

Apple pays \$490m to settle Norfolk Pension Fund case

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By Martin George

18 March 2024

American technology giant Apple has agreed to pay \$490m to settle a lawsuit led by Norfolk Pension Fund.

The class action lawsuit took place in America and centred on claims Apple's chief executive Tim Cook had made a misleading statement about iPhone sales in China.

Mark Solomon, a partner at law firm Robbins Geller Rudman & Dowd which brought the case, told the LGC Investment Seminar on Friday: "Tim Cook in one statement in early November 2018 essentially said 'we're not suffering iPhone problems in China the way it was suffering in other countries'. Words to that effect.

"Within two months, he was admitting that they were suffering iPhone problems in China and the stock price collapsed 5% or 10%, creating a huge aggregate potential recovery."

Apple did not respond to a request for comment from LGC.

Alex Younger, head of funding and investment at Norfolk Pension Fund, told delegates the outcome was "the culmination of quite a number of years of work".

He said that some Local Government Pension Scheme funds are opposed to taking such legal action, while other think it is legitimate and are "very keen on collection".

He added: "And then there are the likes of us, Strathclyde and many others, who as part of our genuine stewardship – are we a responsible owner of assets, are we part of a wider asset community – will where appropriate ... take these things forward."

He said that funds "ultimately have to decide which camp you fall in".

Mr Younger told the seminar that most LGPS funds would be capable of leading similar legal action, but warned that "you do have to commit".

He added: "It's not without work [but] it doesn't become everything we do. And it will be work in periods. There might be a week where you have to spend a day or so doing it; you will have meetings.

"Obviously if it goes to trial, you will find yourself in court and it will be located in the United States. You have to be willing to do things like make depositions, so be aware of that."

Norfolk humbles the mighty Apple with £380m pension fund win

thetimes.co.uk/article/norfolk-pension-fund-wins-multimillion-dollar-settlement-with-apple-jh6fnmzpl

Jonathan Ames



UK NEWS

Norfolk county council pension fund led a group action alleging that Apple had misrepresented its position in China, leading to artificially inflated share prices

Jonathan Ames
, Legal Editor

Friday March 15 2024, 11.00pm GMT, The Times

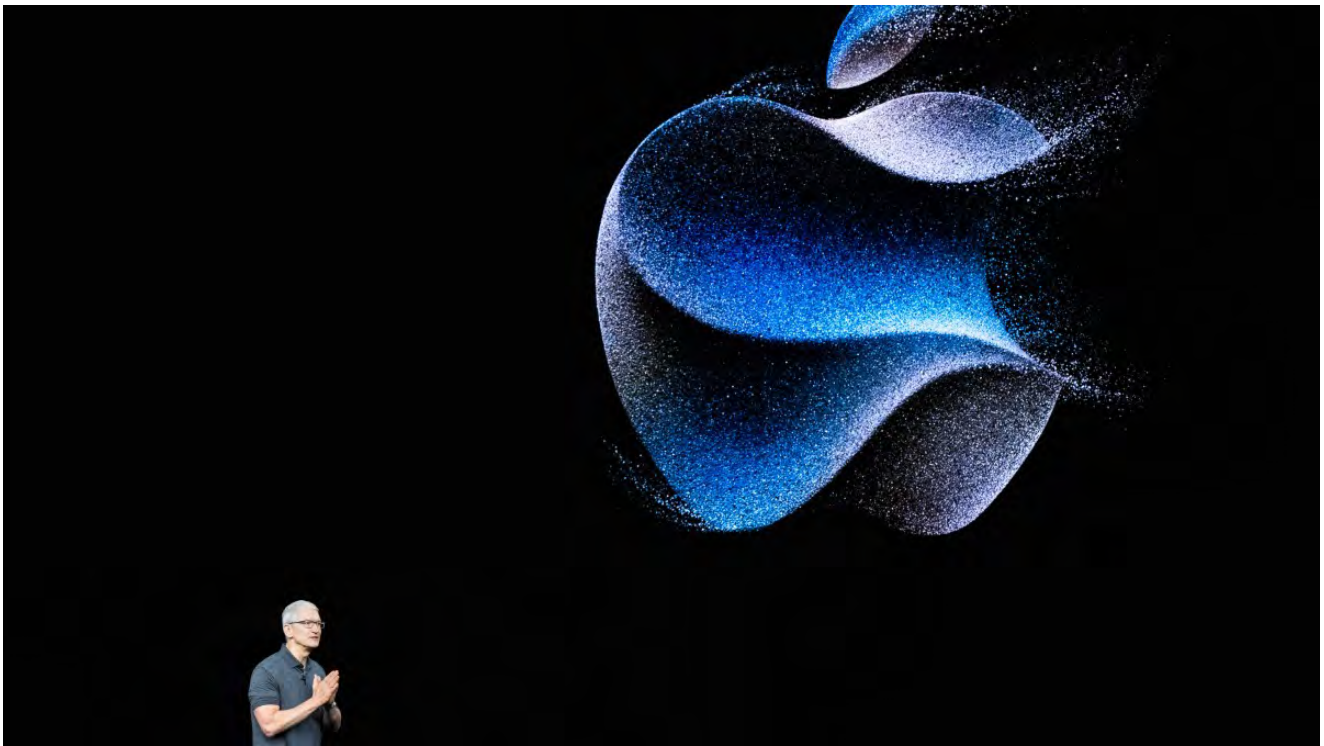
Apple

China

Law

Technology

United States



Apple denies liability, but is believed to have settled to avoid the cost and negative attention of continuing action

NIC COURRY/AFP/GETTY IMAGES

A local authority pension fund has won a multimillion-pound battle with Apple over claims that the US technology giant fraudulently misrepresented its prospects in China.

The Norfolk county council pension fund agreed a \$490 million (£385 million) settlement with Apple, ending a five-year case.

The settlement equated to less than two days' profit for the company on the basis of its most recent financial results.

The dispute hinged on comments made to investors in 2018 by Tim Cook, Apple's chief executive, where he was alleged to have given assurances that demand was high for the company's products in China.

But it was claimed that four days after that conference call, Apple reduced iPhone production in China.

About six weeks later, in early 2019, Apple announced it would miss its quarterly earnings for the first time in more than 15 years. The shortfall, which was said to be up to \$74 billion (£58 billion), was attributed to weak iPhone sales in China.

As a result, Apple's share price fell by about 10 per cent, significantly damaging investors.

Norfolk's pension fund was the lead claimant in a group action against the Silicon Valley giant. A preliminary settlement was filed on Friday at the US district court in Oakland, California. The deal is understood to be awaiting approval by the judge, Yvonne Gonzalez Rogers.

The litigation centred on the acknowledgment by Apple in 2019 that it had suffered its first lowered revenue forecast since the iPhone's launch 12 years earlier. Shares in the company tumbled the next day, wiping billions off Apple's market value.

When the class action claim was initially issued in the California court, Apple denied liability, but written submissions suggest that the company has settled to avoid the cost and negative attention of continuing action. In court documents, it continued to deny the claims but said that "further litigation will be protracted, overly burdensome, expensive, and distracting".

Shawn Williams, a partner at Robbins Geller Rudman & Dowd, the US law firm that represented the shareholders, called the settlement an "outstanding result".

A spokesman for the Norfolk pension fund said its officials were "pleased to have been instrumental in achieving such a notable recovery for all investors who, like the fund, unknowingly paid artificially inflated prices for their shares".

It is understood that lawyers for the shareholders could seek costs of up to 25 per cent of the settlement amount.

Mark Solomon, the founder of Robbins Geller, described the settlement as "a historic result for a UK fund leading shareholder litigation in the US".

Included in the claim were shareholders who bought Apple shares in the two months between Cook's comments and the revenue forecast.

In June, Rogers refused to dismiss the lawsuit, ruling that senior Apple executives were aware that China's economy was slowing and demand could fall.

Apple's share price has more than quadrupled since January 2019, giving the company a market value of more than \$2.6 trillion. It recorded \$97 billion in revenue in its latest fiscal year.

Norfolk Pension Fund secures £380m in class action against Apple

EP [europeanpensions.net/ep/Norfolk-Pension-Fund-secures-380m-in-class-action-against-Apple.php](https://www.europeanpensions.net/ep/Norfolk-Pension-Fund-secures-380m-in-class-action-against-Apple.php)

By Natalie Tuck

20/03/24

The UK's Norfolk Pension Fund has secured a £380m (USD 490m) recovery in a class action case against technology giant Apple.

Following a five-year battle, investors led by Norfolk County Council as administering authority of the Norfolk Pension Fund, won the case that alleged Apple CEO, Tim Cook, made false and misleading statements to investors.

Apple allegedly misrepresented the circumstances of the company's business in China, including demand for the iPhone in the region during an investor conference call in November 2018.

On the call, Apple stated that the company was not negatively impacted by deteriorating economic conditions like other emerging markets it operated in. Four days after the call, Apple substantially reduced iPhone production.

Furthermore, in January 2019, Apple announced it would miss its quarterly earnings for the first time in more than 15 years. The reason given for the shortfall of up to USD 9bn was weak iPhone sales in Greater China caused by economic problems in the country. This news caused the market price of Apple stock to plunge more than 9 per cent.

During the five-year case, Apple contested the accusations at every stage and executives admitted no wrongdoing as part of the settlement. The win has been described as "a historic result for a UK fund leading shareholder litigation in the United States", by Robbins Geller Rudman & Dowd LLP partner, Mark Solomon, who leads the firm's international practice.

Robbins Geller Rudman & Dowd LLP partner, Shawn A. Williams, who served as lead counsel for investors, added: "This USD 490m recovery is not just an outstanding result for investors who purchased their Apple securities during the two-month class period, it is a testament to the perseverance of the lead plaintiff, the UK's Norfolk Pension Fund, in pursuing the action to the brink of trial."

The settlement is pending approval before U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California.

It is not the first time Norfolk Pension Fund has had a successful outcome leading a class action case. In 2020, it was announced that the pension fund had recovered in excess of €46.7m as part of a class action against US pharmaceuticals company, Puma Biotechnology Inc.

European Pensions has contacted Apple for comment but it is yet to respond.

Opioids judge won't oust Motley Rice but casts cloud over 'public client' business

 [reuters.com/legal/government/column-opioids-judge-wont-oust-motley-rice-casts-cloud-over-public-client-2024-03-19](https://www.reuters.com/legal/government/column-opioids-judge-wont-oust-motley-rice-casts-cloud-over-public-client-2024-03-19)

Alison Frankel

The logo of law firm Motley Rice LLC is seen in their office in Cherry Hill, New Jersey, U.S., September 3, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

March 19 (Reuters) - Prominent plaintiffs' firm Motley Rice won a battle on Monday when a Cleveland federal judge denied an attempt by pharmacy benefits manager OptumRx to oust the firm from sweeping, multibillion-dollar litigation arising from the opioids crisis.

But Monday's ruling , opens new tab by U.S. District Judge Dan Aaron Polster gives new ammunition to critics fighting a broader policy war to block state and local governments from hiring plaintiffs' firms like Motley Rice to pursue private claims against corporate defendants.

At the very least, Polster's decision seems likely to force Motley Rice and other plaintiffs' firms to tread carefully when they represent multiple state and local governments with overlapping interests.

It's easier to understand why if you have some background on OptumRx's attempt to disqualify Motley Rice. Over the last several years, Motley Rice lawyers were hired by the state government of Hawaii and the city governments of Chicago and Washington, D.C., to investigate billing practices by pharmacy benefits managers. In response to subpoenas in those investigations, OptumRx provided confidential information to Motley Rice lawyers.

OptumRx, which did not respond to my email query, denies any responsibility for the opioids crisis but is a defendant in four upcoming bellwether cases against pharmacy benefits managers. Last December, with those trials on the horizon, the company's lawyers at Alston & Bird moved to oust , opens new tab Motley Rice from the entire consolidated litigation before Polster, asserting that the firm may have received confidential information in that prior work for Hawaii, Chicago and D.C. that could disadvantage the pharma benefits company in lawsuits by Motley Rice clients in the opioids case. OptumRx cited a widely adopted ethics rule that bars government lawyers from capitalizing on information they learned in government service when they take on private clients.

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

OptumRx cast the issue as a public policy problem: When state and local attorneys general hire private plaintiffs' firms to investigate potential claims against corporate defendants, it argued, there's a serious risk that those private lawyers, wearing the "cloak" of government

power to obtain confidential information, will subsequently “weaponize that knowledge against the same companies in separate private litigation for other clients.”

As you probably know, corporate defendants have chafed at collaborations between private plaintiffs' firms and state and local governments ever since the tobacco litigation of the 1990s. After OptumRx filed its disqualification motion, the Wall Street Journal's editorial board quickly seized on Motley Rice's alleged conflict as a chance to criticize the business model of trial lawyers “using government authority to pursue private interests.” The Journal's editorial said this purported “double dipping” is “an open scandal in the tort business.”

The plaintiffs' executive committee in the opioids case, which includes Joe Rice of Motley Rice as a member, responded to OptumRx in a pair of filings. In its first brief [\[1\]](#), opens new tab opposing Motley Rice's disqualification, the committee emphasized a case-specific argument: If OptumRx produced any material relevant to the opioids litigation in its response to those subpoenas from Hawaii, Chicago and D.C., it should also have turned over that information in the opioids case.

In other words, according to the plaintiffs' committee, OptumRx could not have been disadvantaged by Motley Rice's previous representations of Hawaii, Chicago and D.C. because it was required to disclose any overlapping information under an longstanding discovery order from Polster in the opioids case.

The committee offered broader arguments about the nature of Motley Rice's work for Hawaii, Chicago and D.C. in a second brief [\[2\]](#), opens new tab opposing disqualification, asserting that the firm and its lawyers were not acting as government attorneys as that phrase is used in the ethics rule. Motley Rice was hired to serve as an independent contractor overseen by state officials, the brief argued. The firm did not independently wield state power, it said, so is not covered by the ethics rule.

Motley Rice's allies also contended that the ethics rule is inapplicable because the firm's clients in the opioids litigation are also state and local governments — not private entities. OptumRx cannot have it both ways, the plaintiffs' executive committee argued: Motley Rice can't be deemed a public official in work for state and local governments at the same time that state and local governments are deemed private clients.

In Monday's ruling, Polster agreed with plaintiffs' case-specific arguments. He concluded that Motley Rice can't be disqualified for putting OptumRx at a disadvantage because the company was under a separate court order to turn over all of the relevant documents. He also chided OptumRx for waiting years to challenge Motley Rice's alleged conflict, which the company has known about since 2018.

But on the issues with important implications beyond this case, Polster sided with OptumRx. He ruled that Motley Rice lawyers were government officials — and therefore subject to the ethics rule for government lawyers — when they subpoenaed information under their

contracts with Hawaii, Chicago and D.C. Polster also ruled that the public entities Motley Rice represents in the opioids litigation are private clients.

As a result, Polster held, the ethics rule restricting the use of information obtained by government lawyers applies to Motley Rice's work for its clients in the opioids MDL. And that, Polster said, makes him "very uncomfortable."

"If private outside counsel, like Motley Rice, intends to enter agreements where it has the power to wield (and potentially abuse) government power, then it needs to adhere to all the same rules to which government lawyers are subject," Polster wrote. "Motley Rice and all other law firms should carefully take this into account going forward."

Motley Rice name partner Rice told me that's what his firm intends to do.

Rice noted that Polster is the only judge who has concluded that private firms working for state and local governments are bound by the ethics rule for government lawyers, despite years of pressure from business-friendly groups. But he said the issue is probably manageable.

"We'll just have to make adjustments," Rice said. "We'll discuss it internally, we'll discuss it with our ethics advisers and we will discuss it with AGs. It's too early to speculate about what steps we may take."

OptumRx counsel Brian Boone of Alston & Bird did not respond to my email query.

Motley Rice and other plaintiffs' firms have secured tens of billions of dollars for state and local governments in the consolidated opioids litigation. It would be quite something if Polster's decision makes it significantly harder to replicate that success.

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Reporting By Alison Frankel

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Franklin Wireless Investors Greenlighted in Hotspot Defect Suit

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- Record shows CEO knew of problem since 2018, court says
- Company's share price fell 34% upon news of recall

Corporate officers and directors of Franklin Wireless Corp. failed to shake off a shareholder derivative action over battery safety issues with its Ellipses Jetpack mobile hotspot device it sold to Verizon.

The shareholders presented sufficient evidence that the officers and directors breached their fiduciary duties, Judge Anthony J. Battaglia of the US District Court for the Southern District of California said, denying the defendants' motion for summary judgment.

A reasonable jury could find that Franklin's Chief Executive Officer, OC Kim, and the other board members "knowingly engaged in conduct that violated their duties of care and loyalty to the company," Battaglia said.

"The record shows that over the course of three years, OC Kim knew about: (1) Verizon's complaints about Franklin's battery overheating since 2018, (2) Franklin's former Director of Finance's concerns about the risk of losing major revenue due to the battery issues, (3) reports of Franklin's product not performing within Verizon's battery specifications and potentially trapping flammable gas, (4) Verizon's requests for third-party testing, and (5) Verizon's demand for credit for faulty devices," Battaglia said.

"Despite having this information, at no point did OC Kim inform the other board members about the battery issues until Verizon's recall was imminent," he said.

The plaintiffs may also proceed with their claims against several of the defendants, including OC Kim, under Section 14(a) of the Securities Exchange Act of 1934 for material misrepresentation or omission in the company's 2020 proxy statement, Battaglia said.

The Exchange Act claims against OC Kim sufficiently allege he failed to disclose information to shareholders, including that Verizon submitted reports of the Jetpack overheating; that the devices were being sold to children; and that the problem hadn't been fixed, Battaglia said.

The Exchange Act claims against the other “proxy defendants” survive because the plaintiffs presented sufficient evidence “to infer that the shareholders were, at a minimum, misled into believing” that the defendants were performing their oversight function “when they were not,” he said.

The shareholders may also go forward with their unjust enrichment claims against OC Kim, Battaglia said.

“Plaintiffs point to evidence showing the financial benefits that O.C. Kim received that a jury could determine constitute unjust enrichment, including substantial compensation earned during the time that the undisclosed Jetpack defects existed and stock options worth \$566,000 awarded in 2022 notwithstanding the alleged wrongdoing related to the recall,” Battaglia said.

The plaintiffs allege that OC Kim, in a May 2019 letter to the US Consumer Product Safety Commission, stated that there had been no incidents of the company’s products “causing any physical/bodily or property damage,” that the Jetpacks “are compliant with Verizon Power Management Requirements,” and that the “defect rate is less than 0.5%.”

On April 1, 2021, Franklin stated that it had been “notified of reports of battery issues in some of its wireless hotspot devices,” the complaint alleged. The company also stated it was “working with its battery and device manufacturing partners and carrier customer to determine the cause and extent of the problem,” according to the complaint.

A week later, CNBC reported that Verizon was “recalling 2.5 million hotspot devices after discovering that the lithium ion battery can overheat, creating a fire and burning hazard,” and that the recall “impacts Ellipsis Jetpack mobile hotspots imported by Franklin Wireless Corp and sold between April 2017 and March 2021,” according to the complaint.

After Franklin revealed it was issuing a recall on April 9, the company’s share price fell \$6.89 over two days, or approximately 34%, the plaintiffs allege.

In addition to OC Kim, the plaintiffs sued Chief Operating Officer Yun J. Lee, Chief Financial Officer David Brown, and directors Gary Nelson, Kristina Kim, Johnathan Chee, Joon Won Jyoung, and Heidi Chow.

Glancy Prongay & Murray LLP and Bottini & Bottini Inc. represent the plaintiffs. SML Avvocati PC and Tencer Sherman LLP represent the defendants.

The case is *In re Franklin Wireless Corp. Derivative Litig.*, 2024 BL 90067, S.D. Cal., No. 21-cv-1837, 3/18/24.

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Albertsons Is Latest Company Targeted for Board Nomination Bylaw

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A shareholder is suing Albertsons Cos. over its board nomination bylaw, adding to the wave of litigation challenging advance-notice provisions over claims they wrongfully kneecap activist investors.

The lawsuit, filed Monday, targets multiple bylaw sections covering dissident director candidates, focusing on two that take a broad view of when the shareholders behind the nominations must disclose that they're "acting in concert" with others. The provisions "serve as an unlawful deterrent to those seeking to meaningfully participate in the nomination process," according to the proposed class action.

The allegations echo a recurring theme in Delaware's Chancery Court, where investor litigation is increasingly taking aim at the new generation of defensive measures adopted by corporate boards seeking to fend off stockholder influence campaigns. The rising tide of activists—emboldened by recent changes such as the universal proxy—is now colliding with "weaponized" nomination bylaws, repurposed poison pills, and shareholder agreements that favor insiders.

Read More: Activist Investors Confront 'Weaponized' Board Nomination Bylaws

Albertsons didn't immediately respond to a request for comment Tuesday. The supermarket operator is based in Boise, Idaho.

On their face, the advance-notice bylaws serve legitimate purposes, such as ferreting out nominees with conflicts of interest or those who face regulatory barriers that shareholders have a right to know about. But the lawsuits—some brought by ordinary investors, others by activists embroiled in proxy fights—raise allegations that boards are brandishing the bylaws to dig for dirt or manipulating deadlines to keep their rivals off ballots.

Delaware's courts have only recently begun to grapple with the questions raised by the tactic, and it remains to be seen whether they'll land on an approach that involves cutting overzealous bylaws down to size or instead opt to invalidate them outright.

The lawsuit against Albertsons, which also names members of its board as defendants, zeroes in on two sections of its advance-notice bylaw: a "wolfpack" clause that declares stockholders with parallel goals to be "acting in concert," and a "daisy-chain" provision that takes a hub-and-spoke view of investors "acting in parallel with the same third party," even if they don't know about each other.

In light of those provisions, the bylaw “cannot be complied with,” according to the complaint. Unless it’s invalidated, it “will continue to operate as a hindrance to the free and fair vote of the company’s stockholders,” the suit says.

The investor leading the case, Robert Garfield, is represented by Block & Leviton LLP and Abbott Cooper PLLC. Albertsons and its board haven’t yet made a court appearance.

The case is Garfield v. Allen , Del. Ch., No. 2024-0270, complaint filed 3/18/24 .

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Playtika Beats Class Suit Over Changes to Mobile Casino Games

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- Two games allegedly generated half of company's revenue
- Shareholders won't have chance to amend fraud allegations

Playtika Holding Corp., its executives, and underwriters for its initial public offering will no longer face allegations that they concealed from investors changes to Slotomania and Bingo Blitz, two of the company's most popular mobile casino games, after a federal judge dismissed the case.

Judge Rachel P. Kovner ruled that Playtika shareholders failed to adequately allege that the company needed to disclose it was altering the popular games, which typically generated more than half of the company's revenue through in-game purchases, according to the order filed Monday in US District Court for the Eastern District of New York.

Investors had alleged in 2021 that Playtika, as well as the executives and IPO underwriters, filed a registration statement ahead of the company's market debut that failed to disclose the company's revamping of several games. The company revealed in a November 2021 financial results disclosure that its revenue had fallen since the prior quarter and revised its full-year guidance downwards. Playtika's share price fell more than 23% that same day to close at \$22.72, the stock's biggest drop ever, according to data compiled by Bloomberg.

The infrastructure upgrades Playtika made to Slotomania and Bingo Blitz weren't adequately shown to be material omissions from the registration statement, Kovner ruled, granting the defendants' motion to dismiss. Even though the disclosures didn't specifically mention those two games, they "plainly conveyed" that Playtika's constant deployment of new features and upgrades had certain risks, she said in her order.

Playtika also didn't have a legal duty to disclose those infrastructure changes, since company disclosures had informed investors that the developer needed to make those changes regularly to prevent the games from becoming outdated, which drove new user engagement and existing player retention, according to Kovner's ruling.

The shareholders, who sought to establish a class with all investors who acquired Playtika stock around the company's January 2021 IPO, don't have an opportunity to amend their complaint.

A separate shareholder derivative suit was put on hold last year pending the ruling on the motion to dismiss in the proposed class action, and plaintiffs in that case now have 30 days to reopen the shareholder derivative suit.

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

Stradling Yocca Carlson & Rauth LLP and Stradley Ronon Stevens & Young LLP represented Playtika and the executive defendants. Ropes & Gray LLP represented the underwriter defendants.

Labaton Keller Sucharow LLP and Schall Law Firm represented the plaintiffs and the proposed class.

The case is In re Playtika Holding Corp. Sec. Litig. , E.D.N.Y., No. 1:21-cv-06571, 3/18/24 .

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Ardelyx Escapes For Now From Proposed Securities Class Action

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Litigation

Photo: Bloomberg

A proposed securities class action against Ardelyx Inc. failed to sufficiently allege that the pharmaceutical company's optimistic and ultimately incorrect assumption its drug could meet FDA standards in 2021 was false or misleading, a federal judge said.

The pharmaceutical company would get Tenapanor approved for treating high levels of phosphate in the blood in 2023, but when Ardelyx disclosed in July 2021 that deficiencies identified by the federal agency would prevent it from successfully applying for FDA approval, the stock price dropped by 74%, according to the order from the US District Court for the Northern District of California. Steven Strezsak alleged that Ardelyx knew about the FDA's concerns before July, "but nevertheless made statements expressing confidence in their dialogue with the FDA, their trial data" and the drug's eventual approval, Judge Haywood S. Gilliam Jr. said. Gilliam dismissed the proposed class action complaint, but granted leave to amend.

- Strezsak needed to "state with particularity the circumstances constituting fraud or mistake," and "plead with particularity both falsity and scienter" to meet the higher pleading standards applicable to the case, Gilliam wrote
- The alleged misstatements were opinions from Ardelyx and its officers, and "an omission that renders misleading a statement of opinion when viewed in a vacuum" might not be misleading in context, Gilliam said
- And, Ardelyx did disclose information Strezsak alleged was omitted, Gilliam also wrote. The company was "free to express optimism in their application and the prospects for approval," Gilliam wrote. The company wasn't obligated to give a detailed log of agency feedback "absent more compelling circumstances" and "the feedback from the FDA did not render those expressions of optimism false"

Scott Scott Attorneys at Law LLP represents Strezsak. Latham & Watkins LLP represents Ardelyx.

The case is Strezsak v. Ardelyx Inc. , N.D. Cal., No. 4:21-cv-05868, 3/18/24 .

Beverage Maker Safety Shot Wins Short Seller Manipulation Suit

news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMThlTU4YzAtZDU4Mi1hZGNmLTdmZDAyNmU3MDAwMSIsImN0eHQiOiJTTE5XliwidXVpZCI6IkkR4ekZ4NW4yT1d2ZG5NN3NBbFI3c3c9PVVRUk5MdGNaeC9uQXNkT1d6alZZSnc9PSIsInRpbWUiOiIxNzEwOTMzMjQ4OTc1Iiwic2lnIjoieXVTY0hoVnBJTUc5T1V1QVFIWmFnWFVPMkw0PSIsInYiOiIxIn0=

Litigation

Photo: David Gyung/Getty Images

Short seller Capybara Research must retract and remove references to its report on Safety Shot Inc. under a default judgment in the drink maker's market manipulation and business interference suit, a federal court ruled.

Another defendant, Accretive Capital LLC, which does business as the financial news site Benzinga, agreed to retract its own story in a settlement with Safety Shot, according to a press release Tuesday. Judge Jed S. Rakoff of the US District Court for the Southern District of New York granted the default judgment against Capybara, and the Benzinga dismissal, on Monday.

- Safety Shot alleged Capybara violated securities laws and improperly interfered with its business of producing a drink that reduces blood alcohol content
- Rakoff earlier allowed an unusual method of service on Capybara and its alleged principal, Igor Appelboom
- A separate suit against Capybara by a different report subject, mobile services company FingerMotion Inc., is proceeding in the same district

The Basile Law Firm PC represents Safety Shot. No attorneys made an appearance for Capybara and Appelboom. Strauss Law PLLC represented Benzinga.

The case is Safety Shot, Inc. v. Capybara Research , S.D.N.Y., No. 1:23-cv-10728, 3/18/24 .

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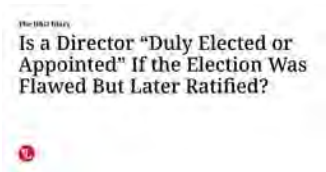
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Is a Director “Duly Elected or Appointed” If the Election Was Flawed But Later Ratified?

K dandodiary.com/2024/03/articles/d-o-insurance/is-a-director-duly-elected-or-appointed-if-the-election-was-flawed-but-later-ratified

March 19, 2024



By Kevin LaCroix on March 19, 2024
Posted in D & O Insurance



D&O insurance policies typically extend coverage to “duly elected or appointed” directors and officers. But what happens if the proper election or appointment procedures were not followed yet the individual served as a director anyway? Is that person a “director” for purposes of D&O insurance coverage?

How about for purposes of the Insured vs. Insured exclusion? These are the questions that a federal district court, applying Idaho law, addressed in a case involving individuals whose board appointments were procedurally flawed but whose board membership was subsequently ratified by corporate conduct. The court concluded the individuals are “directors” within the meaning of the policy, and so lawsuits brought by the individuals against the company and other board members represent insured vs. insured claims for which coverage is precluded by exclusion. A copy of the court’s March 15, 2024, decision can be found [here](#). (Hat Tip to Paul Curley of the Kaufman, Borgeest, & Ryan law firm for his March 16, 2024 *LinkedIn* post about the case, [here](#).)

Background

In 2017, Divinia Water entered into a loan agreement with Michael Breen and Ronald Mezzetta, a condition of which was electing Breen and Mezzetta to its board of directors. The board as then constituted unanimously agreed that Breen and Mezzetta should be added to the board. However, contrary to the requirements of Idaho law and the company’s own by-laws for the election of a director without an in-person meeting, a number of the shareholders never signed an approval for the addition of the directors to the board. (Divinia mistakenly believed it had correctly followed the bylaws and law by having the majority of its shareholders execute a written approval.)

Thereafter, Breen and Mezzetta participated as directors at board meetings. Their names were listed as company directors in SEC filings and in the company’s annual report to the Idaho Secretary of State.

In 2020, Breen and Mezzetta were removed from the board and they filed two lawsuits against Divinia and its certain of its directors and officers. Davinia submitted these lawsuits to its D&O insurer as claims under its policy. The insurer denied coverage for the claims under the policy in reliance on the policy’s insured vs. insured exclusion.

The exclusion precludes coverage for “any Claim brought or maintained by or on behalf of ... a Team Member in any capacity.” For relevant purposes, the term “Team Member” is defined as any “Executive,” and the term “Executive” is defined as “any natural person who was, is or shall be a duly elected or appointed: 1. Director, officer, or member of the board.”

Divinia, which had in the meantime filed for bankruptcy, initiated an adversary proceeding in the bankruptcy court seeking a judicial determination that the insurer must provide coverage for the underlying lawsuits.

Following trial, the bankruptcy court issued findings of fact and conclusions of law, in which the bankruptcy court concluded that the insured vs. insured exclusion precluded coverage for the claims. Although the bankruptcy court concluded that Breen and Mazetta were not “duly elected or appointed” at the time they were initial seated on the board, Divinia, though yearslong conduct in treating Breen and Mezzetta as directors, had “ratified their election or appointment.” Based on its finding of ratification, the bankruptcy court concluded that Breen and Mezzetta qualified as “Team Members” and therefore the insured vs. insured exclusion applies.

Divinia sought to have the district court review the bankruptcy court’s findings and conclusions. Divinia argued to the district court that the phrase “duly elected or appointed” does not encompass subsequent ratification, and that even if ratification could constitute due election or appointment, the board itself did not have authority to ratify the prior deficient election; only the shareholders who had not originally voted on the election could ratify their election. The insurer argued that “duly elected or appointed” means “in proper time, place, and manner” and includes subsequent ratification of the election. The insurer argued further that the board had the authority to ratify the prior election.

The March 15, 2024, Decision

In a March 15, 2024, opinion, District of Idaho Judge Amanda K. Brailsford adopted the bankruptcy court’s findings of fact and conclusions of law in their entirety. Judge Brailsford expressly affirmed the bankruptcy court’s conclusion that coverage for the underlying claims was precluded by the policy’s insured vs. insured exclusion.

In reaching this conclusion, Judge Brailsford rejected Divinia’s argument that a director is “duly elected or appointed” only if the proper procedures were followed *at the time of the appointment*. Judge Brailsford reviewed Idaho law to the effect that ratification “is recognized as a regular and proper channel of corporate governance” and that “the effect of ratified act is essentially the same as an act that was authorized.” As Judge Brailsford herself put it “significantly, ratification ‘relates back’ to the original act, making it valid from the beginning.” Because the ratification makes Breen and Mezzetta’s appointment to the board valid from the beginning, the two “attained their status as directors through regular and proper procedures, and therefore they were “duly elected or appointed” within the meaning of the policy.

She added that “ratification is a mechanism for curing any procedural infirmities in the ‘election’ or ‘appointment’ of a person to a board of directors, and, in turn, making such person ‘duly’ elected or appointed within the meaning of the policy.”

Finally, Judge Brailsford rejected Divinia’s argument that only the shareholders that hadn’t originally voted the two individuals to the board could ratify the individuals’ election to the board. Judge Brailsford noted that the board of directors had the authority to nominate additional board members by unanimous consent, under both the company’s bylaws and Idaho law. Because Divinia, through its board, had the authority to appoint the two to the board in the first place, Divinia had the authority to ratify Breen’s and Mezzetta’s addition to the board without obtaining the unanimous consent of all Divinia’s shareholders.

Discussion

It is worth noting that in this case, Divinia was in the position of arguing that Breen and Mezzetta were not duly appointed or elected directors, in order to try to avoid the preclusion of coverage under the insured vs. insured exclusion. However, it is very easy to envision a slightly different set of circumstances in which Divinia would have instead been arguing that the two in fact were duly elected or appointed directors.

Imagine if instead of being the *plaintiffs* in the underlying lawsuit, Breen and Mezzetta were the *defendants*. It is easy to imagine in those circumstances Divinia arguing that notwithstanding the procedural defects in their election, that they nevertheless qualified as directors and officers and therefore entitled to insurance coverage under the policy.

Judge Brailsford’s opinion reflects a her perception that Divinia may have in fact been shaping its characterization of the Breen’s and Mezzetta’s roles to try to maximize coverage. As Judge Brailsford put it, “Divinia gained a clear advantage from having Breen and Mezzetta as member of its Board.” Among other things, the company was able to secure a loan from them by having them on the board. The company, Judge Brailsford said, “now seeks to take the apparently inconsistent position” that the two were never duly elected or appointed – a position “it can take only because it failed to follow its own Bylaws and proper

procedures” for adding Breen and Mezzetta – “in order to nullify an otherwise applicable exclusion.” Judge Brailsford said she is “skeptical that Divinia should be allowed to take this inconsistent position in furtherance of its own advantage and to [the insurer’s] disadvantage.”

For me, the important thing about the court’s holding here is the perspective it provides on the “duly elected or appointed” language. To paraphrase the court’s holding, “duly elected or appointed” means elected or appointed by whatever procedure or process is sufficient under applicable law and the applicable by-laws to make the election or appointment effective. If ratification of a previously procedurally defective process is not only sufficient to cure the defect but to cure the process as though it had been proper from the outset, then ratification is sufficient to effect an election or appointment. Moreover, the election or appointment is sufficient regardless of whether the question is to determine whether or not they are entitled to coverage under the policy or if the question is whether coverage for claims by them against other directors and officers is precluded by the insured vs. insured exclusion.

Judge halts state claim against X, US court action takes precedence

DJ [dailyjournal.com/articles/377737-judge-halts-state-claim-against-x-us-court-action-takes-precedence](https://www.dailyjournal.com/articles/377737-judge-halts-state-claim-against-x-us-court-action-takes-precedence)

Mar. 20, 2024

The judge granted X Corp's motion to stay the lawsuit in the interests of judicial economy, citing the proposed class action filed in federal court. The plaintiffs did not deny being part of the proposed class action, and the stay will prevent conflicting rulings and inefficiencies.

A San Francisco judge on Tuesday paused a state court lawsuit brought against X Corp. by three Twitter employees who were laid off after Elon Musk's purchase of the company, ruling that the federal court action the plaintiffs are involved in takes precedence.

The complaint, filed in June 2023 by Shannon Liss-Riordan and Bradley Manewith of Lichten & Liss-Riordan PC, accused Musk and X of failing to abide by the plaintiffs' Twitter severance agreements that offered "at least two months' pay."

In his order, Superior Court Judge Richard B. Ulmer granted X's alternative motion to stay the lawsuit "in the interests of the judicial economy." Ulmer noted that the plaintiffs did not deny being part of the proposed class action filed in federal court after Musk's decision to fire over 3,700 employees in November 2022. He detailed his reasoning in his minute order:

"A stay is warranted in the interests of comity and judicial economy. A putative class action that raises claims similar to this action is presently pending in Delaware," Ulmer wrote. "It is black letter law that, when a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action. Here, plaintiffs do not deny that they are members of the Cornet putative class action and the two cases concern the same subject matter. A stay will prevent conflicting rulings and other inefficiencies, e.g., duplicative discovery."

The lawsuit Ulmer referred to was filed by Liss-Riordan's firm in the Northern District of California in the wake of the mass layoffs, echoing similar claims as the state lawsuit claiming insufficient severance pay. The case was transferred to federal court in Delaware in April 2023. *Conet et al. v. Twitter Inc.*, 1:23-cv-00441 (D. Del. Filed April 21, 2023).

Attorneys for X Corp. – Eric Meckley, Brian D. Berry, and Ashlee N. Cherry of Morgan, Lewis & Bockius LLP – had asked Ulmer to dismiss the lawsuit, arguing that San Francisco Superior Court was the wrong forum. *Borghino et al. v. Twitter Inc. et al.*, CGC23606992 (S.F.

Sup. Ct. filed June 12, 2023). Ulmer instead granted the alternative request from X's motion and ordered a stay of the litigation.

In their motion, X Corp's attorneys argued that the plaintiffs should not be allowed to continue.

"By suing specifically for alleged breach of the Merger Agreement, Plaintiffs triggered the forum selection clause. Plaintiffs cannot 'have their cake and eat it too,'" the attorneys wrote. "Although Twitter denies that Plaintiffs are entitled to any severance benefits based on the Merger Agreement, Plaintiffs cannot assert a breach of contract based upon alleged promises/representations within the Merger Agreement yet disclaim all other provisions of the Merger Agreement that Plaintiffs find inconvenient. [. . .] In the alternative, the Court should grant Twitter's motion to stay this action given the pendency of Cornet. This Court has broad discretion to stay parallel litigation when the same or substantially similar claims are pending elsewhere, which is exactly the case here."

In opposition, Liss-Riordan and Manewith argued that the San Francisco state court lawsuit must continue because the plaintiffs are California residents and it would be unfair to force them to litigate their claims in a court across the country.

"In its motion to dismiss, Twitter seeks to force California residents working in California for a California company, whose claims are predominantly based upon agreements and promises made to them in California, to litigate their case in Delaware under Delaware law because one of the three alternative claims in their complaint (breach of contract based on third party beneficiary theory) arises from a contract -- which they never agreed to and which Twitter denies that they are parties to and claims that they cannot try to enforce — that contains a Delaware forum selection clause," the attorneys wrote. "However, California's legislature and courts have made clear that such clauses are unenforceable and void for a host of independent reasons."

Liss-Riordan represents almost 2,000 former employees in arbitration claims against the company as of January 2024.

#377737

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Consumer Advances Kohl's Wiretap Class Action Over Website Chats

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4DIS2B0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X4DIS2B0000000)

Kohl's Inc. must face a proposed class action alleging it installed a third party's chat software on its website and recorded consumers' chats with customer-support agents without their consent in violation of California privacy law.

Plaintiff Miguel Esparza provided enough facts to state claims under the California Invasion of Privacy Act and the Computer Data Access and Fraud Act, Judge Anthony J. Battaglia of the US District Court for the Southern District of California said Monday.

Battaglia denied Kohl's motion to dismiss those claims, but approved the dismissal of his invasion of privacy claims under the California constitution and common law.

Esparza alleged that Kohl's installed chat software from Ada Support Inc. on its website, allowing Kohl's to de-anonymize visitors, obtain their personal information, and share that information with other companies interested in providing consumers with targeted advertising.

The company also allowed Ada Support to wiretap and eavesdrop upon the communications of website visitors, the lawsuit said.

Ada Support isn't named as a defendant.

Kohl's argued that Esparza's CIPA claim failed because consumers consented to the recording of their chats, but Battaglia disagreed.

Esparza alleged that class members didn't provide consent, whether express or implied, to any of Kohl's actions when they used the website chat feature, which was enough at this stage of the lawsuit, the judge said.

Esparza's allegation that the chats were routed through Ada Support's servers, where a transcript was created, was also sufficient to support his claim under CIPA that the contents of the communications were intercepted, Battaglia said.

The judge said that further fact discovery would be needed to determine whether ADA Support acted as an extension of Kohl's or on its own behalf, which in turn would help resolve whether Kohl's could escape liability under CIPA as a party to the communication.

Use of Information

The company also argued that Esparza's claim under the CDAFA should be dismissed because he didn't adequately plead that Kohl's installed identity-resolution "malware" on his computer without his permission, and didn't adequately plead that he had suffered damage or loss from the recording of his chats.

Battaglia rejected the argument, holding that the statutory phrase "without permission" wasn't limited to conduct that "hacks" a system, and that Esparza had an economic stake in the data that Kohl's and Ada Support collected from him and profited from.

Under Ninth Circuit precedent, plaintiffs "can state an economic injury for misappropriated data," he said.

Battaglia rejected Esparza's common law and constitutional invasion of privacy claims, agreeing with Kohl's that the company's alleged conduct didn't constitute a serious invasion of a protected privacy interest.

Pacific Trial Attorneys represents Esparza and the proposed class. Kelley Drye & Warren LLP represents Kohl's.

The case is Esparza v. Kohl's Inc. , S.D. Cal., No. 3:23-cv-01988, 3/18/24 .

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UFC's Owner Settles Lawsuits With Fighters for \$335 Million

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March 20, 2024, 9:16 AM PDT

Bloomberg LP

By Christopher Palmeri

(Bloomberg) --

TKO Group Holdings Inc., parent of the Ultimate Fighting Championship mixed-martial arts league, settled two class-action lawsuits involving its fighters for a total of \$335 million.

The settlement will be paid in installments over an agreed upon period of time, the company said in a regulatory filing Wednesday.

The fighters had alleged that the league used its monopoly power to suppress their compensation. Among the claims, fighters were signed to extended contracts that barred them from working elsewhere.

Shares of TKO rose as much as 7% to \$86.65 in New York.

Read More: UFC Fighters Test Antitrust Law to Escape 'Perpetual' Contracts

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Rob Golum

Company selling kratom powder faces class action

 legalnewsline.com/stories/656792688-company-selling-kratom-powder-faces-class-action

March 20, 2024

Neal Deckant | Bursor & Fisher

SAN DIEGO (Legal Newsline) - The maker of a powder that gives users an opioid-like fix is facing a class action lawsuit over its side effects.

A class action lawsuit was filed March 14 in San Diego federal court against MIT45 Inc. by plaintiffs B.D. and L.M., represented by attorneys Neal J. Deckant and Luke Sironski-White from the law firm Bursor & Fisher, P.A.

The lawsuit accuses MIT45 Inc. of false, misleading, deceptive, and negligent sales practices regarding its kratom products, which include powder, capsules, gummies, and liquid extracts.

The complaint alleges that the company failed to disclose that the active ingredients in kratom are similar to opioids and can lead to physical addiction and dependency with similar withdrawal symptoms.

The plaintiffs argue that reasonable consumers do not expect an "all natural" product purchased at local stores to operate like an opioid with similar addiction risks. They claim that MIT45 Inc. intentionally and negligently failed to disclose these material facts on its labeling, packaging or marketing materials, violating warranty law and state consumer protection laws.

The suit also accuses MIT45 Inc. of relying on innocuous packaging and public ignorance about kratom's pharmacology to get users addicted while profiting from it.

The plaintiffs are seeking relief individually and on behalf of similarly situated purchasers of MIT45's products for violations of California's Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), False Advertising Law (FAL), breach of implied warranty, unjust enrichment, fraud by omission, and negligent misrepresentation.

Unhedged Markets

Calpers bets on leveraged equities

Past performance does not guarantee ...



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Robert Armstrong YESTERDAY



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Good morning. It is Fed day. A good way to prepare for the speech, the dot plot and the rest is to read Chris Giles's admirably clear [newsletter](#) about the stalling of US services disinflation. How Jay Powell talks about this problem is going to matter a lot. Email before 2pm eastern time with your predictions about whether the meeting will be hawkish or dovish: robert.armstrong@ft.com.

Calpers

From the Financial Times' intrepid pensions guru, Josephine Cumbo, [yesterday](#):

“

Calpers, the US's biggest public pension plan, is to increase its holdings in private markets . . . A proposal to increase the \$483bn fund's positions in assets such as private equity and private credit from 33 per cent of the plan to 40 per cent was approved on Monday . . .

The formal approval comes two years after Calpers [admitted](#) that a decision to put its private equity programme on hold for 10 years had cost it up to \$18bn in returns.

However, a review of its investment policy found that, despite the gains it had already missed, private equity was still the asset class with the highest expected long-term total return.

In its [announcement](#) of the change, Calpers said that

“

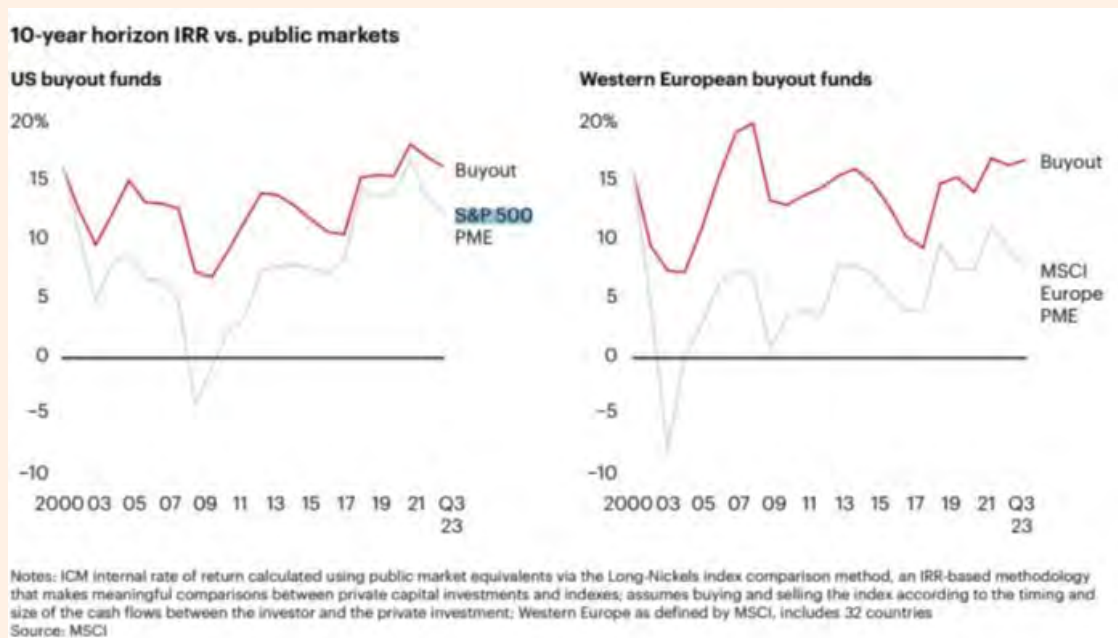
Private equity will increase from a target of 13 per cent of the fund to 17 per cent while private debt will increase from 5 per cent to 8 per cent . . .

The target allocations for public equity and fixed income will decrease under the new policy. Calpers' allocation for [public] equity will go to 37 per cent of the fund and fixed income will be reduced to 28 per cent.

The worrisome aspect of this allocation decision jumps right off the page: it sounds like Calpers is steering the car by the rear-view mirror. The superior returns of private markets over the past decade are going to be a poor guide to its returns in the next decade, unless accompanied by a good theory of where that outperformance came from and why it should persist.

And, as Unhedged has [argued before](#), there are at least three good reasons to think that private equity performance is going to get worse in relative terms. At least one of them, and maybe two, applies to private credit, too:

- 1 The fast growth of the private equity industry has led to greater competition for assets, and therefore higher purchase valuations. This results in lower returns relative to public equity. This may explain the compression in private equity's outperformance that is already evident; see the chart below from Bain & Company's Global Private Equity [report](#) (while remembering that internal rates of return are [not the same](#) as distributions). It would not be surprising if private credit returns followed the [same pattern](#) relative to high-yield bonds.



- 2 A crucial component of private equity's high historical returns, very inexpensive debt, may not be available in years to come. Of course it is possible that, once inflation abates, rock-bottom pre-pandemic interest rates might return. But there are [reasons to doubt it](#), from shifts in the balance of savings and investment to higher levels of government debt. And remember, while higher rates helps private credit funds through higher payments from borrowers, those funds also carry debt of their own, to amplify returns.

- 3 If you believe that a private equity portfolio is a near equivalent to a leveraged public equity portfolio — as Unhedged does — then underlying returns on US public equities are a critical component of private equity return (depending on your global equity weightings). But US equities returns are very likely to be lower in the next 10 years than the last 10, for the simple reason that they were extraordinarily high in the past decade, at 12 per cent annually for the S&P 1500 broad index. Long-term equity returns revert pretty reliably to 7 per cent or so.

It may be that the Calpers investment office does have a theory about why private equity should continue to be the best asset class in the next 10 years. But I don't know what that theory is, and it's not in the slide decks from the office's recent asset allocation [review](#) or its 2023 trust level [review](#). What those slides do show is, first, the fund's historical returns by asset class, with private equity leading the pack at 11.4 per cent over 10 years, and private debt with the second-best one-year return. Apologies to those reading on a phone, who will have to squint:

	End Value (bn)	20-Yr	10-Yr	5-Yr	1-Yr	FYTD	1-Qtr
Total PERF	\$ 483.7	6.7%	6.5%	7.9%	10.3%	4.4%	7.0%
Benchmark		7.1%	6.4%	7.6%	11.4%	4.0%	6.3%
Excess		(40) bps	5 bps	33 bps	(113) bps	34 bps	73 bps
Cumulative Value Added (bn)	\$ (12.3)		\$ 3.5	\$ 6.9	\$ (4.5)	\$ 1.7	\$ 3.3
Public Equity	\$ 215.0	7.6%	7.9%	11.1%	19.1%	6.9%	10.3%
Benchmark		7.7%	7.9%	11.0%	19.2%	6.8%	10.4%
Excess		(13) bps	4 bps	11 bps	(10) bps	6 bps	(9) bps
Cumulative Value Added (bn)	\$ (0.6)		\$ 0.7	\$ 1.0	\$ (0.2)	\$ 0.1	\$ (0.2)
Private Equity	\$ 67.9	12.3%	11.4%	11.4%	8.8%	4.7%	2.4%
Benchmark		12.7%	10.7%	8.3%	22.8%	3.5%	(2.9)%
Excess		(47) bps	66 bps	315 bps	(1,393) bps	114 bps	528 bps
Cumulative Value Added (bn)	\$ (5.5)		\$ 1.3	\$ 3.9	\$ (6.8)	\$ 0.8	\$ 3.6
Income	\$ 130.7	4.5%	2.8%	1.8%	8.3%	4.6%	9.6%
Benchmark		4.0%	2.4%	1.7%	8.2%	4.6%	9.6%
Excess		56 bps	35 bps	19 bps	5 bps	(1) bps	1 bps
Cumulative Value Added (bn)	\$ 5.1		\$ 2.5	\$ 1.1	\$ 0.0	\$ (0.0)	\$ 0.0
Real Assets	\$ 67.8	5.3%	6.9%	4.9%	(9.6)%	(4.2)%	(2.6)%
Benchmark		8.0%	6.9%	4.7%	(12.8)%	(4.9)%	(2.2)%
Excess		(271) bps	8 bps	25 bps	319 bps	68 bps	(39) bps
Cumulative Value Added (bn)	\$ (13.3)		\$ (0.9)	\$ (0.6)	\$ 2.3	\$ 0.4	\$ (0.3)
Private Debt	\$ 12.2	-	-	-	13.3%	8.4%	4.3%
Benchmark		-	-	-	15.1%	7.2%	3.4%
Excess		-	-	-	(180) bps	118 bps	89 bps
Cumulative Value Added (bn)	-		-	-	\$ (0.2)	\$ 0.1	\$ 0.1

Calpers also provides the asset volatilities and correlations (though it is not clear to me whether these are historical numbers or assumptions about the future):

As of Q2 2023

Assets	Long-Term Volatility	Private Equity	Global Equity - Market-Cap-Weighted	Global Equity - Non-Cap-Weighted	Emerging Market Government Bonds	US Mortgage-backed Securities	US High Yield	US Treasuries Long	US Investment Grade Corporates Long	US Cash	US Real Estate	Private Debt
Private Equity	24.5%	1.0	0.6	0.6	0.2	0.1	0.3	0.1	0.2	0.1	0.3	0.4
Global Equity - Market-Cap-Weighted	16.8%	0.6	1.0	0.9	0.3	0.1	0.4	0.1	0.3	0.2	0.3	0.4
Global Equity - Non-Cap-Weighted	12.8%	0.6	0.9	1.0	0.4	0.2	0.4	0.2	0.3	0.2	0.3	0.5
Emerging Market Government Bonds	9.1%	0.2	0.3	0.4	1.0	0.4	0.6	0.6	0.8	0.2	0.3	0.2
US Mortgage-backed Securities	4.7%	0.1	0.1	0.2	0.4	1.0	0.2	0.6	0.5	0.4	0.1	0.2
US High Yield	10.0%	0.3	0.4	0.4	0.6	0.2	1.0	0.2	0.6	0.2	0.3	0.3
US Treasuries Long	11.0%	0.1	0.1	0.2	0.6	0.6	0.2	1.0	0.8	0.3	0.1	0.2
US Investment Grade Corporates Long	9.5%	0.2	0.3	0.3	0.8	0.5	0.6	0.8	1.0	0.3	0.2	0.2
US Cash	0.8%	0.1	0.2	0.2	0.2	0.4	0.2	0.3	0.3	1.0	0.2	0.3
US Real Estate	17.4%	0.3	0.3	0.3	0.3	0.1	0.3	0.1	0.2	0.2	1.0	0.2
Private Debt	11.7%	0.4	0.4	0.5	0.2	0.2	0.3	0.2	0.2	0.3	0.2	1.0

And finally here are the prospective return assumptions for each asset class, drawn from a survey of the fund's money managers. Private equity is at left:



It is good to see, in that last chart, that the expectations for private equity returns do not call for a repeat of the last decade. Instead, the average expectation (the blue dot) is for an 8 per cent annual return, just a percentage point or two better than the hope for public equities. The distance between the blue and orange dots shows that the expectations have been trimmed since the previous analysis, in 2021. This looks like sanity. But the key question still applies: where is the expectation of higher returns for private equity vs public equity coming from?

I suspect that it comes from leverage. Private equities are more leveraged than public ones — in terms of debt, they are something like an equity index bought with 30 per cent borrowed money. Equities usually go up over the long run, so leveraged equities should usually go up more. The bet investors make, then, is that the extra return from the leverage will outweigh the private equity funds' fees. If this is the reason for Calpers' higher long-term return expectation, it makes sense and is another sign of sanity that the long-term volatility Calpers assigns to private equity is well higher than for public equities, at 25 per cent versus 17 per cent (the second slide, top left corner). A more leveraged asset is more volatile than a less leveraged one, whether it is marked to market, like public equity, or not, like private equity and private credit. If the high long-term volatility number is a recognition of that, good for Calpers.

What does not make sense, if private equity is leveraged equity, is that the correlation between public and private equity should be just 0.6. More puzzlingly, the correlation of private debt to high yield is an inexplicable 0.3! A global private equity or debt portfolio should be very closely correlated with a global public equity or debt portfolio. They own a lot of the same underlying stuff, though industry or country exposure may differ a bit. The absence of mark to market on the privates, as well as full corporate control, may make it easier to ride out ugly patches in markets. There is value in this. But if we are entering a truly bad decade for equities, the private funds' leverage will make it all worse, and marks won't help.

One good read

[Let's eat snakes!](#) (Hat tip to [Marginal Revolution](#)).

FT Unhedged podcast



Can't get enough of Unhedged? Listen to [our new podcast](#), hosted by Ethan Wu and Katie Martin, for a 15-minute dive into the latest markets news and financial headlines, twice a week. Catch up on past editions of the newsletter [here](#).

Accounting body says investors want climate data that U.S. rules exclude

 [reuters.com/sustainability/boards-policy-regulation/accounting-body-says-investors-want-climate-data-that-us-rules-exclude-2024-03-19](https://www.reuters.com/sustainability/boards-policy-regulation/accounting-body-says-investors-want-climate-data-that-us-rules-exclude-2024-03-19)

Isla Binnie

Steam rises from a smoke stack at sunset in Lansing, Michigan, U.S., January 17, 2018. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, March 19 (Reuters) - Investors will be asking companies for data on indirect greenhouse gas emissions that new U.S. financial disclosure rules exclude, the International Sustainability Standards Board's (ISSB) chair told Reuters.

The U.S. Securities and Exchange Commission (SEC) earlier this month dropped a requirement for companies to disclose so-called Scope 3 emissions from rules it had drafted on climate change reporting.

The decision deviated from voluntary standards developed by ISSB, which is part of the International Financial Reporting Standards Foundation, the world's accounting standards setter.

Scope 3 emissions account for greenhouse gases, such as carbon dioxide, released in the atmosphere from a company's supply chain and the consumption of its products by customers. For most businesses, Scope 3 emissions represent more than 70% of their carbon footprint, according to consulting firm Deloitte.

"Investors say Scope 3 is important," ISSB Chair Emmanuel Faber said in an interview.

"If all companies report Scope 3, absent local regulation but because they are being asked by investors and banks, the result is (that information) is out there."

Other jurisdictions, including the European Union and the state of California, have passed laws that will require companies to disclose Scope 3 emissions.

The SEC said that Scope 3 emissions-reporting requirements would burden companies and were not yet reliable. The regulator acknowledged that some companies will end up making these disclosures for other jurisdictions.

"I don't think the (SEC) rule is saying Scope 3 is not important, it is saying the methodologies still need to evolve and because of the uptake around the world this will be a matter of evolution," Faber said.

A SEC spokesperson declined to comment.

Some of the companies and trade groups that sent more than 16,000 comment letters in response to the SEC's draft climate rules urged the regulator to accept disclosures based on ISSB's recommendations as an alternative to the SEC's own rules.

In a further move away from the SEC's more prescriptive draft, the regulator will also allow large companies to determine whether emissions from their own operations and the power they purchase -- so-called Scope 1 and Scope 2 -- constitute material information that investors need to have.

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Reporting by Isla Binnie in New York; Editing by Aurora Ellis

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Isla Binnie

Thomson Reuters

Isla Binnie is Reuters's New York-based Sustainable Finance Correspondent, reporting on how the worlds of business and finance are affected by and respond to environmental, social and governance issues. Isla previously covered a broad range of business, politics and general news in Spain and Italy, where she also moderated events. She trained with Reuters in London and covered emerging markets debt for the International Financing Review (IFR).

Texas schools fund pulls \$8.5 billion from BlackRock over ESG investing

 [reuters.com/sustainability/sustainable-finance-reporting/texas-schools-fund-pulls-85-billion-blackrock-over-esg-policies-2024-03-19](https://www.reuters.com/sustainability/sustainable-finance-reporting/texas-schools-fund-pulls-85-billion-blackrock-over-esg-policies-2024-03-19)

Isla Binnie

A climate change activist stands outside of BlackRock headquarters, ahead of the 2021 United Nations Climate Change Conference (COP26), in San Francisco, California, U.S., October 29, 2021. REUTERS/Carlos Barria/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, March 19 (Reuters) - A Texas school fund told BlackRock (BLK.N) , opens new tab on Tuesday it was terminating its contract to manage around \$8.5 billion of state money, accusing the investment giant of boycotting fossil fuel energy producers, who represent a large part of the state's industry.

BlackRock has denied it is engaged in any boycott, saying the money pulled is a tiny sliver of the \$10 trillion in assets that it manages.

The move by the Texas Permanent School Fund, however, highlights how BlackRock and other asset managers continue to attract controversy in some Republican-run states over environmental, social and corporate governance (ESG) investing.

Texas State Board of Education Chair Aaron Kinsey, who administers the fund, said its relationship with BlackRock breached state law against investing with companies accused of boycotting energy companies.

Kinsey told Reuters that the fund was complying with a 2021 Texas law obliging state agencies to divest from fund managers like BlackRock that shed investments to reduce greenhouse gas emissions.

He added the fund receives about \$1 billion a year from Texas's General Land Office, which manages 13 million acres-worth of rights to land and minerals.

"That money originates from the oil and gas industry primarily... if there's no income, no billion dollars a year from oil and gas, that's a problem for our fund, obviously an existential long-term risk," he said.

A few illiquid investments with BlackRock remain in the schools fund's portfolio, but these will roll off over time, Kinsey added.

The video player is currently playing an ad.

BlackRock called the move arbitrary and said it ignores the private equity firm's \$120 billion investment in Texas public energy companies. "The decision jeopardizes Texas schools and the families who have benefited from BlackRock's consistent long-term outperformance," BlackRock said.

CEO Larry Fink said last year BlackRock had lost around \$4 billion as a result of the political backlash, and this was dwarfed by net inflows to BlackRock.

Fink has since said he would stop using the term "ESG", and hosted a summit with state officials in Houston last month focused on investing in the state's infrastructure.

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Nate Raymond reposted



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WORK STOPPAGE: Unionized workers at @Law360 have walked out in protest of layoffs that violate law. Read the details here.....

nyguild.org/front-page-det...

For immediate release: March 20, 2024
Contact: Jen Sheeran, jsheeran@nyguild.org, (866) 573-0740



ONE-DAY STRIKE OVER LAYOFFS

**Unionized editorial workers at Law360 halt work for 24 hours
after colleagues were laid off in violation of labor law**

*Parent company LexisNexis unlawfully terminated 26 Guild-represented workers Friday
despite announcing its highest revenue growth in decades.*

NEW YORK – Unionized editorial workers, represented by The NewsGuild of New York at LexisNexis-owned Law360, have walked off the job in a 24-hour work stoppage to protest layoffs that violate labor law.

Law360 Union members will begin picketing at 12:30 p.m. EST at LexisNexis HQ, 230 Park Ave., NYC.

Just a month ago, LexisNexis executives congratulated themselves on the company achieving its highest revenue growth in decades. The same day, management announced they would lay off 26 members of the Law360 Union.

"This walkout is an unequivocal demonstration of solidarity for our co-workers who lost their jobs," said Hailey Konnath, a reporter for the legal news site and union chair for the union. "The success of Law360 is due in no small part to us and the work we produce. Today we are showing the company that we – including those who lost their jobs – are Law360."

The union's current contract expired on Dec. 31, 2022, and negotiations have been ongoing since then to finalize a new collective bargaining agreement. Changes to workplace terms and conditions, including layoffs, after a contract has expired must be negotiated and agreed to by the Guild. Failure to maintain the workplace status quo is a violation of labor law and is the basis of an unfair labor practice charge filed by The NewsGuild of New York on behalf of Law360 Union earlier this month.

"Our entire union stands in solidarity with the workers who have been laid off," said Susan DeCarava, president of The NewsGuild of New York. "If management continues to refuse to bargain in good faith and reverse these unlawful layoffs, labor peace will be difficult to come by at Law360."

6:01 AM · Mar 20, 2024 · 24.6K Views



↻ 93

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Trial of British tech mogul begins over 'inflated' Autonomy value

DJ [dailyjournal.com/articles/377745-trial-of-british-tech-mogul-begins-over-inflated-autonomy-value](https://www.dailyjournal.com/articles/377745-trial-of-british-tech-mogul-begins-over-inflated-autonomy-value)

Mar. 20, 2024

Michael Lynch, who co-founded Autonomy, is accused of inflating the company's worth before the sale and misleading the auditors. He has pleaded not guilty and faces up to 25 years in prison if convicted.

The criminal conspiracy and fraud trial against British tech mogul Michael Lynch got underway this week in federal court in San Francisco as prosecutors hope to convince the jury that the former Autonomy CEO inflated his company's worth ahead of its \$11 billion sale to Hewlett Packard.

Lynch co-founded enterprise software company Autonomy in 1996 and soon became one of the most prominent tech entrepreneurs in the U.K. Hewlett Packard acquired Autonomy in 2011 and wrote off \$8.8 billion of its value within a year, saying Lynch's company made significant financial misrepresentations before the deal closed.

Defended by Clifford Chance US LLP and Steptoe LLP, Lynch has pleaded not guilty to 16 counts of conspiracy and fraud and faces up to 25 years in prison if convicted. Stephen Chamberlain, Autonomy's former vice president of finance, is also on trial. *USA v. Lynch et al.*, 3:18-cr-00577-CRB (N.D. Cal., filed Nov. 29, 2018).

During his opening statement on Monday, Assistant U.S. Attorney Adam A. Reeves told the jury that Lynch "spun a fabulous tale of corporate success" by backdating contracts, pretending the company had shipped goods it had not, and buying its own products from resellers and other third parties. "To carry out this fraud, the defendants had to lie to Autonomy's auditors, and they did that again and again over 10 quarters. You will learn that the job of misleading the auditors fell principally to Steve Chamberlain and his boss Sushovan Hussain," said Reeves. Hussain, Autonomy's former chief financial officer, was sentenced to five years in prison in 2019.

Prosecutors called Ganesh Vaidyanathan, a former accounting executive at Autonomy, as their first witness. He testified on Monday and Tuesday about his experience working with Chamberlain and any financial inconsistencies he observed during his time with the company.

"How did the announcement of the acquisition [by Hewlett Packard] affect your view of some of these last-minute payments to Filetek and Microtech?" Assistant U.S. Attorney Robert S. Leach asked Vaidyanathan during his direct examination. Filetek and Microtech are resellers that Autonomy worked with to allegedly pad its revenue.

"My assumption was that they were trying to clean up the historical items on the balance sheet in conjunction with the announcement [of the acquisition]," Vaidyanathan replied. "We had a lot of receivables, a lot of payrolls from resellers, we had a bunch of these transactions lying on the books ... and the intent was to make sure the books and accounts were as clean as they possibly could be," he continued.

During his opening statement, Steptoe partner Reid H. Weingarten told the jurors that prosecutors wrongly saw this case as black and white. "What I'm suggesting is you heard a wonderfully prepared piece of advocacy that seriously misses the entire story ... In the bowels of HP, they were valuing Mike's company at \$46 billion," said Weingarten. The attorney also shifted the blame on Hussain, saying he "made virtually all the accounting decisions that the government challenges."

The trial is expected to last until late May before U.S. District Judge Charles R. Breyer. Prosecutors are expected to call over 40 witnesses while Lynch is listed as a defense witness. In 2022, Lynch and Hussain were found liable for civil fraud by a London high court judge in a suit brought by Hewlett Packard. The Palo Alto company is seeking to recoup \$4 billion in losses from the sale.

#377745

Sunidhi Sridhar

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Legal Profession Blog

lawprofessors.typepad.com/legal_profession/2024/03/former-official-charged-.html

Tuesday, March 19, 2024

Former Official Charged

The Columbus Dispatch has the story of charges recently filed by Ohio Disciplinary Counsel Former Public Utilities Commission of Ohio Chairman Sam Randazzo is accused of using his position to benefit Akron-based FirstEnergy in a sweeping bribery scandal.

Now, the Ohio Disciplinary Counsel is accusing Randazzo of violating attorney ethics rules.

The disciplinary counsel says Randazzo violated several professional codes of conduct by taking actions that benefitted FirstEnergy and hurt his large industrial energy user clients, according to a complaint filed Monday and first reported by Bloomberg Law.

It's the latest legal problem for Randazzo who also faces criminal charges in federal and state court. He has pleaded not guilty and said he did nothing wrong.

Randazzo is suspected of working for FirstEnergy without informing his client, Industrial Energy Users-Ohio. In one instance, he signed a contract with FirstEnergy on behalf of IEU-Ohio and his two other businesses.

"Randazzo was on all sides of the transaction," according to the criminal complaint filed in Summit County.

In this capacity, Randazzo is accused of skimming money from side deals he made with IEU-Ohio and utilities, such as FirstEnergy and American Electric Power. These deals are legal if disclosed, but the FirstEnergy deal wasn't, according to the state's criminal indictment.

Randazzo owes at least \$1.2 million to IEU-Ohio, which is now called the Ohio Energy Leadership Council, according to the complaint filed this week by the Ohio Disciplinary Counsel. An attorney representing Randazzo did not immediately respond to a request for comment.

The complaint also outlines actions Randazzo took as PUCO chairman to benefit FirstEnergy, including working on the nuclear plant bailout in House Bill 6 and skuttling a rate case before the PUCO that would have cost FirstEnergy. The allegations mirror details included in the two criminal cases filed against Randazzo.

Randazzo is accused of violating several professional conduct codes, including:

- Committing an illegal act.
- Engaging in dishonesty, fraud or deceit.
- Engaging in conduct that adversely reflects on the lawyer's fitness to practice law.

If Randazzo violated the rules, he could face a fine, suspension of his law license or disbarment. The Ohio Supreme Court ultimately decides the appropriate penalty.

A highlight of the bar charges is a reference to a text message sent by another executive on the date that legislation he had supported passed.

The text message contained an image of Respondent's face on a faux Mt. Rushmore with other executives who allegedly benefitted from the legislation with the caption

HP 6 F*ck Anybody Who Aint Us

(Mike Frisch)

No Easter vacation for indicted FirstEnergy lobbyist, judge rules

[cleveland.com/open/2024/03/no-easter-vacation-for-indicted-firstenergy-lobbyist-judge-rules.html](https://www.cleveland.com/open/2024/03/no-easter-vacation-for-indicted-firstenergy-lobbyist-judge-rules.html)

March 18, 2024

- Updated: Mar. 18, 2024, 10:05 p.m.]
- Published: Mar. 18, 2024, 10:35 a.m.



Former top lobbyist for FirstEnergy Mike Dowling appeared at the Summit County Court of Common Pleas for his Feb. 13, 2024 arraignment. (David Petkiewicz/Cleveland.com)David Petkiewicz, cleveland.com

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – A Summit County judge said Mike Dowling, a FirstEnergy lobbyist charged with a sweep of bribery related crimes, cannot take a two-week trip to South Carolina to celebrate Easter.

Dowling last week asked Common Pleas Judge Susan Baker Ross for leave from terms of his pre-trial bond, which require him to stay in Ohio, to travel by car to his second home in Mt. Pleasant, South Carolina, from March 23 to April 4. He said he has aging family there who cannot travel, and other extended family will be in town as well.

It's not that long a trip, he argued, if you consider the two driving days to and from South Carolina.

"The schedule proposed essentially provides him only a single weekend (Easter weekend) that he will have in Mt. Pleasant," his attorneys for the former executive wrote in a court filing. "Accordingly, the number of days requested given the duration of travel and ability to remain flexible for those family members intent on visiting Mr. Dowling in Mt. Pleasant, is not an unreasonable request."

State attorneys who brought the charges said Dowling's summer home or vacation plans aren't privileges the court should spend its time on. They scoffed at referring to a 13-day trip as a "single" weekend.

"The charges accuse Dowling of corrupting Ohio's government for purposes of greed and power," they argued. "Dowling already gets many privileges that other criminal defendants charged with serious crimes in Summit County do not enjoy."

Ross rejected Dowling's motion without explanation in an order Friday.

Dowling, along with FirstEnergy CEO Chuck Jones, is accused of paying a \$4.3 million bribe to Public Utilities Chairman of Ohio Sam Randazzo just before he was appointed by the governor as the state's top utility regulator. The alleged bribe came in exchange for Randazzo's favorable rulings in that role and his assistance pushing a \$1.3 billion bailout bill tailored around FirstEnergy through the General Assembly. All three men have pleaded not guilty.

Randazzo faces a federal criminal prosecution and state civil lawsuit on similar charges.

Ex-Ohio House Speaker Larry Householder and three conspirators have all been convicted or pleaded guilty to racketeering. They were accused of engaging in a similar, related bribery scheme to accept a massive bribe from FirstEnergy to build up a political machine that could get the bailout legislation through the Statehouse. Householder is serving a 20-year prison sentence.



Stories by Jake Zuckerman

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

Former top utility regulator Sam Randazzo could lose law license as he faces bribery charges

 [cleveland.com/open/2024/03/former-top-utility-regulator-sam-randazzo-could-lose-law-license-as-he-faces-bribery-charges.html](https://www.cleveland.com/open/2024/03/former-top-utility-regulator-sam-randazzo-could-lose-law-license-as-he-faces-bribery-charges.html)

March 20, 2024

Subscriber 

- Updated: Mar. 20, 2024, 8:02 a.m.]
- Published: Mar. 20, 2024, 8:00 a.m.

Ohio's former ranking utilities regulator Sam Randazzo on Tuesday, February 13, 2024, for his arraignment in Summit County Common Pleas Court. (David Petkiewicz/Cleveland.com)David Petkiewicz, cleveland.com

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – A state board that regulates attorneys filed a complaint Tuesday against Ohio's former chief utility regulator, who has been twice criminally accused of taking a bribe, starting a process that could strip him of his license to practice law.

The complaint comes more than three years after Randazzo was first implicated in a bribery scheme as FBI agents were seen raiding his Columbus home. Since then, he has resigned as chairman of the Public Utilities Commission of Ohio and been hit with separate federal and state criminal bribery charges. He has pleaded not guilty.

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March 19, 2024, 11:27 AM PDT

Matt Levine's Money Stuff: Banks Can Get Emissions Off the Books

By Matt Levine

Opinion

Bloomberg Law News 2024-03-20T10:46:42452222282-04:00

Matt Levine's Money Stuff: Banks Can Get Emissions Off the Books

By Matt Levine 2024-03-19T14:27:42345-04:00

Carbon risk transfer

Ahh this is clever:

A veteran of alternative investment management has started pitching a new type of securitization he says would allow banks to cut the carbon footprint of their balance sheets.

Andrew Hohns, a former managing director at hedge fund Mariner Investment Group who now runs Newmarket Capital, says he's currently in talks with a number of banks to construct such novel transfers.

For banks, repackaging and transferring the credit risk from their loan books to less-regulated private fund managers is nothing new. The appeal for investors on the other side of such deals is they can get double-digit returns, while banks get capital relief, freeing them up to do more business.

Newmarket, a Philadelphia-based alternative asset manager that specializes in structured credit, is now pitching a similar mechanism for banks to repackage and transfer their so-called financed emissions, which represent the greenhouse gas pollution linked to their lending and investment activities. Banks that channel a lot of capital into the fossil-fuel industry, for example, would have big financed emissions.

That is from Bloomberg's Natasha White this week. The idea in credit risk transfer is:

1. A bank lends money to companies.

- 2. If those companies don't pay back the loans, the bank loses money.
- 3. Bank regulators require the bank to have capital as a cushion against that possible loss, with the actual amount of capital being sort of a crude function of how likely the regulators think the loss is.
- 4. The bank can "transfer the credit risk" of the loans to a hedge fund, meaning that, if the companies don't pay back the loans, the bank doesn't lose money, but the hedge fund does.
- 5. The simplest way to do this is to sell the loans to the hedge fund, but usually when people say "credit risk transfer" they mean a more complicated transaction in which the hedge fund promises that, if the companies don't pay back the loans, the hedge fund will, so the bank doesn't lose money. And in exchange the bank pays the hedge fund a premium for insuring this risk.
- 6. If you do this right, the bank will not have to have as much capital, and the savings from reduced capital will be worth more to the bank than the premium that it pays to the hedge fund for the credit risk transfer. That is: The market (the hedge funds) effectively *assigns a lower credit risk* to the loans than capital regulators do, so there is a trade available in which the bank saves money, and the hedge funds make money, by moving that risk out of the regulated banking system.

Fine. But now do emissions risk. In addition to capital rules, now banks get bad publicity and possibly regulatory consequences if they lend too much money to fossil fuel projects. (Or, in the US, too little.) There are global standards for the carbon impact of banks' activities, with separate treatment for "financed emissions" (carbon emissions associated with loans and investments that banks make and hold on their books), "facilitated emissions" (emissions associated with stock and bond underwriting and loan syndication — that is, money that banks help companies raise but that does not come from the banks themselves) and "insurance-associated emissions." Newmarket's idea seems to address only financed emissions, which is fine; transferring facilitated emissions seems harder but possibly more fun.

How do you transfer financed emissions? Well, the simplest way is, still, to sell the loans to the hedge fund: If some loan on a bank's balance sheet is associated with 10 tons of emissions, and you move it off the balance sheet, then the 10 tons of financed emissions goes away. This is not a particularly complicated business, but it is a good pitch. You go to a bank and say "look, you have a bunch of loans to oil and gas companies, and people yell at you about them. Just sell us the loans at, you know, 98 cents on the dollar, and that gets rid of both the credit risk *and* the people yelling at you about financing carbon emissions. And we get 2% for helping you out." And in fact the plan seems to be that the credit risk and carbon risk will go together:

The idea is to "transfer the credit risk, but at the same time transfer the so-called emissions risk to a third-party investor outside of the banking system, such as ourselves," Hohns said.

That probably doesn't *exactly mean* "just sell us the loans," but it's pretty close.

The fun financial engineering would be to transfer the emissions accounting *without* the credit risk. What would that even mean? With credit risk transfers, it's pretty straightforward: If a bank transfers the credit risk of a loan to a hedge fund, that means that, if the borrower doesn't pay back the loan, the hedge fund makes up the difference and the bank doesn't lose any money. With emissions, though, there is no real *risk*: If a bank lends an oil company \$100 to build a refinery, and it expects that refinery to emit 100 tons of carbon, then those 100 tons just count against the bank's financed emissions. There is no relevant uncertainty, so no arbitrage; the market does not assign a lower amount of emissions to the trade than the standards do. Still one could imagine a few approaches:

1. The purely metaphysical approach: The bank pays a hedge fund \$2, and in exchange the hedge fund says "actually I financed those emissions." I don't think that would work, but who knows. "Applying a risk-transfer model to carbon emissions remains experimental," writes White, "in large part because it's hard to assign monetary values to such risk and because no rules exist to guide such a construction."

- 2. Something with carbon offsets. White: "Ryan Dunfield, chief executive of SAF Group, a Canadian private credit investor, says he's also had talks with banks about taking on their emissions risk. ... Structures that SAF has discussed with banks include a so-called black carbon pool, Dunfield said. The idea is to create a vehicle into which banks can 'move all their emissions-intensive financings,' he said. SAF would then seek to match those with carbon offsets, he added." That way, the bank is not *lending money to fossil fuel companies*; it is *lending money to a black carbon pool*, whose net emissions (including offsets) are zero. So no financed emissions.

- 3. Just sell the loans, and then buy back the credit risk. Sell the loans to the hedge fund, have them live on its balance sheet, get them off the bank's balance sheet, and then have the bank write credit insurance against the loans. Or, even better, sell the loans to the hedge fund, have them live on the hedge fund's balance sheet, and then have a *different hedge fund* write credit insurance against the loans.

It is interesting to think about pricing in the third case. Assume that a bank makes a \$100 loan to a fossil fuel company and would have to pay \$5 to transfer its credit risk. How much is the carbon risk worth? Does the bank sell the loan for \$94, the hedge fund buys credit insurance for \$5, and effectively they pay \$1 for the carbon transfer? How much does the hedge fund need to be paid to take on the emissions as a *pure accounting matter*, if the hedge fund is a private company that doesn't have to report its emissions to anyone? Like, with the right structure — one in which I took no credit or liquidity risk and put up no money — I would probably be willing to take all of JPMorgan Chase & Co.'s carbon emissions off their hands, and put them on my balance sheet, for, you know, one basis point of notional value? I feel like that would probably be a nice payday for me and cost me nothing except some time and effort to review the documents, which I would enjoy.

DWAC

Last month, a New York state court found Donald Trump liable for a somewhat odd form of fraud. Over the years, Trump borrowed a lot of money from banks, and as part of these deals the banks wanted financial statements from him. Because he is Donald Trump, he delivered inflated vanity financial statements to the banks, and because he is Donald Trump, the banks ignored those financial statements. Everyone knew he was lying about his wealth, because he has very publicly done that for decades, but the banks were able to underwrite the loans without paying too much attention to his inflated estimates of his own net worth, and in fact the loans at issue in this case were paid back and the banks did fine.

As a philosophical matter, I think there's a good argument that lying about something *immaterial* to your banks should not be treated as fraud, and if the banks knew you were lying about your net worth then that lie is not quite fraud. As a practical matter, though, if you are *filling out a loan application at a bank and lying about how much money you have*, you should probably expect to get in trouble. A lot of people do not have a sense of humor about these things and are not interested in the philosophical arguments.

Trump was ordered to pay \$454 million to the New York attorney general, and he plans to appeal. But to appeal he needs to post a bond for the full judgment with the court, and he can't come up with the money:

Donald Trump said he reached out to the world's biggest insurance companies to seek help in arranging an appeal bond covering the \$454 million verdict against him in New York's civil fraud suit, and none would take his real estate as collateral. They all want cash and Trump says he doesn't have enough.

The real estate mogul and former president will be forced to hold a "fire sale" of his properties to raise enough cash if the bond isn't waived while he challenges the verdict, Trump said in a filing Monday with a New York appeals court. The appeal bond is due March 25 if the requirement isn't put on hold.

This, I should say, is somewhat weird. His whole argument is that his banks were in fact thrilled to lend him money, and that whatever was wrong in his financial statements didn't matter because the banks knew he was worth far more than they were lending him. Now, though, nobody will give him money. His lawyers complain :

Diligent efforts ... including "countless hours negotiating with one of the largest insurance companies in the world," have proven that "obtaining an appeal bond in the full amount" of the judgment "is not possible under the circumstances presented." The amount of the judgment, with interest, exceeds \$464 million, and very few bonding companies will consider a bond of anything approaching that magnitude. The remaining handful will not "accept hard assets such as real estate as collateral," but "will only accept cash or cash equivalents (such as marketable securities)." Moreover, sureties would typically "require collateral of approximately 120% of the amount of the judgment," which "would require Defendants to hand over collateral in the form of cash or cash equivalents of approximately" \$557 million. In addition, sureties would likely charge bond premiums of approximately 2 percent per year with two years in advance — an upfront cost over \$18 million.

Where will Donald Trump get \$557 million worth of marketable securities by March 25? Oh man, do I have amazing news for him. The New York Times reported last month:

Former President Donald J. Trump's stake in Trump Media & Technology Group, his social media company, could be worth as much as \$4 billion once a long-delayed merger closes.

The deal, with Digital World Acquisition Corporation — a publicly traded shell company — could provide him with a potential financial lifeline at a time when he must come up with the cash to pay a \$454 million penalty after a New York judge's ruling in a civil fraud case.

Digital World has scheduled a March 22 shareholder vote on the merger with Trump Media, whose flagship product, Truth Social, has become the social media platform of choice for Mr. Trump to attack his critics and political opponents.

The shareholder vote is this Friday; the bond is due on Monday. Pretty tight! There are problems. For one thing, the shareholders have to vote to approve the deal. They *obviously* should do that: DWAC's stock closed yesterday at \$35.575 per share in anticipation of the deal; if the deal fails, shareholders will get back roughly \$10.87 per share. They want the deal. But in the past, DWAC has failed to get shareholder approval for obviously good things because its heavily retail shareholder base doesn't vote that much. I would be surprised if that happened on the merger vote, but it's not impossible.

Then, the deal has to close right after the vote. At that point, Trump will personally have shares worth about \$2.8 billion.

Also, Trump's shares are subject to a lockup agreement, so he's not allowed to "lend, offer, pledge, hypothecate, encumber, donate, assign, sell, contract to sell ... or otherwise transfer or dispose of" his shares for six months, which presumably covers using them as collateral for a loan (or appeals bond). But the agreement is between Trump and DWAC, and DWAC could just waive it. It is not *best practices* or anything, as a capital markets matter, to waive the lockup an hour after the merger, but I think it is *possible*. Ordinarily you don't do it because shareholders will be mad about additional shares flooding the market, but (1) if he just *pledges* his shares to a bank, they won't flood the market, and (2) the shareholders are presumably Trump fans and will be happy to help him fund his legal bills. Probably the stock would go *up* if they gave him a limited waiver for this.

The other problem is, if you were a bank, would you lend money against those shares? Maybe? Bloomberg's Bailey Lipschultz reported last month:

"He needs the money but he can't sell too much at once without risking tanking the stock," said Usha Rodrigues, a professor at the University of Georgia School of Law. "Once the lockup is expired, he could use the shares as collateral for loans in order to access cash without selling the shares."

And it's unlikely a bank would lend him a large sum of money against the locked-up shares, according to industry watchers like University of Florida finance professor Jay Ritter.

I guess I'm a little more optimistic than that, though I see his point. The shares are worth billions of dollars at present market value, but TMTG has never actually made money, and a bank that lends money against a locked-up meme stock is making a risky bet that the shares will still be valuable in six months. A lot can happen in six months! Still, at current prices, that's a lot of collateral. It's not an insane bet. You'd want recourse.

Mostly though it seems fitting. Trump was fined \$454 million because of his habit of inflating his own estimates of his wealth, basing his estimates on how he feels rather than objective measures like cash flows or comparable transactions. But then DWAC came along and gave him the opportunity to, in effect, turn his celebrity into a publicly traded security. Lipschultz:

"This is a meme stock, it's not the type of thing where you bust out P/E ratios — you can throw that out the window," said Matthew Tuttle, the chief executive and chief investment officer at Tuttle Capital Management. "DWAC has now become the de facto way to bet on or against Trump," he added.

The old world ("just making up your net worth based on your feelings is fraud") is dying at the exact same time that the new one ("actually there's a stock ticker for how Donald Trump feels and it has a market cap of several billion dollars") is being born, and if he times it just right maybe he can use the new stock to pay the old fine.

Evergrande

China Evergrande Group is a Chinese real estate developer whose business model involved (1) selling apartments for cash up front and (2) then eventually building them. There are many attractions to this business model. In particular, in the early days, you feel rich: You have all this cash, from the apartments you sold, and you haven't spent any of it to build the apartments.

There are, however, obvious problems, or at least temptations. What if you take all that cash and spend it on executive salaries, or buying more land to build more apartments, or advertising to attract new buyers? Then, when you eventually get around to building the apartments that you already sold, you might find out that the cash is all gone and you can't afford to build them. That would be bad! You would have to go out and borrow more money just to build the apartments you already sold. Or, of course, you could sell even *more* apartments, to raise the cash to build the ones that you previously sold, but that only kicks the can down the road: Where will you get the money to pay to build the apartments you're selling now, if you use their purchase price to build the apartments you sold previously? The problem snowballs.

One way to resist this temptation is accounting. Most accounting standards won't let you count the purchase price as income the day you get it: You only recognize revenue when you actually deliver the apartment, when you fulfill your end of the deal. That money isn't *yours* when you sell the apartment and get the money; it only becomes yours when you deliver the apartment, and the accounting ought to reflect that. If the accounting reflects that, you don't look at your giant pile of cash and think "we're rich and profitable, let's spend it"; you think "oh wow, we gotta get to work building these apartments."

Anyway, Evergrande has collapsed catastrophically over the last few years and was ordered to liquidate this year. There were many problems — it had borrowed a lot of money, it was highly levered to Chinese property prices — but this was one of them. For years, Evergrande was booking apartment sales as revenue before it completed the apartments. Eventually it ran into trouble, and, in an effort to get out of trouble, it cleaned up its accounting. From its (much delayed) 2021 annual report:

Prior to 2021, the Group considered that the revenue is recognised when the earlier of the acceptance of the property by the customer or according to the sales contract, the property was deemed to have been accepted by the customer. However, since 2021, due to the Group gradually facing liquidity difficulties, the Group believes that including the requirement for obtaining construction completion certificates or delivery of property inventory to property owners for use as an additional condition for revenue recognition would better reflect the Group's situation and have practical operability.

Before 2021, that is, Evergrande booked revenue when the apartment was “deemed to have been accepted,” a purely metaphysical concept that did not involve actually building the apartment. To the naked eye, this looks like booking the revenue before it was earned, and it led to temptation. From 2021 on, Evergrande apparently did the accounting right, but it didn't even bother to correct its previous financial statements: “after the company experienced liquidity problems,” it said, “a large number of financial and engineering staff left and the Group was unable to identify or estimate the effect of implementing the change in revenue recognition treatment on historical financial statements.” Whoops. GMT Research wrote last year :

At some point, it appears Evergrande's primary purpose became raising finance to fund its inflating balance sheet and keep the party going. While, correctly measured, the property business may not have been profitable, Evergrande's ability to find new sources of financing was exceptional, including wealth management products, insurance funds, new business ventures (bottled water, healthcare, electric vehicles etc.) and RMB130bn from strategic investors with the promise of an onshore listing.

An unprofitable business combined with an exceptional ability to raise money is in many ways the worst possible business, at least for the people giving you the money. Getting the accounting right is an important safeguard against that, but getting the accounting *wrong* does help with the financing. And so Bloomberg News reports:

China Evergrande Group's alleged \$78 billion revenue overstatement escalates the legal peril of founder Hui Ka Yan, who now stands at the center of one of the biggest financial fraud cases in history.

The nation's top securities regulator said the developer's onshore unit inflated revenue by recognizing sales in advance in the two years through 2020 that led up to its default. It imposed a 4.18 billion yuan (\$581 million) fine against the unit.

Evergrande's alleged fraud dwarfs that of Luckin Coffee Inc. and Enron Corp., dealing a blow to the reputation of its former auditor PricewaterhouseCoopers LLP and the country's financial oversight. It fuels concern about how widespread such accounting issues are, just as the new China Securities Regulatory Commission chairman is trying to tighten oversight. ...

Regulators allege Hui instructed other personnel to “falsely inflate” annual results. The onshore unit Hengda Real Estate Group boosted its 2019 revenue by about 214 billion yuan, and another 350 billion yuan in 2020, the regulator said. The inflated figures accounted for half of Hengda’s total revenue in 2019, and 79% in 2020.

As the supervisor in charge, Hui used particularly “egregious” means, the regulator said. Hengda also used these inflated figures in marketing to issue a combined 20.8 billion yuan in bonds, the regulator said.

Obviously this is the sort of thing that a regulator will find interesting after Evergrande collapsed, though it is embarrassing for the regulator — and the auditors! — that they didn’t notice it *before*. But when Evergrande was pulling in all that cash, I guess everyone faced some temptations.

Don’t call bribes candies

One possibility is that bribing government officials is just routine in the world of global commodity trading. Here is a Bloomberg News story about a former Vitol Group trader named Javier Aguilar, who was convicted last month of bribing Ecuadorian officials, and it seems like it would have been bigger news if he had *not* bribed them:

The revelations of the trial stretched far beyond Javier Aguilar and Vitol, as witness after witness described a frenzied period of corruption in Ecuador that extended across the oil trading industry. On the very first day, a former Ecuadorian official stated flatly that he had been bribed not just by Vitol, but also by Trafigura Group and Gunvor Group — together, three of the four largest independent oil traders. (The other member of the quartet, Glencore Plc, has not been accused of wrongdoing in Ecuador but in 2022 pleaded guilty to separate charges of corruption in eight other countries.) ...

At one point Antonio Peré was asked if he had ever helped a client with government business without paying a bribe to a government official. “I’m not sure,” he replied. “I cannot recall one.”

If you bribe one public official once in your life, I suppose you might be, like, giddy and awkward about it. But if you bribe every official on every deal, I would expect that you’d get pretty businesslike about it. If every deal involves a bribe, there will be professional networks of bribe consultants who will do the work in a professional manner, and in fact there are:

By adding more intermediary layers between corrupt traders and corrupt government officials, the industry has fueled a thriving underbelly of “consultants” and “brokers” with bank accounts in opaque offshore jurisdictions.

“In our country, in that area, it was common knowledge that in order to do business with the government, most of the time you had to pay bribes,” Antonio Peré said.

Peré is a former Ecuadorian government employee who left to become a bribe consultant:

By the time he met Aguilar, Peré and his brother Enrique had set themselves up as a one-stop shop for oil traders looking to do business in Ecuador. In practice, they were a clearinghouse for bribes to Ecuadorian government officials.

Which is a good business:

But it was the Perés who made the fattest margins. Of the roughly \$100 million they admitted receiving from oil traders seeking business in Ecuador, the brothers kept about half for themselves.

One advantage to all this professionalism, if you are paying or receiving bribes, is that it can create some deniability. If on every deal you and all of your competitors pay consulting fees to a handful of consultants who work out of normal office buildings and have business cards that say “energy consultant,” then if the authorities ask questions you can say “ah yes we had to pay that consultant for consulting,” and it will be a little hard for them to prove that you did anything illegal. Perhaps at some point somebody hands a government official a sack of cash in a parking lot, but having *many* parts of the business look open and traceable and normal can give it all a veneer of legitimacy. The article features a spreadsheet of bribes. Businesslike!

On the other hand, years of writing about bribery has taught me that absolutely no one can resist the allure of talking in dumb code that makes them look more guilty:

Sometimes their pseudo-spycraft veered towards the absurd: they referred to Switzerland as the “country of cheese.” Rather than naming Vitol’s competitors Trafigura and Glencore, they talked of “the T and the G.” ...

It was not just Ecuadorian officials that Vitol bribed via Hanst. He sent money to another middleman who handed it over, sometimes in a Houston parking lot, to employees of Mexico’s state oil company Pemex, who messaged each other excitedly about deliveries of “candies.”

Nobody’s going to read those messages and think you meant candies!

Slorg didn’t burn Slerf

Yesterday’s column discussed a crypto project called Slerf that accidentally lost \$10 million of money from buyers in its presale after its anonymous developer hit the wrong button; that developer then apologized in an X Spaces session. I incorrectly attributed this mistake and apology to Slorg, another pseudonymous participant in the Space. It wasn’t Slorg, it was someone else; Slorg didn’t do anything wrong. Alas my all-time favorite Money Stuff headline, “Slorg Is Sorry He Burnt Slerf,” was incorrect, and I apologize to Mr. Slorg.

Things happen

Japan Ends Era of Negative Rates With Few Clues on Further Hikes. Trading Floors Buzz With Excitement as BOJ Axes Negative Rates. Wall Street Bonuses Slump to 2019 Low After Dealmaking Drought. Russia's Backdoor to the Global Banking System Is Slamming Shut. Realtors Reckon With a Seismic Shift to How They Get Paid. "The buyer pool is made up of tech titans and 'the nepo community.'" Pet rocks.

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- 1. In modern deals, this is ordinarily a funded transaction in which the hedge fund puts up the money in advance, and the premium is paid in the form of a high interest rate on the hedge fund's money.
- 2. Right? Here is the facilitated emissions standard. What about something like: You take your oil-and-gas bankers, you put them in a separate spinoff, you give them enough control so that you don't consolidate them, they get bookrunning credit for all your oil and gas deals, you take 80% of the fees as a dividend? Would that work? I dunno, someone had better be working on this.
- 3. Presumably it becomes 10 tons of facilitated emissions, though perhaps there are some gaps.
- 4. I suppose I would need financing, and I suppose the financing would carry an emissions cost.
- 5. This is a somewhat argumentative characterization of the facts, and I doubt either side of the case, or the judge, would agree with it. Here's the judge's opinion finding Trump liable, in which he says that "there is ample documentary and testimonial evidence that the banks, insurance companies, and the City of New York did, in fact, rely on defendants to be truthful and accurate in their financial submissions." But see pages 18-20 of Trump's appeals brief.
- 6. This is an argument that came up a lot a few years ago, when a bunch of bond traders were prosecuted for lying about the prices they had paid for bonds. "Everybody lies about that, and everybody knows it, so no one believed us," was roughly the defense, which mostly worked. On the other hand, this is not really how New York fraud law works; see pages 75 (on reliance) and 76 to 77 (on materiality) of the judge's opinion.
- 7. Citations omitted. Note that this cites a different number for the judgment than Bloomberg News (\$464 million versus \$454 million); I think the interest on the judgment ticks up by the day so nobody really knows how big it is.
- 8. See page 24 of the merger proxy.
- 9. That's 78,750,000 shares (see page 309 of the proxy) times yesterday's closing price. There are another 40 million earnout shares that will be given to the TMTG shareholders (meaning mostly Trump) if the stock stays above \$17.50 for a while (see page F-11), but the \$2.8 billion is right away.
- 10. It has an accounting profit due to changes in fair value of its warrant obligations, but it has only losses from operations. See page 56 of the proxy.

- 11. Last year, Evergrande “rejected” GMT’s conclusions that it “inflated revenue and profits for years” and was “never profitable.”

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Trump SPAC Sues to Force Board Member's Vote for Media Deal

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March 20, 2024, 8:18 AM PDT

Greg Farrell

Bloomberg Editorial

- Special purpose acquisition company faces deal deadline
- Digital World deal could produce \$4 billion windfall for Trump

By Greg Farrell

(Bloomberg) --

The company planning to take Trump Media & Technology Group public sued to force its biggest investor, ARC Global Investments II, to vote in favor of the deal before a critical deadline this week.

The suit, filed in New York state court Tuesday, is the latest legal battle between Digital World Acquisition Corp. and its former chairman, Patrick Orlando. While he was ousted last year, Orlando still holds significant leverage over the company through his ability to influence the voting shares of ARC.

With the merger vote March 22, Digital World insists that ARC has to vote in favor of the deal pursuant to a 2021 agreement, at the time of the special purpose acquisition company's initial public offering. If the Digital World takeover of Trump Media proceeds, it could provide a windfall of as much as \$4 billion to former President Donald Trump as he faces hundreds of millions of dollars in legal verdicts.

"ARC must vote in favor of the merger pursuant to the unambiguous terms of the letter agreement," DWAC said in the suit. "There are no exceptions despite ARC's managing member Patrick Orlando's desire to hold ARC's vote hostage for his personal gain."

Orlando, who still sits on DWAC's board, has challenged how much stock ARC shareholders would receive in Trump Media & Technology Group. He didn't return messages seeking comment on the lawsuit.

Digital World and Trump Media have also sued Orlando in Florida over the deal.

The March 22 date for the shareholder vote on DWAC's proposed acquisition of Trump Media survived an attempt by Trump Media co-founders Andy Litinsky and Wes Moss to halt the vote over complaints that their 8.6% stake in Trump's company would be diluted.

Read more: Judge Clears Way For Trump Media To Hold Merger Vote
--With assistance from Jef Feeley.

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Crypto News

March 19, 2024, 1:24 PM PDT

MicroStrategy's Plunge Shows Risk of Stock as Bitcoin Proxy (1)

By Carmen Reinicke

- Software firm owns more than 1% of all Bitcoin to be issued
- Company has sold converts twice this month to buy more

Bloomberg Law News 2024-03-20T10:48:06517465064-04:00

MicroStrategy's Plunge Shows Risk of Stock as Bitcoin Proxy (1)

By Carmen Reinicke2024-03-19T16:24:06244-04:00

- Software firm owns more than 1% of all Bitcoin to be issued
- Company has sold converts twice this month to buy more

MicroStrategy Inc. investors who bought shares of the biggest corporate holder of Bitcoin to gain amped-up exposure to the digital asset are getting a painful reminder of its brutal volatility.

This week is driving home how the leverage the company deploys to buy Bitcoin is a recipe for explosive moves. MicroStrategy sank 16% on Monday, more than 10 times the drop in Bitcoin. It slumped 5.7% Tuesday as the digital token extended a retreat from record highs. The slide pushed this week's losses to 20%, the stock's worst two-day drop since 2022, an abrupt reversal after the shares doubled last month alone.

The business software firm has been loading up on the token since 2020, making its stock a proxy for those who want to bet on the biggest cryptocurrency without buying it outright. After selling convertible debt twice this month to finance additional purchases, the company now has roughly \$14 billion worth of Bitcoin, more than 1% of all that will ever be issued.

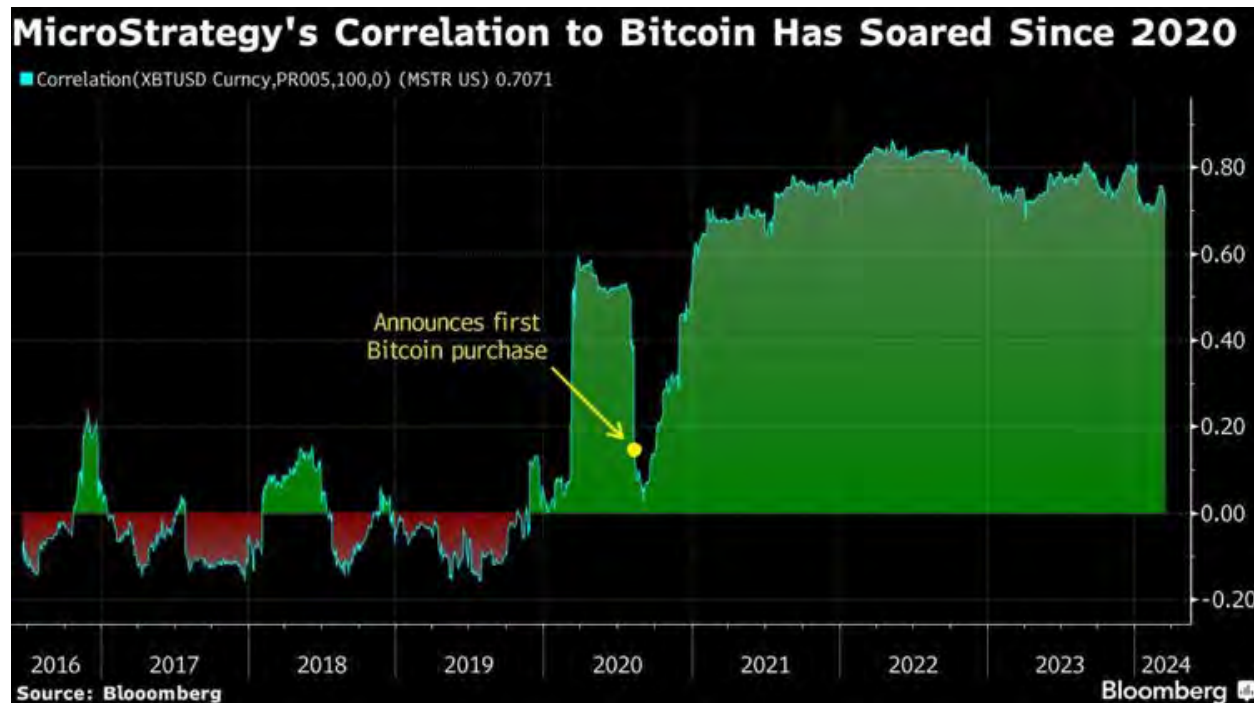


Given MicroStrategy's market capitalization of about \$24 billion, its debt and the approximately \$1.5 billion value that many on Wall Street give the Virginia-based firm's core business, its shares trade at a more than 90% premium to the value of Bitcoin on its balance sheet, according to Bloomberg calculations.

"It creates financial alchemy that is really quite unique in the market," said **Mark Palmer**, an analyst at Benchmark.

What it comes down to now, for investors, is whether it's a chance to buy the dip in MicroStrategy. It's a revved-up bet that Bitcoin will resume its climb, and it also has certain benefits over purchasing Bitcoin exchange-traded funds, an option that's been available since January.

"We view MicroStrategy as an attractive vehicle for investors that are looking to create exposure to Bitcoin," said **Lance Vitanza**, managing director of equity research at TD Cowen. "That's the only reason to buy MicroStrategy stock, because you want to own Bitcoin."



Beyond the appeal of the stock given the company's ability to sell debt to fund Bitcoin purchases, another benefit is that as a share it doesn't charge a management fee like ETFs. As Vitanza sees it, particularly for investors who are in for the long run and expect Bitcoin to rebound, the premium in the shares makes sense because of those advantages over ETFs. He has a \$1,560 price target on the stock, around 10% above the current level.

"When you compound the impact over a long time horizon like 20 years or more and if you assume the underlying value of Bitcoin is going to appreciate rapidly," he said, "that goes a long way toward justifying the kind of premium that we've seen in the marketplace recently."

(Updates at market close.)

--With assistance from **Tom Contiliano**.

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'Off' and 'on' channel communications in the workplace

 [reuters.com/legal/legalindustry/off-on-channel-communications-workplace-2024-03-20](https://www.reuters.com/legal/legalindustry/off-on-channel-communications-workplace-2024-03-20)

Wendi Lazar

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

March 20, 2024 - Protecting communications in the private workplace has always been challenging. Our constitutional privacy protections are geared to protecting U.S. citizens from the government, not from their employers — and state and federal courts have long confirmed that there is little protection for employees. However, beginning with the internet, and becoming more compelling with the development of messaging platforms and the cloud, legislators and courts agree that there is some expectation of privacy when it comes to personal data in the workplace. But what is personal data?

Recently, the Securities and Exchange Commission (SEC) has demanded that personal chatting of all kinds must be "captured, stored and supervised" under its recordkeeping rule and financial services companies are paying a steep price for failing to comply.

Broker Dealers, Investment Advisors and certain commodities and trading advisors are subject to various recordkeeping rules. While all are slightly different, the Exchange Act Rule 17a-4 requires all business communications be retained and recorded. How does this square with the employee's privacy in regard to these communications? It is hard to determine what is personal and what is business on the cloud and in chat rooms.

The early attempt at legislation to address these ills was the Electronic Communications Privacy Act of 1986, "ECPA" 18 U.S.C. Sections 2510-2523, but only one section of the ECPA applied to employees. Title II, the Stored Communications Act, ("SCA"), became relevant in the early stages of data privacy protection as it applied to text messaging and employee emails. This section set out to protect the privacy of employees from the unauthorized access to personal information and the contents of files stored by third-party service providers. Of course, the exception to the SCA is when the government compels the information.

Moreover, this legislation quickly became outdated as it did not foresee the cloud revolution and did not address any of the current concerns felt by employees. In reality, electronic chats and social media have replaced the concept of the casual "water cooler" conversations and maybe even email communications. The difference is that with few exceptions, speech around the old fashioned but literal water cooler was protected speech under the National Labor Relations Act in both the public and private workplace, but electronic speech is not.

There is no question that in the workplace of today, there is a blurred line between personal communications and business communications which has existed since employees were encouraged to bring their devices to work. However, during the pandemic era, the increased use of Zoom and messaging platforms exacerbated the problem for employers when the frequency of corporate communications in the private home increased exponentially, and in 2024, the remote workplace has morphed to a hybrid environment making it even more difficult to separate out personal communication.

Moreover, through AI, surveillance tools and complex programming, employers can now capture employee communication of every kind. While this is problematic for the employee, recently the SEC has set out to ensure that the financial services industry either eliminate all "off channel" communications or record all of them.

In 2022, the SEC put the world on notice when it charged 15 financial services firms for violations of its recordkeeping rule which requires broker-dealers and investment advisory firms (registrants) to preserve originals of all communications relating to their business, including amongst other things recommendations and advice to clients and customers. By allowing employees and supervisors to use "off channel" communication apps firms cannot supervise or preserve communications, hence violating the recordkeeping rules.

In 2022 and 2023 combined, the U.S. government (SEC and FINRA) collected over \$2.8 billion in fines related to these violations. On Feb. 9, 2024, the SEC published a press release announcing additional fines of \$81 million in civil penalties citing the failure to "maintain and preserve electronic communications."

"Off channel" communications are defined as business-related communications sent or received on a communication tool that has not been authorized for business use. Considering that the hybrid and remote workplaces have now replaced the traditional office where personal devices were easier to control, employers and employees need to navigate the question of acceptable business standards for communications. For example, is chatting on Zoom personal or business related? What we know is that the chat, if not saved, will likely disappear once the Zoom has ended. Of course, what is "off channel" or "on," will differ from business to business. While apps like WhatsApp have dominated the news— any chatting, messaging and other form of communication that is not "captured, stored or supervised" could be considered "off channel" and subject to liability.

The SEC recordkeeping rules are not new to financial services. Registrants have been preserving electronic communications since 2000. However, the proliferation of off channel communication apps such as What's App by employees since the pandemic and the remote work environment has put registrants at increased risk even if those client and customer communications were "personal."

But it is not just the companies who are paying a high price. As soon as the SEC fined financial companies, the companies, in turn, blamed their supervisors and teams of employees and many were terminated demoted, and had compensation clawed back to cover some of the damage.

For the registrant, termination resulting from a breach of company policy can result in very harsh financial and personal penalties. As the financial services industry is based on deferred compensation systems a "for cause" termination can result in the loss of years of deferred bonuses, equity and even severance. In fact, many financial services companies have clawbacks written into their offer letters and employment agreements and violating company policy may trigger these provisions.

In addition, a regulated employee in financial services will be subject to a U-5 filing which will report the reason for termination. A "for cause" termination, better known in the industry as a "dirty U-5" will follow the employee for years and likely prevent them from securing new employment in a regulated company.

On top of the huge fines levied, the SEC asked companies to put in place policies to ensure compliance. Some companies the SEC targeted had no policies in place in terms of employees using WhatsApp or other communication apps to communicate with clients in the course of business. But even those companies that appeared to have set policies often did not enforce them. In addition, they often failed to distribute these policies to supervisors and the teams of traders and advisors. While companies are now examining internal policies regarding electronic communications and record retention, they need to ensure distribution of these policies to all those affected.

As mentioned above, New York law provided some protection to New York employees when it passed A836 in September 2023, prohibiting an employer in certain situations from requesting that an employee disclose username or password or any other means of assessing its electronic personal account information including accounts such as WhatsApp.

This law (which resembles California and Illinois legislation) will go into effect on March 12, 2024, and in some respects will make it more difficult for employers to comply with the SEC and FINRA recordkeeping rules and compliance recommendations. While there are solutions for companies such as installing collaborative team platforms and security software that may help these businesses comply with the recordkeeping rules, the privacy of the employee is at risk using them.

The good news for employers is that the new law does not restrict employers from the duty to "monitor or retain employee communications that is established under federal law or by a self regulatory organization" and only applies to personal not business accounts even if installed on personal devices. But, in the end, it will present challenges to separate the two types of communication and design compliant policies and systems to combat the problem.

The effects on companies and employees from these aggressive tactics by the government are a game changer in the financial services world. However, what often starts as a trend in financial services, such as clawbacks and now "off" channel monitoring, often results in much broader policies, privacy infringements, increased regulation, legislation, and contractual obligations. These obligations are often tied to compensation programs.

In light of what has happened in financial services, this trend in the financial services industry raises critical questions around employee privacy rights: Will other industries, in particular public companies, also clamp down on employees' personal communications as a result of the government actions in the financial services industry and monitor their every word in order to prevent other kinds of less regulated recordkeeping and disclosure liability?

On the other hand, will states finally be motivated to pass legislation that draws a line on employee privacy protections when a company allows its employees to use their own devices to communicate? Is New York's recently passed legislation on this topic too little too late? Is monitoring what could be the "water cooler" conversation going to create a stifling environment for employees and make the workplace anti-social and less productive? While they may seem esoteric, these are questions that get at essential concepts around the employer-employee relationship — and are therefore critical to carefully consider and to follow as this trend continues.

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US Supreme Court appears to back insurers' participation in bankruptcy

 [reuters.com/legal/government/us-supreme-court-appears-back-insurers-participation-bankruptcy-2024-03-19](https://www.reuters.com/legal/government/us-supreme-court-appears-back-insurers-participation-bankruptcy-2024-03-19)

Dietrich Knauth

Signage is seen at the United States Bankruptcy Court for the Southern District of New York in Manhattan, New York City, U.S., August 24, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

- Court considers insurers' objection to asbestos settlement
- Kaiser Gypsum says insurer isn't harmed and shouldn't be heard

March 19 (Reuters) - Justices on the U.S. Supreme Court on Tuesday seemed inclined to grant insurers broad leeway to participate in bankruptcy proceedings, in a case involving asbestos injury claims.

The justices heard oral arguments in an appeal by Truck Insurance Exchange that is seeking a ruling allowing it to object to Kaiser Gypsum's proposal to settle asbestos litigation in its Chapter 11 bankruptcy reorganization.

The building materials manufacturer's bankruptcy plan would create a \$50 million trust for people suing the company alleging that exposure to asbestos in the materials caused their cancer, funded in large part by the company's insurance policies. Truck has objected to the settlement because it did not include provisions that the insurer said would help weed out fraudulent claims and reduce its liability.

Legal experts have said the case could have implications for other mass tort bankruptcies involving large numbers of victims and settlements funded by insurance.

Chief Justice John Roberts and Justices Amy Coney Barrett, Sonia Sotomayor, Neal Gorsuch, Elena Kagan, and Brett Kavanaugh all pushed back on Kaiser Gypsum's arguments that the insurers should not weigh in on the bankruptcy plan.

"Why do you want Truck to not even be heard?" Barrett asked. "What is your motivation to be fighting this so hard?"

Gorsuch said Kaiser Gypsum appeared to basing its argument on the standards for voting on a bankruptcy plan, instead of stakeholders' broader right to participate in a bankruptcy case.

"They may not have a vote, but they can be heard on any issue," Gorsuch said.

Kaiser Gypsum attorney Kevin Marshall said Truck's continued objection threatened to "blow up" the bankruptcy settlement, which would allow the company to emerge from Chapter 11 and pay people who alleged they were harmed by asbestos found in the company's products.

"Bankruptcy is not just about getting everybody to the table," Marshall said. "It's also about having an efficient and expeditious proceeding."

David Frederick, representing asbestos victims who sued Kaiser Gypsum, echoed Marshall's concern about open-ended objections in bankruptcy. The Supreme Court must allow bankruptcy courts to stop "various muckrakers" that would speak up only to derail bankruptcy negotiations, Frederick said.

"Delay is profit maximizing," Frederick said. "Every day the insurer does not have to pay on its claims is a good day for insurers."

Justice Ketanji Brown Jackson asked whether there should be any limit on participation from possible stakeholders, or whether there was a risk of "opening the floodgates" to anyone.

Truck's attorney Allyson Ho responded that her client had every right to weigh in on a bankruptcy settlement that depends in large part on pursuing payments from insurance. Truck had sought to block confirmation of the plan, based on its contention that the settlement risked allowing payment for fraudulent claims.

"If anyone is a party in interest in this bankruptcy, it is the insurer, who will pay virtually every dollar that claimants receive," Ho said.

Lower courts had ruled that Truck's objection could not succeed in blocking the bankruptcy plan, because the asbestos settlement did not alter any rights under insurance policies that Truck had sold to Kaiser Gypsum.

Truck's petition was supported by the U.S. Department of Justice's bankruptcy watchdog, which argued that stakeholders and potential stakeholders have a right to be heard on "any issue" that arises in a bankruptcy.

The debate over insurers' rights in bankruptcy has been a sticking point in several recent mass tort bankruptcy cases, including bankruptcies of the Boy Scouts of America and several Catholic dioceses.

"It really affects the big mass tort cases, and those have come up in recent years with increasing frequency," according to George Singer, a bankruptcy attorney who is not involved in the case.

The case is Truck Insurance Exchange v. Kaiser Gypsum Company Inc., U.S. Supreme Court, No. 22-1079

For Truck Insurance Exchange: Allyson Ho of Gibson, Dunn & Crutcher

For Kaiser Gypsum: Kevin Marshall of Jones Day

For the asbestos personal injury committee: David Frederick of Kellogg, Hansen, Todd, Figel & Frederick

For the U.S. Solicitor General: Anthony Yang of the U.S. Department of Justice

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Reporting by Dietrich Knauth in New York



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OptumRx Can't Get Motley Rice Disqualified From Opioid MDL

By **Mike Curley**

Law360 (March 19, 2024, 2:05 PM EDT) -- An Ohio federal judge has denied a bid by pharmacy benefit manager OptumRx to disqualify Motley Rice LLC from representing plaintiffs in the national opioid litigation, saying the company hasn't shown that the firm's prior representation of states investigating opioids puts the company at a disadvantage in the multidistrict litigation.

In an **order** filed Monday, U.S. District Judge Dan Aaron Polster agreed with the firm's argument that even if its attorneys had access to information from OptumRx based on those prior investigations, the company is already obligated to produce the same information in the MDL.

The judge wrote that, as one of the defendants in the MDL, OptumRx has been required to review any documents it previously produced in any civil investigation or litigation by state entities and produce any documents relevant to the claims in the MDL.

"The MDL Repository Orders require OptumRx to produce the Investigation documents in the MDL, where all other plaintiffs' attorneys can use them," the judge wrote. "It is obvious that Motley Rice's possession and knowledge of the Investigation documents cannot, by itself, cause a material disadvantage to OptumRx, when every other plaintiff's attorney also has them."

OptumRx first sought disqualification **in December**, arguing that the South Carolina-based plaintiffs firm "weaponized" confidential information it received while investigating on behalf of the governments. According to court documents, Motley Rice has represented Hawaii, Chicago and Washington, D.C., in suits over OptumRx's alleged overbilling for insulin and other prescription drugs.

The pharmacy benefit manager asked Judge Polster of the Northern District of Ohio to block the firm from the MDL. Because the firm was acting on behalf of the government, its current role representing public and private clients against the company is unethical and violates rules of professional conduct, it said.

In January, the firm **pushed back**, saying OptumRx's argument was "fundamentally flawed," as the information Motley Rice has either isn't relevant to the opioid MDL, or, if it is relevant, would have to be produced by the company anyway.

In Monday's order, the judge also expressed skepticism of the timing of OptumRx's request, noting that it was aware of Motley Rice's role both in the government investigations and the MDL from its inception but did not seek disqualification until now.

While OptumRx had argued, and the court previously agreed, that it would be more appropriate to seek disqualification in the context of specific pharmacy benefit manager bellwether cases, the judge noted that none of the PBM bellwethers come from Motley Rice's inventory.

"If OptumRx always intended to move to disqualify Motley Rice as MDL co-lead counsel, then the Court finds the timing of OptumRx's motion somewhat troubling," the judge wrote.

The judge also rejected OptumRx's argument that the documents produced in those investigations are "confidential government information," saying the documents are the type that can be obtained through routine discovery, and OptumRx's labeling of them as confidential does not make them such.

"The Court cannot conclude that the subject of a government investigation can turn all its business information produced in response to a [civil investigation demand] into 'confidential government information' simply by designating it as confidential when they produce it," Judge Polster wrote. "OptumRx paints with a broad brush and fails to distinguish between documents it would produce in routine discovery (perhaps covered by a protective order) and other information that might legitimately be deemed true, confidential government information."

OptumRx had also highlighted in its briefs that the court had earlier disqualified a defense attorney in the MDL, but Judge Polster wrote that none of the circumstances line up here. In that instance, the attorney had previously worked with the government, but at the time of the MDL worked with the defendants in this case, and there was no doubt that the attorney had gotten access to confidential government information.

In addition, the judge wrote, that attorney was only disqualified from a single case in the MDL, while OptumRx is trying to disqualify Motley Rice from the MDL altogether.

"OptumRx asks this Court to deprive all litigants that are suing PBMs of Motley Rice's considerable experience with complex litigation generally and this MDL specifically," the judge wrote. "A litigant's right to counsel of their choice, including MDL co-lead counsel, should only be limited in exceptional circumstances."

Finally, while he sided with Motley Rice, the judge also expressed concern that the firm, in those civil investigations, appears to have been able to act both as a public agent or employee and as if the government were a private client, depending on its needs.

"There is a real difference between a law firm's representation of a governmental entity as a private client and a law firm's wielding the authority of that government," the judge wrote. "The facts happen to work in favor of Motley Rice in this case: were it not for the standing Repository obligations, and the nature of the Investigation materials OptumRx produced, the Court's discussion and analysis in this Order might have been different."

A spokesperson for the plaintiffs' executive committee said in a statement Tuesday, "The PEC is pleased that Judge Polster denied the motion to disqualify, and that Motley Rice can continue its role in helping lead this important case to provide additional resources to cities and counties around our nation."

Representatives for OptumRx could not immediately be reached for comment.

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

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

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

--Additional reporting by Emily Sawicki and Emily Field. Editing by Nicole Bleier.

Update: This story has been updated with a comment from the plaintiffs' executive committee.



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Mining Co. Faces Investor Suit After Turkey Landslide Losses

By **Sydney Price**

Law360 (March 19, 2024, 6:04 PM EDT) -- Colorado-based SSR Mining Inc. has been hit with a proposed class action from an investor alleging the company understated the likelihood of a February landslide at its Turkish mine that left nine miners missing and led to the country's government to revoke some of the company's environmental licenses.

According to shareholder Karam Akhras' **suit filed Monday** in Colorado federal court, SSR Mining is a U.S.-based precious metals mining company with international operations in Turkey, Canada and Argentina. In February, the company announced that it was suspending operations at its mine in Copler, Turkey, after a "large slip" on a mining structure. In the days following the incident, which was reported to be a landslide, news outlets said that several miners were missing and that the Turkish government had arrested some of SSR Mining's employees.

The events caused major damage to investors as the company's share prices fell, the suit alleges.

SSR Mining's executive chairman and former CEO Rodney P. Antal and former Chief Financial Officer Alison White — who departed the company earlier this month — are also defendants in the suit.

The class period begins Feb. 23, 2022, nearly two years before the incident at the Copler mine and the day after SSR Mining filed its 2021 annual report with the SEC. In the filing, SSR mining stated that it had a "robust commitment" to health and safety, and that it maintained safe working environments for employees. Those statements, and similar statements made throughout the class period, were false and misleading, since they understated regulatory risks the company faced as a result of its "unsafe business practices," the complaint alleges.

After SSR announced the incident at its Copler mine in a press release on Feb. 13, 2024, a news report later that day said nine miners were missing following a landslide at the site. The article also stated that the Turkish government had launched an investigation into the incident, and that the Union of Chambers of Turkish Engineers and Architects had filed lawsuits against the company.

The price of SSR Mining shares declined \$5.22, or nearly 54%, to close at \$4.50 on Feb. 13 on this news, according to the complaint.

Over the next few days, more news outlets reported on the landslide. Cengiz Demirci, Turkish director and senior vice president of operations at SSR Mining, was detained by Turkish authorities, according to the complaint, which cited one outlet's Feb. 18 report. According to news reports, six Copler mine employees had also been formally arrested, the complaint states.

SSR Mining shares declined by 29 cents, or nearly 6%, to close at \$4.62 per share on Feb. 20, according to the complaint. The next day, it fell a further 11 cents or 2%, to close at \$4.51 on Feb. 21 on this news, according to the complaint.

SSR Mining held an earnings call on Feb. 27. During the call, the defendants told investors that the Copler incident "will have an impact on our financial results in 2024," and that the company would suspend its quarterly dividend and automated share purchase plan.

Following the call, the price of SSR Mining shares declined by 37 cents, or nearly 8%, to close at \$4.29 on Feb. 28, according to the complaint.

Akhras seeks damages and accuses the defendants of violating the Exchange Act and acting with scienter, or actual knowledge of wrongdoing or reckless disregard.

Counsel for Akhras and a representative of SSR Mining did not immediately respond to requests for comment Tuesday.

Akhras is represented by Phillip Kim of The Rosen Law Firm PA.

Counsel information for SSR Mining was not immediately available Tuesday.

The case is Akhras v. SSR Mining Inc. et al., case number 1:24-cv-00739, in the U.S. District Court for the District of Colorado.

--Editing by Michael Watanabe.

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Apple Beats Decade-Old Derivative Suit Over Anti-Poach Deals

By **Dorothy Atkins**

Law360 (March 19, 2024, 9:11 PM EDT) -- A California federal judge threw out for good an Apple shareholder's decade-old proposed class derivative suit that alleged the tech giant's top brass caused losses by cutting illegal anti-poaching agreements with tech rivals, finding that the case is barred by a 2021 state appellate court ruling.

In a 25-page order, U.S. District Judge Edward Davila agreed with Apple and its executives that lead plaintiff R. Andre Klein's demand futility argument is identical to the demand futility arguments raised by investors in state litigation, which were ultimately rejected by a state appellate panel in 2021.

"The court is sympathetic to plaintiff's suggestion that he was made to wait on the sidelines while the state court plaintiffs litigated their case, and might now be bound by their defeat in the state courts," the order says.

However, Judge Davila noted that other courts evaluating the issue of preclusion in shareholder derivative litigation have consistently held that preclusion "does not deprive subsequent shareholder plaintiffs of their due process rights, particularly where the subsequent shareholder plaintiff had sufficient notice of the prior action."

Judge Davila added that Klein was fully aware of the ongoing state action, and he even litigated the reason for staying his federal case, but he also later stipulated to continue the stay in exchange for receiving discovery produced in the state action and he never objected to the state court plaintiffs.

"Here, the court has found that plaintiff is in privity with the state court plaintiffs," the order says. "As such, the court finds that the application of issue preclusion here does not violate plaintiff's due process rights."

The ruling marks an end to Klein's shareholder derivative complaint filed in **August 2014**, alleging that the directors' anti-poaching scheme led Apple to potentially spend millions of dollars on settlements and related litigation costs and fees to the detriment of Apple stockholders.

The expenditures also include costs incurred from years of lost opportunities to hire more qualified employees who were employed at other companies, as well as a loss of reputation, according to the complaint.

The alleged anti-poaching scheme came to light in 2010 after the U.S. Department of Justice launched a probe that revealed Apple and other Silicon Valley giants had cut deals behind closed doors not to compete for one another's employees.

The DOJ concluded that the companies had reached "facially uncompetitive" agreements that limited the employees' job prospects and, although the companies agreed to halt those practices in 2010, the revelations led to a flurry of private class actions.

But in May 2015, Judge Davila **granted the defendants' request to stay** Klein's case to await the outcome of three consolidated derivative actions pending in Santa Clara County Superior Court in Silicon Valley.

Judge Davila reasoned in his stay order that it would be most efficient to let the state court first

handle the threshold issue of demand futility.

But Klein appealed the stay decision to the Ninth Circuit, **arguing in 2016** that the district court had "no discretion" to stay the case while a related state court suit played out, because his case contains a claim under the federal Exchange Act, a claim over which federal courts have exclusive jurisdiction.

However, the appellate court denied Klein's appeal and an en banc panel refused to consider the decision.

Meanwhile, in August 2021, the state appellate court affirmed the dismissal of the state actions, agreeing that the investors in that litigation could not sufficiently allege demand futility and that they failed to allege facts sufficient to show that a majority of the Apple board was unable to evaluate a demand.

In light of the state appellate court ruling, Judge Davila lifted the stay in the federal case, and in May 2022, Apple moved to dismiss the federal action, arguing that the state litigation barred the claims, and Klein couldn't adequately plead demand futility. Apple also argued that the claims are time-barred by the Exchange Act's one-year statute of limitations and that Klein hasn't sufficiently alleged he has continuously owned stock.

In May, Judge Davila **dismissed** the lawsuit, but the judge gave Klein another shot at amending his complaint. In his order, the judge held that claims based on the 2012 and 2013 proxy statements are time-barred, but he added that claims related to the 2014 proxy statement are within the one-year statute of limitations, since Klein initially sued that same year.

Judge Davila also agreed with Klein that the state appellate court's ruling doesn't bar the claims outright. He noted that the state case involved different Apple board members and therefore the demand futility issue decided by the state court is not identical to the demand futility issue presented in the federal case.

Judge Davila added that Klein had sufficiently pled demand futility as to Cook and two other Apple board members, but not all the named defendants, and he has "therefore not met his pre suit demand requirement."

The judge gave Klein two weeks to amend the complaint to add demand futility allegations related to the 2014 proxy statement, and Klein amended his complaint, spurring Apple to file another motion to dismiss.

On Tuesday, the judge granted Apple's motion, and noted that the board members who are subject to the demand futility analysis in the latest rendition of the complaint are identical to the board members at issue in the state case.

The judge found that the additional allegations involving certain board members added to the latest rendition of the complaint, as well as the federal Security Act allegations, involve the same "underlying universe of facts" that were at issue in the state court litigation.

"Thus, because 'the factual predicate of the legal issue decided in the prior case is sufficient to frame the identical legal issue in the current case,' the issues are identical even though this action 'involves other facts or legal theories that were not specifically raised in the prior case,'" the order says.

Judge Davila additionally held that the state appellate opinion was final, and that Klein is in privity with the state court plaintiffs, although the judge acknowledged that he couldn't find any California state court case addressing the question of privity as between successive shareholder derivative plaintiffs.

Judge Davila dismissed Klein's case without leave to amend, and ordered the clerk to close the case.

Counsel for the parties and representatives for Apple didn't immediately respond to requests for comment Tuesday.

In 2015, then-U.S. District Judge Lucy H. Koh **approved** a \$415 million class action settlement

with Apple, Google and others, resolving claims they illegally agreed not to poach each other's engineers, but she gave the plaintiffs just half of the \$81 million in attorney fees they had requested.

Klein is represented by Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc. and by Joseph W. Cotchett, Mark C. Molumphy, Tyson C. Redenbarger and Gia Jung of Cotchett Pitre & McCarthy LLP.

Apple and its executives are represented by Michael Tubach, Jorge deNeve and Amy S. Park of O'Melveny & Myers LLP.

The instant case is R. Andre Klein v. Timothy D. Cook et al., case number 5:14-cv-03634, in the U.S. District Court for the Northern District of California. The consolidated state case is In re Apple Inc. Derivative Litigation, case number 1-14-CV-262174, in the Superior Court of the State of California, County of Santa Clara.

–Additional reporting by Vin Gurrieri. Editing by Emily Kokoll.

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Apple Deleted Siri Recordings, Users Say In Seeking Sanctions

By **Lauren Berg**

Law360 (March 19, 2024, 10:26 PM EDT) -- Users of Apple's Siri who claim the voice-activated software records their conversations have asked a California federal judge to sanction the company for allegedly deleting millions of proposed class members' Siri records, including data they say "meticulously documented Apple's interception" of their confidential communications.

In a 22-page **motion**, the users asserted Monday that since they filed their lawsuit in 2019, Apple has continuously deleted the data of millions of Siri users by deliberately and intentionally failing to suspend its data deletion policies throughout the case. What's worse, the company implemented new deletion protocols just after the lawsuit was filed that caused "the majority of all incoming user audio to be irretrievably lost," the users said.

"This data meticulously documented Apple's interception of plaintiffs' and class members' confidential communications as well as provided a comprehensive account of the number of violations for purposes of calculating class-wide damages," the motion states.

"The little data Apple did preserve was stripped of several dozen data fields that would have provided vital context; cabined to just two user languages out of 41 total; and not fully representative of Apple's practices throughout the class period," it says.

Just the timing of Apple's new deletion policies "strongly suggests bad faith in and of itself," the users said, but it then spent more than four years concealing the fact that user audio and data no longer exists.

And the company negotiated the scope of data for production it knew didn't exist, the motion states.

"Instead of admitting that Apple had already deleted the data — and was continuously deleting it at the time of the parties' meet-and-confers — or raising any data availability issues during the parties' initial meet-and-confers, Apple negotiated at length over the scope and nature of user audio and data plaintiffs were seeking in discovery, alluding to the data's existence and implying its availability," the motion states.

"Apple should have raised the issues of preservation and suspension of ongoing document deletion programs even before plaintiffs served these discovery requests," it states. "Instead, Apple repeatedly covered up its conduct."

The users claim the destruction of that data was "deliberately calculated to prevent plaintiffs from using such data at class certification, summary judgment and trial," according to the motion.

They want to preclude the company from using the absence of the deleted data to challenge their expert reports, class certification motion or as grounds upon which to move for summary judgment. The users also want an "irrebuttable presumption" and an adverse or permissive jury instruction "that the destroyed evidence was unfavorable to Apple."

The suit, first filed in August 2019, followed media reports that the tech giant had **recorded users** of devices equipped with the Siri voice recognition application without their consent.

U.S. District Judge Jeffrey S. White, who is overseeing the case, subsequently dismissed the

proposed class action, saying the plaintiffs' theory of harm is **"overly speculative"** because there are no plausibly alleged facts that their specific communications were intercepted or disclosed.

Months later, Judge White largely kept intact the consumers' amended complaint, finding it **fixed** their previous failure to allege that conversations had been intercepted, but held they had not claimed any economic injury.

In his order, Judge White noted that the consumers had added allegations regarding their use of Siri-enabled devices, including one plaintiff's claim that after he spoke to his physician in the presence of his device in December 2020, he received advertising tailored to his condition. Two other users said they charged their devices in their home and received targeted ads based on private conversations, the order said.

"The targeted advertising claims, while attenuated, are rendered plausible by the unique nature of oral communications," Judge White said. "While advertising tracking abounds online, there are far fewer ways to intercept oral communications taking place in person."

The plaintiffs seek damages plus profits for the alleged violation of the Electronic Communications Privacy Act, and also seek compensation under their claim for "intrusion upon seclusion and invasion of privacy."

Monday's motion isn't the first time the users have sought to sanction Apple. Back in July, they said the company and its DLA Piper attorney should be sanctioned for the lawyer's **"unnerving" and "aggressive" conduct** during a deposition.

However, Judge White promptly struck the motion, noting that it was "improperly filed" to him rather than to the magistrate judge overseeing discovery.

In their Monday motion for sanctions, the users said Apple had a duty — at least since Aug. 7, 2019, when the lawsuit was filed — to preserve the audio recordings and associated data that was subsequently destroyed.

That data, which is critical evidence in the users' case, is now permanently lost and cannot be restored or replaced through additional discovery, according to the motion.

"The destroyed evidence contains Apple's internal record of its historical eavesdropping activity across plaintiffs and other class members throughout the class period," the users said. "This is, in many instances, the best evidence of the true extent of Apple's misconduct."

The users said they have been gravely prejudiced by this "intentional spoliation" and that sanctions in the form of irrebuttable presumption and an adverse jury instruction are warranted.

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

The users are represented by Vincent Briganti, Christian Levis, Margaret MacLean and Andrea Farah of Lowey Dannenberg PC, Erin Green Comite, Joseph P. Guglielmo, John T. Jasnoch and Hal D. Cunningham of Scott + Scott Attorneys At Law LLP, Mark N. Todzo of Lexington Law Group, and E. Kirk Wood of Wood Law Firm.

Apple is represented by Isabelle L. Ord, Raj N. Shah and Eric Roberts of DLA Piper.

The case is Fumiko Lopez et al. v. Apple Inc., case number 4:19-cv-04577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Craig Clough, Hailey Konnath and Bonnie Eslinger. Editing by Adam LoBelia.



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Tesla Investors Want Musk Go-Private Tweet Spat Revived

By **Katryna Perera**

Law360 (March 19, 2024, 6:28 PM EDT) -- Tesla investors have urged the Ninth Circuit to grant their request for a new trial, saying the California district judge who oversaw the litigation gave improper jury instructions that cleared the electric-car maker and its CEO Elon Musk last year over his alleged 2018 tweets that he had "funding secured" to take the company private.

The investors filed a **brief** Monday telling the appeals court that the district court committed a "fundamental error of law" by requiring them to prove during trial, through improper jury instructions, that Musk acted with deliberate recklessness in making the challenged statements and did so knowingly.

"This double requirement is contrary to the well-settled law of this circuit. Defendants' attempt to defend the instruction are unavailing as the misstatement of the law (or, at a minimum its confusion) is facially apparent and its prejudice self-evident considering the centrality of the issue of scienter to securities fraud claims," the brief states.

In February 2023, a California jury **cleared** Tesla and Musk of securities fraud in a trial over his 2018 tweets that he had "funding secured" to take the company private. Shares of Tesla rose after the "funding secured" tweet on Aug. 7 and then declined days later when it was revealed that funding was not in place, resulting in losses of \$12 billion, according to a securities class action investors filed.

In their Monday brief, the investors say they properly objected to the court's proposed jury instructions multiple times during the trial since the district court had previously determined that the claims of scienter had already been adequately pled. Therefore, there was no burden for the investors during trial to provide Musk's state of mind.

Nonetheless, the trial court still required the investors to prove this claim, and the jury was twice given instructions addressing the issue of scienter, according to the brief.

The brief states that the instruction was erroneous, clear, and unambiguous and caused harm to the investors.

"Defendants argue that there was 'no reasonable likelihood of confusion' resulting from the district court's instructions. The erroneous instruction on scienter, however, can only have caused substantial confusion for the jury," the brief states. "Defendants argue that any instructional error on scienter was harmless ... this argument, however, is premised on mere speculation and misrepresentation of the record."

The investors further argue in the brief that U.S. District Judge Edward M. Chen was wrong in his **conclusion last year**, following trial, that there was substantial evidence for a jury to find that Musk's false tweets about taking the company private weren't material to investors' stock-buying decisions.

"No reasonable jury could have found that Musk's false statements on Aug. 7, 2018 that funding was 'secured' and 'investor support is confirmed' for a \$60 billion go-private transaction of Tesla were not material or relied on by Tesla investors," the brief states. "Defendants' identification of unsubstantial scraps of evidence and assertions of unsupported speculations are insufficient to rebut the mass of

evidence and testimony, including unrebutted expert analysis and opinion, establishing these elements."

According to the brief, the investors at trial presented evidence from Musk himself that the statement "funding secured" was material and that he wanted investors to rely on it.

"Musk further testified that he expected Tesla's stock price to increase following the tweet," the brief states. "Defendants did not present a single witness who testified that the statement 'funding secured', either taken in isolation or in the context of the entire tweet, was immaterial."

The investors also pushed back against Judge Chen's agreement with the defendants that the suit's claims had not established loss causation.

"The argument is absurd. The only evidence on loss causation presented at trial was presented by plaintiff and was sufficient to show that Musk's fraudulent Aug. 7, 2018 tweets played a substantial part in causing the losses sustained by plaintiff and the class when Tesla's stock price declined," the brief states. "Defendants do not meet their burden 'that it is more probable than not that the jury would have reached the same verdict had it been properly instructed.'"

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

The investors are represented by Nicholas I. Porritt, Adam M. Apton and Adam C. McCall of Levi & Korsinsky LLP.

Tesla, Musk and the other defendants are represented by Michael Lifrak, Alex Bergjans, Alex Spiro and Ellyde R. Thompson of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Glen Littleton v. Elon Musk et al., case number 23-16010, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Ivan Moreno. Editing by Jay Jackson Jr.



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Casino Game Co. Escapes Investor Suit Over System Changes

By **Sydney Price**

Law360 (March 19, 2024, 9:02 PM EDT) -- A New York federal judge has dismissed a lawsuit from investors of mobile gaming company Playtika accusing it of announcing an overhaul that was already underway for two of its most successful games, saying the company was not obligated to make specific disclosures regarding the changes.

The putative class action suit, which was originally filed in November 2021 and amended in May 2022, alleges Playtika failed to disclose in its 2020 registration statement the disruptions caused by the infrastructure changes it was making to two of its games, Slotomania and Bingo Blitz, that together accounted for 50% of the company's revenue. The risks materialized, the suit alleges, when Playtika disclosed in an earnings call that the company experienced a 3.6% decline in revenue in the third quarter of 2021 and Playtika's shares declined 23%.

But U.S. District Judge Rachel P. Kovner said Monday that the investors' suit fails to plausibly allege that disclosure of the infrastructure upgrades was necessary. Playtika "adequately warned the reasonable investor of the allegedly omitted risks," Judge Kovner said.

"Playtika specifically identified 'implementing new systems and transitioning data,' 'difficulties in developing new systems,' and 'maintaining and upgrading current systems,' as potential causes of disruption," the order states.

According to the suit, Playtika generates 97% of its revenue from in-game purchases by players. To grow its revenue, Playtika has to consistently create new in-game features to keep users engaged, the suit states. In explaining the revenue decline, Playtika stated that it generated fewer features in the quarter because of the previously undisclosed infrastructure projects for those games, according to the suit.

Playtika made the changes to update outdated code and capture younger users, which the company eventually revealed in the third-quarter 2021 earnings call, the suit states.

The suit alleges that Playtika needed to disclose in its registration statement that the Slotomania and Bingo Blitz infrastructure projects were already underway to show that they were ongoing and not just hypothetical. But Judge Kovner said Playtika's registration statement "made clear that changes that could lead to disruption were 'constantly' occurring."

Judge Kovner also said that Playtika was under no obligation to disclose the specific underlying conditions prompting the changes.

"[Playtika's] disclosures informed investors that Playtika needed to constantly develop and upgrade its games both in order to prevent them from becoming outdated and to attract new and retain existing players," Judge Kovner said.

Counsel for the parties did not immediately respond to requests for comment Tuesday.

The investors are represented by Carol C. Villegas, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP and Brian Schall of The Schall Law Firm.

Playtika is represented by Marc J. Schneider, Micol Small, Sean Thomas Lobb and Stephen Leonard

Ram of Stradling Yocca Carlson & Rauth PC and Steven David Feldman of Stradley Ronon Stevens & Young LLP.

The case is Bar-Asher v. Playtika Holding Corp. et al., case number 1:21-cv-06571, in the U.S. District Court for the Eastern District of New York.

--Editing by Michael Watanabe.

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Ford Pushes To Decertify Classes Amid Mustang Defect Trial

By **Greg Lamm**

Law360 (March 19, 2024, 8:54 PM EDT) -- Ford Motor Co. urged a Florida federal judge Tuesday to undo classes of consumers in four states who allege they were misled when buying high-performance Mustangs, arguing that a jury heard testimony from the drivers this month that the "word was out on these cars" before purchases were made.

The automaker argued in a **motion to decertify** that consumer classes in Florida, New York, Missouri and Washington should be nullified because the issue of whether Ford committed a deceptive act is not a common question among class members who own 2016 Shelby GT350 Mustangs.

During the trial, which began March 11, a New York class representative testified that by the time he took delivery of his car, he knew from internet research that "the word was out on these cars and what would happen on the track," Ford noted. That included a claim that the car could go into so-called "limp mode," according to the company's filing.

The carmaker added that plaintiffs from Florida and Washington gave similar testimony, contending this shows a jury could conclude that many class members could have reasonably obtained the relevant information they are now accusing Ford of failing to provide.

"In light of the evidence presented at trial, it is now clear that common issues do not predominate and that this litigation is not manageable as a class action," the motion read.

More than a dozen drivers filed the class action in 2017, asserting that they relied on Ford's marketing when they bought their GT350s and believed the cars could perform on racetracks at high speeds. But instead of getting a rush behind the wheel, the consumers said, the Mustangs switched to a limp mode that reduced performance after a short time on the track.

A group of Shelby owners **told a Florida federal jury** during opening statements March 11 that the auto giant misled them on the high-performance capabilities of the cars, testifying that the vehicles overheated after about 10 minutes of track racing.

Ford insisted Tuesday that jurors also have heard evidence that some of the consumers knew about the defect even if the company failed to disclose it, meaning the damages would now need to be determined on a case-by-case basis.

Furthermore, even though the law is more developed in New York and Florida, case law in all four states, including Missouri and Washington, has established that consumers cannot recover damages after buying a product knowing facts they later say were undisclosed, according to the motion.

The amount of damages is not a common issue among the classes because the consumers purchased used vehicles and the market value of used vehicles can vary, the company also said.

And based on the evidence presented that some of the owners knew the car had purported performance issues, Ford's affirmative defense that the owners could have avoided their losses also requires individual inquiry, the filing said.

A representative of the drivers declined to comment. Representatives of Ford did not immediately respond to requests for comment.

The consumers are represented by Catherine Y.N. Gannon, Christopher R. Pitoun, Shelby R. Smith and Steve W. Berman of Hagens Berman Sobol Shapiro LLP, and Manuel A. Arteaga-Gomez and Stuart Z. Grossman of Grossman Roth Yaffa Cohen PA.

Ford is represented by Henry Salas and Sean Hernandez of Cole Scott & Kissane PA, and John M. Thomas, David M. George and Krista L. Lenart of Dykema Gossett PLLC.

The case is *Tershakovec et al. v. Ford Motor Co.*, case number 1:17-cv-21087, in the U.S. District Court for the Southern District of Florida.

--Editing by Covey Son.

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