see if the technology could accurately predict how a case turned out.

“No one’s got a tool where you could push a button and say, wow, this is an order of magnitude better—you still have to read the case,” said David Perla, co-chief operating officer at Burford.

Burford also uses AI to identify lawyers that handle the types of cases they typically get involved in, but the firm can’t envision using it to send out automated emails, Perla said. “It just won’t work for a company like Burford,” he said.

Litigation funder Parabellum Capital is skeptical of the role AI could currently play and instead said it relies on relationships to obtain clients and invest in cases. “We’re not in the business of cold outreaches, so people will approach us,” said Angela Ni, managing director at Parabellum.

But the funder has found other ways to use AI. Ni said Parabellum created a proprietary tool that automates the case management process. Parabellum often invests in portfolios—bundles of hundreds of cases typically handled by one law firm as a way to hedge risk—so there’s often a lot of tracking involved.

“We use rules, algorithms, and code so that we can see all this information,” Ni said. “And it helps us with decision-making moving forward.”

The software improves efficiency. Parabellum would likely hire two full time employees to do the job if not for the software, she said.

Burford’s Perla said it is likely AI will improve and will have more uses in the future.

"I'm optimistic a year from now, maybe less, we'll get on the phone and I'll say to you, 'Yeah, it's much, much faster, we're now seeing stuff and we're seeing things we didn't see before,'" he said.

"Everything in the next few years is gonna be incremental and then in 15 years, litigating is gonna look totally different than it looks today," Perla said.

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Class Action

March 1, 2024, 4:42 PM PST

Apple Faces Antitrust Class Action Alleging iCloud Monopoly

By [Maia Spoto](#)

Documents

[complaint](#)

- Apple allegedly restricts some file storage to dominate market
- Proposed class of customers would include tens of millions

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Apple Faces Antitrust Class Action Alleging iCloud Monopoly

By Maia Spoto 2024-03-01T19:42:18000-05:00

Apple allegedly restricts some file storage to dominate market

Proposed class of customers would include tens of millions

Apple Inc. is “rigging the competitive playing field” for cloud services by unnecessarily restricting the storage of certain iPhone and iPad files to its iCloud platform, plaintiffs alleged Friday in a proposed class action.

Only iCloud, Apple’s own cloud platform, can host some data from Apple’s phones and tablets, including application data and device settings that users need to access when they replace their device, according to the complaint filed in the US District Court for the Northern District of California. This arbitrary practice has “unlawfully ‘tied’” Apple’s mobile devices and iCloud together, the complaint says.

As a result, Apple’s iCloud dominates the market with an estimated 70% share, according to the complaint.

The iCloud product is among Apple’s most profitable, producing higher margins than its other products because it has been “undisciplined by competition.”

“Apple has marked up its iCloud prices to the point where the service is generating almost pure profit. Apple’s ability to sustain these prices is a testament to its monopoly power,” the suit said.

The proposed class, with tens of millions of potential members, would include a nationwide class and a California subclass of users who bought iCloud plans and were overcharged. Apple didn’t immediately respond to request for comment on Friday.

Cloud storage allows users to store and access data remotely.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X3NK5K3K000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...>

1/2

Apple does have cloud platform competitors, the complaint said, pointing to major technology companies such as Alphabet Inc.'s Google and Microsoft Corp, as well as specialists like Dropbox Inc. However, juggling multiple cloud accounts with different interfaces to store non-restricted data, such as photos, is an "unattractive option" for users, the suit said.

Hagens Berman Sobol Shapiro LLP represents lead plaintiff Julianna Felix Gamboa and the proposed class.

The case is Gamboa v. Apple Inc. , N.D. Cal., No. 5:24-cv-01270, 3/1/24 .

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[ANALYSIS](#)

OpenAI Swings Wide in Its Motion to Dismiss NYT Copyright Suit

OpenAI hit back at the New York Times, seeking to dismiss four of its seven copyright infringement claims. Not all are convinced its arguments will carry weight.

March 01, 2024 at 05:27 PM

Copyrights



Isha Marathe
Legal Tech Reporter



The original version of this story was published on [Legaltech News](#)

Two months after The New York Times hit OpenAI with a lawsuit alleging copyright infringement, the powerhouse AI startup struck back on Monday, with a [motion to dismiss](#) filed in the U.S. District Court for the Southern District of New York.

The AI company asked the court to dismiss four of the the news publisher’s seven claims on the following grounds: expiration of the statute of limitations on the apparent infringement claim; a rejection of the allegation that OpenAI itself contributed to the infringement; a rejection of the claim that OpenAI failed to remove the infringing content; and pushback against the allegation that OpenAI engaged in anti-competitive behavior under state law.

The three claims the motion did not seek to dismiss were trademark dilution, copyright infringement and vicarious copyright infringement.

Observers were waiting eagerly for OpenAI’s response to the Times’ [scathing complaint](#). Indeed, the sparring match between the two is the one to watch when it comes to copyright infringement and AI, at a time when human content creators and generative AI developers are in a tug-of-war over their interpretations of the Fair Use doctrine and just how far tech companies can go when it comes to data scraping.

OpenAI’s motion however, has drawn lukewarm reviews from copyright experts who spoke to Legaltech News.

While some believe the motion is a mere formality, with little chance of getting the suit thrown out, others see it as full of hot air and red herrings. And then there are those who argue that while there may be glimmers of potency in OpenAI’s argument, they are few and far between.

Still, the motion’s fervency underscores the fact that the Times’ suit poses a potentially substantial threat to OpenAI’s business practices, and the company is using the opportunity to make its mark on how courts understand the technology.

OpenAI did not respond to request for comment from Legaltech News by the time of publication.

What’s ‘Hacking’ Anyway?

One of the most circulated arguments in OpenAI’s latest motion is the idea that the Times, in its efforts to prove that ChatGPT and Bing Chat were capable of reproducing paywalled Times articles verbatim, hired someone to “hack” the tool and achieve the desired results (outlined in [Exhibit J](#) to the complaint).

Of course, “hacking” is not a legal term pertinent to copyright infringement. But what OpenAI alleges in its motion papers is that the Times’ “hired gun” made “tens of thousands of attempts to generate the highly anomalous results that make up Exhibit J to the Complaint.” This was done by exploiting a “bug” in OpenAI’s system whereby the tool sometimes “[regurgitates](#)” trained content, using “deceptive prompts that blatantly violate OpenAI’s terms of use,” it contends.

Essentially, the motion states that the Times violated OpenAI’s [Terms of Use](#), which prohibit the user from intentionally making the tool infringe on a copyright license.

Ian Crosby, Susman Godfrey partner and lead counsel for The New York Times, pushed back on the argument, telling Legaltech News that the term “hacking” is “bizarrely mischaracterized.” He added that the Times was simply using the tool to “look for evidence” of copyright infringement.

For its part, OpenAI does not detail how it claims to knows that the Times queried its chatbot thousands of times, nor how it knows that it was done by a hired prompter. The motion simply stated that the “truth” will come out during trial.

Of course, even if the Times breached OpenAI’s Terms of Use, the terms themselves are not a strong enough failsafe to warrant the AI company shaking off copyright liability if its AI systems engaged in infringing behavior, noted Shyamkrishna Balganesh, copyright, technology and IP professor at Columbia Law School.

For Balganesh, the “hacking” argument is a red herring.

“The idea that putting in a prompt that is tailored to extract data is something that you are forbidden from doing presents some challenges [for OpenAI]” on the copyright side, Balganesh said. “If we assume that part of why these AI models are so good is because you can’t predict what they’re going to say—then I can’t predict what the model is going to tell me in response. How am I to know that it’s going to spit out data that is going to be infringing? It’s like out-predicting the model.”

While most mainstream AI tools’ terms of service restrict users from making a tool purposefully infringe on copyright, how far a prompter has to go to qualify as manipulation of the chatbot is arguably a gray area.

For example, Cecilia Ziniti, an attorney, and founder and CEO of legal technology company GC AI, said that OpenAI’s “hacking” allegations are a way to assert that the tool was being used in a way that it is not meant to. And to really convince the court that an egregious violation of the Terms of Use took place, OpenAI has to “go a step further and say this is not regular [prompting], they literally hired a consultant and tried 50,000 different prompts. Then they picked the 100 best ones and that’s how they got that amazing

‘Hot-News’ Misappropriation

It’s helpful to remember that, in its lawsuit, the Times alleged that by virtue of GPT-4-powered chatbots revealing insights from content only available through paid subscriptions, such as Wirecutter, OpenAI engaged in unfair competition, driving revenue away from the newspaper publisher.

“This is not a copyright claim,” Balganesch said. “It’s a New York State common law misappropriation claim.”

This claim relies on the ruling in the *Barclays Capital v. Theflyonthewall.com* case in the U.S. Court of Appeals for the Second Circuit.

The 2011 appellate decision reversed a district court decision that the defendant, an internet stock news service, had violated “the hot-news tort,” which is a legal theory that seeks to protect time-sensitive information from being copied by a competitor or third-party. The decision hinged on the finding that the defendant did not violate the tort, since it cited where it received the information from.

Similarly, OpenAI states that since the Wirecutter recommendations were attributed to Wirecutter, it should be similarly protected from the misappropriation claim.

While it wasn’t a copyright claim, Barclays Capital won on appeal on the grounds that the hot-news tort was similar to copyright law. So, under under Section 301 of the Copyright Act, it was preempted and barred by federal copyright law by virtue of being too similar to a copyright claim.

Given the unsettled history of the “hot-news” doctrine—which stems from the 1918 Supreme Court decision *International News Service v. Associated Press*—the NYT-OpenAI suit will likely revive debates around the scope of what “hot-news” means, and how far the preemption extends if the suit goes to trial.

Thomas Magnani, the head of the technology transactions practice at Arnold & Porter, believes that the misappropriation argument is one of OpenAI’s stronger ones in its motion to dismiss, because “the New York Times is relying on a very narrowly construed exception to the copyright preemption rule.”

As for the argument that the NYT’s infringement claims are time-barred because the alleged activity took place three years ago, and should therefore be dismissed under the statute of limitations in the U.S. Copyright Law, both Ziniti and Magnani found that argument to be full of holes.

For Magnani, OpenAI simply doesn’t produce enough evidence in the motion papers to prove that “The New York Times should have known that they started training their model databases more than three years ago.”

“The time-barred argument is kind of silly,” Ziniti said. “They’re just kind of trying. ... But there’s no chance this suit goes away.”

Crosby, the Times’ attorney, also highlighted the irony that, “OpenAI, which has been secretive and has deliberately concealed how its products operate, is now asserting it’s too late to bring a claim for infringement or hold them accountable.”

Beyond the Motion

While there are many opinions on the impact of the motion to dismiss, there’s something to be said for the way in which OpenAI is trying, observers stressed.

The stakes are high if the Times were to win the case, rather than settling. Plainly, the Times is asking for disgorgement, or destruction of all OpenAI algorithms that use copyright materials from the news publisher. This would be a significant blow to OpenAI, many believe, since Times content is one of the companies’ most used content across several training sets.

Magnani pointed out that OpenAI’s strategy around using non-legal terms like “hacking” is to plant its interpretation of AI terminology in the courts’ vocabulary.

“I think the other purpose this motion serves,” notwithstanding the strength of its dismissal arguments, “is really to educate the judge ... the community at large, on OpenAI’s positions on these other issues [of copyright].”

Indeed, the same week that OpenAI filed this motion, the AI company and its partner Microsoft were hit by three lawsuits similar to the Times’, alleging copyright infringement from news publications The Intercept, Raw Story and AlterNet.

Whether claims like hacking, or OpenAI’s unequivocal assertion that training on copyrighted works is fair use—which is being debated in several ongoing lawsuits—are sound, they work to “color the public’s and the courts’ perception of the New York Times,” Magnani stressed. It is “laying the groundwork,” he said, for the idea that just because a tool is capable of infringing on copyright, doesn’t mean it should be used in that way—and if it is, the culprit is not the company that created it.

It’s not clear if or how OpenAI will be able to prove this alleged manipulation of its chatbots. But it could come at a heavy price—opening the company up to another legal vulnerability entirely.

As Crosby told Legaltech News in a statement, OpenAI’s assertion of knowing how the Times used the chatbot “shows that it is tracking users’ queries and outputs, which is particularly surprising given that they claimed not to do so.” He added, “We look forward to exploring that issue in discovery.”

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NEWS

Florida Jurors to Begin Deliberations in First Ovarian Talc Trial Since J&J Bankruptcies

"Because it doesn't appear that you are even remotely remorseful for any of the conduct that you have been alleged, or been found, to have been involved in," Miami-Dade Circuit Judge William Thomas said in tense arguments that occurred prior to the closings.

March 01, 2024 at 06:36 PM

Litigation



Amanda Bronstad
staff reporter



The original version of this story was published on [Daily Business Review](#)

What You Need to Know

- The trial involves plaintiff Bob Sugarman, who is suing on behalf of his wife, Marilyn Seskin, an anesthesiologist who died in 2019 from ovarian cancer.
- The case is the first ovarian cancer trial in three years over Johnson & Johnson's talcum powder.
- On July 18, a California jury hit Johnson & Johnson with an \$18.8 million verdict in a mesothelioma trial that occurred during the second talc bankruptcy.

The first ovarian cancer trial in three years over Johnson & Johnson's talcum powder wrapped up on Friday before jurors in Miami.

The trial, which began on Feb. 13, is the first against Johnson & Johnson since a bankruptcy judge tossed subsidiary LTL Management's second Chapter 11 cases last year.

Miami-Dade Circuit Judge William Thomas is overseeing the trial, which involves plaintiff Bob Sugarman, who is suing on behalf of his wife, Marilyn Seskin, an anesthesiologist who died in 2019 from ovarian cancer.

Sugarman's lawyer, Lance Oliver, a Motley Rice partner in Mount Pleasant, South Carolina, asked jurors in his closing argument for \$14 million in compensatory damages and enough punitive damages to be "meaningful" to Johnson & Johnson, according to coverage of the trial by Courtroom View Network.

"It was reckless, but they did everything they did intentionally, and it was a diabolical level of intentionality," he said. "If you punish them with \$1 million, that doesn't matter to them. That's a rounding error. You have to pick an amount of money that will get their attention."

Allison Brown, a partner at New York’s Skadden, Arps, Slate, Meagher & Flom, told jurors that Seskin had other risk factors, most especially her age. She told jurors that hundreds of millions of women use Johnson & Johnson’s baby powder around the world but only 19,000 in the U.S. get diagnosed with ovarian cancer each year.

“It doesn’t make sense,” she said, according to Courtroom View Network’s coverage. “This is an extraordinarily rare disease.”

Jurors were expected to begin deliberations on Monday.

Talc trials against Johnson & Johnson have been on hold since 2021, when LTL filed its first bankruptcy.

During the second Chapter 11 case, filed in 2023, U.S. Bankruptcy Chief Judge Michael Kaplan of the District of New Jersey allowed one case to go before jurors because the plaintiff, 24-year-old Anthony Hernandez Valadez, had months to live. Valadez, however, suffered from a terminal mesothelioma, a type of lung cancer.

On July 18, the jury in California’s Alameda County Superior Court [awarded \\$18.8 million](#).

‘Additional Punitive Damages May Be Warranted’

In the Florida trial, Johnson & Johnson filed a motion for judgment to prevent plaintiffs’ lawyers from asking jurors for punitive damages. They cited Florida Statute 768.73, a 1999 law that bans punitive damages if a previous jury awarded them against the same defendant in another action over the same course of conduct.

Johnson & Johnson’s lawyers relied on a 2018 verdict of \$4.7 billion in St. Louis, Missouri, for 22 women who had ovarian cancer. That award, later reduced on appeal, included more than \$715.9 million in punitive damages, which Johnson & Johnson’s lawyers in Florida now insist should offset any potential award in their case. The jury also returned \$900 million in punitive damages against Johnson & Johnson Consumer Inc., which no longer exists, but whose liabilities were absorbed by LTL, another defendant in the trial.

They also noted that Johnson & Johnson stopped selling asbestos-based talc products in 2020. Thomas, in tense arguments that occurred prior to the closings, did not buy that argument.

“But you also could have looked at the evidence that was there and you could have made a decision voluntarily to simply cease the product that jurors have already determined was defective,” Thomas held. Instead, Thomas said, Johnson & Johnson continued to sell its product, which it insisted was safe.

“And that, maybe,” he instructed, “is why additional punitive damages may be warranted. Because it doesn’t appear that you are even remotely remorseful for any of the conduct that you have been alleged, or been found, to have been involved in.

Thomas added: “And if you show absolutely no remorse, if you show absolutely no action or redemption, why can’t that be something the court considers in terms of whether or not the original award was adequate in order to deter this type of behavior in the future?”

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<https://www.law.com/delawarelawweekly/2024/03/01/mistrial-declared-in-first-roundup-trial-in-delaware/>



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NEWS

Roundup Verdicts: Arkansas Jurors Side With Monsanto, Mistrial in Delaware

Jurors in Conway County Circuit Court, in Arkansas, gave Monsanto its 11th win on Friday in Roundup trials, and New Castle County Superior Court Judge Vivian Medinilla declared a mistrial after jurors in Delaware were deadlocked.

March 01, 2024 at 06:52 PM

Toxic Torts



Amanda Bronstad
staff reporter



What You Need to Know

- The Arkansas trial involved plaintiff Robert Cody, filing on behalf of his wife, Wanda Cody, who died from non-Hodgkin lymphoma.
- The Delaware trial involved plaintiff Anthony Cloud, a South Carolina man who claimed Roundup caused his non-Hodgkin lymphoma.
- Monsanto faces three other pending Roundup trials in Pennsylvania, California and Arkansas.

Monsanto won a defense verdict Friday in a Roundup trial in Arkansas, while a Delaware judge declared a mistrial in the state’s first trial over the pesticide, according to Monsanto parent company Bayer.

The Arkansas trial, at the Conway Circuit Court, began on Feb. 15 and involved the plaintiff Robert Cody, who filed on behalf of his wife, Wanda Cody. Wanda Cody died from non-Hodgkin lymphoma.

Lyn Pruitt, a partner at DLA Piper in its Dallas, Texas, office, and Lee Mickus, a partner at Evans Fears Schutttert McNulty Mickus in Denver, Colorado, represented the defendant, Monsanto.

The verdict gives Monsanto 11 wins in Roundup trials and, according to a statement from parent company Bayer, “validates the company’s strategy of taking cases to trial based on strong scientific and regulatory evidence.”

“Consistent with this science, the plaintiff in this case failed to prove that Roundup was the cause of the injuries alleged in this case,” Bayer said in the statement. “This decision aligns with the overwhelming weight of scientific evidence and the consensus assessment of regulatory bodies and scientists worldwide that Roundup can be used safely and is not carcinogenic.”

Andrew Kirkendall, a partner at Kirkendall Dwyer in Dallas, and a member of Robert Cody’s legal team, did not immediately respond to a request for comment.

Meanwhile, also, on Friday, New Castle County Superior Court Judge Vivian Medinilla declared the mistrial in the Delaware trial after jurors were deadlocked.

“The court’s decision to order a mistrial in this case reflects the plaintiff’s failure to meet their burden to prove their case,” Bayer said in a statement. “That is because the overwhelming weight of scientific evidence and the consensus assessment of regulatory bodies and their scientists worldwide supports the safety and non-carcinogenicity of Roundup.”

Plaintiffs lawyer Bart Rankin, of Dallas-based Forrest Weldon Law Group, did not respond to a request for comment. On Nov. 17, Rankin and Jay Utley, also at his firm, [won a \\$1.56 billion Roundup verdict](#) in Jefferson City, Missouri.

The trial, which [opened about a month ago](#), involved Anthony Cloud, a South Carolina man who claimed Roundup caused his non-Hodgkin lymphoma. He died shortly after filing his case in 2021 and his wife, Queen, is representing his estate.

Arnold & Porter partner Pamela Yates, in Los Angeles, represented Monsanto.

Monsanto faces two other pending Roundup trials in Pennsylvania and California. Since courthouses reopened amid the COVID-19 pandemic, juries have awarded more than \$4 billion in Roundup verdicts, but Monsanto now has won 11 out of 20 trials.

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Bayer AG**Bayer turns to state lobbying in battle over Roundup weedkiller**

Company is pushing for legislation that would limit its legal exposure over allegedly carcinogenic product



Since 2018 Bayer has been ensnared in a complex and costly US legal battle over the weedkiller Roundup © Haven Daley/AP

Patrick Temple-West in New York and **Olaf Storbeck** in Frankfurt YESTERDAY



Bayer has embarked on a lobbying effort to persuade US states to pass legislation that would cut billions of dollars in liabilities and reduce the legal threat the German company faces from an allegedly carcinogenic weedkiller.

Since 2018, Bayer has been ensnared in a complex and costly US legal battle over the weedkiller Roundup, whose active ingredient glyphosate has been blamed by tens of thousands of Americans for giving them cancer.

The German conglomerate maintains that the product is safe and says scientific research supports that view. Despite that, the company has taken steps to end the protracted crisis over Roundup, which Bayer acquired as part of its ill-fated \$63bn acquisition of US crop sciences business Monsanto in 2016.

In 2020, Bayer reached a \$10.9bn [settlement over claims](#) and set aside another \$4.5bn a year later. The strategy Bayer embarked on this year has targeted Idaho, Iowa and Missouri, states where it has significant business operations.

Bayer lobbyists are pushing for local legislatures to pass bills that would affirm the primacy of federal laws on the labelling of Roundup, a key point of contention in the cases that have been fought across the US.

In a series of courtroom victories, lawyers for plaintiffs have argued that Roundup's warning labels failed to meet state requirements and these are not pre-empted by federal law, helping them win billions of dollars.

Bayer has previously pointed to the fact that the US Environmental Protection Agency, which regulates weedkillers and their labelling, has ruled that Roundup is safe and approved its labelling.

The legal quagmire is one of multiple challenges facing Bayer chief executive [Bill Anderson](#), who joined from Swiss drugmaker Roche last year and has vowed to restore the fortunes of one of Germany's best-known companies.

Last month, [Bayer said it would slash its dividend by 95 per cent](#) this year and pay a minimal amount for the next two in bid to conserve cash. Anderson has also raised the prospect of splitting up the group to reverse the 50 per cent drop in Bayer shares over the past 12 months.

Anderson is likely to be quizzed on a potential overhaul of the company, as well its legal strategy on Roundup, when he delivers a long-awaited strategy update alongside the group's results on March 5.

Although Bayer has won many of the Roundup cases, including one in Arkansas last week, it has also lost several.

In January, a jury in Philadelphia awarded damages of \$2.2bn to a plaintiff, and while the size of awards are typically reduced by a judge, the scale of the ongoing legal fight Bayer faces in the US has worried investors. About 50,000 cases filed over Roundup remain unresolved.

Nora Freeman Engstrom, a professor at Stanford Law School, said that the chief failing of Bayer's legal strategy was "quite simply, it didn't reach a global [comprehensive] settlement", referring to the 2020 settlement. "It left some cases outstanding."

US trial attorneys are eager to keep fighting Bayer in court. They have spent more than \$1mn between November and January on Roundup television ads, according to X Ante, a firm that tracks spending on legal advertising.

Compared with all other consumer products — such as drugs and medical devices — Roundup has been the most targeted TV advertising since August, the firm said.

According to a person familiar with Bayer's strategy, its lobbying was not making radical demands as the federal legislation that regulates pesticide "was always taken to be the law of the land for 50 states" for decades.

That principle had been attacked by "the litigation industry" in recent years, that person claimed, adding that Bayer was calling on state lawmakers to "reconfirm that the EPA [rather than an individual state] has authority over the label of pesticides".

Lawmakers in Iowa say the lobbying effort could be broadened across the country. This state-by-state strategy had previously been attempted by tobacco and asbestos companies when facing a wave of lawsuits, said Daniel Hinkle, senior state affairs counsel for the American Association for Justice, which represents trial lawyers.

"They [companies] go state-by-state to carve out and eliminate as many cases as they can that way," he said.

But as Bayer's fight over Roundup goes on, it is unclear whether its lobbying of state legislatures will pay off. In Idaho, for example, Republicans joined with Democrats to torpedo the legislation that Bayer was seeking.

Bayer said that proposed legislation at state level "would ensure any pesticide evaluated and registered with the Environmental Protection Agency — and sold under a label consistent with the EPA's own scientific determinations — is sufficient to satisfy any requirements for health and safety warnings".

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BMW Owners' \$6 Million Software Settlement Gets Early Court Nod

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5Q3P4FC000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5Q3P4FC000000)

A worker walks along a line of white painted BMW 3 Series automobiles as they near the end of the production line in Rosslyn, South Africa, on Sept. 9, 2015.

Photographer: Kevin Sutherland/Bloomberg

March 1, 2024, 2:35 PM PST

Tre'Vaughn Howard

- BMW allegedly falsely advertised clean diesel technology
- Court says settlement is fair, reasonable, adequate

A class of BMW vehicle owners and the automaker received preliminary approval for a \$6 million settlement of a lawsuit over emissions-cheating devices in certain diesel vehicles.

Garner Rickman and others sued BMW of North America LLC for allegedly engaging in deceptive business practices by failing to disclose that under normal operating conditions, the BMW X5 and BMW 335d aren't "clean diesels" and emit more pollutants than permitted under federal and state laws. Rickman alleged that BMW's scheme was the latest in a worldwide diesel emissions cheating scandal that included "virtually all" diesel manufacturers falsely advertising their vehicles.

Magistrate Judge James B. Clark of the US District Court for the District of New Jersey determined the settlement agreement is "fair, reasonable and adequate" under Rule 23(e). The class representatives and experienced counsel adequately represented the class, the agreement resulted from "extensive, non-collusive" negotiations, and the net settlement provided adequate relief, Clark said.

The proposed class includes anyone "who purchased or leased a model year 2009-2013 BMW X5 xDrive35d or 2009-2011 BMW 335d on or before the Preliminary Approval Date." Class members are eligible to receive a cash award amount that is proportional to their length of ownership or lease of the vehicles. The final approval hearing will be held in September 2024.

Seeger Weiss LLP, McCarter & English LLP, Carella Byrne Cecchi Brody & Agnello PC represent the plaintiffs.

Latham & Watkins LLP represents BMW.

Rickman v. BMW of N. Am. , D.N.J., No. 2:18-cv-04363 .

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Browse More Stories in Class Action

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Wells Fargo accused of covertly enrolling customers in products

DJ [dailyjournal.com/articles/377413-wells-fargo-accused-of-covertly-enrolling-customers-in-products](https://www.dailyjournal.com/articles/377413-wells-fargo-accused-of-covertly-enrolling-customers-in-products)

Mar. 4, 2024

A complaint says the financial institution sent letters to many fraudulently enrolled customers and unlawfully shifted the burden to dispute the enrollment.

Wells Fargo & Co. was accused in a putative class action filed in San Francisco of covertly enrolling customers in financial products and services and trying to pay its liabilities at bargain rates.

The lawsuit came more than a year after Wells Fargo paid \$3.7 billion to the Consumer Financial Protection Bureau and consumers to settle claims that it illegally assessed interest charges on auto and mortgage loans and engaged in other unlawful conduct.

“We are still reviewing the claims in this lawsuit and can’t share specifics at this time. Wells Fargo is a different company today, with new people, structure, processes, controls, and culture in place, and we have placed heavy emphasis on remediating customers for past practices,” company representative Sunny Rodriguez said in an email Friday.

The complaint was filed on Thursday in federal court by Alisa R. Adams of the Dann Law Firm.

Adams said lead plaintiff Amanda Gonzales was contacted by Wells Fargo last month and informed that she was enrolled in a service without her knowledge from May 2009 to December 2022. Wells Fargo was extracting fees and payments throughout that time but is now pushing an inadequate compensation offer, hoping customers will not question how much they are owed, she wrote in the filing. *Gonzales v. Wells Fargo & Co. et al.*, 3:24-cv-01223-AGT (N.D. Cal., filed Feb. 29, 2024).

Adams said the financial institution sent letters to many fraudulently enrolled customers and unlawfully shifted the burden on the putative class members to dispute the enrollment. “Wells Fargo placed the onus on the plaintiff to contact Wells Fargo if she felt that ‘the enrollment in this product was not authorized or not wanted.’ Wells Fargo imposed an arbitrary 60-day deadline in which the plaintiff and class members had to raise the dispute,” the attorney continued.

Adams said Wells Fargo relied on the suspicious nature of the letter to depress claims rates, as well as on other procedural and administrative burdens to “sweep under the rug its long-standing, intentional misconduct.” The plaintiff is also represented by Marc E. Dann of the Dann Law Firm and Thomas A. Zimmerman Jr. of the Zimmerman Law Offices PC.

In December 2022, Wells Fargo paid \$2 billion in redress to consumers and a \$1.7 billion civil penalty for alleged conduct including misapplying loan payments. The San Francisco-based company did not admit or deny wrongdoing.

“We and our regulators have identified a series of unacceptable practices that we have been working systematically to change and provide customer remediation where warranted. This far-reaching agreement is an important milestone in our work to transform the operating practices at Wells Fargo and to put these issues behind us,” CEO Charlie Scharf said in a statement at the time. In February 2020, the bank agreed to pay \$3 billion to resolve potential criminal and civil liability after it was revealed that 1.5 million fake deposit accounts and over 500,000 fake credit card accounts were created without customer knowledge.

#377413

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March 4, 2024, 10:15AM PST
Facebook 'Pixel' Video-Sharing Lawsuit Advances Against Pearson
By [Christopher Brown](#)
Documents

-  [Order](#)
-  [Docket](#)

- Plaintiff had Article III standing to sue in federal court
- Facebook ID was 'personally identifiable information'

Bloomberg Law News 2024-03-04T13:28:17354997966-05:00
Facebook 'Pixel' Video-Sharing Lawsuit Advances Against Pearson

By Christopher Brown 2024-03-04T13:15:13000-05:00
Plaintiff had Article III standing to sue in federal court
Facebook ID was 'personally identifiable information'

Pearson Education Inc. must face a proposed class action alleging it shared information about videos viewed by its subscribers with Meta Platforms Inc. in violation of the Video Privacy Protection Act.

John Collins alleged that Pearson incorporated the Facebook “pixel” on its website, allowing the social media giant to collect the Facebook IDs and video-viewing histories of website visitors without their knowledge or consent.

Collins had standing to bring the lawsuit in federal court and provided enough factual allegations to state a claim under the VPPA, Judge Paul A. Engelmayer of the US District Court for the Southern District of New York said March 1, denying the educational-media company's motion to dismiss.

Pearson argued in the motion that Collins failed to allege he had suffered a concrete injury, a requirement for Article III standing, but Engelmayer said his allegation that Pearson shared his video-viewing history to Facebook identified a “concrete, particularized injury to a legally protected interest.” Facebook isn’t named as a defendant in the lawsuit.

Collins’ lawsuit is part of a wave of litigation against website operators alleging VPPA violations related to their use of online tracking tools provided by Facebook, Google, and others.

The ruling is at least the second in 2024 from a federal court denying a motion to dismiss in a VPPA lawsuit, suggesting that the litigation is still showing signs of life after a surge of dismissals in 2023.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X78TS7RS000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L... 1/3

Video Sharing

The company's argument that Collins didn't plead enough details about which videos he watched was unavailing, the judge said.

The complaint's allegations that Pearson had an overarching business practice of sharing video-viewing information with Facebook "necessarily picks up the specific facts necessary to establish the claim," Engelmayer said.

Pearson's argument that Collins failed to present enough facts to state a claim under the VPPA failed for similar reasons, he said.

The company didn't need allegations of specific videos watched by Collins and the dates on which he watched them to prepare a defense against his claims, the judge said.

Englemayer also rejected its argument that the information transmitted to Facebook wasn't personally identifiable information under the VPPA, a requirement to state a claim under the act.

Courts both inside and outside the Second US Circuit have consistently held that disclosure of a Facebook ID would readily permit even an ordinary person to identify a specific person's video-viewing history, he said.

The judge also rejected as premature Pearson's motion to strike the class allegations on the basis of an arbitration agreement signed by at least some members of the proposed class.

The company retained the right to pursue the same relief at a later time, he said.

Lieff Cabraser Heimann & Bernstein LLP, Meyer Wilson Co. LPA, and Levin Law PA represent Collins and the proposed class. Steptoe & Johnson LLP represents Pearson.

The case is Collins v. Pearson Educ. Inc. , S.D.N.Y., No. 1:23-cv-02219, 3/1/24 .

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Why Larry Householder maybe paying too high a price for House Bill 6

[dispatch.com/story/opinion/columns/2024/03/03/thomas-suddes-larry-householder-firstenergy-sentence-house-bill-6/72775832007](https://www.dispatch.com/story/opinion/columns/2024/03/03/thomas-suddes-larry-householder-firstenergy-sentence-house-bill-6/72775832007)

COLUMNS

Is mastermind behind one of Ohio's biggest scandals paying too high a price?

Thomas Suddes

Contributed Commentary



Thomas Suddes is a former legislative reporter with The Plain Dealer in Cleveland and writes from Ohio University. tsuddes@gmail.com

Last week, Larry Householder, Republican former speaker of the Ohio House of Representatives, now serving a 20-year sentence on federal corruption charges, appealed his conviction and sentence to the U.S. Court of Appeals (6th Circuit).

One of Householder's key arguments is that his sentence is excessive. And although many bystanders will likely disagree, Householder has a point.

What the Cincinnati-based court will make of Householder's appeal is anyone's guess. Prosecutors have a month to reply.

At the center of the case is \$60 million-plus spent by or on behalf of Akron-based FirstEnergy Corp., aimed at helping elect Householder as House speaker and seeking to assure passage in 2019 of House Bill 6.

Householder attorneys: Biased judge, overzealous prosecutors led to corruption conviction

FirstEnergy scandal is still costing Ohioans millions

HB 6, at consumers' expense, would have bailed out two money losing nuclear power plants FirstEnergy owned, including Lake County's Perry plant. As a consequence of the HB 6 affair, FirstEnergy agreed to pay a \$230 million penalty to the federal government in exchange for a deferred prosecution agreement.

Even though partially repealed, HB 6 has cost Ohio electricity consumers almost a quarter-billion-dollars, and counting, in subsidies to AES, American Electric Power and Duke Energy.

Object: To cover the losses of two coal-fueled power plants, one in Indiana, the three utilities partly own. The legislature seems to think that's just swell, maybe because one of the coal-fueled plants is in the district of Republican House Speaker Jason Stephens, of Lawrence County's Kitts Hill.

Some Democrats had their hands in House Bill 6

A factor worth remembering: HB 6 couldn't have become law without the "yes" votes of some of the General Assembly's Democrats. (Also voting "yes" on HB 6, along with most other Senate Republicans: Sen. Matt Dolan, of Chagrin Falls, running this year for the U.S. Senate.)

In 2019, among the 19 state Senate votes to pass House Bill 6 — with 17 required — were three cast by Democrats. And of 51 House votes to pass HB 6 — with 50 votes required — nine were cast by Democrats. So far as is known, none of those legislators lost his or her seat due to HB 6.

Where are the ethics reforms? Ohio has done almost nothing since 2020 Householder arrest

One of HB 6's two prime sponsors was then-Rep. Shane Wilkin, of Hillsboro., now a state senator seeking a Republican congressional nomination in southwest Ohio's 2nd District for the seat of retiring Republican Rep. Brad Wenstrup (originally of Cincinnati, now also of Hillsboro).

The other prime co-sponsor of HB 6, Republican Rep. Jamie Callender, of Greater Cleveland's Concord, is now perhaps best known for being the General Assembly's leading advocate for marijuana legalization. And Republican Gov. Mike DeWine signed the Wilkin-Callender bailout bill the day legislators passed it.

Is 20 years too long of a sentence for Larry Householder?

In his appeal, Householder, who is imprisoned in the Federal Correctional Institution in Columbiana County's Elkton, cites numerous decisions, appeals, and sentences in other federal prosecutions of official corruption. And assuming the 6th Circuit agrees to consider the appeal, Householder's arguments will have their day.

One Householder point concerns the length of the 20-year sentence he received from U.S. District Judge Timothy Black.

Householder will turn age 65 in June; he'd be age 84 at the end of his sentence, and, practically speaking, there's no parole in the federal justice system.

True, if Donald Trump returns to the White House, there's the chance of presidential clemency, given that Householder was one of Trump's earliest Ohio supporters in 2016, while most Ohio Republicans marched in lockstep in the presidential campaign of then-Gov. John R. Kasich.

According to a study published in 2021 by the U.S. Office of Justice Statistics, the median sentence served in state prisons in the United States for murder in 2018 was 17.5 years – that is, half of all murder sentences served were shorter than 17.5 years, half of all such sentences, lengthier than that.

You don't have to like Larry Householder, and many people don't, but with life expectancy what it is, a 20-year sentence for someone age 64 may amount to a life sentence.

Looking at the HB 6 affair overall, outrageous though it is, Householder's sentence seems excessive. And will his sentence deter others from the same kind of Statehouse misconduct?

Given the legislature's continuing antics, that seems doubtful.

Thomas Suddes is a former legislative reporter with The Plain Dealer in Cleveland and writes from Ohio University. tsuddes@gmail.com

Justice department must investigate scandal costing Ohioans millions

 [dispatch.com/story/opinion/columns/guest/2024/03/04/allison-russo-justice-department-ohio-house-bill-6-hb-dewine-firstenergy/72796317007](https://www.dispatch.com/story/opinion/columns/guest/2024/03/04/allison-russo-justice-department-ohio-house-bill-6-hb-dewine-firstenergy/72796317007)

GUEST

Roots of HB 6 corruption scandals run deep in Ohio. Justice department must investigate.

Allison Russo

Guest columnist

Ohio House of Representatives Minority Leader Allison Russo is currently serving her third term, representing House District 7 which includes Upper Arlington, Grandview Heights, Ohio State University, and portions of Columbus.

April marks five years since House Bill 6, the infamous nuclear bailout bill—was first introduced in the Ohio House of Representatives.

HB 6 sparked the fire that engulfed Ohio in the largest political corruption scheme in the state's history.

The well-publicized federal trial and guilty verdict of former House Speaker Larry Householder helped bring to light some of the dark truths of Ohio's broken political landscape.

This corruption scheme traded \$60 million in bribes to influence powerful politicians to bailout two FirstEnergy nuclear power plants and two OVEC coal plants, one operating in Indiana. This conspiracy defrauded Ohio's energy customers of \$1.3 billion and demonstrates that, under the state's current leadership, corporate greed and politics are often prioritized over the people.



Recent state indictments issued by Attorney General Dave Yost remind the public that the second leg of this corruption scheme included ensuring the appointment by the DeWine-Husted Administration of a friendly utility regulator, former Public Utilities Commission of Ohio Chairman Sam Randazzo.

PUCO directly oversees investor-owned utility companies like FirstEnergy. In the state indictments, Randazzo and two former FirstEnergy executives are charged with engaging in a pattern of corrupt activity, including bribery, theft, and fraud.

These latest indictments reveal Gov. Mike DeWine's then chief of staff and current senior advisor testified to a grand jury that she knew of a \$4.3 million payout from FirstEnergy to Randazzo before DeWine appointed Randazzo as PUCO chair. The DeWine-Husted team also had a 198-page internal memo detailing undisclosed financial ties between FirstEnergy and Randazzo, but the appointment moved forward anyway.

When Randazzo's appointment seemed to be in jeopardy due to pushback from consumer advocates and the PUCO nominating council, text messages from indicted former FirstEnergy executives read, "Forced DeWine/Husted to perform battlefield triage. It's a rough game..."



The DeWine-Husted Administration has long been criticized for employing former FirstEnergy lobbyists while at the same time taking significant amounts of campaign money from the company.

Federal indictments previously revealed FirstEnergy personally recommended Randazzo as the PUCO chairman at a private dinner with then, newly elected Governor DeWine and Lt. Governor Husted. It's as if the DeWine-Husted Administration established a system of privileged access for FirstEnergy to be involved in state decision-making, while everyday Ohioans paid the price.

Back to Mr. Randazzo: four months after HB 6 passed—legislation he helped write—Randazzo gave FirstEnergy another critical win by eliminating the requirement that FirstEnergy come before PUCO for a rate case in 2024. This gave FirstEnergy a pass on opening its books to ensure it wasn't ripping off customers. That key decision gave a financial windfall to FirstEnergy and likely cost Ohio energy consumers millions.

Ohioans have been paying this corruption tax ever since through higher utility bills and additional fees. According to Ohio Consumers' Counsel, HB 6 utility subsidies alone cost \$533,589 per day, totaling nearly \$245 million collected already on utility bills.

Though the attorney general's indictments are long overdue and laudable, most Ohioans no longer trust that the state alone—the very system that ignited this corruption—has the ability to detach itself from the political realities of Ohio's current state government.

Case in point: to date, not a single ethics, campaign finance, or utility regulation reform has been passed by Ohio's Republican supermajority legislature or proposed by the DeWine-Husted Administration to prevent another HB 6-like scandal from happening again.

House and Senate Democrats have repeatedly introduced several reforms if they're looking for good ideas.

Last week, we also sent a joint letter to the United States District Court for the Southern District of Ohio requesting U.S. Attorney Kenneth Parker to further investigate newly revealed details in the state indictments about what members of the DeWine-Husted administration knew about Randazzo's alleged crimes.

Five years ago might have marked the legislative beginning of Ohio's largest corruption scandal in history, but its roots continue to run deep in the halls of government and should be weeded out once and for all.

Like they say, eliminating Ohio's corruption tax is a rough game.

Ohio House of Representatives Minority Leader Allison Russo is serving her third term representing House District 7 which includes Upper Arlington, Grandview Heights, Ohio State University, and portions of Columbus.

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March 4, 2024, 2:01 AM PST

From SPAC Dreams to a Riviera Mirage: How Lottery.com Imploded

By Nicola M. White

Deep Dive

- “We are breaking the law in 42 different ways,” a board member said
- SEC, DOJ investigating company amid revival efforts

Bloomberg Law News 2024-03-04T10:16:09914397731-05:00

From SPAC Dreams to a Riviera Mirage: How Lottery.com Imploded

By Nicola M. White 2024-03-04T05:01:05000-05:00

- “We are breaking the law in 42 different ways,” a board member said
- SEC, DOJ investigating company amid revival efforts

They partied like they'd just won the lottery.

Aboard the yacht docked at the 2023 Monaco Grand Prix were buckets of chilled bubbly, more than \$6,000 worth of cigars, a live band, and bow-tied bartenders. UK pop star Robbie Williams dropped by to do a podcast interview.

If anyone knew how much it all cost, they weren't telling the CEO, who suspected the total was in a second set of books no one would let him see.

Lottery.com Inc. couldn't make payroll. It had no domestic lottery ticket sales. Its stock price had dived below \$1. It was so far behind on regulatory filings that Nasdaq threatened to kick it off the exchange. The French Riviera fete was a blow-out by some board members, including the future CEO, to lure well-heeled investors into what was left—a sports website with huge aspirations but no content and little to do with lotteries.

Lottery.com had promised to do for lottery ticket sales what Uber did for getting a ride or DoorDash for getting a meal. No longer would you have to go into a convenience store to get your weekly fix of Powerball or Mega Millions; you could buy a ticket from anywhere on an app.

Instead, Lottery.com came to represent all the hubris and excesses of the special purpose acquisition company era: phantom revenues, multiple CEOs hired and fired, accusations of forged documents, an alleged check-kiting scheme, trails of stiffed investors and vendors—including a church— and finally, a promised rescue by a would-be Premier League team owner that turned into something else.

New executives are working to fend off lawsuits, raise money, and get operations going again. Two prominent hedge funds—billionaire Ken Griffin's Citadel Securities and Balyasny Asset Management—bought stakes in Lottery.com last month. But its past looms large, with Securities and Exchange Commission and Department of Justice investigations underway. At least three company insiders say they've been interviewed by the US Attorney's office for the Southern District of New York.

Lottery.com's Global Reach

The players in the Texas-based firm's saga spans three continents.



Graphic: Jon Meltzer/Bloomberg Tax

Bloomberg Tax

"This had almost every element of crookery you could imagine. And I was seeing it in real time," said Mark Gustavson, who was CEO at the time of the party but was fired two months later, replaced by a board member who was on the yacht.

Bloomberg Tax pieced together the arc of the Lottery.com story by interviewing more than a dozen current and former employees, board members and vendors, some of whom spoke on condition of anonymity; obtaining audio recordings, internal communications and board documents; and examining press releases, lawsuits, and securities filings.

Buy By Phone

Tony DiMatteo sported a shaved head and a long auburn biker beard. He called himself a serial entrepreneur with a servant heart, aiming to raise funds for natural disasters and to end world hunger. He would do that by bringing mobile technology and blockchain to one of the last paper-based businesses: lottery tickets.

DiMatteo and fellow startup veteran Matthew Clemenson founded what they first called AutoLotto in 2015. Five years later, rebranded Lottery.com was operating in a dozen states when the special purpose acquisition, or SPAC, market exploded. Money poured into blank-check companies, which were created to find promising privately held businesses and give them a shortcut to a public listing.

The boom coincided with Covid. That meant the in-person handshake meetings critical to raising startup money weren't possible. And Lottery.com needed cash.

It owed at least \$10 million to the owners of a company that supplied Lottery.com with real-time, worldwide lottery results. It spent \$11 million to acquire majority interests in two Mexican lottery businesses and, former officials say, was considering a stake in a sharia-compliant raffle enterprise in Dubai. In April 2021, it spent \$6 million to acquire rights to the domain name Sports.com, which would later be at the center of the yacht party.

Trident Acquisitions Corp. was a SPAC searching for a company to acquire. Most SPACs have two years to find a target, and it was running out of time before it would have to return money to investors. Founded by Ilya Ponomarev, a former executive at the Russian oil company Yukos who as a member of the Russian parliament cast the only vote against Vladimir Putin's annexation of Crimea, Trident originally targeted oil or gas companies, but those deals kept falling apart.

It pivoted to fintechs, and Lottery.com looked promising. DraftKings Inc. had gone public via SPAC in 2020 and gaming looked like a growth business, said Ponomarev, the former CEO, who's now in exile in Ukraine and a leading voice against Putin's government. In investor pitches and SEC filings, Lottery.com predicted an eight-fold surge in revenue by 2023.

The SPAC deal closed in October 2021, bringing in \$63 million. Ponomarev resigned as the SPAC's CEO before then, reasoning that gaming wasn't in his professional wheelhouse. Trident's current CEO, Marat Rosenberg, didn't respond to requests for comment.

The way DiMatteo tells it, the pressure to close the deal and excitement of the SPAC market propelled the company to go public, ready or not.

"They were eager to get a deal done," DiMatteo said. "We had no idea what this game was. They were the grownups in the room."

The C-suite celebrated the Nasdaq debut with a Times Square photo of the leaders jumping in front of an electronic billboard emblazoned with the company's ticker. Within days, Lottery.com was being valued at more than \$800 million.

Cracks showed in a matter of weeks.



'Check Kite'

The company's first earnings report in November 2021 boasted \$32.2 million in revenue, an almost 2,000% increase from the year before.

But nearly all of that, \$30 million, was based on the sale of credits the company had amassed with media partners that turned out to be non transferrable, meaning they weren't supposed to be sold, the company later said when it had to correct its financials to fix its mistakes. Beyond that, the company further erred by recognizing income from the transaction before it had been paid, according to its SEC filings.

The payment hadn't come in because the buyer — a payments platform company — didn't actually have the money on hand. So the company and the buyer struck a complex financing agreement in which Lottery.com pledged its own assets to secure a line of credit that the buyer would then use to pay up, the company would disclose to the SEC a year later.

Feeling pressure to make year-end revenue projections, company officials arranged for a courier to collect a check from the buyer two days before New Year's Eve, according to people involved in the transaction and an audit committee memo reviewed by Bloomberg Tax. When the line of credit came through, the buyer covered the \$30 million check and Lottery.com in turn wired the money right back—but continued to count the money as revenue on its books until it restated, or corrected, its financial reporting five months later.

Essentially, it was “a check kite,” a member of the company’s management team said a year later at a meeting explaining the transaction to an outside adviser. Bloomberg Tax reviewed a recording of that meeting. Asked about the deal, Lottery.com’s current leadership said the transaction is one of the subjects of SEC and DOJ scrutiny, and the company has been fully cooperating with authorities in their reviews.

A few months later, CFO Ryan Dickinson faced a substantial personal tax bill. The executive of the payments company that had been involved in the complex credit transaction suggested his Southern California church could help. The church had sold its only building, netting a few million dollars, and needed more money to buy a new property for its growing congregation.

The customer convinced church leaders, including its pastor Daniel Jones, that instead of borrowing money from a bank, they should offer the CFO a loan with a return which no normal investment would offer—\$2.7 million for one week with \$300,000 interest, according to people involved in the transaction and a lawsuit the church later filed. Even though it was a personal loan for the CFO, CEO DiMatteo and chief revenue officer Clemenson supplied the value of their shares in the company—worth about \$40 million at the time—as proof the loan could be repaid.



Lottery.com - Share Price

By Jon Meltzer on 1 Mar 2024



A Precipitous Share Price Crash

Lottery.com lost over half of its share value in November 2021 and never

Instead, according to a lawsuit filed in San Diego county, the church lost all the money.

“It’s been traumatic for them. They had all this money. They were going to buy this new church and renovate it,” attorney Craig Holiday said. “And all of a sudden they lost it.” Dickinson, who was fired within two months of the loan arrangement, didn’t respond to requests for comment.

‘Beyond Breathtaking’

Meanwhile, it became clear that Lottery.com’s core business had some serious flaws.

By mid-2022, customers in a dozen states could buy lottery tickets on their phones using the Lottery.com app. But tickets didn't instantly pop into customers' digital wallets; state lottery regulations are much more old school than that.

Like other online lottery sales companies, Lottery.com had to hire couriers in each state to go to convenience stores and gas stations to buy tickets and store them.

Couriers sometimes couldn't be found when a customer ordered a ticket, however, according to an internal investigation initiated by the company's chief legal officer, Katie Lever. When that happened with an order for a Powerball ticket from a customer in Pennsylvania, for example, the company directed that ticket to get printed in a backup hub in Texas, where the company was headquartered and had a state-licensed lottery retail outlet, the investigation revealed.

This technically made the purchase not a Pennsylvania lottery ticket, but a Texas lottery ticket. That deprived Pennsylvania of revenue from the sale and the tax revenue on any winnings. It's also illegal, board members learned as the investigation progressed. What if someone in Pennsylvania won the Powerball with a ticket produced somewhere else?

The Audit Committee of the Board of the Directors (the "Board") of Lottery.com (the "Company") retained outside counsel to conduct an independent investigation that has revealed instances of non-compliance with state and federal laws concerning the state in which tickets are procured as well as order fulfillment. The investigation also identified issues pertaining to the Company's internal accounting controls. Following a report on the findings of the independent investigation, on June 30, 2022, the Board terminated the employment of Ryan Dickinson as the Company's President, Treasurer and Chief Financial Officer, effective July 1, 2022. Mr. Dickinson served as the Company's President and Treasurer since October 2021 and as the Company's Chief Financial Officer since March 2022. The Company is continuing to work with outside counsel with respect to the matters that are the subject of the independent investigation and to institute appropriate remedial measures.

The backup printing arrangements also turned out to be much more than a backup. In a seven-month period, Lottery.com printed out more than 500,000 tickets worth more than \$1.1 million in Texas for out-of-state lottery players. The practice had been going on since before 2020, according to an internal memo reviewed by Bloomberg Tax.

Lottery.com had said in SEC filings that it had geolocation technology to confirm that web-based customers were in the state where they said they were located. But the internal investigation discovered that wasn't true. Anybody using the web-based system, as opposed to the mobile app, could skirt any jurisdictional requirement for ticket purchases, according to the investigation report and interviews.

"We are breaking the law in 42 different ways," one board member said a June 2022 meeting, according to a transcript obtained by Bloomberg Tax.

"I am without words. The potential for Homeland Security, AML, and all the other things that come into play is beyond breathtaking," the board member said, referring to anti-money laundering laws.

Board members told management to shut down the web-based application. In July, Lottery.com announced it was furloughing almost all employees and temporarily shutting down operations.



Tony DiMatteo.

Photographer: Dia Dipasupil/Getty Images for Tribeca Film Festival

DiMatteo, who resigned as CEO later in July, declined to comment on either the \$30 million transaction or the backup lottery ticket printing arrangement. Lever, the chief legal officer, didn't return requests for comment.

The law firm that conducted the internal investigation never got paid, according to a lawsuit filed last month.

The company's auditor quit in September, saying it could no longer rely on management's word. That firm, Armanino LLP, made headlines two months later as the auditor of the US arm of collapsed crypto exchange FTX. Armanino quit auditing public companies altogether in 2023. The firm didn't respond to requests for comment.

London Calling

The furloughs, the operations shutdown, and the fleeing auditor might have been it for the company, except for a last-ditch funding search by the original SPAC team.

Through old connections from Azerbaijan, an oil-rich former Soviet republic, they landed upon London-based Woodford Eurasia, a self-described specialist in turnaround situations and distressed assets. It was led by Nasib Piriyeve, the son of an Azerbaijani millionaire who had tried to buy the West Ham soccer club of the English Premier League in 2021. The group's non-executive director is Lord Simon Woolley of Woodford, a member of the British House of Lords. Woolley directed questions to the firm.

Piriyeve promised a \$2.5 million loan from the firm to start and up to \$50 million as long as Woodford Eurasia got to install a new board and his own CEO. The leader he chose was Sohail Quraeshi, a securities lender who most recently had served as CEO of a cannabis company.

Quraeshi was intrigued by the company's premise and Nasdaq listing. "It's a shitshow, but it's an interesting shitshow," he remembers thinking at the time.

He flew to Austin to see what he was getting into. He wasn't expecting much, given the company had paused operations and had stopped paying employees. But he was still disappointed by what he saw: a nondescript building on the side of a highway that contained three servers. "I said, this isn't a corporate office; this is a failed 7-Eleven with three goddamn machines," he said.

Money from London barely trickled in. Not "a single penny of this promised investment has arrived," former board member Richard Kivel wrote in a resignation letter, accusing a Piriyeve-blessed board member, Matthew McGahan, of taking "complete control of the board." In an SEC filing, the company said it "categorically and unequivocally refutes all statements made by Kivel as baseless" and that Kivel resigned to avoid being removed. Kivel declined to be interviewed for this story.

McGahan, who eventually became the company's CEO, also declined interview requests.

Piriyeve, in an interview, rejected the accusations of failing to fund the company or that he tried to take it over from overseas. Woodford and its subsidiaries poured in more than \$3 million, sometimes sending payments directly to vendors instead of through the company, he said.

The company reported that about \$991,000 came in. That wasn't enough for Quraeshi. He filed a notice of default on the promises he said Woodford Eurasia had made. The board fired Quraeshi the next day, Feb. 1, 2023, and replaced him with another turnaround specialist, Gustavson.

Another Round

Gustavson had dabbled in over-the-counter tech companies in Silicon Valley and was up for a new challenge. He flew to London, expecting to be there a week. He stayed more than a month, holed up in Piriyeve's office to try to get the company's financial records straight, make plans for re-launching ticket sales, and do a reverse stock split to boost the company's stock price and stave off a Nasdaq de-listing.

But as 2023 progressed, Gustavson said he began to suspect the board was keeping a second set of books. When the company filed its first-quarter financial statement, it was a surprise to Gustavson, who said he never even saw the document. Gustavson's electronic signature was on it, as required by law, but he said he didn't authorize it. Current officials said the company "followed its customary consent protocol and policies prior to making this filing and did the same for all other filings made by the Company" and it keeps a single set of financial records.

More red flags emerged. The original founders of Lottery.com pledged some of their stock to Woodford Eurasia as an incentive to invest in the company and help turn it around. The catch: it only could be sold if the stock rebounded above \$5, according to the terms of the funding arrangement. It never did.

Yet in May 2023, almost 5 million of DiMatteo's shares—worth almost \$2 million at the time — got sold in two different transactions, even though the stock was trading below 50 cents per share at the time, well under the \$5 threshold.

He says he has no idea who did it or who got the proceeds, but he later wrote to the transfer agent requesting a freeze on any future sales, according to a letter reviewed by Bloomberg Tax. "I did not receive a dime of my shares that were sold," DiMatteo said.

Regulatory filings reporting the stock sales bear the electronic signature of Alex Smotlak, who is a former director at Woodford Eurasia according to UK Companies House filings. Piriye declined to comment, saying Woodford Eurasia and DiMatteo had confidential commercial agreements in place.

At the same time, the company was planning its Monaco yacht party as a vehicle to promote Sports.com, which the company was trying to launch as a fan engagement platform. Two days before the Monaco Grand Prix, the company announced Sports.com's new president: Majed Al-Sorour, a director of the Premier League's Newcastle club and former managing director of Saudi Arabia's LIV golf tour.



Yacht party in Monaco.

Image: YouTube

With the company in dire straits financially, Woodford footed most of the bill for the party—around 400,000 euros, according to an invoice and emails reviewed by Bloomberg Tax. The yacht rental alone cost 175,000 euros, not counting damage from cigar burns on the furniture and blinds.

Gustavson said he was fired after raising questions about the quarterly filing he said he didn't approve. His replacement: McGahan, the board member who another director had accused of trying to take over.

Gustavson said he had heard about the party being planned, didn't want anything to do with it and didn't attend.

Still Standing

The SEC and Department of Justice are investigating the company and some of its founders over the findings of the internal investigation and other matters including the credit sales transaction, according to company filings and an SEC subpoena reviewed by Bloomberg Tax. The SEC declined to comment, as did the DOJ.

Lottery.com's near demise wiped out millions for shareholders and business partners. John Brier and Bin Tu, developers of the tech business that fuels the company's lottery data feed sold their business to Lottery.com, but allege they are still owed \$10 million in missed payments.

"We believe strongly the company itself has tremendous upside. Tremendous opportunity. It's all there," Brier said in an interview. "But not in the hands of these people."

Lottery.com in November filed its own lawsuit against Brier and his partner, Tu, alleging they stole company secrets to start a competing business with Gustavson. Their attorney said any noncompete and nondisclosure agreements were void because they never got fully paid for their work.

Meanwhile, Lottery.com hasn't sold domestic lottery tickets since the spring of 2023. The app for buying mobile lottery tickets no longer exists.

DiMatteo said he believes the company is salvageable. He said he didn't profit from its problems.

"I've even gotten some death threats online," he said. "You go on Stocktwits, people believe I walked away with 2 million bucks, basically, and screwed everybody, which is completely untrue. It's insane."

McGahan, once picked by Woodford Eurasia to run the board, has become disconnected enough from Woodford that he changed the locks on his office door in London to keep Piriye out, Woodford claimed in a lawsuit alleging the company breached its loan agreement and omitted the breach from its last proxy statement. Woodford dropped the suit in February but is considering other legal action, the firm said.

If there had been any doubts about the nefarious intentions of McGahan and Battles, those doubts were removed on July 19, 2023 when Battles sent an email to personnel affiliated with Woodford instructing them not to come into the offices that Woodford itself had leased and paid for at 18 Saville Row "until we have completed a review of historic activities and established a new path for Lottery.com and Sports.com." The locks on the office Woodford had leased were immediately changed.

A skeleton crew of Lottery.com employees has stuck around, with the company tapping a loan from a London investment firm tied to McGahan. The stock still trades on Nasdaq, with a market cap 99 percent below its peak.

In late December, the stock price briefly quadrupled when it gave notice of a new investor for Lottery.com and Sports.com. In February, the company announced a stock-based deal to buy a sports content platform to beef up Sports.com's offerings.

The company is working to resume lottery ticket sales in 2024, and the Monaco party led to partnerships that are materializing for the company, Chief Operating Officer Greg Potts said in an interview.

"So much of what has been holding the company back are things that we're looking at in the rearview mirror," Potts said. "You have a new group of dedicated leadership and board members who are making sacrifices in order to turn this company around."

SPAC founder Ponomarev also remains a believer. "I think the technology there is great and I think that they will survive," he said. "I do believe in them despite all the stupidity that was going on."

Quraeshi, the first turnaround CEO, says he's heard this before. "Is this the perfect fraud or the perfect stupidity," he asked. "I don't know."

—with assistance from Lucca de Paoli of Bloomberg News

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NYCB shares resume slide as internal control issues hurt investor trust

 [reuters.com/business/finance/nycb-shares-eye-rebound-after-sell-off-material-weakness-disclosure-2024-03-04](https://www.reuters.com/business/finance/nycb-shares-eye-rebound-after-sell-off-material-weakness-disclosure-2024-03-04)

Manya Saini

By Manya Saini

March 4, 2024 10:00 AM PST Updated 2 hours ago

A screen displays the trading information for New York Community Bancorp on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., January 31, 2024.

REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

March 4 (Reuters) - New York Community Bancorp (NYCB.N) , opens new tab shares fell in early trading on Monday, extending its slide from the previous session after the lender replaced its CEO and flagged "material weaknesses" in internal controls related to a loan review.

The shares tumbled 13.8% to hit a 28-year low. They had dropped as much as 26% on Friday despite the bank saying that potential issues related to its financial reporting would not impact its 2023 results.

"Unfortunately, these additional news items place further scrutiny on the company at a time when it needs to restore confidence," analysts at Morningstar DBRS said in a note.

NYCB has been under pressure since posted a surprise fourth-quarter loss on Jan. 31 due to higher provisions tied to its exposure to the beleaguered commercial real estate (CRE) sector, and cut its dividend.

Last week, it revised its quarterly loss to \$2.7 billion, citing a \$2.4 billion goodwill impairment tied to transactions from 2007 and before and named financial services veteran George Buchanan as its chief risk officer.

"The return to the news cycle will once again test customer loyalty and deposit stickiness given this new round of stock price pressure following the fallout from a disappointing 4Q23," the ratings agency said.

The lender is also subject to stricter capital and liquidity norms as its balance sheet now exceeds the \$100 billion regulatory threshold due to the acquisition of Flagstar and purchase of some assets of failed Signature Bank.

Shares in the bank have slumped nearly 65% so far this year as worries related to its CRE exposure spilled over globally.

The KBW Regional Banking Index (.KRX) [↗](#), opens new tab - a key gauge of investor sentiment towards the sector - was down 11.1% in the same period.

Short-sellers targeting a key regional U.S. bank exchange-traded fund have made \$977 million on paper so far this year, while NYCB's plunge has fetched them \$145 million, data from analytics firm Ortex showed.

Reporting by Manya Saini and Niket Nishant in Bengaluru; Editing by Sriraj Kalluvila and Arun Koyyur

Manya Saini
Thomson Reuters

Manya Saini reports on prominent publicly listed U.S. financial firms including Wall Street's biggest banks, card companies, asset managers and fintechs. Also covers late-stage venture capital funding, initial public offerings on U.S. exchanges alongside news and regulatory developments in the cryptocurrency industry. Her work usually appears in the finance, markets, business and future of money sections of the website.

Read Next

Watchdog, Better Markets, Investigates the Bank that Has Lost 65 Percent of Its Market Value in Two Months and Was Downgraded to Junk by Moody's

 wallstreetonparade.com/2024/03/watchdog-better-markets-investigates-the-bank-that-has-lost-65-percent-of-its-market-value-in-two-months-and-was-downgraded-to-junk-by-moodys

By Pam Martens and Russ Martens: March 4, 2024 ~



The widely respected banking and Wall Street watchdog, Better Markets, has a new report out on the latest teetering bank holding company, New York Community Bancorp (ticker NYCB). The title of the well-researched report pretty much says it all: “A Frankenstein Monster Federal Regulators Created.”

NYCB has lost 65 percent of its stock market value year-to-date and was downgraded to a junk credit rating by Moody's after the stock market closed on February 6. Moody's wrote in its downgrade that a third of the bank's deposits lack FDIC insurance.

NYCB's rapid share price descent began on January 31 when the bank filed an 8K form with the SEC indicating a \$260 million net income loss in the fourth quarter; a dividend cut from 17 cents to 5 cents; and a \$552 million provision for credit losses on commercial real estate – an area of growing concern by the credit rating agencies.

The facts in the Better Markets report are astonishing in terms of what passes for federal bank regulation today. The Better Markets researchers write as follows:

“In late 2022 and early 2023, the federal banking regulators inexplicably approved not one, but two, mergers for NYC Bancorp in rapid succession. First, in December 2022, Flagstar was acquired by NYC Bancorp and at the same time Flagstar acquired [New York Community Bank]. Then, only about 100 days later, Flagstar was selected as the winning bidder by the FDIC to acquire the failed Signature Bank ('Signature'). A bank acquiring and integrating any one of these transactions in isolation would be challenging under the best of circumstances, it is inexplicable that the banking regulators allowed them in tandem under extremely stressed conditions.”

And this:

“...over the course of just two quarters, Flagstar’s two acquisitions quadrupled its asset size, from \$25 billion on September 30, 2022, to \$123 billion on March 31, 2023. It also more than doubled its employee count, from about 2,800 in September 2022 to 6,800 in March 2023.”

It should be noted that rapid asset growth was cited by federal banking regulators as a key factor in the collapse of Silicon Valley Bank, which set off a banking panic and bank runs in the spring of last year. That panic resulted in the second, third and fourth largest bank failures in U.S. history.

The Better Markets investigation points the finger at the federal regulator of national banks, the Office of the Comptroller of the Currency (OCC), as a key player in the making of this Frankenstein bank. (National banks are those allowed to operate across state lines.)

What happened was that when this bank didn’t initially get merger approval from its primary federal regulator, it simply switched its primary regulator to the OCC and got its merger approved.

Better Markets calls this “shocking and literally unbelievable,” writing as follows:

“...The American people rely on the banking regulators to protect them, and the broader financial system and the facts related to this situation suggest unacceptable failures in these areas.

“The apparent lack of regulatory coordination and the ability of a bank to switch regulators and receive a different decision on a merger application is shocking and literally unbelievable. However, what is worse is the apparent willingness of regulators to overlook all that and racial discriminatory conduct by merger participants on multiple occasions in approving the final merger transaction. The American people deserve better from their financial regulators, and financial stability depends on it.”

The grimy fingerprints of the OCC were also at play when it approved the purchase of the failed First Republic Bank by the riskiest and largest bank in the United States – JPMorgan Chase – on May 1 of last year.

On July 12 of last year, Senator Elizabeth Warren, Chair of the Senate Banking’s Subcommittee on Economic Policy, held a hearing on “Bank Mergers and the Economic Impacts of Consolidation.” Warren had this to say during the hearing:

“When First Republic Bank collapsed in April, the bank was ultimately sold to the biggest bank in America, JP Morgan Chase. That sweetheart deal cost the Federal Deposit Insurance Fund \$13 billion. Meanwhile, overnight, the country’s biggest bank got \$200 billion

bigger. And what happened to the regulators? The Acting Comptroller of the Currency, Michael Hsu, rubber stamped the deal in record time. When I asked Mr. Hsu at a hearing in May to explain how this merger was approved, he was unable to provide a clear answer.

“But the overall picture gets worse. Instead of inattentive regulators who don’t use their tools to block increasing consolidation, leaders within the Biden Administration seem to be inviting more mergers. In a May 2023 statement before the House Financial Services Committee, Acting Comptroller Hsu reassured banks that the agency would be ‘open-minded’ while considering merger proposals....

“Treasury Secretary Yellen recently warned that the banking ‘turmoil’ from the collapse of Silicon Valley Bank, Signature Bank, and First Republic might lead to more mergers and that regulators would be – quote – ‘open to’ them. Then the New York Times also reported that Secretary Yellen privately told big banks that she would, and I quote, ‘welcome more mergers.’ ”

At the hearing, Warren called this lax position by regulators to be “stunningly wrongheaded” and “courting disaster.”

Tens of millions of Americans are sleepwalking their way to the next banking crisis. If you agree with *Wall Street On Parade* that the current banking structure in the U.S. represents a threat to national security and economic stability, please contact your U.S. Senators *today* via the U.S. Capitol switchboard by dialing (202) 224-3121. Tell your Senators to hold immediate hearings on the Fed’s non-stop bailouts of the banking sector and demand the restoration of the Glass-Steagall Act to separate Wall Street’s trading casinos from federally-insured commercial banks.

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March 4, 2024, 8:50 AM PST

Matt Levine's Money Stuff: Bed Bath & Beyond Stock Is On Sale (Correct)By Matt Levine
Opinion

Bloomberg Law News 2024-03-04T13:45:43807023247-05:00

Matt Levine's Money Stuff: Bed Bath & Beyond Stock Is On Sale (Correct)

By Matt Levine 2024-03-04T11:50:11902-05:00

Bloodbath Beyond

We [talked](#) last [month](#) about a death-spiral-ish financing at Bed Bath Beyond Inc. The company was days away from bankruptcy when a deal arrived: Hudson Bay Capital Management would put about \$1 billion into Bed Bath in exchange for vast amounts of stock. But not, like, Hudson Bay wrote a check for \$1 billion and Bed Bath gave it a pile of stock. Rather, the deal is that Bed Bath got \$225 million, and in exchange it would basically give Hudson Bay stock each day, and Hudson Bay would sell it, until Hudson Bay got back its \$225 million plus a nice little return. The mechanics were more complicated than that – they involve convertible preferred stock with a floating conversion rate, etc. – but that's the economic intuition. Each day Hudson Bay can convert some of its \$225 million investment into shares at below the market price that day, and then sell those shares to pay itself back with interest.

If all goes well, Hudson Bay will put up more money: as much as \$800 million more, in stages, over the course of the year. Each time, it will put up some money and get the same deal again, convertible preferred stock that it can convert over time into common shares at a discount to the market price each day. It keeps doing that until Bed Bath has gotten the full billion.

There are limits to this. This plan involves issuing hundreds of millions of shares of Bed Bath stock; when the plan was announced, there were only 117.3 million shares outstanding. So Bed Bath would be issuing many times more shares to Hudson Bay than it currently has outstanding, and Hudson Bay would be dumping them, relentlessly, over the course of the year. Relentlessly dumping stock will move the price down. The stock closed at \$5.86 per share on Feb. 6, as this plan was being finalized. It closed at \$1.49 this past Friday.

This doesn't matter too much for Bed Bath, since the alternative seems to have been a messy bankruptcy without much prospect for recovery for the equity: *Diluting* the shareholders, and driving down the stock price, is a relatively good outcome. And it doesn't matter too much for Hudson Bay, because it gets to buy the stock at a discount to whatever the stock price is: If the stock is at \$1.49, it gets to convert at \$1.37, so it makes 12 cents per share.

But it does matter a little, because (1) Bed Bath cannot issue infinite shares (it seems to be capped at about 780 million) and (2) Hudson Bay cannot sell them at infinitesimal prices. In a [true death spiral](#), Hudson Bay would keep getting more shares and dumping them, the stock would go to zero, and everyone would be sad, but that is not the deal here. In fact, the conversion price is floored at \$0.716 per share: If the stock trades at, say, \$0.60, Hudson Bay will lose money.

This gives Hudson Bay some incentive to manage its sales of the stock: It can't dump too much too fast, or it will drive the price too far down and lose money.

On the other hand Hudson Bay was not going to put up \$1 billion all at once and risk losing it all if the stock price cratered. Bed Bath only got the first \$225 million upfront; the rest comes in over time, and only if the stock can still support the trade. Specifically, Hudson Bay doesn't have to put up any more money unless the stock has consistently traded above \$1.25, for the first few tranches, or \$1.50, for the remainder.

And so the price is hovering right around there. If it goes up any more, Hudson Bay is incentivized to convert and bang out as much stock as it can. If it goes down much more, the mutually beneficial deal – Hudson Bay gets to buy tons of stock at a discount, Bed Bath gets cash – stops working. So here we are. Bloomberg's [Eliza Ronalds-Hannon reports](#) :

The financial lifeline that pulled Bed Bath Beyond Inc. from the brink of bankruptcy last month is already at risk because of the retailer's tumbling stock price. ...

The additional cash has strings attached. Among them: Future injections are contingent on Bed Bath Beyond maintaining a weighted average stock price of at least \$1.25 or \$1.50, depending on the timing, according to a regulatory filing. The deal terms allow Hudson Bay to waive those conditions if it wants.

But keeping the stock price above those thresholds may not be easy. It has already tumbled over 70% since Feb. 6 and closed as low as \$1.41 on Tuesday. The shares ended Thursday at \$1.56.

Volume remains very high, though, so someone is still buying, and presumably they're buying stock that Hudson Bay is selling.

Tether

In principle, Tether, the big stablecoin issuer, has an extremely simple business model:

- 1. People give it dollars.
- 2. It gives them back Tether stablecoins, or "USDT." Each USDT is meant to be worth \$1, and the exchange rate is one USDT for one dollar. If people give Tether \$10,000, it gives them back 10,000 USDT.
- 3. Tether keeps the dollars somewhere safe, presumably earning interest on them, which it uses to pay operating expenses and executive salaries and so forth.
- 4. If people want their dollars back, they can give Tether USDT and get back dollars, again one-for-one.

As of its most recent ... auditor-related thingy? ... Tether had about \$67 billion worth of assets backing about \$66 billion of Tether tokens, though that was in December 2022 and it has grown since then.

This is, in principle, a very simple and attractive business, but Tether has found it hilariously difficult as an *operational* matter. In principle the way you do this business is you have people wire you the dollars, and you send them their USDT (on the blockchain), and you keep the dollars in a bank account or money-market fund or Treasury bills or whatever earning like 4%, and if people want their dollars back you wire them the dollars, and meanwhile you're earning like \$200 million a month on the float and life is good.

But in practice what seems to happen is that people go to their banks and are like "I would like to wire Tether \$1 million to buy stablecoins" and the banks say "no." And then Tether goes to banks and says "we would like to deposit the \$67 billion backing our stablecoins" and the banks say "no." And then people go to Tether and say "I would like you to wire me back \$1 million for my stablecoins" and everyone's banks say "no." I am exaggerating, but the basic fact of Tether's life seems to be that a lot of the financial intermediaries – banks, brokers, auditors – who would normally be thrilled to work with a \$67 billion pot of money, for some reason, aren't. So Tether has to do this very simple banking business in a very complicated way.

How would you do it, if you were them? On Friday the Wall Street Journal had an article about one possible answer, well summarized by the headline: "Crypto Companies Behind Tether Used Falsified Documents and Shell Companies to Get Bank Accounts." Well, sure:

Tether's efforts to keep bank access grew urgent in March 2017, when Wells Fargo Co. stopped processing transactions from several Taiwanese accounts that Tether was using. ...

Phil Potter, Tether's now-former chief strategy officer, sought to calm anxious users on a conference call a few weeks later, saying Tether and Bitfinex had always found a solution. "There's been lots of sort of cat-and-mouse tricks that everyone in the industry has to avail themselves of," Mr. Potter said on a recording of the call.

The companies opened new accounts by using established business executives and tweaking company names, according to the documents. In Taiwan, the accounts were held in trust by Chrise Lee, an executive of Hylab Technology Ltd., which makes television set-top boxes. But the accounts were opened under the name Hylab Holdings Ltd., documents show. Mr. Lee didn't reply to a request for comment.

Right, one way around the problem is that you have all the customers wire money to Legitimate Import/Export Ltd. and label it "for televisions," that is an approach. We [talked last month](#) about how Sam Bankman-Fried is facing bank-fraud charges for, um, that. Early in FTX Trading Ltd.'s existence it had trouble getting bank accounts for itself (as a crypto exchange, a high-risk sort of business), so it had customers wire money to accounts under different names, and then sort of held the money in trust for the customers and figured it would all work out. Then it allegedly stole the money, but that is a separate point from the bank fraud; even if the money was still there, this is the sort of thing that can get you in trouble. You never want to use the phrase "cat-and-mouse tricks" about your banking relationships!

Anyway "falsified documents and shell companies to get bank accounts" is one possible approach for Tether. ("Tether said the Journal's report was 'wholly inaccurate and misleading' and said that Tether and Bitfinex have 'world-class compliance programs' and adhere to legal requirements.") There are others. One is to find some money-transmitting partner who is a little more risk-tolerant than, you know, Wells Fargo, but that has its own problems:

Bitfinex also moved more than \$1 billion into a Panama-based payment processor called Crypto Capital Corp., despite the lack of a written agreement between the companies, court records show. Crypto Capital is now defunct. ...

By October 2018, the Crypto Capital plan was backfiring. Around \$850 million of the companies' funds were seized by authorities in the U.S. and Europe as a result of criminal investigations into bank fraud and alleged money laundering. Customers had trouble withdrawing funds, tether lost its peg to the U.S. dollar and Bitfinex borrowed from Tether to cover the hole in its balance sheet.

The following year, Bitfinex said it was defrauded by Crypto Capital and is still fighting the seizures.

The advantage of finding a payment processor that doesn't require a lot of paperwork is that they'll take your money without a lot of paperwork. The disadvantage is that they won't give it back. (We [talked about the Crypto Capital aftermath in 2019](#) ; this approach did not *avoid* regulatory trouble for Tether.)

There are other, more theoretically interesting approaches. One good one is to do everything, as it were, synthetically. Your problems are with getting dollars, hanging onto the dollars, and wiring back dollars. *Issuing Tethers* on the blockchain is the easy part of your business. If you can issue Tethers *without* getting dollars, that would simplify things. Of course then you wouldn't have dollars! The whole point of Tether is to be backed by dollars, to occasionally release auditor-flavored reports that loosely suggest that Tether is fully backed by dollars.

But you could imagine a system that is like:

- Some crypto exchange or trading firm has an easier time getting dollars than you do.

- So they get dollars and turn them into some sort of crypto-native form of value. Another stablecoin, maybe. Or just Bitcoin, really.
- They give you the crypto-native form of value in exchange for Tether.
- You never have to touch dollars, avoiding a lot of headaches for you.
- They do the cash-out too.

Someone else – some independent third party with its own banking relationships – is handling the dollars, so you don't have to. And in fact Tether seems to deal mainly with large customers – crypto exchanges and big traders – rather than letting every retail investor buy and sell USDT with Tether directly, which does make life easier: Tether's banking life is simpler if it has a few big customers making occasional trades than if it is sending and receiving money with hundreds of counterparties a day. But it would be even simpler if it did mostly non-cash trading even with them.

I don't think that is a huge part of Tether's business, but here is another Journal story from December:

The company behind the tether stablecoin has increasingly been lending its own coins to customers rather than selling them for hard currency upfront. The shift adds to risks that the company may not have enough liquid assets to pay redemptions in a crisis.

Tether Holdings Ltd. says it lends only to eligible customers and requires that borrowers post lots of "extremely liquid" collateral, which could be sold for dollars if borrowers default.

These loans have appeared for several quarters in the financial reports that Tether shows on its website. In the most recent report, they reached \$6.1 billion as of Sept. 30, or 9% of the company's total assets. They were \$4.1 billion, or 5% of total assets, at the end of 2021.

Tether calls them "secured loans" and discloses little about the borrowers or the collateral accepted. Alex Welch, a Tether spokeswoman, confirmed that all of the secured loans listed in the reports were issued and denominated in tether. The company said the loans were short-term and that Tether holds the collateral.

If you sell USDT for dollars, you have to do a dollar transfer; if you lend USDT secured by Bitcoin, you don't. We [talked about that story at the time](#), and I wrote, somewhat exasperatedly:

The thing with Tether is that there's like \$65 billion outstanding, it pays no interest and one-month US Treasury bills yield like 3.8%. People do not give Tether money in order to earn interest on it; they give Tether money in order to get back USDT to use for crypto transactions. If you were Tether, you could just park their money in the safest and most liquid possible investments and earn billions of dollars of revenue that you get to keep. This is a very good and easy business. You don't need to do anything else. When people call you up for loans, instead of evaluating their collateral and creditworthiness and negotiating good documentation and having a prudent risk management and monitoring system, you could just say "no we're good" and buy Treasuries and sleep well on your giant pile of money.

But of course I was wrong: *In principle* Tether has a very good and easy business, but *in practice* it is weirdly difficult, and issuing USDT in exchange for Bitcoin collateral might in fact be easier and safer than issuing USDT in exchange for dollars in the bank. To get dollars in the bank, you need a bank.

Binance

Elsewhere in crypto regulatory stuff, here's a Wall Street Journal story about Binance:

Worried about the threat of prosecution, Binance set out on a plan to neutralize U.S. authorities, according to messages and documents from 2018 to 2020 reviewed by The Wall Street Journal as well as interviews with former employees.

The strategy centered on building a bare-bones American platform, Binance.US, that would license Binance's technology and brand but otherwise appear to be wholly independent of Binance.com. It would shield from U.S. regulators' scrutiny the larger Binance.com exchange, which would exclude U.S. users.

But Binance and Binance.US have been much more intertwined than the companies have disclosed, mixing staff and finances and sharing an affiliated entity that bought and sold cryptocurrencies, according to the interviews and the messages and documents reviewed by the Journal. Binance developers in China maintained the software code supporting Binance.US users' digital wallets, potentially giving Binance access to U.S. customer data.

In general if you are a global crypto exchange your options are:

- 1. Get approval to trade in the US. This is pretty constraining – you are limited in what products you can trade, the US Securities and Exchange Commission will come after you for products it doesn't like, etc. – and also just *annoying*; the SEC doesn't like you, and if you are in crypto for the permissionless innovation, getting permission from the SEC for everything is a drag.
- 2. Don't get approval to trade in the US, but do it anyway. This was a pretty popular approach in early crypto, but carries a lot of risk. The US is good at finding ways to prosecute foreigners for financial crimes.
- 3. Don't get approval to trade in the US, and don't trade in the US. This loses you access to a lot of customers and liquidity. Also though some people in the US *will* find a way to trade on your exchange, and you'll probably get in trouble for it.
- 4. Keep your main exchange off limits to the US, but set up a US-only exchange that doesn't do much and complies with US rules. This way you have some presence with US investors, some way to lobby for more generous US rules, etc. Also this will probably deter US investors from trading on your main exchange, which is what gets you in trouble. Also even if some US investors *do* trade on your main exchange, you'll look better: "How could we know US investors would trade on our main exchange? We tried to stop them, even gave them their own exchange, this isn't our fault."

Binance and FTX, most notably, chose Option 4. This strikes me as a reasonable choice, but there are always risks. In particular people are going to be skeptical of your separate US exchange. They are going to think that your heart isn't quite in it. Also probably it isn't:

In the Binance chat on Telegram, an employee noted that more than 18% of page views on Binance.com were from U.S. users. Samuel Lim—then Binance's compliance chief, and the person who referred to "nuclear fall out" from any U.S. regulatory lawsuit—suggested ways Binance could retain the largest U.S. clients, despite its pledge not to let Americans trade on the global platform.

"Have them be creative and VPN," he said in a Telegram chat in June 2019. A VPN, or virtual private network, allows a computer user to appear to be located in another country.

A part of Binance called Binance Academy that teaches users how to trade published a guide to using a VPN in 2020. It has since been deleted.

Also, this isn't legal advice, but whatever this is, don't do this:

In one instance, an employee tried to create a Google Form for new Binance.US customers, but he was using an account for the global exchange and had trouble changing the creator of the form from Binance.com to Binance.US.

That "will surely be seized upon by media and can be cited as direct evidence for corporate veil piercing in an adversarial judiciary proceeding," Harry Zhou wrote on the Binance Telegram chat.

"It is particularly concerning here because this form has to do with opening client accounts," he wrote. "If I were an AG, I would cite this as evidence that it is in fact Binance, an 'unregistered foreign-based [money services business],' onboarding the US clients."

What? Why write that? If you make an online form, and the metadata says that the form was created by one legal entity instead of another legal entity, *maybe* the media and prosecutors will notice and cite the form as evidence of corporate nefariousness, but honestly no one is going to get that excited about it. But when you *say in the chat* that the thing “will surely be seized upon by media,” and that if you were an attorney general you would cite it as evidence of crime, they will! The chats are always better evidence – more lively, more indicative of intent, more intuitive to jurors or readers – than the account-opening forms!

Multicoin

Just a funny series of numbers here:

Multicoin Capital's hedge fund lost 91.4% in 2022, according to a copy of the firm's annual investor letter viewed by CoinDesk.

The letter attributed last year's decline to a turbulent year for cryptocurrencies, as well as direct and indirect impact from the collapse of crypto exchange FTX.

“While the fund successfully dodged the catastrophic implosions of LUNA and Three Arrows Capital earlier in the year, we didn't avoid the explosive revelations about FTX nor the subsequent contagion that spread across the market,” said the letter. “After a remarkable year in 2021, our performance in 2022 was the worst since inception.” ...

Despite the massive drawdown, Multicoin's hedge fund remains up 1,376% net of fees from its inception through 2022. As the broader crypto market rebounded from last year's lows, Multicoin reported that the fund gained 100.9% in January 2023, bringing the fund's inception-to-January return to 2,866%.

You will sometimes hear traders talk about the importance of avoiding drawdowns in terms of simple arithmetic: “If you're down 50% one year, you have to be up 100% the next year to make up for it,” that sort of thing. In those terms it is very bad to be down 90% for the year, because even if you're up 100% the next year you're still down 80% from your high. But Multicoin was up 100% in the first *month* of 2023, after being down 91% in 2022. And if you were in the fund from the beginning, you have still made a lot of money, because I guess they've had more up-100% months than down-90% months. You probably weren't in the fund from the beginning – probably the up-100% months attracted investors – but never mind. “Multicoin says it ‘remains steadfast’ in its long term strategy and ‘does not attempt to time the market.’”

Citadel

If you put in many years of hard work at top academic institutions and ended up becoming the world's leading expert at predicting the weather two months in advance, who do you think is the best employer to monetize your skills? Oh the answer is pretty much always “an enormous multi-strategy hedge fund.” The Financial Times reports:

In 2018 Ken Griffin's Citadel hired a group of scientists and analysts whose weather forecasts were more accurate than those of most meteorological offices. ...

Griffin and his senior team are attracted [to commodities] by the size of the asset class, its low correlation with other markets and its complexity. In gas, supply can be mapped and analysed by his large teams of researchers while the many gas hubs across the US and beyond offer numerous prices that can be traded.

Forecasting demand is much harder. Weather heavily influences usage, which is higher during hot summers because of air conditioners and in cold winters as homes are heated.

This is where Citadel is seen as having a key advantage, with its traders fed information by a weather team that uses supercomputers to run forecasts and includes specialists in areas such as thunderstorm and tropical cyclone prediction. Much of the team is based in London – well placed to capitalise on volatile European gas and power prices.

It has been bolstered in recent years with hires out of academia. Head of weather Nicholas Klingaman, formerly at the UK's National Centre for Atmospheric Science, specialises in “sub-seasonal” forecasts. Such predictions, typically for up to two months ahead, are far more difficult than shorter-term forecasts and highly lucrative if accurate.

I feel like this could be a good perk of working at Citadel? Like if you are planning a ski trip or a beach vacation two months from now, call up the natural gas desk and they'll tell you what the weather will be like? Citadel's biggest weather-related move in recent years was probably moving its headquarters from Chicago to Miami, and you probably didn't need an advanced degree in meteorology to know that that would be an improvement, but still.

It is always sort of a mixed bag, when investment firms are the highest bidder for this sort of useful-in-real-life talent and knowledge. On the one hand, wouldn't it be nice if your phone's weather app was super-accurate two months out? Or if farmers, utilities, etc. had this forecasting ability, instead of a hedge fund? On the other hand, I suppose the farmers, utilities, etc. get the information indirectly, in the form of price signals. And the hedge-fund bid for meteorological knowledge probably makes meteorology a more lucrative field, which leads to more and better meteorologists, which trickles down to the rest of us?

Acronyms

I don't care for this:

Wall Street says it is done with TINA.

For years after the 2008 financial crisis, investors held on to the belief that "there is no alternative" to stocks. ...

Then came last year's market selloff. Stocks slumped and bond yields soared to levels not seen in more than a decade. ...

Goldman Sachs Group Inc. has dubbed the shift "TARA," short for "there are reasonable alternatives," while Deutsche Bank AG has endorsed "TAPAS," meaning "there are plenty of alternatives," and Insight Investment has come up with "TIARA," or "there is a realistic alternative" to stocks.

I assume someone out there is building a large language model for coming up with cutesy investing acronyms.

ETF paradoxes

We [talked on Thursday](#) about LJIM and SJIM, two exchange-traded funds from Tuttle Capital Management that buy (LJIM) or short (SJIM) all the stocks that Jim Cramer recommends on television and on Twitter. They are not affiliated with Cramer or anything, and seem to be making fun of him, but they require three Tuttle employees to "watch Cramer's television appearances throughout the day and monitor his Twitter account," so who really should be embarrassed here?

Anyway a bunch of readers wrote in to make the same joke/point: Cramer should go on TV and recommend SJIM. Then, by its own rules, SJIM has to short itself. He should do it! Feels like a win-win. For Cramer, he gets to stick it to these guys who are making fun of him. For Tuttle, it's funny, and "this is funny" seems to be the main theory of attracting investors to these funds, so presumably having to short their ETF in their ETF would attract more investors. For me, also, it is funny, and I want it to happen. Are ETFs allowed to short themselves? Probably? I have no idea but I really hope we're going to find out.

Things happen

US Banks Are Finally Being Forced to Raise [Rates on Deposits](#) . German banks accused of short-changing savers with low rates. AQR Leads 10 Hedge Funds Suing LME Over [Nickel Trade Debacle](#) . Junk-Rated Companies Are Borrowing Again. Fear of ratings downgrades puts companies off debt-driven deals. Germany's Sleepy Savings Banks Play Wall Street With [LBO Bets](#) . Missing Banker Reignites [Fear of Xi](#) Among China's Tech Bosses. "Hell Is Coming": How Bill Ackman Predicted the Covid Market Crash – And Made a Fortune. Goldman's [Top Stock Trader](#) Whose Pay Rivalled CEO's Makes Surprise Exit. [Credit Suisse](#) Loses One of Its Biggest Backers. Swiss fund manager GAM rushes to find buyer before results. Short Seller Accuses Kroll and Jones Day of [Wirecard Harassment](#) . Musk Delayed Paying Twitter's Amazon Cloud Bill, Sparking Ad Threat. Auction for 13% of World's [White Rhinos](#) to Start at \$10 Million. "George Patterson, chief investment officer at PGIM Quantitative Solutions, got a whiff of that retail urge recently when some friends' [teenage kids asked him questions about ODTE options](#) ."

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!

(In second item, deletes reference to portions of a Wall Street Journal story that has since been corrected.)

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- 1. And some other investors, but Hudson Bay was the anchor investor and seems to have put up the bulk of the money – most of the initial slug of \$225 million and all of the remaining \$800 million.
- 2. Technically I believe they can sell the stock first (short) and then convert, though borrow in Bed Bath stock is tight and, given the pricing mechanism of the conversion, they'd probably do *fine* converting first and selling later.
- 3. In fact the mechanics are more complicated than that, and Hudson Bay gets to convert at 92% of the *lowest* daily volume-weighted average price of the stock over the 10 trading days up to and including the conversion date. If the stock is volatile, this lookback option gives it a better price on some days: If the stock averages \$1.40 on Monday and \$1.50 on Tuesday, it still gets to convert on Tuesday at \$1.29. If the stock is monotonically down this doesn't help that much. (Also Hudson Bay buys the preferred at a discount to its face value, so the economics are in fact a bit better than this.)
- 4. It also matters because the conversion price is capped at \$6.15, and Hudson Bay gets warrants to buy even more stock at that price. So if the stock goes to \$20, Hudson Bay gets to buy at \$6.15 and makes a huge profit. Not that relevant now but, sure, technically, upside.
- 5. See the definition of "Price Failure" on page S-36 here: "'Price Failure' means, with respect to a particular date of determination, the VWAP of the common stock on any Trading Day during the twenty (20) Trading Day period ending on the Trading Day immediately preceding such date of determination fails to exceed (x) at any time on or prior to the time at least 21,054 shares of preferred stock (as adjusted for stock splits, stock dividends, stock combinations, recapitalizations or other similar transactions occurring after the Subscription Date, the 'Threshold Share Amount') have been issued under the Preferred Stock Warrants, \$1.25 or (y) at any time after at least the Threshold Share Amount of shares of preferred stock have been issued hereunder, \$1.50." Again, it's the *worst* day in the 20 trading days before the tranche is drawn, not the average.

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Legal transparency in AI finance: facing the accountability dilemma in digital decision-making

 [reuters.com/legal/transactional/legal-transparency-ai-finance-facing-accountability-dilemma-digital-decision-2024-03-01](https://www.reuters.com/legal/transactional/legal-transparency-ai-finance-facing-accountability-dilemma-digital-decision-2024-03-01)

Joshua Dupuy

AI (Artificial Intelligence) letters and robot hand are placed on computer motherboard in this illustration taken, June 23, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights [↗](#), opens new tab

March 1, 2024 - "Pay no attention to the man behind the curtain!" booms a powerful voice, as Dorothy and her companions watch incredulously as the once-intimidating facade crumbles, revealing a bumbling wizard with levers and tricks. Unlike the limited illusion projected in "The Wizard of Oz," today's financial landscape conceals a far more potent force: artificial intelligence (AI), utilizing algorithms capable of harmonizing economic development with technological progress.

Like hidden gears whirring behind the Emerald City facade, AI algorithms are transforming finance by unlocking efficiencies, predicting trends and personalizing financial experiences. From fighting fraud to streamlining transactions, AI's potential to improve financial markets is vast. Yet, unlike the clumsy sorcerer, AI wields real power, raising a critical legal question: can we truly trust what we cannot see?

This opacity, often referred to as the "Black Box" dilemma, presents a challenge for the financial services industry, where transparency is crucial. Industry leaders have taken note. JPMorgan's Jamie Dimon highlights the need for AI systems to be explainable, meaning they should not only make decisions but also clearly justify them. For example, an explainable AI in credit scoring could transparently outline the reasons for approving or denying a loan. In his December 2023 congressional testimony [↗](#), opens new tab for the Senate Banking Committee's annual oversight hearing of Wall Street, Dimon underscored JP Morgan's commitment to clear, regulatory-compliant customer disclosures, particularly in credit decisions.

Integrating AI into the financial sector brings significant complexities, with legal and regulatory challenges at the forefront. Data governance concerns, such as privacy, cross-border data flows and adherence to regulations like the General Data Protection Regulation (GDPR) are critical. These rules influence AI's development and use in finance, dictating how data is handled and ensuring systems respect privacy and data sovereignty.

This focus on clarity underscores the importance of data governance in AI, which involves various licensing frameworks. But balancing AI's effectiveness with transparency remains challenging. Scholars, such as Professor Michael Osborne from Oxford, advocate [↗](#), opens

new tab for openness. Similarly, initiatives like the global AI dataset audit [\[link\]](#), opens new tab by MIT Media Lab push for ethical data usage. The Media Lab's heatmap—a graphical representation of data with values represented by colors—visualizes AI data generation globally, with linguistic normalization for fair comparison. Darker areas indicate more datasets, shaped by policies and privacy laws, reflecting the legal and ethical implications for AI innovation and inclusivity. Such distribution underscores the importance of equitable data access in shaping AI's future and its fairness.

Reuters Image Purchase Licensing Rights [\[link\]](#), opens new tab

Complexities of AI integration in the financial sector

Legally, this has implications. In regions where data is scarce or guarded by restrictive licensing, AI development risks becoming a Black Box—opaque and inaccessible to external scrutiny. This lack of transparency can exacerbate secrecy in AI algorithms, making it difficult to understand, challenge or improve upon their decisions. The situation highlights a critical junction in AI development: unaccountable AI systems could have far-reaching consequences for society at large.

The opacity of AI algorithms and data imbalances pose additional hurdles, potentially obscuring decision-making and perpetuating biases. For example, AI-driven trading algorithms could trigger market fluctuations with just one unclear decision, challenging regulators to maintain accountability and implement preventive strategies. Similarly, credit scoring systems illustrate the difficulties in regulatory oversight due to a lack of transparency, with the risk of entrenching biases from historical data.

These challenges are compounded by the interplay of algorithmic and human biases, making it difficult to assign responsibility for biased outcomes. AI's potential to inadvertently reinforce discriminatory practices, such as redlining or targeting vulnerable groups with unsuitable products, raises significant concerns.

In the financial sector, these biases can influence a broad spectrum of decisions, highlighting the critical need to balance AI's benefits against the risks of bias and discrimination.

Yet regulatory bodies are scrambling to keep pace. In February 2023, the UK's Financial Conduct Authority (FCA) censured [\[link\]](#), opens new tab Amigo Loans for insufficient affordability checks, influenced by a flawed algorithm, which put vulnerable customers at risk and resulted in unaffordable loans. The FCA eschewed a £72.9 million fine, considering Amigo's financial hardship and the impact on a High Court-mandated customer redress program. This situation highlights the complexities of AI regulation in finance, emphasizing the need for definitive legal frameworks that reconcile consumer protection with technological progress.

In the U.S., the Fair Credit Reporting Act (FCRA) imposes strict guidelines on consumer credit information use. Financial institutions must ensure AI-driven processes for credit scoring and loan allocation are transparent, fair and non-discriminatory. This legal requirement underscores the importance of rigorous testing and monitoring of AI systems to prevent non-compliance. Regulatory bodies like the Federal Trade Commission and the Consumer Financial Protection Bureau offer guidance [\[1\]](#), opens new tab and oversight to ensure compliance under the FCRA in the digital age.

Towards comprehensive legal solutions and international frameworks

Traditional legal and regulatory frameworks, built around human decision-making, face challenges when confronted with AI's Black Box nature. This dilemma, where the rationale behind AI decisions is not transparent or easily understandable, complicates the assignment of liability and responsibility, especially when such decisions lead to adverse outcomes or systemic risks.

Global AI legislation and guidelines are increasingly focusing on critical aspects such as transparency, bias, accountability and systemic risk to build a resilient financial ecosystem that leverages AI's benefits while addressing its potential challenges. At the forefront of these efforts is the European Union's AI Act [\[2\]](#), opens new tab aimed at regulating the opacity of AI systems, especially within the financial sector.

This act, expected to receive final Parliamentary approval in April 2024, sets a comprehensive legal standard for tackling the risks associated with high-stakes AI applications, promoting ethical AI practices and enhancing overall system transparency and accountability.

It introduces a pyramid framework for AI governance, focusing on risk-based classification, rigorous transparency requirements and human intervention to maintain the accountability of AI systems. This legislative structure is designed to demystify AI decision-making processes, ensuring that advancements in AI are in harmony with societal values.

The U.S. is steering towards responsible AI through industry-driven initiatives and voluntary adherence, guided by the comprehensive Executive Order [\[3\]](#), opens new tab issued by the Biden administration in October 2023, which advocates for transparency without enforcing stringent regulations.

Meanwhile, the UK, in its July 2023 white paper [\[4\]](#), opens new tab champions a delicate equilibrium between fostering innovation and managing risk. It emphasizes the importance of explainability and the reduction of bias in AI, advocating for a regulatory approach that supports innovation while stressing the significance of international collaboration.

These concerted efforts underline the imperative to balance regulatory advancements with innovation and ethical considerations, ensuring the transparent and accountable evolution of AI across different regions.

Synergizing finance: blending human insight with advanced technologies

Fostering a synergistic future requires a concerted effort to transition from opaque Black Box AI systems to more transparent Glass Box models, which enable clear insights and foster trust. This framework emphasizes transparency over secrecy. Put simply, a Glass Box world champions openness and accountability, while a Black Box world cloaks the decision-making process in secrecy. This shift will be driven by advancements in Explainable AI (XAI), blockchain and quantum computing, each playing a pivotal role in redefining the contours of financial services and ethical governance, ultimately leading us towards a future where technology and transparency go hand in hand.

XAI advocates for AI systems that elucidate their reasoning processes, promoting a deeper understanding and trust in AI decisions. In parallel, blockchain technology, particularly its public variant, has the potential to introduce an unprecedented level of transparency in financial transactions. By securing transaction records in an immutable ledger, blockchain could fortify trust and streamline regulatory compliance.

Quantum computing, with its potential to dramatically enhance AI's analytical power, brings forth ethical considerations around data privacy and security. Despite these concerns, its unparalleled processing capabilities promise to revolutionize fields such as health care, climate science and finance, offering solutions to some of society's most complex problems.

Accountability matters. As we navigate the complexities of AI integration in finance, lessons from the past urge us to build a future where innovation is balanced with human insight. By embracing new technologies, adopting comprehensive legal frameworks and fostering international cooperation, we can ensure AI-driven finance breaks new ground in innovation and paves the way for a resilient and prosperous future.

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Joshua Dupuy

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Jo's tweets reposted



Jerrick White

@BostonJerry

...

Elaine Chao's sister drowning in a Tesla that may have driven itself into a lake and then McConnell almost immediately announcing that he's stepping down from GOP leadership 8 full months before the election.... that's something.

9:48 AM · Mar 1, 2024 · 388.6K Views



89



1.2K



5.8K



596



Post your reply

Reply



Jerrick White @BostonJerry · 6h

...

Certainly nothing to see here:

[cnbc.com/2024/02/29/ang...](https://www.cnbc.com/2024/02/29/ang...)

Angela Chao was a double Harvard graduate who became CEO of Foremost in 2018. She previously served on the board of the Bank of China and as a director of the China State Shipbuilding Corporation.

Her husband Breyer is part owner of the National Basketball Association's Boston Celtics, and previously served on the boards of Facebook, Walmart, Marvel Entertainment, News Corp. and Dell.



7



102



579



47K



47K



Jerrick White @BostonJerry · 5h

...

The fact that ppl are responding to this like "What??" is suspicious on its own.

Former Trump cabinet member/McConnell's wife Elaine Chow's sister (who was married to a VC billionaire w ties to FB/Walmart/NewsCorp) dying under mysterious circumstances SHOULD be a bigger story.



14



120



999



42K



42K



Wanda Maximoff Stan Account @CaliKapowski · 6h

...

What?!?!



1



1



78



36K



36K



Jess @jampackedjessie · 5h

...

This and the CEO of the biggest Nigerian bank dying in a helicopter crash in Nevada on the way to the Super Bowl barely making the news is interesting for sure

4

23

387

24K

🔖 ⬆



Elaine Benes @BananaChiqua · 1h

...

Is "drowning in a Tesla" analogous to "falling out of a window?"

8

21

287

10K

🔖 ⬆



just another Rebecca on the Internet @NYCScribbler · 3h

...

We're all so inured to horror stories about the Elmo cars that one driving itself into a lake seems perfectly normal.

0

12

189

17K

🔖 ⬆



Effing Grim @EffingGrim · 1h

...

Reminder that a Tesla can be directed remotely to drive you into a lake and disable the doors so you can't escape.

8

14

144

11K

🔖 ⬆



Shevawn Weber @Thrifting4Good · 52m

...

The plot thickens!



THE WHITE HOUSE
WASHINGTON

Statement from President Biden on Addressing National Security Risks to the U.S. ...



Tom @TomTomClub510 · 6h



I've seen that movie



13



10K



LynnMarie @belizedrmz · 5h



"There are a lot of killers." TFG



33



7K



Tweety @purrypuppydog · 2h



Wat?!?!?

Angela Chao died on February 11, 2024, at the age of 50. According to the **Blanco County** sheriff, she died after her **Tesla** went into a pond on her private ranch [...] which is located [...] about 40 miles west of Austin. She was under water for over an hour as rescuers tried to reach her and extricate her from the submerged car, but, upon her removal from the car, **EMS** workers delivered "advanced life support" for 43 minutes, but were unable to revive her.



5



30



75



5.5K



A-A-ron 🐼 🍷 @A_A_Ronprime · 19m



Elon Musk 🐦 x @elonmusk · 20h
Concerning



2



99



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March 4, 2024, 7:00AM PST

Morgan Stanley Offers Pre-IPO Share Trading to Wealth Clients

By Bailey Lipschultz

- Unit to offer private shares to accredited investors
- Valuations of private firms like OpenAI, SpaceX have jumped

Bloomberg Law News 2024-03-04T13:49:33826934373-05:00

Morgan Stanley Offers Pre-IPO Share Trading to Wealth Clients

By Bailey Lipschultz2024-03-04T10:00:51831-05:00

Unit to offer private shares to accredited investors

Valuations of private firms like OpenAI, SpaceX have jumped

Morgan Stanley’s wealth management arm is giving its clients a chance to buy and sell coveted shares of private companies before they are available to the wider public, as startups weighing initial public offerings increasingly remain private for longer.

The bank’s Private Markets Transaction Desk will assist Morgan Stanley Wealth Management clients seeking to invest in the highly-fragmented and opaque market for private shares, according to a statement Monday. Shares in more than 1,000 so-called unicorns – private companies valued at over \$1 billion – aren’t available to the general public, the statement showed.

Private market trades let employees and some institutional investors sell their stakes to accredited investors. Though the shares are inherently riskier due to their relative illiquidity, investors have been drawn to them as a way to capture the growth of companies like Reddit Inc., which is set to go public this month after nearly two decades as a private firm.

“There’s been increasing pressure over the past number of years to get into these companies while the value creation is occurring rather than having to wait until the IPO,” said Kevin Swan, Head of Private Markets Solutions at Morgan Stanley Wealth Management. “When investors have a need for liquidity we want to be there to have a solution for them.”

The offering won’t be aimed at competing with platforms that already enable investors to buy and sell shares of still private companies like Forge Global Holdings Inc. and Rainmaker Securities . Instead, Morgan Stanley will take an “open and agnostic approach,” working with external platforms as well as its different internal arms to complete trades based on each situation, Swan said in a phone interview.

Read More: [Arm IPO Is Helping to Revive the Market for Pre-Offer Investing](#)

Private companies like OpenAI and Elon Musk’s SpaceX have seen their valuations surge, a stark contrast with an IPO market that has been quiet for more than two years. Just \$44 billion was raised on US exchanges over the past two years, a little more than one-tenth of the proceeds raised via new offerings in 2021 alone, data compiled by Bloomberg show.

As the market for startups recovers after the Federal Reserve's interest-rate hiking campaign, the gap between what private sellers and would-be buyers are seeking has narrowed, according to **Michael Gavis**, Head of Private Markets at Morgan Stanley Wealth Management.

"As that happens you'll see an exponential increase," Gavis said by phone. "What drives the market going forward? That narrowing of the bid-ask spread and people getting more comfortable with the state of the marketplace."

--With assistance from **Lauren Tara LaCapra**.

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March 4, 2024, 1:30 AM PST

NDA Overuse Can Lead to Serial Misbehavior, Embarrassing Reveals

By Rob Chesnut

Column

Columnist Rob Chesnut, former general counsel and prosecutor, writes on in-house and ethics issues. He says companies should carefully consider when to require non-disclosure agreements to avoid the downsides of overuse.

Bloomberg Law News 2024-03-04T10:17:09643872883-05:00

NDA Overuse Can Lead to Serial Misbehavior, Embarrassing Reveals

By Rob Chesnut2024-03-04T04:30:48000-05:00

If you're an in-house lawyer, I think you're keeping secrets. And that might be putting your company at risk.

Lawyers love secrets. They quietly handle investigations of employee misconduct. They protect trade secrets, champion privacy, push for data security, and fight insider trading. They run closed door board meetings. They're in offsite war rooms working on confidential mergers and acquisitions.

Don't forget to mark that document "confidential, attorney client privileged." When you think about it, the entire profession is grounded in the attorney client privilege, a promise of secrecy so sacred that even a grand jury subpoena can't unlock it. For a lawyer, secrecy is good for business.

But you might love secrecy too much when it comes to the most common legal tool in the world—the non-disclosure agreement. Employees at all levels across many industries are expected to sign an NDA as a condition of employment; as many as a third of all employees are estimated to be bound by some form of employment NDA when they start work.

Try to go to a meeting at someone's office, but don't be surprised if a smiling receptionist hands you a tablet with an NDA to sign before you get through the inner doors—can't have you posting pictures of what you might see on conference room walls. Want to date a celebrity? You might have to sign an NDA on the first date—Jack Harlow even raps about it on his song "21C/Delta." Let's just get this notarized, and then I'll order the coffee.

NDAs are a useful tool when used to protect confidential information. But when they're routinely used as part of your settlement agreements to silence employees and customers and cover up negligence, bad behavior, or criminal conduct, you're playing with fire. It's a lose-lose situation.

If the NDA requires silence, it enables the perpetrator to continue to engage in the same behavior. If an individual ultimately decides to break the NDA and speak out, they risk a lawsuit. Meanwhile, the company now faces the double whammy of dealing with the exposure for the original bad behavior and the tawdriness of trying to cover it up with an NDA. The cover up, as they say, is worse than the crime.

In the wake of Harvey Weinstein, Bill Cosby, Roger Ailes, Matt Lauer, and many more, Congress passed the Speak Out Act banning NDAs in cases involving sexual assault and harassment. But that hasn't stopped in-house lawyers from blindly insisting on NDAs in other cases involving their employees and consumers, from serious cases involving race or gender discrimination, to the most routine customer disputes.

Take the airline industry. If you have a bad experience regarding a flight with a major North American carrier and end up negotiating some form of compensation (such as miles) for your trouble, you may have to sign a notarized settlement agreement barring you from ever speaking about the incident or making a critical remark about the airline to anyone, ever again.

If you posted on social media about your experience, at least one major carrier requires that you delete all of your statements about the matter, specifically including social media posts about the experience, statements to regulatory authorities, even emails, as a condition of getting your compensation. The criticism just vanishes, like the problem never happened.

Kudos to the legal department, right? Well, at least until a regulatory agency finds out that consumers are required to sign NDAs and withdraw their statements to get compensated. I can only imagine how the Federal Trade Commission might react—it has already taken an aggressive posture toward phony positive online reviews and failures of influencers to disclose that they are compensated for their glowing product reviews.

If a business is bullying consumers into removing honest online product and service reviews as a condition to receiving fair compensation, and thus depriving other consumers of honest critical reviews about the business's services, it won't end well.

The consequences of overusing NDAs might be worse than underusing them. In an era where AI might be writing your contracts and mindlessly inserting non-disclosure clauses, you may be overextending and (ironically) putting your company in the embarrassing position of covering up things that shouldn't be covered up, all for an NDA that you probably wouldn't go to court to enforce anyway.

It's time to review all of the NDAs you use in settlement documents, and ask whether they protect you, or put you in harm's way. I think transparency is often the better course—let people speak their truth, note that you occasionally make mistakes and aren't afraid to let them be aired and fairly resolved, and remember that getting a little public criticism will usually make you better.

When you hide mistakes, you're more likely to make the same ones over and over. And coverups have a way of getting out from under the covers.

Rob Chesnut consults on legal and ethical issues and was formerly general counsel and chief ethics officer at Airbnb. He spent more than a decade as a Justice Department prosecutor.

Read More Good Counsel

To contact the editors responsible for this story: Jessie Kokrda Kamens at jkamens@bloomberglaw.com; Alison Lake at alake@bloombergindustry.com; Melanie Cohen at mcohen@bloombergindustry.com

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Amazon Cuts Deals With Mastercard, Banks In Fee MDL

By **Henrik Nilsson**

Law360 (February 29, 2024, 11:31 PM EST) -- Amazon told a New York federal court Thursday that it has reached settlement agreements with Mastercard and several banks, after reaching a previous deal with Visa, over allegations that anti-competitive conduct by the card companies and banks caused the online retail giant to overpay for transaction fees.

Amazon and its subsidiaries filed a stipulation of dismissal for claims in the litigation against Mastercard, Bank of America, JPMorgan Chase, Citibank and Wells Fargo, saying it has "fully settled all of its claims" against them. Terms of the settlement were not disclosed, but the sides agreed to cover their own costs and fees, according to the stipulation.

The filing also noted that the deals mean Amazon has settled its claims against all defendants in the case, following a settlement with Visa in March 2022.

Home improvement retail chain Lowe's also **reached settlement agreements** with the card companies last year.

The action is part of multidistrict litigation before U.S. District Judge Margo K. Brodie in the Eastern District of New York, accusing Visa and Mastercard of violating antitrust law by working with the banks that issue their cards to eliminate competition and inflate the "interchange fees" charged on each transaction.

The allegations target rules including those that require merchants that accept Mastercard- and Visa-branded cards to take all types of cards from that brand, regardless of the fees charged, and prevent merchants from steering customers towards particular payment options.

A class of merchants in the broader action reached a **\$7.25 billion settlement** in 2012, only to see it upended **years later** by the Second Circuit. In 2019, the lower court approved an updated deal. The Second Circuit upheld a \$5.6 billion settlement **in March**.

In May, a pair of retail gas station franchisees pointed to the Second Circuit ruling in **renewing a bid to intervene** in the case, arguing that a potential conflict of interest between franchisees and franchisors warrants a "subclass" of gas retailers.

Earlier this month, Visa and Mastercard asked the court to **throw out claims** brought by Intuit and Square, saying the allegations were released as part of the \$5.6 billion settlement.

Meanwhile, class members who **objected** to the deal recently argued that they're entitled to \$1 million in legal fees for "enhancing the adversary process, sharpening the debate, and pursuing meritorious appeals in this litigation over the past eleven years."

Counsel for Amazon declined to comment. Attorneys for Mastercard did not immediately return a request for comment.

Amazon is represented by Jeffrey I. Shinder, A. Owen Glist, Ankur Kapoor, Taline Sahakian and David A. Scupp of Constantine Cannon LLP.

Mastercard is represented by Gary R. Carney, Kenneth A. Gallo and Donna M. Ioffredo of Paul Weiss

Rifkind Wharton & Garrison LLP.

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

--Additional reporting by Matthew Perlman, Aaron Keller, Bryan Koenig, Katryna Perera and Jared Foretek. Editing by Jay Jackson Jr.

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Ventyx Investor Says Co. Overhyped Psoriasis Drug

By **Gina Kim**

Law360 (March 1, 2024, 11:15 PM EST) -- Ventyx investors filed a proposed securities class action in California federal court on Friday, alleging the biopharma company made misleading statements regarding the efficacy and commercial prospects of its candidate inhibitor to treat psoriatic arthritis and Crohn's disease, before terminating its second clinical phase, leading stock prices to drop 80%.

In a 37-page complaint filed in the Southern District of California, a putative class of Ventyx stockholders accuse the clinical-stage biopharmaceutical company of breaching federal securities laws linked to statements the company and its officers made regarding its lead clinical product candidate, VTX958, an oral medication used to treat patients with psoriasis, psoriatic arthritis and Crohn's disease, according to the suit.

Ventyx launched the second phase of VTX958's clinical trial in 2022, hoping to treat patients with moderate to severe plaque psoriasis, according to the complaint.

The company began publicly trading on Nasdaq on Oct. 21, 2021, the day of its initial public offering, and Ventyx issued more than nine million shares of its common stock at \$16 per share, the suit says.

Proceeds from the IPO poured back into Ventyx at about \$141 million, before expenses and after applying underwriting discounts, the suit says.

However, the company's offering documents in connection with the October 2021 IPO were "negligently prepared," the investors allege. Further, Ventyx's officers, directors or executives made false or misleading statements or failed to disclose VTX958 wasn't as effective in treating psoriasis as the company had led investors to believe, the complaint says.

As a result, the company overstated the clinical and commercial prospects of VTX958, and misrepresented its ability to develop and commercialize effective product candidates, the suit says. Those statements inflated Ventyx's business prospects after the IPO, the investors say.

"On November 6, 2023, during after market hours, Ventyx issued a press release announcing results from the phase 2 serenity trial," the complaint says. "Therein, the company disclosed that, '[a]lthough the trial achieved its primary endpoint, the magnitude of efficacy observed did not meet our internal target to support advancement of VTX958 in plaque psoriasis.' Based on these results, the company announced that it 'will terminate ongoing activities in the phase 2 plaque psoriasis trial effectively immediately,' and 'terminate the ongoing phase 2 trial of VTX958 in psoriatic arthritis.'"

Ventyx's common stock price plunged to \$11.36 per share as the news broke, or just above 80%, and closed at \$2.73 per share on Nov. 7, according to the suit. Approximately two weeks later, Ventyx filed a Form 8-K with the SEC, revealing William J. Sandborn, the company's president and chief medical officer, would be stepping down, the suit says.

To this day, Ventyx's common stock continues to trade below the \$16 per share IPO price, resulting in damage to the investors, the complaint says.

The investors claim the defendants had motive and opportunity to deceive investors, actual knowledge of the misleading nature behind their statements or that they acted in reckless disregard when the statements were made.

The suit asserts claims against Ventyx and its officers, executives and major shareholders under

sections 11, 15, 10B, 20(a) and Rule 10b-5 of the Exchange Act. The investors are asking the court to certify the proposed class, tap the plaintiff, Omer Yuksel, as class representative, and order the defendants to pay damages, attorney fees and costs.

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

The proposed class is represented by Jennifer Pafiti, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP and Brian Schall of The Schall Firm.

Counsel information for the defendants was not immediately available.

The case is Omer Yuksel v. Ventyx Biosciences Inc. et al., case number 3:24-cv-00415, in the U.S. District Court for the Southern District of California.

--Editing by Drashti Mehta.

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Tesla Stock For Fees? Attys Who Got Musk's Pay Cut Say Yes

By **Lauren Berg**

Law360 (March 1, 2024, 11:06 PM EST) -- The lawyers who convinced the Delaware Chancery Court to scuttle Elon Musk's proposed \$55 billion Tesla compensation package on Friday filed a request for legal fees that came with a twist — they want to be paid in Tesla stock that rounds out to about \$5.6 billion.



The lawyers who successfully argued to strike down Tesla's 10-year compensation plan for Elon Musk asked to be paid with more than 29 million Tesla shares and an additional \$1 million to cover their litigation expenses. (Patrick Pleul/picture-alliance/dpa/AP Images)

The attorneys from Bernstein Litowitz Berger & Grossmann LLP, Friedman Oster & Tejtelt PLLC and Andrews & Springer LLC, who represent the shareholders who in **November 2018 challenged** Musk's pay package as unfair, asked for more than 29 million Tesla shares and an additional \$1 million to cover their litigation expenses, according to the **motion**.

They are seeking about 11% of the 267 million shares they say are now available for Tesla's use as a result of Chancellor Kathaleen St. J. McCormick's **decision in January** striking down Musk's 10-year compensation plan, the motion states. She found that disclosure failures, murky terms, conflicted director architects and Musk's own hand on the tiller warranted an order to roll back the award.

"Rather than debate the value conferred to Tesla by canceling the options or the value of the underlying stock returned to the Tesla treasury free of restriction, plaintiff's counsel instead seeks a fee award in kind — a percentage of the shares returned for unrestricted use by Tesla (rather than cash)," the lawyers said. "In other words, we are prepared to 'eat our cooking.'"

"This structure has the benefit of linking the award directly to the benefit created and avoids taking even one cent from the Tesla balance sheet to pay fees," they added. "It is also tax-deductible by Tesla."

The plan went to a weeklong trial in November 2022 after it was challenged by stockholders led by plaintiff Richard J. Tornetta. The compensation scheme included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

In her order squashing the plan, Chancellor McCormick found that "Musk dictated the timing of the process, making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the ten board or compensation committee meetings during which the plan was discussed."

Although the defendants argued that Musk was "uniquely motivated by ambitious goals," with Tesla desperately needing him to succeed, the opinion observed, "these facts do not justify the largest compensation plan in the history of public markets."

The price was no better than the process, the chancellor concluded, observing that "Musk owned 21.9% of Tesla when the board approved his compensation plan. This ownership stake gave him every incentive to push Tesla to levels of transformative growth — Musk stood to gain over \$10 billion for every \$50 billion in market capitalization increase."

In their motion for attorney fees on Friday, the shareholders' attorneys from the three firms said they collectively logged nearly 19,500 hours throughout the case, which came out to about \$13.6 million in lodestar, as well as \$1.1 million in out-of-pocket expenses.

And although a typical attorney fee request seeks about one-third of a settlement or verdict won in favor of their client, in this case, the attorneys said they are asking for a conservative 11% of the recovery.

"We recognize that the requested fee is unprecedented in terms of absolute size," the attorneys said. "Of course, that is because our law rewards counsel's efforts undertaken on a fully contingent basis that, through full adjudication, produce enormous benefits to the company and subject the lawyers to significant risk."

"And here, the size of the requested award is great because the value of the benefit to Tesla that plaintiff's counsel achieved was massive," they added.

And this isn't the first time a court has awarded plaintiffs a fee of recovered shares, according to the motion.

The attorneys point to the 2000 case *Sanders v. Wang*, in which the Chancery Court granted plaintiffs judgment on the pleadings over the improper issuance of 4.5 million shares, approved a settlement and then awarded the plaintiffs a fee comprising 20%, or 900,000, of the 4.5 million recovered shares.

Overall, the attorneys said their fee request is supported by their history as experienced stockholder advocates, the substantial effort they put forth, the complexity of the case, and the "unprecedented result" they achieved in this case.

Tesla and counsel for the parties did not immediately respond to requests for comment late Friday.

The shareholders are represented by Jeroen van Kwawegen, Margaret Sanborn-Lowing, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Musk and the other defendants are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

The case is *Richard J. Tornetta et al. v. Musk et al.*, case number 2018-0408, in the Court of Chancery of

the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Jay Jackson Jr.

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NY Judge Tosses \$6.4B BMS Investor Action For Good

By **Nadia Dreid**

Law360 (March 1, 2024, 9:29 PM EST) -- Celgene Corp. investors could not convince a New York federal judge that Bristol-Myers Squibb Co. was intentionally trying to flout securities law by delaying the U.S. Food and Drug Administration's approval of a cancer treatment in order to avoid giving them a \$6.4 billion payout.

U.S. District Judge Jesse M. Furman entered judgment in favor of Bristol-Myers on Thursday and directed that the case be closed, nearly two and a half years after investors first filed the suit in his court. He said the aggrieved investors had, for the second time, failed to properly allege that Bristol-Myers and its executives had been acting with scienter.

"Measured against the foregoing standards, the court concludes that plaintiffs' allegations of scienter still fall short," Judge Furman said. And where "as here, 'there is no evidence of motive ... the strength of the circumstantial allegations [of scienter] must be correspondingly greater.'"

Judge Furman said there was no motive for Bristol-Myers to behave the way the investors claim it did, quoting the pharmaceutical giant as saying what it is proposed to have done "defies economic reason."

The investors were holders of contingent value rights as shareholders of the former Celgene Corp., which was absorbed by Bristol Myers. Along with the merger came an agreement that if three medications that Celgene had in the works gained FDA approval on time, holders of the so-called CVRs would get a \$6.4 billion payday.

But if even one drug was approved late, even by a single day, Judge Furman said the CVRs would "expire worthless."

And that is precisely what happened. One of the drugs, blockbuster cancer therapy lisocabtagene maraleucel wasn't approved by the FDA until five weeks after the deadline due to delays caused in part by regulatory violations found during FDA-mandated inspections, according to the record.

This meant that instead of \$6.4 billion, the CVR holders got nothing.

According to the investors, Bristol-Myers intentionally stalled approval, so it wouldn't have to pay out, but Judge Furman gave credence to the idea that that didn't make economic sense. Surely the executives at Bristol-Myers understood that the expiry of the CVRs would prompt litigation "seeking equivalent damages" accusing the company of bad behavior, so it couldn't have been a move intended to save money, he said.

It's been a year since Bristol-Myers slipped the suit the first time, for essentially the same reasons, but Judge Furman gave investors a chance to try again. The court had previously found that, on top of the other issues, the investors hadn't shown how Bristol-Myers' executives had benefited from the purported fraud.

The investors are represented by Michael B. Eisenkraft, Laura H. Posner, Benjamin F. Jackson, Steven J. Toll and Brendan Schneiderman of Cohen Milstein Sellers & Toll PLLC, Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC, and Robert N. Cappucci, Brendan J. Brodeur and Andrew J. Entwistle of Entwistle & Cappucci LLP.

Bristol-Myers Squibb and its executives and directors are represented by John Clarke, Jessica

Masella, Steven Rosato and Jessica Park Wright of DLA Piper.

The case is In Re: Bristol-Myers Squibb Co. CVR Securities Litigation, case number 1:21-cv-08255, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.

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McDermott Investors' Cert. Bid Should Be Denied, Judge Says

By **Emilie Ruscoe**

Law360 (March 1, 2024, 11:23 PM EST) -- Investors in energy industry engineering company McDermott International Inc. shouldn't be granted class certification in their suit over the company's \$6 billion all-stock acquisition of Chicago Bridge & Iron Co., a federal magistrate judge has determined.

In a memorandum and recommendation Thursday, U.S. Magistrate Judge Andrew M. Edison said lead plaintiff Nova Scotia Health Employees' Pension Plan should instead be allowed to refile a motion to certify certain subclasses of McDermott stockholders who allege they were harmed by the merger, which was closed in 2018.

The magistrate judge said that the Nova Scotia pension fund, which was previously a shareholder in Chicago Bridge & Iron Co., had standing to bring its claims, but added that the fund had "a fundamental conflict" with purchasers and acquirers of McDermott stock who never held CB&I shares during a proposed class period spanning December 2017 to November 2019.

In a revised class certification bid, the magistrate judge said, the parties should include two proposed subclasses: one subclass of those who bought McDermott stock and held CB&I shares during the proposed class period, and a separate subclass of shareholders who bought McDermott stock but didn't have any CB&I stock during the proposed class period.

The magistrate judge noted that if the district court adopted his recommendation, the magistrate judge would immediately schedule status conferences on future class certification briefing, but added that he expected the briefing would be limited, "as the class certification issues determined by this recommendation will not be relitigated."

"The parties are, of course, free to preserve their continuing objections to these determinations in the (hopefully) final round of class certification briefing," Judge Edison said Thursday.

The action dates back to 2018 and comprises two suits, which were consolidated in 2019. The latest version of the claims aims at alleged material misrepresentations McDermott made both before and after its acquisition of CB&I, which was announced in December 2017 and closed in May 2018.

According to the pension fund, McDermott concealed that "four large, challenging CB&I projects" would ultimately cost "well over \$1 billion," a price tag that posed known risks to the "strength and viability of McDermott's postmerger capital structure, balance sheet, liquidity, and financial health."

The suit survived a dismissal bid in April 2021, with U.S. District Judge George C. Hanks Jr. finding that certain statements by the company were made "with actual knowledge that they were misleading."

On Friday, counsel for the pension fund declined to comment and representatives for McDermott did not immediately respond to requests for comment.

The Nova Scotia Health Employees' Pension Plan is represented by Matthew L. Tuccillo, Jeremy A. Lieberman, Jennifer Banner Sobers and Zachary Denver of Pomerantz LLP and Willie Charles Briscoe of the Briscoe Law Firm PLLC.

McDermott is represented by David D. Sterling, Amy Pharr Hefley, Anthony J. Lucisano and Elizabeth P. Furlow of Baker Botts LLP.

The case is Edwards v. McDermott International Inc. et al., case number 4:18-cv-04330, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Craig Clough. Editing by Jay Jackson Jr.

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Avalara Beats Investors' \$8.4B PE Buyout Challenge For Good

By **Greg Lamm**

Law360 (March 1, 2024, 10:17 PM EST) -- A Washington federal judge refused Friday to give another chance to a proposed shareholder class action alleging Avalara lied to win investors' support for an \$8.4 billion private equity buyout, in an order finding the lead plaintiff failed again to show the tax software company made false statements.

U.S. District Judge Marsha J. Pechman **ruled** that despite having an opportunity to add additional allegations in amended complaints, stockholder Martin Sohovich "continues not to identify sufficient factual allegations to sustain his claims," and dismissed his complaint.

Sohovich brought new claims in a second amended complaint accusing Avalara Inc. of making false statements in a proxy statement and other U.S. Securities and Exchange filings connected to the deal. But the judge said the new claims were unconvincing.

"The minimal additions included in the [amended complaint] fail to plead adequate Exchange Act claims," she wrote.

Judge Pechman concluded that allowing Sohovich to further amend the lawsuit would be futile.

In October, **the judge dismissed** Sohovich's previously amended complaint, determining that he had not shown how any of the risk disclosures mentioned in the 2022 proxy filing were objectively false. But Judge Pechman said at the time that Sohovich could again amend the complaint.

Sohovich asserted that Avalara executives used proxy misrepresentations to persuade shareholders to approve the October 2022 transaction with private equity firm Vista Equity Partners by inducing them to sell their shares for less than fair value. The going-private deal netted stockholders a 27% cash premium for their equity, Avalara noted in a court filing.

The suit named Avalara's current and former directors, including co-founder and CEO Scott McFarlane, as defendants. Sohovich contended that Avalara's management and outside directors stood to receive more than \$65 million from the transaction and that Goldman Sachs, the software firm's financial adviser, would be paid \$70 million. Vista Equity Partners was not named as a defendant.

In the second amended complaint, Sohovich argued that McFarlane presented revenue projections to the board over nine separate meetings, and the board should have known the projections omitted inorganic growth and reflected risks and weaknesses that contradicted public statements.

"While these allegations are plausible, they are not particularized such that each defendant is identified as having sufficient personal knowledge of each allegedly false statement in the Proxy," Judge Pechman said in her order Friday.

The judge also found that while Sohovich newly alleged the revenue projections for 2022 through 2025, prepared by Avalara's management, omitted gains from future acquisitions, he didn't provide any reason why the omission of certain predictions would be false or misleading.

Representatives of Avalara and the investor did not immediately respond to requests for comment.

Sohovich is represented by Jeremy A. Lieberman and Tamar A. Weinrib of Pomerantz LLP and Duncan C. Turner of Badgley Mullins Turner PLLC.

Avalara is represented by Matthew Solum and Mike Rusie of Kirkland & Ellis LLP and James P. Savitt of Savitt Bruce & Willey LLP.

The case is Sohovich v. Avalara Inc. et al., case number 2:22-cv-01580, in the U.S. District Court for the Western District of Washington.

--Editing by Covey Son.

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EV Maker Rivian Rips Investors' Class Cert. Bid In Fraud Suit

By **Linda Chiem**

Law360 (March 1, 2024, 10:18 PM EST) -- Investors alleging Rivian Automotive Inc. underpriced its electric vehicles and misrepresented its profitability ahead of a blockbuster 2021 initial public offering cannot certify their class with zero evidence, weak fraud-on-the-market theories and troubling litigation tactics, Rivian argued in a California federal court filing Thursday.

Rivian, its executives and its board directors said in an **opposition brief** that investors were sufficiently warned about inflationary pressures, increasing component costs, and unprecedented supply chain shortages and parts delays that would impact Rivian's production.

Irvine, California-based Rivian, which makes electric trucks, SUVs and vans for consumers and businesses, argued it made clear in its U.S. Securities and Exchange Commission filings that it produced each of its R1 electric vehicles at a loss, that those losses would continue for the foreseeable future, and that spreading fixed costs over more vehicles alone would not lead to gross profitability.

It urged the court to reject a **class certification bid** from Swedish public pension fund Sjunde AP-Fonden, known as AP7, which is serving as lead plaintiff, and named plaintiff James Stephen Muhl.

The plaintiffs allege in an amended consolidated complaint that **Rivian miscalculated** how much it actually cost to build its electric vehicles and knew before its November 2021 IPO that it would have to increase the vehicles' retail prices by nearly 20% to make up for the losses.

Rivian announced price hikes in March 2022, and investors were left holding the bag when Rivian's stock took a beating, according to the plaintiffs. Rivian on Thursday rejected allegations that the March 2022 price increases had been decided at the time of the IPO.

"Regardless, Rivian never promised profitability, much less on a specific timeline. Disclosures about hypothetical price increases would not have corrected any of Rivian's existing disclosures," the company said in its brief. "Still, no misapprehension existed in the market to correct. Revealing Rivian's potential pricing strategy would not only be a terrible business decision, but is not required under the securities laws. That alone is sufficient to deny class certification."

Ultimately, "this castle of cards cannot bear the weight of class proceedings," Rivian said in its brief.

"In addition to their flawed legal theories and factual misrepresentations, plaintiffs' depositions revealed a shocking abdication of duties to counsel and ignorance of the case," Rivian argued.

Rivian accused lead plaintiff's counsel Kessler Topaz Meltzer & Check LLP of "engaging in troubling investigative tactics," according to Thursday's opposition brief.

The automaker contended that lead plaintiff AP-7 didn't even know that it held Rivian stock until it was solicited by counsel for the proposed class, and never even reviewed the operative complaint. Moreover, former employees whose purported statements anchor much of the plaintiffs' claims have since disavowed allegations attributed to them, according to Rivian.

"Here, KTMC has engaged in — and plaintiffs have blinded themselves to — tactics that undermine the 'integrity of the class action,'" Rivian said in the brief.

A Kessler Topaz Meltzer & Check attorney representing the investor plaintiffs said Friday that the firm does not comment on pending matters.

But in recent court filings, the investor plaintiffs have blasted Rivian for trying to "torpedo discovery" and misrepresenting to the court what it gleaned from interviews and depositions conducted with some of the former employees.

The amended consolidated complaint alleges two former employees who led Rivian's cost engineering group came forward with details on how Rivian's per-vehicle production costs soared to over \$100,000, yet Rivian kept promising it could deliver a \$70,000 electric pickup truck to consumers knowing it would have to raise prices. In other words, Rivian presented the pricing pressures as mere possibilities, when those problems had already materialized, according to court documents.

But one former employee has since testified that he felt "mischaracterized" by plaintiffs, while another former employee testified that he felt "coerced," according to Rivian's opposition brief Thursday.

Rivian, which counts Amazon as its largest shareholder, in November 2021 priced an **upsized \$11.9 billion IPO**, which was the **largest IPO of 2021**. The amended consolidated complaint alleges Rivian had been struggling with bringing its so-called bill of materials costs down for years before the IPO without success. The bill of materials refers to the total amount for parts and materials to build each vehicle.

Rivian announced March 1, 2022, that it would raise the price of its R1T pickup truck from roughly \$67,500 to approximately \$79,500, and the price of its R1S SUV would be bumped up from roughly \$70,000 to approximately \$84,500. Rivian said at the time that the price hikes would apply to all future orders, as well as existing preorders, because of "inflationary pressure on the cost of supplier components and raw materials across the world." Rivian's stock price fell from \$67.56 per share Feb. 28, 2022, to close at \$53.56 per share March 2, 2022.

Amid fierce customer backlash, Rivian promptly walked back the price increase for customers with preorders placed before March 1, 2022. Rivian said it would honor the original configured price for anyone with a Rivian preorder as of the March 1, 2022, pricing announcement. Within weeks, Rivian's stock price fell to \$35.83 per share March 14, 2022, according to the amended consolidated complaint.

Rivian founder and CEO Robert J. Scaringe, Chief Financial Officer Claire McDonough, Chief Accounting Officer Jeffrey R. Baker and other board directors are named as individual defendants. Various underwriter financial institutions are also named as defendants for allegedly failing to conduct an adequate due diligence investigation.

Representatives for Rivian could not be immediately reached for additional comment Friday. But the company has previously said it does not comment on pending litigation.

The investor plaintiffs and proposed class are represented by Sharan Nirmul, Darren J. Check, Richard A. Russo Jr., Alex B. Heller, Austin W. Manning and Jennifer L. Joost of Kessler Topaz Meltzer & Check LLP and Stephen G. Larson and Paul A. Rigali of Larson LLP.

Rivian, its executives and its board directors are represented by Boris Feldman, Doru Gavril, Eunice Leong, Rebecca Lockert and Olivia Rosen of Freshfields Bruckhaus Deringer LLP.

The underwriter defendants are represented by James N. Kramer, Alexander K. Talarides, Richard A. Jacobsen, Darrell S. Cafasso and Jennifer Keighley of Orrick Herrington & Sutcliffe LLP.

The case is Charles Larry Crews Jr. v. Rivian Automotive Inc. et al., case number 2:22-cv-01524, in the U.S. District Court for the Central District of California.

--Editing by Janice Carter Brown.



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Levi & Korsinsky Gets Nod To Lead Nikola Investor Action

By **Sydney Price**

Law360 (March 1, 2024, 4:42 PM EST) -- An Arizona magistrate judge has recommended Levi & Korsinsky LLP to lead an investor suit alleging hydrogen-electric vehicle manufacturer Nikola Corporation failed to disclose that its safety and structural controls were deficient for its battery manufacturing, which made its vehicles unsafe to operate.

In her report and recommendation issued on Thursday, U.S. Magistrate Judge Deborah M. Fine said Randolph C. Reyes' alleged losses of over \$345,000 were the largest in the class, so he should be appointed lead plaintiff.

Reyes and his counsel from Levi & Korsinsky beat out two competing bids from Glancy Prongay & Murray LLP and Pomerantz LLP, whose clients alleged losses of approximately \$266,000 and \$198,000, respectively.

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

Levi & Korsinsky attorney Adam M. Apton told Law360 in an email Friday that he welcomes the opportunity to lead the suit.

"We hope the district court judge is able to adopt the report and recommendation without delay and look forward to pursuing the claims on behalf of the class," Apton said.

Shareholder John Tenneson launched the suit in October against Nikola, its CEO Stephen Girskey, Chief Financial Officer Anastasiya Pasterick and three former executives.

The instant suit appears to be unrelated to securities fraud charges against the automaker's founder and former CEO Trevor Milton. In December, a federal judge sentenced Milton to four years in prison over his conviction on charges that he fraudulently inflated the price of Nikola shares. He is not a defendant in the instant case.

Tenneson says the truth about Nikola's deficiencies and unsafe products began to emerge in June when one of its battery-electric vehicles caught fire at the company's headquarters, causing Nikola to open an investigation.

The company stated that foul play was suspected as the cause of the fire, the complaint states. But despite this message, Tenneson says Nikola's stock price fell 9 cents per share, or nearly 7%, to close at \$1.29 per share on June 23, 2023.

In August, the company retracted its suspicions of foul play as a cause of the fire and issued a recall of all 209 battery-electric trucks it had delivered or built to date after the investigation revealed a coolant leak inside a battery pack caused the fire, according to the complaint.

News of the recall caused Nikola's stock price to decline by 13 cents per share, or nearly 7%, to close at \$1.82 per share on Aug. 14, 2023, the complaint states.

The following month, another Nikola battery-electric vehicle caught fire at a warehouse in Arizona due to the same battery pack deficiency, and a few days later, a fourth truck caught fire near the

company's headquarters, according to the suit.

The complaint states that after these fires, Nikola issued a statement saying, "There was a thermal incident with one engineering validation battery-electric truck near Nikola's Phoenix headquarters. No one was injured. This pre-production truck was outside and undergoing battery fire investigation and testing."

Tenneson says that on this news, Nikola's stock price fell 16 cents per share, or 15.38%, to close at 88 cents per share on Sept. 8, 2023.

Reyes is represented by Adam M. Apton of Levi & Korsinsky LLP and Scott H. Zwillinger of Zwillinger Wulkan PLC.

Nikola and the individual defendants are represented by Alison R. Benedon, Brad S. Karp, Gregory F. Laufer and Susanna M. Buergel of Paul Weiss Rifkind Wharton & Garrison LLP and Dennis Ira Wilenchik of Wilenchik & Bartness PC.

The case is Tenneson v. Nikola Corporation et al., case number 2:23-cv-02131, in the U.S. District Court for the District of Arizona.

--Additional reporting by Katryna Perera. Editing by Vaqas Asghar.

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Amazon Shareholder Seeks Prime Info In Del. Chancery

By **Jeff Montgomery**

Law360 (March 1, 2024, 8:50 PM EST) -- An Amazon stockholder has sued the online shopping and media giant in Delaware's Court of Chancery to obtain internal documents regarding what the investor and the government have called misleading schemes by the company to drive up Prime service subscriptions and confound customers who try to cancel their paid membership.

In a complaint lodged Thursday, Amazon.com Inc. shareholder DM Cohen Inc. alleged the retailer improperly pushed back against voluntary release of the records sought in the lawsuit and that its counsel made unsupportable attempts to impose restrictions on the use of the information requested.

"For years, Amazon and its leadership have knowingly duped millions of consumers into unknowingly enrolling in its Amazon Prime service" through "manipulative, coercive, or deceptive language and user-interface designs known as 'dark patterns' to trick consumers into enrolling in automatically renewing Prime subscriptions," the investor wrote.

DM Cohen is also asking for information related to the Federal Trade Commission's claims in a separate suit that the Prime membership cancellation process is likewise set up with byzantine steps and features intended to thwart consumers from terminating their subscriptions.

The Amazon investor said Thursday it seeks to investigate "potential corporate mismanagement, wrongdoing, and waste by fiduciaries of the company" through its records requests, arguing its goal "is reasonably related" to its interests as a stockholder.

The FTC sued Amazon in June in the U.S. District Court for the Western District of Washington, and brought the Prime membership entry and exit allegations referenced by DM Cohen. The retailer previously revised its steps for subscription cancellation due to FTC pressure.

DM Cohen observed Thursday that, according to the FTC, Amazon's senior leadership has been aware that "nonconsensual enrollment is widespread, and has been aware of that fact since at least 2016."

The Delaware filing added that Amazon did not cooperate with the FTC's investigation, and proposed document search terms that led the agency "away from key documents, delaying document production" and obscuring the identities of key custodians, to quash some demands. The FTC categorized the company's behavior "as 'intentional misconduct meant to delay the commission's investigation,'" the investor also pointed out.

The shareholder's suit accused Amazon of attempting to assert an improper forum restriction on derivative litigation filed by an investor to assert claims against the company. Amazon, DM Cohen maintained, has no such forum restriction.

The investment company began its attempt to secure Amazon records on Oct. 9, it noted.

"Without judicial intervention, Amazon will continue to simply refuse to produce statutorily required documents and insist on improper and unjustifiable conditions," the complaint read.

On Feb. 26, U.S. District Court Judge Ricardo S. Martinez ruled in the FTC case that Amazon must face claims in a proposed class action alleging the automatic renewal feature of Prime, Kindle and other Amazon services violates California and Oregon consumer laws.

Judge Martinez said he was not persuaded that the e-commerce company's policy and disclosures on how to cancel subscriptions satisfy California or Oregon automatic renewal laws, in an order rejecting Amazon's motion to dismiss.

Amazon's price disclosures were not illegal misrepresentations, and Amazon's cancellation policies contain the information required under California and Oregon automatic renewal laws, the Washington federal judge added.

Neither party responded to requests for comment Friday.

DM Cohen is represented by Blake A. Bennett of Couch & Taylor PA and Michael I. Fistel Jr., Mary Ellen Conner and Oliver tum Suden of Johnson Fistel LLP.

Counsel information for Amazon in the Delaware case was not immediately available.

The case is DM Cohen Inc. v. Amazon.com Inc., case number 2024-0192, in the Court of Chancery of the State of Delaware.

--Additional reporting by Greg Lamm. Editing by Covey Son.

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Adamas' Ex-COO Agrees To \$4.6M Deal In Investor Suit

By **Henrik Nilsson**

Law360 (March 1, 2024, 10:52 PM EST) -- Adamas Pharmaceutical Inc. investors asked a California federal judge on Friday to approve a \$4.65 million settlement with the company's former chief operating officer to resolve proposed class claims the company misled consumers about the success of its treatment for Parkinson's disease.

Lead plaintiff investor Ralph Martinez said he's reached a \$4.65 million deal with Adamas' former chief operating officer Richard King to settle claims King made misleading statements about the company's drug Gocovri, a treatment for patients with Parkinson's disease.

Under the deal, King's directors and officers insurer and Adamas must pay the settlement into an escrow account within 20 business days after entry of a preliminary approval order.

"Plaintiff submits that the settlement represents an excellent result for the settlement class and ultimately should be approved by this court, especially given the risks, costs, and delays of continued litigation, including risks associated with defendant's anticipated motions for summary judgment, trial and appeals," Martinez wrote in a motion for preliminary approval.

Lead counsel for the plaintiff, Glancy Prongay & Murray LLP, will apply for attorney fees not to exceed 33% of the settlement. In addition, the firm will seek expenses up to \$120,000, which will include a \$10,000 representation fee for Martinez.

After fees are paid out, the rest of the money will be distributed to a proposed class of investors who purchased Adamas stock between Aug. 8, 2017, and March 4, 2019. Any residual funds will go to the Public Justice Foundation, according to the motion.

The settlement follows more than four years of litigation. The operative complaint alleged that Adamas and three executives, including King, touted the benefits of its new Gocovri drug over generic options that use a different formula for releasing the medicine into the body.

Both versions are targeted toward patients with Parkinson's disease and are intended to improve control over their bodies. However, many patients quit using generic options because they can cause sleep-related side effects, according to the second amended complaint.

Adamas claimed Gocovri's formula could mitigate those sleep-related issues. The company campaigned to differentiate its drug from other options but did so without the backing of any studies, the suit alleged.

The defendants "repeatedly told investors that patients, physicians, and payers were able to differentiate Gocovri ... and understood its benefits," according to the complaint. "As such, investors were led to believe that payers would provide reimbursement support and physicians would prescribe Gocovri, thus painting a promising growth outlook for Adamas."

As time went on, insurers and physicians began to question the benefits of Gocovri as evidence suggested patients continued to suffer side effects. Prescriptions for the drug eventually flattened out and Adamas backtracked from previous statements that it would gain a significant share of the market, according to the suit.

As a result of the decline in the market value of the company's securities, investors "suffered significant losses and damages," the plaintiffs alleged.

In January 2023, the court dismissed allegations against Adamas and two executives but sustained a claim against King for a statement he made in 2017, asserting that the company did not anticipate that insurers would require patients to try other alternatives before approving Gocovri.

The parties participated in a mediation session in September that resulted in a proposal to resolve the suit for \$4.65 million, according to Friday's motion.

On Friday, Martinez noted that "continued litigation would be risky and uncertain, as well as complex, costly, and lengthy. By contrast, the \$4.65 million settlement provides a favorable, immediately realizable recovery and eliminates all of the risk of continued litigation."

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

Martinez is represented by Robert V. Prongay, Leanne H. Solish and Christopher R. Fallon of Glancy Prongay & Murray LLP.

King is represented by Tijana M. Brien of Cooley LLP.

The case is Ali Zaidi et al. v. Adamas Pharmaceuticals Inc. et al., case number 4:19-cv-08051, in the U.S. District Court for the Northern District of California.

--Editing by Michael Watanabe.



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Gatos Silver Investors Get Initial OK On \$21M Settlement

By **Sydney Price**

Law360 (March 1, 2024, 10:38 PM EST) -- A district judge granted preliminary approval to a \$21 million settlement between a class of investors and precious metals producer Gatos Silver Inc. over allegations the company's Mexican operation fell short of expectations.

According to U.S. District Judge Philip A. Brimmer's order issued Thursday, lead counsel for the plaintiffs will receive attorney fees of up to \$5.9 million — about 28% of the fund. They will also request reimbursement of no more than \$325,000. Bard Betz and Jude Sweidan, the suit's two lead plaintiffs, will together receive up to \$15,000 for representing the investors, the order states.

"With regard to adequacy, the Court finds that the interests of the class are fairly and adequately protected by the representative plaintiffs and lead counsel," Judge Brimmer said.

According to the order, the parties engaged in private mediation last June before settling, exchanging "multiple demands and counteroffers" during the session.

Investor Michael Bilinsky launched the suit in February 2022. According to the most recent version of the suit filed in August 2022, the registration statement and prospectus for Gatos' October 2020 initial public offering cited a July 2020 technical report published by Tetra Tech Inc.

Though the registration statement cautioned that the mineral reserve estimates and economic analyses contained in the report were merely estimates, the defendants did not disclose that the report contained certain errors, and that the mineral reserves had been overestimated by as much as 50%, the suit said.

In addition to Gatos, several former and current Gatos executives and directors are individual defendants in the suit.

The suit alleges that throughout the relevant period, the defendants misrepresented that the activities and results at the Mexico mine "would not result in a material change to the information contained in the Los Gatos Technical Report."

However, on Jan. 25, 2022, the company disclosed errors in the report and indications that there had been overestimations in the report's resource model, according to the complaint. The company also revealed that it had overestimated the metal content in the Mexico mine by 30% to 50%.

On this news, the suit says Gatos' stock price fell 69% in one day, closing at \$3.17 per share on Jan. 26, 2022.

Gatos is also the nominal defendant in a **derivative suit** in Colorado federal court with similar allegations related to the Mexico mine.

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

The investors are represented by Joseph A. Fonti and Evan A. Kubota of Bleichmar Fonti & Auld LLP.

Gatos and the individual defendants are represented by Michael Flynn, Lawrence Portnoy, Isaac M. Gelbfish and Danielle Mullery of Davis Polk & Wardwell LLP and Michael A. Rollin of Foster Graham

Milstein & Calisher LLP.

The case is Bilinsky v. Gatos Silver Inc. et al., case number 22-cv-00453, in the U.S. District Court for the District of Colorado.

--Editing by Emily Kokoll.

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2nd Circ. Won't Revive Ex-Barclays Exec's Whistleblower Suit

By **Sarah Jarvis**

Law360 (March 1, 2024, 10:20 PM EST) -- The Second Circuit on Friday affirmed a lower court's decision to toss a whistleblower suit from a former Barclays executive, finding that he didn't sufficiently back up his allegations of retaliation under the Sarbanes-Oxley Act.

A three-judge panel wrote in its **order** that former executive Brian La Belle took issue with a **ruling from a district court** last year that he failed to allege any facts that implicated Section 1514A of the Sarbanes-Oxley Act. But the policy at issue in his case is an internal Barclays Capital Inc. policy known as mandatory block leave, not a U.S. Securities and Exchange Commission rule or regulation, the panel said.

"We see no reason to disturb the district court's conclusion that La Belle failed to establish a whistleblower retaliation claim on this basis," the judges said. "La Belle concedes that MBL is not a legal requirement, but rather an internal Barclays policy."

La Belle had argued that he was pressured in 2017 to work during two attempts at taking mandatory block leave, a two-week paid vacation that some financial institutions require of certain employees to protect against fraud or embezzlement, but he was punished when he complained.

U.S. District Judge J. Paul Oetken granted Barclays' motion for summary judgment last March, finding that while the SEC recommends that institutions utilize MBL, it doesn't require it, and La Belle was therefore complaining about an internal policy.

La Belle appealed his case to the Second Circuit, **arguing in July** that he should be able to revive his whistleblower claims because he had a reasonable belief that working during MBL violated securities regulations. Barclays **pushed back** in October, arguing that La Belle never engaged in SOX-related protected activity that contributed to his eventual termination.

The appellate panel said Friday that the former executive's attempts to "shoehorn" his MBL claim into one of the enumerated provisions of Section 1514A fall short, and that in order for a purported whistleblower's belief to be considered reasonable, it can't be completely divorced from the law's specific provisions.

La Belle had argued that when he reported suspected violations of Barclays' MBL program, he subjectively believed MBL was a regulatory requirement. But the court said that SOX's "reasonable belief" standard contains both subjective and objective components.

The judges said La Belle's mistaken belief "was not objectively reasonable insofar as MBL is not a legal requirement and is therefore 'wholly untethered' from the enumerated provisions in section 1514A," quoting a 2014 Second Circuit decision in **Nielsen v. AECOM Tech**.

According to La Belle's opening brief, he had been a director and head of primary commercial mortgage-backed securities trading and distribution at Barclays since March 2016. In 2017, he was told he needed to schedule time off for his MBL, though he repeatedly had to move it on his calendar due to other pressing work.

La Belle said he understood the MBL period to be a fraud-control measure, requiring certain employees to take at least two weeks completely off per year so that, if they were committing fraud,

it would be noticed by those filling in for them or by its absence during the leave period.

But when he finally took time away for his scheduled MBL in December 2017, he was still expected to do work and field calls from his personal devices, La Belle said. Upon officially returning to work, he noted that he'd worked during his leave period in an email that included his manager, which he said "enraged" his boss and touched off a monthslong campaign to undermine him and find reasons for firing him, which eventually happened in August 2018.

Counsel for the parties didn't immediately respond to requests for comment Friday.

U.S. Circuit Judges Pierre N. Leval, Susan L. Carney and Richard J. Sullivan sat on the panel for the Second Circuit.

La Belle is represented by Steven Barentzen.

Barclays is represented by Ronald M. Green, John F. Fullerton III and James D. Mackinson of Epstein Becker Green and Elizabeth K. McManus of Ballard Spahr LLP.

The case is La Belle v. Barclays Capital Inc., case number 23-0448, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Katryna Perera, Matthew Santoni and Patrick Hoff. Editing by Brian Baresch.

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General Mills Hit With False Ad Suit Over Pesticide In Cheerios

By **Henrik Nilsson**

Law360 (March 1, 2024, 10:36 PM EST) -- A General Mills Inc. customer filed a proposed class action in New York federal court Thursday, alleging the company's labeling of its Cheerios brand is deceptive because it does not disclose that the cereals could contain dangerous levels of a pesticide that can reduce fertility and harm fetuses.

New York resident Steven Epstein alleges General Mills induces consumers to buy Cheerios by not clearly stating on the products' labels that they could contain dangerous levels of the pesticide chlormequat.

"Reasonable consumers believe products they purchase are safe for oral ingestion and expect the ingredients listed accurately reflect what is within the product," Epstein said. "Accordingly, plaintiff and class members suffered economic injuries as a result of purchasing the products."

Epstein asserts violations of New York General Business Law, breach of implied warranty of merchantability and unjust enrichment. He wants to represent a nationwide class and a New York subclass.

Epstein seeks restitution, attorney fees, as well as compensatory, statutory and punitive damages. He's also requesting an order requiring General Mills to undertake a corrective advertising campaign.

Epstein said he purchased General Mill's Regular Cheerios from a ShopRite store in New York in January. Relying on the company's advertising, marketing and listed ingredients, he thought the cereal was safe for consumption. Had he known the cereal instead contained or risked containing chlormequat, Epstein would not have bought the product or at least paid a lower price, according to the suit.

General Mills produces and sells Cheerios in different flavors, such as Honey Nut, Frosted, Oat Crunch, Oats n' Honey and Regular. The cereals are made with whole grain oats, according to General Mills' website.

However, independent testing has revealed that all four products contain chlormequat, which controls plant size and improves the harvesting process.

The nonprofit Environmental Working Group has said that 30 parts per billion is the most chlormequat someone can consume daily without facing potential health risks. General Mills' Regular Cheerios contains over 100 parts per billion, Epstein alleges.

Studies have also suggested that the pesticide is dangerous even if consumed at low levels. For example, chlormequat can delay puberty, reduce fertility or impair mammals' reproductive functions. It has also been linked to harming the development of fetuses at doses lower than daily intake levels set out by regulatory agencies, according to the suit.

"As a direct result of defendant's material misrepresentations and omissions, Mr. Epstein suffered, and continues to suffer, economic injuries," according to the suit. "Mr. Epstein would consider purchasing defendant's products in the future if defendant removed chlormequat from them."

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

Epstein is represented by Joshua D. Arisohn and Caroline C. Donovan of Bursor & Fisher PA.

Counsel information for General Mills was not immediately available.

The case is Steven Epstein v. General Mills Inc., case number 7:24-cv-01551, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.

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Kimberly-Clark Hit With Connecticut PFAS Class Action

By **Ryan Harroff**

Law360 (March 1, 2024, 4:54 PM EST) -- Three Connecticut residents have hit Kimberly-Clark Corp. with a proposed class action for allegedly contaminating private wells near its New Milford manufacturing plant with toxic "forever chemicals" emitted from the facility's smokestacks into the air and spread to the surrounding area.

New Milford residents Bethany DePaul, Arlene Quaranta and Meredith Quaranta alleged Kimberly-Clark effectively poisoned the private drinking water wells with harmful polyfluoroalkyl and perfluoroalkyl substances, which are commonly known as PFAS and often called forever chemicals because they can take hundreds or thousands of years to break down naturally in the environment. The trio's Wednesday complaint lays out two proposed classes, one for property owners whose land or water was allegedly contaminated by Kimberly-Clark's emissions and another for those who ingested those contaminants.

Kimberly-Clark's New Milford facility has been producing paper products including Huggies brand diapers and Kleenex tissues since the 1950s, and the production of those products is known to involve forever chemicals, according to the complaint. PFAS chemicals can damage property value from contamination and ingesting them can increase cancer risks and lead to developmental problems for children among other health issues, the suit says.

Ian Sloss, counsel for the proposed classes, told Law360 on Friday that Kimberly-Clark and other paper products makers regularly use forever chemicals in things like bleaches used while making their products and also often coat the machines used in the manufacturing process with PFAS-containing products like Scotchgard.

"We believe, as the complaint alleges, that these PFAS chemicals were incinerated and made their way into the emissions that were released from the stacks at this facility," Sloss said. "Once they went airborne, these chemicals were transported and deposited on the soil of our clients' properties and from there migrated down to the drinking well water on our clients' properties."

A representative for Kimberly-Clark pushed back on the claims made in the complaint in a Friday email to Law360.

"We believe the allegations raised in this lawsuit are unfounded and plan to vigorously defend against them," the representative said. "We do not use PFAS in any of our U.S. consumer products."

The suit does not allege that the paper products made at the New Milford facility contained toxic forever chemicals themselves, and instead focuses on the PFAS allegedly used in the manufacturing process which purportedly get into the environment via emissions. DePaul and the Quarantas note in the complaint that Kimberly-Clark's website states it "cannot always eliminate" the presence of chemicals on its restricted substances list including PFAS in its manufacturing process.

DePaul and Arlene Quaranta seek to represent both proposed classes and Meredith Quaranta only seeks to be a representative of the medical monitoring class. The suit calls for damages to their proposed class members, legal fees and court orders requiring Kimberly-Clark to update its facility and manufacturing practices to get its PFAS chemicals to non-detectable levels and also establish a medical monitoring program for class members.

DePaul, the Quarantas and the proposed classes are represented by Ian W. Sloss, Johnathan Seredynski, Krystyna Gancoss and Kate Sayed of Silver Golub & Teitell LLP.

Counsel information for Kimberly-Clark was not immediately available.

The case is DePaul et al. v. Kimberly-Clark Corporation, case number 3:24-cv-00271, in the U.S. District Court for the District of Connecticut.

--Editing by Patrick Reagan.

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Suits Against Insulin Pricing Are Driven By Rebate Addiction

By **Dan Leonard** (March 1, 2024, 6:54 PM EST)

U.S. states, cities and counties are increasingly filing lawsuits against insulin manufacturers and pharmacy benefit managers over the issue of insulin pricing.[1]

The states of Utah and Arizona, as well as municipalities in New York, Virginia, Maryland and Ohio, have filed suits against insulin manufacturers and the PBMs that serve as the agents between employers, insurance companies and manufacturers.

Although these cases can face challenges in achieving class action certification, we are still seeing a proliferation of action as more cases continue to be filed at the municipal level.



Dan Leonard

Through these legal actions, the local government plaintiffs and their partners in the trial bar have conveniently removed themselves from any responsibility, and claim that the companies and middlemen conspired to drive up the costs of insulin for patients and government plan sponsors.

This legal strategy may sound familiar: First, there was tobacco litigation followed by opioid cases in states across the country which led to billions of dollars in settlement funds going into the coffers of state and local governments. With those massive payouts gone or drying up, new revenues need to be identified, and so enter insulin.

Despite this flurry of new lawsuits, it is important to state that insulin is different from tobacco or painkillers. Those were clearly well-justified legal actions, but there are many important differences that need to be identified. Once these differences are identified and understood, it's clear these suits should be dismissed. I would like to focus on two differences between these earlier legal actions and one similarity.

The first difference is that the insulin market has self-corrected through the introduction of biosimilars, manufacturers' proactive pricing practices and new price caps on Medicare. Today, insulin is widely affordable for the patients who rely on it to manage their diabetes.

The second difference is that the cities and states that are now filing suit are the same large employers that contracted with the PBMs to manage the drug benefits on behalf of their employees. These same contracts that cities and states entered into with the PBMs perpetuated the broken system we have today.

Now for the similarity between this issue and the previous tobacco and opioid cases: addiction.

In the two prior instances, millions of innocent citizens became victims of addiction with all-too-common tragic and heartbreaking results. In this new case, the addiction is to rebates — the money that comes back in the form of contracted payments from the manufacturers to the PBMs and their employer customers.

In this case, the counties themselves as large employers have been part of the system of driving up rebates and were rewarded for it. It is this addiction to ever larger and larger rebates that continually drove the market and failed the patient. The very jurisdictions filing the lawsuits signed the contracts

that they now protest. They were indeed enablers of the addiction.

I will take this last point first — the addiction to rebates — and then address the other two differences.

We have a system in this country where there is no correlation between the published or list price of a medicine, and the actual price paid by the employer or insurer and any corresponding out-of-pocket payments coming from the patient.

In this opaque Frankenstein-inspired system, only the PBMs know what that delta is between list and net price, and how much comes back to them and their employer clients in the form of rebates.

A key exhibit in one of the local lawsuits — filed by the County Board of Arlington County in the U.S. District Court for the Eastern District of Virginia in November 2023 — shows a graph depicting a 1,527% increase in the price of insulin between 1997 and 2018.[2] This visual is strikingly misleading and should not be allowed in court.

The actual data points that have any meaning are the net price paid once rebates and fees are factored and copays born by the patients.

One of the manufacturers named in the suits, Sanofi, points to its own sales data demonstrating that net prices for its insulin have actually fallen 58% between 2012 and 2022.[3] If the net prices paid to the manufacturers have dropped 58%, but the list prices have increased over 1,500%, we have a system failure.

As recently as two weeks ago on Capitol Hill, drug company CEOs testified that up to 90% of their list prices were rebated back to the middlemen. That money in the middle is going somewhere, and it's not to the patients who have seen their out-of-pocket costs rise during the same time frame.

At its core, we have a system failure that has led to higher list prices set by manufacturers, which secured them preferred positions on the PBMs' drug formularies, followed by ever-growing rebates and fees that clawed billions of dollars back to the middlemen and their employer customers, including the municipalities now filing legal action.

The notion that they are now filing suits and claiming they were not part of the system or didn't understand the contracts they were signing makes this action absurd.

I would submit the case of Semglee as Exhibit A that the system, and specifically the insulin market, is broken.

In 2021, new ground was broken with the approval of the first interchangeable biosimilar insulin. Instead of launching the new insulin with a dramatic price reduction, the manufacturer, Viatris Inc., opted to launch two versions of the same medicine. The first unbranded version was priced at 6% less than the competitor, while the second branded version was launched at only 5% less, but with far greater rebates.

Question: Which product was carried on more PBM formularies and therefore available to more patients? Answer: The high-price, high-rebate version.

The bottom line is that no one would create a system like the one we currently have, but it is the system we have, and it is the system that the plaintiffs signed up for when they contracted with the companies they are now suing.

On the bright side, insulin prices have been dropping over the past few years.

As previously mentioned, we now have biosimilar insulins on the market, driving down prices through lower-cost competition. The innovator-brand manufacturers of insulins have voluntarily dropped their prices.

One of the three large manufacturers, Eli Lilly & Co., reduced their prices by 70% and implemented a \$35-per-month out-of-pocket cap on its top-selling insulin.

And last year, Congress passed — and President Joe Biden signed — legislation capping insulin costs at \$35 in the Medicare program. Another potential positive to note is that it does appear that Congress is on its way to enacting meaningful reforms to PBM practices this year. Bringing transparency and eliminating some of the egregious elements of how the system is currently operating would definitely benefit patients.

Despite this recent progress and focusing on continued innovation to benefit patients, manufacturers will be litigating the past in lawsuits filed by the very governments that signed the contracts, received the intoxicating rebate money and perpetuated the totally legal, but deliberately opaque and shadowy, pharmacy benefit scheme.

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[1] A growing number of U.S. states, cities, and counties are suing insulin makers and PBMs. <https://www.statnews.com/pharmalot/2023/11/28/insulin-diabetes-lawsuits-sanofi-lilly-novo-cvs-optum-cigna/>.

[2] Litigation filed by Arlington County, VA. <https://www.statnews.com/wp-content/uploads/2023/11/arlington-va-insulin-lawsuit-1.pdf>.

[3] Sanofi statement: <https://www.sanofi.com/assets/dotcom/pages/docs/investor-relations/environmental-social-governance/Sanofi-2023-Pricing-Principles-Report.pdf>.

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