

Activist investors win greenmail case in Ohio

 financialregnews.com/activist-investors-win-greenmail-case-in-ohio

March 21, 2024

An Ohio judge on March 20 dismissed a case accusing two activist investors of violating Ohio's anti-greenmail statute, a decision that if it had gone another way stood to chill investment in Ohio corporations, raise the risk of more litigation, and potentially harm the state's economy, according to experts.



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Franklin County, Ohio Court of Common Pleas Judge Daniel Hawkins issued his order in the case originally filed in 2021 by Robbins Geller Rudman & Dowd LLP, a California plaintiff firm representing the Texas-based Corpus Christi Firefighters' Retirement System against activist investors Macellum Capital Management and Ancora Holdings.

The plaintiff alleged that Macellum/Ancora engaged in a greenmail campaign by manipulating the trading price of publicly traded equity securities for Columbus, Ohio-based retailer Big Lots Inc., between March 6, 2020 and the present, violating Ohio's anti-greenmail statute (Ohio Revised Code Section 1707.043).

The Texas firefighters' group had asked the court to return all of their trading profits to the company, saying Macellum/Ancora had engaged in "manipulative practices."

That's not how Judge Hawkins saw it.

"This Court acknowledges that while the statute may colloquially be referred to as Ohio's Anti-Greenmail statute, the statute does not actually contain the term "greenmail", nor does it define the term "manipulative practices," according to his order.

Rather, the court's role is to interpret the statute as it is written, Hawkins wrote, and when a term is undefined, the court must give the term its "plain and ordinary meaning."

In determining what constitutes manipulative practices, Hawkins said the court holds that there must be evidence of intentional conduct to deceive or defraud in an unfair manner. And he said the court did not find that the defendants' actions rose to the level of "intentional conduct that had the intent to deceive or defraud in an unfair manner."

Hawkins also determined that the firefighters' group did not meet its burden of providing factual evidence that actions by Macellum/Ancora rose to the level of "manipulative" as required under the statute.

"Specifically, this Court finds that Defendants' actions of approaching Big Lots regarding its concerns as shareholders, releasing open letters to fellow Big Lots' shareholders regarding corporate strategy, nominating new individuals for election to the Board of Directors, filing a preliminary proxy statement, and engaging in settlement discussions with Big Lots constitutes shareholder activism, and this Court is hesitant to stifle that by labeling those practices as 'manipulative,'" the judge wrote.

Hawkins also said it's clearly questionable whether actions by Macellum/Ancora equated to being "a proposal to acquire control" of Big Lots.

"I am happy with the result," said Phillip Goldstein, a co-founder and principal of Bulldog Investors who last month told Financial Regulation News that he thought the case should be dismissed. "Obviously, there could be an appeal but it's satisfying to get a well deserved victory under our belt."

While not involved in the case, Goldstein and other experts say that under the definition of greenmailing, there was no such action taking place in this case because Macellum/Ancora did not attempt to take control of Big Lots, and Big Lots did not buy shares from Macellum/Ancora at a premium above market price.

Rather, Macellum/Ancora submitted mostly independent director nominees for shareholder consideration and all of their transactions occurred on the open market.

Goldstein said the case involved "a plain vanilla proxy contest" in which the defendants' goal was to persuade management to sell and lease back some of its properties, which they thought would help Big Lots' financial position.

"As anyone familiar with securities law knows, greenmail occurs when a corporation buys the shares of a 'greenmailer' at a premium to the market price to avert a takeover threat," Goldstein said in February. "As far as I know, that did not occur here, and no one has alleged that the defendants ever proposed to sell their shares to Big Lots."

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/03/texas-judge-finds-pump-dump-not-wire-fraud.html

Thursday, March 21, 2024

Texas Judge Finds Pump & Dump Not Wire Fraud

By Benjamin P. Edwards

A recent decision from Judge Andrew S. Hanen of the Southern District of Texas found that a pump and dump scheme could not be prosecuted as wire fraud.

I'm trying to wrap my head around it and struggling. It seems to find that the government could not prosecute a pump and dump scheme because the defendants only wanted to make money and did not want to deprive any specific people of money or property. The mere fact that the pump and dump scheme occurred through a market and not in direct personal transactions seems to have driven the decision.

Bloomberg's Matt Levine has covered it. It also made CNN.

Notably, the indictment even includes statements that the Defendants said things like "we're robbing ... idiots of their money."

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March 21, 2024, 10:43 AM PDT

Matt Levine's Money Stuff: Pump and Dumps Are Legal Now

By Matt Levine

Opinion

Bloomberg Law News 2024-03-22T10:24:27827232908-04:00

Matt Levine's Money Stuff: Pump and Dumps Are Legal Now

By Matt Levine 2024-03-21T13:43:26604-04:00

Programming note: Money Stuff will be off tomorrow and next week, back in April.

Nothing is securities fraud?

The simplest form of fraud is that you lie to someone and they give you money. Perhaps you give them something in exchange for their money, but you lie about its attributes. (They pay you for magic beans, but the beans are not magic.) Or perhaps you lie about giving them something and give them nothing. (They pay you for the Brooklyn Bridge, but you do not give them the Brooklyn Bridge.) Fraud is often illegal, though exactly how it is illegal will depend on how you do the fraud, and to whom, and what you are lying about.

For instance, doing fraud about securities is illegal under US federal law; this is called securities fraud. Securities fraud often takes the simple form: You lie to someone (about securities) and they give you money (for the securities). You tell people that you have started a company that has discovered cold fusion, you offer them a 1% stake in the company (stock, a security) for \$1 million, they pay you, you deliver the stock, but you were lying about the cold fusion. This is fairly standard; Elizabeth Holmes and Sam Bankman-Fried are recent high-profile cases of people convicted of fraud for lying about their companies to sell stock to investors.

But securities fraud often does *not* work that way. In modern public stock markets, it is possible to lie to people in a way that *costs* them money, and *gets* you money, without *them giving you the money*. Schematically:

1. You have some stock.
- 2. You lie about it.
- 3. The people who believe your lies buy the stock, anonymously, on the stock exchange, so it goes up.
- 4. You sell the stock at a profit, anonymously, on the stock exchange.
- 5. Eventually your lies are discovered and the stock goes back down again.

You made money (Step 4), and your victims lost money (Step 5), and your lies caused their losses and your gains. But you didn't necessarily sell the stock *to the victims*: You sold the stock on the stock exchange, they bought it on the stock exchange, and you have no idea who was on the other side of any of those trades. Quite likely the victims bought the stock from some sophisticated electronic market maker, and you sold the stock to some sophisticated electronic market maker, and the market makers didn't believe or even see your lies.

This is quite a common form of securities fraud. Companies, for instance, are regularly accused of doing securities fraud for lying about their business in a way that keeps their stock price up, even if they are not selling the stock themselves and lying directly to the purchasers. ("Everything is securities fraud," I often say.)

But this sort of securities fraud doesn't have to be done by the company. We have talked a few times about fake takeovers, where someone buys stock, puts out a fake press release saying that the company will be bought, and then sells the stock at a profit. More broadly, a "pump and dump" is a classic form of securities fraud in which someone — perhaps a promoter affiliated with the company, perhaps just a guy online — buys a stock (often a small, illiquid penny stock) and then tells lies about it. "This company discovered cold fusion," he says, to his email newsletter subscriber list, or on X or Reddit or whatever. People believe him, they buy the stock, the stock goes up (the pump), and he sells his shares (the dump) before the price crashes again. He doesn't necessarily sell the shares *to* his email subscribers or X followers, but their buying is what makes his sales profitable.

This is, if you think too hard about it, actually a bit of a puzzle. If you are charged with fraud, you might say: "Oh sure I lied about this stock, and it went up, and then I sold the stock. But nobody can *prove* that I sold the stock to *the people I lied to*. So how can I have committed fraud? As far as you know, the people I lied to never gave me money, and in fact I never even wanted them to. I just wanted them to buy the stock, so it would go up, so somebody else — some anonymous person on the stock exchange who never even heard my lies — would give me money."

I think most people think this is too cute. It sure *looks* like fraud: You lied, someone believed you, they paid money, a fairly mechanical process (the workings of the stock market) occurred, the money came to you. Surely that's fraud. In US securities law, this is called the "fraud on the market theory." In 1988, the Supreme Court endorsed the theory :

The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations. ...

The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of Rule 10b-5's reliance requirement must encompass these differences.

In face-to-face transactions, the inquiry into an investor's reliance upon information is into the subjective pricing of that information by that investor. With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. Thus, the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.

If you lie to *the market*, and the market believes you and gives you money, then that is fraud, even if the particular people who believe you are different from the people who give you money.

Or, I mean, that's what I thought yesterday.

In 2022, federal prosecutors and the US Securities and Exchange Commission brought securities fraud charges against a group of people who allegedly did pump and dumps using Twitter, Discord and a podcast. We talked about the case at the time. It was typically silly: The defendants went by online nicknames like "MrZackMorris" and "Mystic Mac" and "The Stock Sniper," the podcast was titled "Pennies: Going in Raw," the SEC complaint had pictures of a Lamborghini, and the defendants were publicly saying things like "I'll never get sick of pumping ... money into my followers bank accounts. LETS ALL GET RICH!" while they were privately saying things like "We're robbing f*cking idiots of their money."

So I couldn't *not* write about it. But it was kind of boring, really, just the most garden-variety pump and dump imaginable. "Pretty straightforward fraud," I called it. "I don't know why people keep falling for it," I wrote. There was nothing particularly novel or interesting about this case except I guess the names.

But yesterday a federal judge in Texas dismissed the criminal charges against MrZackMorris and friends in an absolutely wild opinion ruling that, in fact, a pump and dump is not securities fraud, because the people who bought the stock didn't buy it from the pumpers :

Unlike a traditional fraud case, in which the victim directly surrenders their property to the defendant (or an entity in the defendant's control), the investors here surrendered their property to the stock market at market prices, and in return, received the benefit of the bargain in the form of securities. Thus, the scheme did not deprive investors of their money or property through any misrepresentation; the misrepresentations deprived them only of accurate information necessary to make discretionary economic decisions.

And:

There are allegations that the Defendants intended to "maximize" their own trading profits and that Defendants in fact profited from their activities. These allegations adequately allege that obtaining financial gain was an object of the Defendants' scheme to defraud; obtaining financial gain, however, is only half of the equation. It is the other half of the equation — harming a victim's traditional property right — that is lacking.

The Indictment states that "the defendants used their credibility to maximize their own trading profits through their tweets and posts in Atlas Trading Discord, *often at the expense* of their Twitter followers and members of Atlas Trading Discord." That allegation, however, underscores the issue with the Government's allegations when accepted as true — the defendants may have "used their social media influence to pump and dump securities for their own financial gain," but the language of the Indictment indicates that losses to victims happened incidentally (i.e., "at the expense of") rather than as the "object of" the alleged scheme. Rather than plead a scheme aimed at harming someone's traditional property right, the scheme as pleaded is totally indifferent to its effect on the alleged victims. Many of the alleged victims may have actually made money. This was confirmed at the oral arguments. Moreover, even accepting as true that the alleged victims ultimately lost money on the stock market because the value of their shares went down, the Defendants did not obtain something of value from the entity to be deceived. The investors' trading losses are one step too far removed from the Defendants' alleged fraudulent misrepresentations.

What a weird opinion. Part of the theory here seems to be that it's only fraud if you *want* your victims to lose money, which ... I mean, then nothing is fraud, is it? Surely *everyone* who does a fraud is "indifferent to its effect" on the victims: The goal is to get money for yourself, not to cost the victims money, though of course that is the usual outcome. If you sell people fake magic beans, you will get money, which is what you want, and they will probably lose money, which you don't care about one way or the other. But if they turn around and resell the beans at a profit to some other sucker, you don't care, and you still did the fraud!

But the main part of the judge's theory is just that, since the victims bought stock on the stock market instead of directly from the pump-and-dumpers, the pump-and-dumpers could not have been doing fraud on them. Fraud requires a direct connection, a victim who "directly surrenders their property to the defendant." And in the public stock market, where everyone is buying and selling anonymously and probably through market makers, you can never really prove that the victim traded with the defendant.

Seems wrong to me, but what do I know! If it's right, though, it means that pump and dumps are completely legal, as are fake takeover offers : It's not fraud to lie about stocks and make money trading them, as long as you are only trading on the stock market and not directly with the people you're lying to. (Not legal advice! This is one weird opinion in Texas, don't try it at home.) If that's right, the stock market, and social media, are going to get pretty weird.

Reddit

There is a standard argument, whenever a big tech company does an initial public offering, about whether it "left money on the table." When a company does an IPO, it sells stock to investors at some price that the company sets with its bankers based on orders from investors, and then the next day the stock opens for trading, and *usually* it trades up. There is an "IPO pop"; the stock opens at a higher price than what the investors paid the company. The investors who bought in the IPO have an instant profit. And then venture capitalists on Twitter (now X) chime in and say "the company left money on the table, why sell stock to investors who could turn around and sell it immediately at higher prices, why couldn't the company just sell at those higher prices?" And they suggest things like direct listings or special purpose acquisition companies to accomplish that.

There are *answers* to their question, reasons that the company might decide to leave money on the table. The main answer is probably something like this: The company wants the investors to be happy. If it sells them stock that goes up, and they make a quick profit, they will be happy. This has various, somewhat fuzzy, long-term advantages for the company. If the investors are happy, they might support management's business plans; the company will be less vulnerable to activists or hostile takeovers. If the investors are happy, and later the company needs to raise more money, maybe the investors will buy more stock. If the investors are happy, the stock price will go up and *keep* going up, so that later when the company or its pre-IPO investors or its executives want to sell stock, they'll get a better price. Usually a fairly small fraction — say, 10% to 20% — of the company's stock is actually sold in the IPO; you want the price to be high when you sell the rest. Happy shareholders make for a higher long-term stock price.

None of these answers are perfect, because markets have short memories and the price is driven by fundamentals and supply and demand, not fuzzy investor happiness. If the company's business performs terribly for two years after the IPO, and it comes back to the market to raise more money in a stock offering, no investor is going to overpay for that stock because they remember the joy of the IPO pop two years ago. There is nothing *rigorous* about the idea that an IPO pop is good for the company in the long term. It just seems, on balance, that treating your investors nicely is the sort of thing that might pay off.

One nice thing about Reddit Inc.'s IPO is it makes that argument a bit more concrete. Reddit priced its IPO last night at \$34 per share, the high end of the pricing range that it marketed; it raised \$748 million in the IPO, on a fully diluted market capitalization of about \$6.4 billion. There was talk of pricing it *above* the range: Reddit had enough demand to sell the stock at \$35 or \$36 or whatever. But it went with \$34. As of noon today, the stock still had not opened for its first day of trading, so I don't know if there will be a pop or how big it will be, but the pre-opening indications were around \$50 so, probably.

If there is a pop, that will be nice for the institutional investors who bought in the IPO. But it will also be nice for at least some Reddit users:

About 8% of Reddit's IPO shares are being set aside for users and moderators who created accounts before Jan. 1, as well as some board members and friends and family of some employees and directors. Those shares won't be subject to a lockup, meaning the owners can sell them on the opening day of trading, according to Reddit's filings.

And the thing is, Reddit is *terrified* of its users:

Reddit said its millions of loyal users and moderators pose risks as well as a benefit for the company. Redditors have a historically combative relationship with the site, launching revolts over everything from racism on the platform to executives' staffing decisions.

Thousands of members of the WallStreetBets forum — which boasts around 15 million users and helped popularize meme stocks like GameStop Corp. — voted to boost a forum post about shorting Reddit's stock when it begins trading. Their reasons varied from the company's lack of profitability to competitive concerns.

One reason Reddit sold some of its IPO stock to its users was probably to buy their loyalty, to cause them to be literally invested in Reddit's success. You sell them stock, and they stick around to comment and moderate and provide value to advertisers and artificial intelligence scrapers. You give them a nice IPO pop, and they are happy. They, you know, vote down the WallStreetBets post about shorting the stock.

That's a risky move! If you sell them stock at \$34 and it *goes down*, they will be mad at you. They'll vote up the post about shorting the stock; they'll be surly and mischievous on their subreddits. Maximizing the price at which you sell the stock is nice, but not *that* important in the long run. Making sure that the Redditors who buy in the IPO have a good experience is probably more important.

Carbon risk transfer

I wrote the other day about hypothetical ways that a bank could “transfer” its carbon emissions to somebody else. The basic idea is that there are standards — mainly from the Partnership for Carbon Accounting Financials — for calculating the greenhouse gas emissions attributable to a bank's financing activities (that is, loans that it makes and holds) and its facilitation activities (that is, offerings that it underwrites). Banks face public and regulatory pressure to report low numbers under those standards, but they also want to lend money to oil companies. There is, perhaps, an opportunity for financial engineering: Is there a way for a bank to *make those loans*, but *get the emissions off its books* for PCAF accounting purposes?

So I wrote about a Bloomberg News story about some hedge funds who have some ideas, and I proposed some crude ideas of my own, but let's be honest: My post was mostly a call for financial engineering, a request for my readers to come up with ideas. And of course they did. Reader Andreas Seidel suggested a few, of which my favorite might be:

Deflating the emissions by inflating debt. The “base case” PCAF works is by multiplying emissions with the outstanding debt amount and dividing by equity and debt [I am oversimplifying a little]. If a bank lends \$100 to a company with \$50 equity and \$50 other debt, it would get 50% of the emissions. However, what if at the same time, the company borrows a billion from an off-balance-sheet SPV that invests all the money in money market instruments and uses these as collateral and essentially funds itself with the interest from the money market? Financed emissions drop to practically zero.

I love the idea of massively grossing up every company's balance sheet just for carbon-accounting purposes: “You can borrow \$100 from us to build an oil refinery, but only if you also set up a subsidiary that borrows \$1 billion from a special-purpose vehicle and invests it in money-market funds, for pure accounting reasons.” Maybe you could make the economics work, but the accounting *for the borrower* sure would look weird.

More generally, one wants some sort of intermediation. Like, a bank that lends money to an oil company is going to have a lot of financed emissions on its books. But what about a bank that lends money to an investment firm named Green Investments Ltd., which then lends it to an oil company? (What if Green Investments is only nominally an investment firm, and really just a pass-through vehicle with one asset and one liability — just a way to structure the loan to the oil company?) We have talked about this approach in the past, as a general way to make oil-company investments seem more environmentally friendly (and get them into environmental, social and governance investing indexes). I'm not sure it specifically works with PCAF standards for banks — “‘Follow the money’ is a key tenet for GHG accounting of financial assets,” says PCAF, “meaning that the money should be followed as far as possible to understand and account for the climate impact in the real economy” — but I'm sure someone is working on it.

Things happen

The mutual fund at 100: is it becoming obsolete? Justice Department Sues Apple in Antitrust Case Over iPhone. Nelson Peltz Wins Key Endorsement in Disney Battle. The mystery of the Hampstead mansion and the £1.4bn bitcoin haul. Short Sellers Up Their Wagers Against Commercial Real Estate Again. Why Arizona Law Firms Are a Hot Investment for Private Equity. Why Texas Is Banning Banks Over Their ESG Policies. NY Poised to Seize Trump Westchester Assets If Fraud Fine Is Unpaid. It's Hard to Imagine Who'd Want to Buy Trump's Seized Properties.

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- 1. Another possibility is: You offer them the stock, they pay you, you *don't* deliver the stock. This seems less common, since in standard frauds it is in some sense *free* for you to deliver the stock, and that strings them along longer than if you never deliver it. But there are versions like this. You tell people that you have access to shares of hot startups before their initial public offerings, they pay you for the shares, you don't have the shares and never deliver them.
- 2. Holmes was actually convicted of wire fraud, not securities fraud, though wire fraud is just fraud using phones or computers, and the substance of the fraud was about Theranos Inc. stock. Bankman-Fried was convicted of securities fraud for lying to FTX Trading Ltd.'s equity investors (venture capitalists), though that was sort of a sideshow to the bigger fraud of lying to FTX's customers, which was not really securities fraud. (The customers were customers of FTX, not investors in it.)
- 3. Much of this is quoted from previous decisions by lower courts, and I have omitted the internal quotation marks and ellipses.
- 4. I omit citations in the quotations from the opinion.
- 5. For instance, I am *certain* that Sam Bankman-Fried and Elizabeth Holmes did not *want* their investors or customers to lose money. Why would they *want* that? It just seems irrelevant to the question of whether they did fraud.
- 6. The judge's theory here comes from a 2023 US Supreme Court decision called *Ciminelli v. United States*. In that case, a contractor bribed public officials to get a \$750 million city contract and was convicted of wire fraud. The Supreme Court reversed his conviction, ruling that it is not wire fraud to "to deprive the victim of 'potentially valuable economic information' 'necessary to make discretionary economic decisions.'" The opinion is a little puzzling: It doesn't quite say that bribing public officials to win city contracts isn't wire fraud, only that the prosecution's theory for why it was wire fraud was wrong. For a long time, US prosecutors argued that bribes were wire fraud because they deprived the government of the "honest services" of its officials, but the Supreme Court eventually concluded that that's not fraud, only depriving victims of money is fraud. The "potentially valuable economic information" theory looks to the Supreme Court too much like "honest services," so it reversed the convictions. It seems to me like "we tricked the government into giving us a \$750 million construction contract" looks a lot like taking money from the government, but for some reason that theory was not at issue in the case. (See footnote 1: "An earlier indictment alleged that the Buffalo Billion contracts were the property at issue. But, to defend against the defendants' motion to dismiss, the Government relied solely on the theory that the scheme 'defraud[ed] Fort Schuyler of its right to control its assets.' ... The District Court then relied expressly on the right-to-control theory in denying the motion to dismiss.") Anyway, the application of this theory to pump and dump scams makes absolutely no sense to me but here we are.
- 7. The interesting question is: Does this make *insider trading* legal?
- 8. Also crypto, I guess, though how much weirder can that get.

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NOT FOR REPRINT

8 US Firms to Battle Out Didi Global Securities Class Action in US Court

Quinn Emanuel, Skadden, Wilson Sonsini, Sullivan & Cromwell, Gibson Dunn and O'Melveny are all representing parties in the lawsuit.

March 21, 2024 at 11:48 AM

Securities Litigation

By Jessica SeahT March 21, 2024 at 11:48 AM

The original version of this story was published on [Law.com International](#)

Chinese ride-hailing company Didi Global, its current and former directors, and the underwriters to its initial public offering on the Nasdaq in 2021 will have to face a class action lawsuit in the U.S. District Court for the Southern District of New York.

Plaintiffs claim that they were defrauded by the defendants, who they allege concealed and disobeyed directives from the Cyberspace Administration of China to postpone its 2021 listing until cybersecurity and privacy concerns were resolved. Didi had tried to have the case dismissed,

In a 54-page decision, U.S. District Judge Lewis A. Kaplan dismissed Didi’s argument that the plaintiffs had failed to state a claim. He also refused to dismiss claims against the banks that helped Didi with its debut.

Kaplan found that investors who brought the proposed class action sufficiently pleaded that Didi’s management knew that regulatory sanctions were likely if the company were to proceed with its IPO.

Following its debut, which was advised by Skadden, Arps, Slate, Meagher & Flom and Beijing-based Fangda Partners and raised over \$4 billion, the Cyberspace Administration of China banned Didi from registering new customers and removed the Didi Travel app from smartphone app stores.

Didi later announced plans to delist the U.S.-listed shares and was subsequently fined \$1.2 billion by the regulator.

U.S. plaintiff firms Rosen Law Firm and Glancy Prongay & Murray are acting for the plaintiffs, who are holders of Didi’s American Depositary Shares. Individual investor Junhong Cao is taking the lead role in pursuing the case.

A host of law firms, including Quinn Emanuel Urquhart & Sullivan and Skadden are acting for Didi Global Inc.

Quinn Emanuel is also representing defendants Will Cheng, who is the chief executive officer at Didi; Jean Qing Liu, a director and president of Didi; Stephen Zhu, a senior vice president at Didi; and Alan Zhuo, who is Didi’s chief financial officer.

Former Didi board members Daniel Zhang and Adrian Perica have also hired Quinn Emanuel to represent them.

Two other former board members, Kentaro Matsui and Martin Lau, are being represented by Sullivan & Cromwell and Gibson, Dunn & Crutcher, respectively.

Zhiyi Chen, a former Didi director, has hired Wilson Sonsini Goodrich & Rosati.

O’Melvey & Myers is acting for the underwriters: Goldman Sachs (Asia), Morgan Stanley & Co, JPMorgan Securities, BofA Securities Inc., Barclays Capital Inc. Citigroup Global Markets Inc., China Renaissance Securities (US) Inc., HSBC Securities (USA) Inc., UBS Securities, and Mizhuho Securities.

Securities class action lawsuits are common in the U.S. Most do not make it to trial and are dismissed or settled outside of court.

According to the [Stanford Law School Securities Class Action Clearinghouse](#), 32 filings of securities class actions related to data breaches have been filed since 2017. Of those 32, seven are against China-based companies. Including the claim against Didi, five were filed in 2021 and 2022.

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ALS Drugmaker's Execs, Board Allegedly Downplayed FDA Rejections

By Ben Miller 2024-03-22T12:40:36000-04:00
COURT: S.D.N.Y.
TRACK DOCKET: 1:24-cv-02139

Brainstorm Cell Therapeutics Inc.'s directors and top executives failed to disclose issues with the regulatory approval of the NurOwn treatment for amyotrophic lateral sclerosis, a shareholder derivative complaint says.

The drugmaker announced its submission of an application to the Food and Drug Administration in August 2022, and continued to tout the effectiveness of NurOwn in subsequent disclosures despite the regulator's multiple rejections of the treatment over efficacy issues, according to the complaint filed Thursday in US District Court for the Southern District of New York.

The directors and officers told investors in a November 2022 press release that the FDA had not accepted the application to bring NurOwn to market as a commercially available ALS treatment, while reiterating the company's commitment to pursuing approval from the regulator. That day, the company's share price fell more than 42% to close at \$1.67 per share on Nov. 10.

Almost a year later, the company announced in another press release that the FDA's review of its application had shown insufficient evidence of NurOwn's effectiveness in treating ALS. The FDA's briefing document on the matter revealed that the company had "grossly downplayed the risks associated with NurOwn," namely that the manufacturing information was "grossly deficient to ensure adequate product quality," according to the complaint.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X78AF978000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d...> 1/3



The following day Brainstorm's share price fell more than 47% to close at \$0.20 per share on Sept. 28, 2023, the stock's biggest single-day decline in nearly three years, according to data compiled by Bloomberg.

Brainstorm's top brass and board also subjected the company to legal liability in the form of a separate class action lawsuit, which is currently pending in the same district court, as well as internal investigations that will together cost company to spend millions of dollars, the complaint. Shareholders who filed the class action in November allege that the company and its top executives misled investors about the drug's effectiveness during the same approval process.

Shareholder Barry Holtzman seeks to recover damages on behalf of the company, as well as disgorgement of insider transaction profits and other compensation from the executives' and directors' for their alleged violations of the Securities Exchange Act. He also seeks legal fees, the complaint says.

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

The Brown Law Firm PC represents the plaintiff.

The case is Holtzman v. Lebovits, S.D.N.Y., No. 1:24-cv-02139, complaint filed 3/21/24.

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

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TripAdvisor's Maffei Loses Initial Appeal Bid on Nevada Move (1)

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- Judge declines to certify immediate appeal of damages ruling
- Original decision seen as road map for Elon Musk to move Tesla

TripAdvisor Inc. corporate leaders lost their initial bid Thursday to swiftly appeal a court ruling that tentatively allowed shareholders to seek damages over the company's move from Delaware to Nevada.

A Delaware judge, Vice Chancellor J. Travis Laster, declined to greenlight an immediate appeal by Greg Maffei, the company's controlling stockholder. Although the judge refused last month to block the reincorporation, Maffei has moved to appeal sections of the decision that kept alive the fiduciary breach claim seeking money damages from him. The Delaware Supreme Court could decide to take the case anyway.

Laster's Feb. 20 ruling for Delaware's Chancery Court drew significant attention about a month after Elon Musk threatened to move Tesla Inc. away from the state—where nearly 70% of Fortune 500 companies are incorporated—in response to a court decision invalidating his \$55 billion pay package. The TripAdvisor decision has been described as providing Musk with a road map for relocating Tesla.

Read More: Musk Gets Blueprint for Moving Tesla With TripAdvisor Opinion

Although Maffei has alluded to “the disproportionate media attention that the opinion received after Elon Musk’s high-profile comments about forsaking Delaware,” the legal framework covering immediate appeals “does not invite a trial court to consider the level of media attention,” Laster said Thursday.

“That does not mean that the Delaware Supreme Court could not consider it,” he said. “A trial court’s ruling on an application for interlocutory appeal is only a recommendation.”

Musk, who has said he plans to move the company to Texas, reincorporated the former Twitter Inc. in Nevada, a state where companies are allowed to waive many of the core shareholder protections that are a staple of Delaware law. Laster said in his TripAdvisor ruling last month that Maffei’s reduced legal exposure in Nevada could count as a conflict of interest requiring heightened court scrutiny.

Any potential damages would likely be based on “whether and to what extent the market reaction suggested harm” to ordinary investors left with fewer avenues, under Nevada law, to hold Maffei accountable for self-dealing or other fiduciary breaches, Laster has said.

Maffei and other directors at TripAdvisor and its immediate corporate parent, Liberty TripAdvisor Holdings Inc., are represented variously by Potter Anderson & Corroon LLP, O’Melveny & Myers LLP, Ross Aronstam & Moritz LLP, and Weil, Gotshal & Manges LLP.

The shareholders are represented by Bernstein Litowitz Berger & Grossmann LLP, Block & Leviton LLP, Friedman Oster & Tejtell PLLC, and Kaskela Law LLC.

The case is Palkon v. Maffei , Del. Ch., No. 2023-0449, 3/21/24 .

(Updates throughout with additional reporting and case information.)

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

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<https://www.law.com/delbizcourt/2024/03/21/ousted-chemours-execs-targeted-in-securities-action-over-corporate-books/>



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NEWS

Ousted Chemours Execs Targeted in Securities Action Over Corporate Books

ernstein Litowitz Berger & Grossman and Kessler Topaz Meltzer & Check are representing the plaintiff in the case, which brings Exchange Act claims against Chemours and several executives.

March 21, 2024 at 04:18 PM

Securities Litigation



Ellen Bardash



A shareholder filed a [securities suit](#) against Chemours in Delaware federal court on March 21, weeks after the company announced it was placing three members of its senior management team on leave for suspected tampering with financial reports.

Bernstein Litowitz Berger & Grossman and Kessler Topaz Meltzer & Check are representing the plaintiff in the case, which brings Exchange Act claims against Chemours, president and CEO Mark Newman, senior vice president and CFO Jonathan Lock, controller and principal accounting officer Camela Wisel and former senior vice president and CFO Sameer Ralhan.

On March 6, Chemours [reported](#) an investigation by the board's audit committee and independent outside counsel had found Newman, Lock and Wisel had attempted to get the company to reach its projected free cash flow targets by trying to push payments originally due in the fourth quarter of 2023 into the first quarter of 2024 and doing the opposite for receivables.

According to the complaint, Chemours had predicted free free cash flow of \$350 million for 2023, an estimate later reduced to \$325 million, but had been in the red on that metric for the first three quarters of 2023. Those targets were a key metric used to determine executive compensation, Chemours stated, and the investigation found similar actions were taken to boost free cash flow reported at the end of the previous year, though to a lesser extent.

Newman, Lock and Wisel have been on administrative leave since the announcement. The complaint also names Ralhan, who left the company in June 2023 and was succeeded by Lock, as a defendant for his signing off on the accuracy of Chemours' 2022 financials.

The company has reported the issue was reported anonymously to its hotline but not brought to the attention of its general counsel or audit committee until the 2023 financials were under review, and the investigation found that delay was a result of inadequate procedures for evaluating and escalating tips made through the hotline.

Between Feb. 13, when Chemours pushed its 2023 financial reporting back two weeks to Feb. 28, and Feb. 28, when it was announced the reports would again be delayed due to concerns about internal controls, the company's stock fell from \$30.49 to \$19.67 per share. The company has until mid-September to file its delayed 10-K with the SEC in order to comply with NYSE standards.

Chemours was spun off from DuPont and has operated independently since 2015, though both remain rarities among large corporations in that they're headquartered as well as incorporated in Delaware.

The complaint proposes a class of those who held Chemours stock between Feb. 10, 2023, when the company publicized its fourth quarter and year overall financial results for 2022, and Feb. 28, 2024, the day Chemours announced the filing of its 2023 annual report would be delayed and it was placing Newman, Lock and Wisel on administrative leave.

A spokesperson for Chemours did not immediately respond for comment.

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Chemours Allegedly Hid Execs' Scheme to Maximize Incentive Pay

By Ben Miller

- COURT: D. Del.
- TRACK DOCKET: [1:24-cv-00361](#)

Bloomberg Law News 2024-03-22T10:27:36992774314-04:00

Chemours Allegedly Hid Execs' Scheme to Maximize Incentive Pay

By Ben Miller 2024-03-21T15:00:06000-04:00

- COURT: D. Del.
- TRACK DOCKET: [1:24-cv-00361](#)

Chemours Co. failed to disclose that certain senior executives manipulated the company's free cash flow targets to maximize their cash and stock incentive compensation, concealing deficient accounting practices from investors for more than a year, according to a proposed shareholder class action filed Thursday.

The chemical company and suspended CEO Mark Newman, Chief Financial Officer Jonathan Lock, and Principal Accounting Officer Camela Wisel hid attempts to delay vendor payments and accelerate the collection of receivables between quarters, a scheme to secure additional incentive pay and equity, says the complaint filed in US District Court for the District of Delaware.

After a year of alleged misrepresentations, Chemours initially postponed the release of its fourth quarter and full-year 2023 financial results, citing the need for additional time to evaluate its financial reporting controls and to conduct an audit committee review. The day after the company announced the delay and internal review, Chemours stock declined 13% to \$26.42 on Feb. 14, 2024.

Then on Feb. 29, Chemours announced it would delay its annual report along with the suspension of Newman, Lock, and Wisel pending the completion of the review over ethics concerns. That day, Chemours company's stock fell 32% to \$19.67, the company's biggest single-day drop ever, according to data compiled by Bloomberg.



Chemours announced the audit committee's findings on March 6, revealing to that the suspended executives had engaged in efforts to delay vendor payments until the first quarter of 2024 and to expedite the collection of receivables for the previous quarter in order to meet cash flow targets, and in turn collect more incentive compensation. All three executive are named as defendants alongside ex-Chief Financial Officer Sameer Ralhan, who resigned in June 2023.

Shareholder Robert Taylor Jr. seeks to recover damages for a class of investors who acquired Chemours securities between Feb. 10, 2023 and Feb. 28, 2024, alleging that the company and executives violated the Securities Exchange Act. He also seeks legal fees, the complaint says.

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

Kessler Topaz Meltzer & Check LLP and Bernstein Litowitz Berger & Grossmann LLP represent the plaintiff and the proposed class.

The case is Taylor v. Chemours Co. , D. Del., No. 1:24-cv-00361, complaint filed 3/21/24 .

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EIG's Suit to Recover \$220 Million From Brazilian Fraud Tossed

By Bernie Pazanowski

- Investment lost after two oil entities admitted bribery scheme
- EIG didn't show plaintiff was directly involved in fraud

Bloomberg Law News 2024-03-22T10:27:03976474361-04:00

EIG's Suit to Recover \$220 Million From Brazilian Fraud Tossed

By Bernie Pazanowski 2024-03-21T15:38:21000-04:00

- Investment lost after two oil entities admitted bribery scheme
- EIG didn't show plaintiff was directly involved in fraud

EIG Energy Fund XIV LP and its associated funds didn't show that Keppel Offshore & Marine Ltd. aided and abetted a fraud scheme against it by two Brazilian oil entities in which EIG invested and lost \$220 million, a federal court said.

In fact, EIG didn't show that Keppel was actually involved in the fraud against it, Judge Paul G. Gardephe said Wednesday for the US District Court for the Southern District of New York. Keppel demonstrated that there was "no material issue of fact as to its actual knowledge of or substantial assistance in the investment fraud perpetrated by Petrobras and Sete on EIG," Gardephe said, granting summary judgment to Keppel on EIG's New York law claim of aiding and abetting fraud.

The two oil entities involved were Petroleo Brasileiro SA—the Brazilian state oil company—and Sete Brasil Participações SA—a company that Petrobras controlled—neither entity is a party in the case. Sete was established to raise money to drill for oil in an enormous oil field discovered off the coast of Brazil, and Keppel was awarded contracts by Sete to build "drillships" for the project. Keppel "specializes in offshore rig design, construction and shipbuilding," Gardephe said.

When EIG invested in Sete, it didn't know that Petrobras, Sete, and Keppel were engaged in a years-long bribery scheme in Brazil, Gardephe said. EIG contended that Petrobras and Sete defrauded EIG by failing to disclose the bribery scheme and that Keppel aided and abetted their fraud. Gardephe's opinion only involved the claim against Keppel.

"Drawing all reasonable inferences in favor of EIG, the evidence in the record indicates that Keppel knew that (1) EIG was an investor in Sete; (2) Petrobras and Sete were perpetrating a bribery scheme; and (3) some Petrobras/Sete investor materials—which Keppel received as a potential investor in Sete—did not disclose the bribery scheme," Gardephe said.

But there wasn't any evidence presented that showed "Keppel knew that any particular statement made by Petrobras or Sete was communicated to EIG," Gardephe said. There also wasn't any "evidence that Keppel was aware of a general strategy by Petrobras or Sete to conceal bribery and corruption-related risks from EIG," he said.

EIG also argued that Keppel substantially assisted Petrobras and Sete to defraud it. Rejecting that argument, Gardephe said that there was no evidence that Keppel drafted or disseminated any of the fraudulent statements made to EIG. Further, though the investment and bribery schemes were highly interdependent, EIG didn't prove Keppel was involved in the making of the fraudulent statements, he said.

Nor did EIG show that any of the acts undertaken by Keppel, such as giving EIG a shipyard tour, constituted substantial assistance of the investment fraud, Gardephe said.

"In sum, no reasonable juror could find that Keppel's alleged acts of concealment substantially assisted the investment fraud perpetuated by Petrobras and Sete," he said.

Kramer Levin Naftalis & Frankel LLP represented EIG. Cravath Swaine & Moore LLP and Clarick Gueron Reisbaum LLP represented Keppel.

The case is EIG Energy Fund XIV LLP v. Keppel Offshore & Marine Ltd. , 2024 BL 92996, S.D.N.Y., No. 18 Civ. 1047 (PGG), 3/20/24 .

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March 22, 2024, 10:27 AM PDT
Envision Board Must Face Employee Stock Ownership Plan Lawsuit
By [Jacklyn Wille](#)
Documents

-  [Docket](#)
-  [Tenth Circuit Opinion](#)

- 10th Cir. rejected attempt to steer dispute into arbitration
- Case involves factual disputes requiring discovery, judge says

Bloomberg Law News 2024-03-22T14:01:410579258-04:00
Envision Board Must Face Employee Stock Ownership Plan Lawsuit

By Jacklyn Wille 2024-03-22T13:27:28000-04:00
10th Cir. rejected attempt to steer dispute into arbitration
Case involves factual disputes requiring discovery, judge says

Envision Management Holding Inc.'s board of directors must face a lawsuit over the company's employee stock ownership plan in a case that's already been to the Tenth Circuit, a district judge said.

Judge Charlotte N. Sweeney on Thursday denied the board's motion to dismiss, saying the case involved factual disputes that should be resolved after discovery. Sweeney, who sits in the US District Court for the District of Colorado, announced her decision in a short docket entry that didn't include a lengthy analysis of the case.

The proposed class action targets a 2017 transaction in which the medical imaging provider's former owners sold their shares to a newly created employee stock ownership plan at an allegedly inflated price. Envision sought to have the suit sent to arbitration, pointing to a provision in the plan document requiring that disputes involving the plan be resolved through individual, binding arbitration.

A different Colorado federal judge denied the request in 2022, and the Tenth Circuit affirmed the following year. The plan's arbitration clause is unenforceable because it prevents plan participants from effectively vindicating certain statutory rights under the Employee Retirement Income Security Act, the appeals court said.

The board then sought to have the case dismissed, saying it was based on a "demonstrably false theory" and "conclusory allegations of wrongdoing."

The defendants are variously represented by Groom Law Group, Bryan Cave Leighton Paisner LLP, and Faegre Drinker Biddle & Reath LLP. The plan participants are represented by Cohen Milstein Sellers & Toll PLLC.

The case is Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs. , D. Colo., No. 1:21-cv-00304, electronic order 3/21/24 .

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[Class Action](#)
March 22, 2024, 6:50 AM PDT
Molina, Flexpath Defeat 401(k) Fund Class Action After Trial
By Jacklyn Wille
Documents

-  [Docket](#)
-  [Opinion](#)

- Defendants’ expert witness more persuasive than plaintiffs’
- Similar case over Wood Group 401(k) plan failed after trial

Bloomberg Law News 2024-03-22T13:19:21333415372-04:00
Molina, Flexpath Defeat 401(k) Fund Class Action After Trial

By Jacklyn Wille 2024-03-22T09:50:14000-04:00
Defendants’ expert witness more persuasive than plaintiffs’
Similar case over Wood Group 401(k) plan failed after trial

Molina Healthcare Inc. defeated a class action challenging the Flexpath Strategies LLC target date funds chosen as the default investment option in its retirement plan, according to a court ruling issued after a six-day trial.

The Flexpath funds outperformed most other similar target date funds and all three appropriate benchmarks during the relevant time period, Judge Stanley Blumenfeld Jr. said. Workers suffered no loss from the selection of these funds as the plan’s default option, which is fatal to their claims under the Employee Retirement Income Security Act against both companies, he said.

The opinion, docketed Thursday in the US District Court for the Central District of California, focused on the expert witnesses relied on by each party during the judge-only trial held in November. Blumenfeld said the participants’ expert witness was unreliable because he chose top performing funds to use as comparisons, seemed to be employing a “result-oriented analysis,” and “veered into what appeared to be advocacy” during his trial testimony.

Blumenfeld emphasized that his key conclusion in the case—that the participants failed to show they’d suffered a loss—didn’t hinge on which party has the burden of establishing loss. This question, which has driven a circuit split, didn’t need to be resolved because the participants would lose either way, he said.

The opinion comes one month after Flexpath and Wood Group US Holdings Inc. defeated a similar lawsuit after a nine-day trial.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XA3VNEAS000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...> 1/3

The lawsuit challenges a 2016 redesign of Molina's retirement plan in which more than \$210 million—nearly half the plan's value at the time—was moved to a suite of newly established target date funds from Flexpath. Molina employees say these funds were run by an inexperienced investment manager with no track record, and they followed a novel management style that "had never been used in any target date fund offered in a 401(k) plan."

Blumenfeld ruled in September that the Molina workers could go to trial on most of their claims, saying they presented sufficient evidence to suggest that these Flexpath funds were added to the plan through an imprudent process.

The Molina plan participants are represented by Schlichter Bogard LLP and William Edmonson of West Hollywood, Calif. Molina is represented by King & Spalding LLP. Flexpath is represented by O'Melveny & Myers LLP.

The case is *Mills v. Molina Healthcare, Inc.*, 2024 BL 95218, C.D. Cal., No. 2:22-cv-01813, opinion docketed 3/21/24 .

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/03/disney.html

Thursday, March 21, 2024

Disney

By Ann Lipton

I have literally no idea if this is correct, I'm putting it forward as a set of facts that I think demonstrates the very complicated era we're in from a corpgov perspective.

Ike Perlmutter was fired from Disney. It's very well known that he generally opposed attempts to diversify the MCU.

Nelson Peltz has teamed with Ike Perlmutter in his Disney proxy contest. Nelson Peltz is a Trump supporter. He's also friends with Elon Musk, who has increasingly become a right wing culture warrior.

Disney has long been in the crosshairs of the right. We all know about the fight with DeSantis and Don't Say Gay; we also know that a Disney shareholder accused the company of abandoning shareholder value in order to promote a political agenda.

Elon Musk is furious about Disney pulling ads from ex-Twitter, and has openly criticized Disney's diversity priorities. He's even bankrolling a suit by Gina Carano, alleging that Disney discriminated against her due to her conservative politics.

Bill Ackman has also criticized Disney for pulling ads from Twitter, specifically connecting that decision to the proxy fight with Peltz, and arguing that Peltz can right the ship.

ISS is also a right wing target, on accusations that it recommends in favor of "woke" corporate governance instead of sticking to shareholder value.

ISS – I have to assume responding to this complaint – is creating a new "ESG skeptic" voting template, to go along with its other templates like Climate, Catholic, and SRI.

Glass Lewis recommended that shareholders vote for the Disney slate, against Nelson Peltz. The Wall Street Journal recently published a fairly searing indictment of Peltz's Trian fund. And Jeffrey Sonnenfeld of the Yale School of Management, along with Steven Tian of the Yale Chief Executive Leadership Institute, argue that Trian has destroyed value at the companies where Peltz has won board seats.

ISS just recommended in favor of Trian in its proxy fight against Disney.

I have *no idea* if ISS's recommendation had anything to do with politics. Certainly, it offered very plausible reasons for backing Trian, and the proxy fight itself does not involve (explicit) political accusations either way, notwithstanding Ackman's hints.

But everything surrounding corpgov is so politicized these days that it's impossible *not* to ask whether ISS thought that endorsing Peltz would help mitigate some of the right wing criticism.

I guess my point is, whether it's a sign of the times or not, it is very hard to evaluate shareholder value in a manner that's divorced from the political environment. In the end, companies make money by appealing to popular tastes. Politicians have every incentive to insist that their side is the "popular" one, and therefore that any appeals to other audiences must be unpopular, and therefore unprofitable. Profitability is now a proxy for political popularity. And when politicians threaten to legislate those preferences – functionally a legal dictate as to what is and is not profitable – we can't tell if corporate actors are responding to the regulatory threats or their own independent judgment.

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<https://www.law.com/litigationdaily/2024/03/22/litigators-of-the-week-plaintiffs-reach-a-418m-market-shifting-settlement-with-realtor-group/>



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[Q&A](#)

Litigators of the Week: Plaintiffs Reach a \$418M Market-Shifting Settlement With Realtor Group

The National Association of Realtors agreed to changes that could trim the commissions paid to agents as part of the deal reached with co-lead counsel at Ketchmark and McCreight, Boulware Law, Williams Dirks Dameron, Hagens Berman, Cohen Milstein, and Susman Godfrey.

March 22, 2024 at 07:30 AM



Ross Todd
Editor/columnist



Journalists refer to it as “above the fold.”

The top half of the front page is reserved for the big stuff.

And there, last week, atop [The New York Times](#), [The Washington Post](#) and [The Wall Street Journal](#) sat stories about a \$418 million settlement that the National Association of Realtors reached to resolve antitrust claims brought on behalf of home-sellers across the country. Perhaps bigger than the number, NAR agreed to shake up the industry practice where the seller’s agent shares commissions—usually 5% to 6% of the total sale price—with the buyer’s real estate agent. Critics have argued that the practice inflates commissions and the overall cost of residential real estate in the U.S.

Our Litigators of the Week are co-lead counsel in the proposed settlement at **Ketchmark and McCreight, Boulware Law, Williams Dirks Dameron, Hagens Berman Sobol Shapiro, Cohen Milstein Sellers & Toll** and **Susman Godfrey**.

The Litigation Daily quizzed Cohen Milstein’s managing partner **Benjamin Brown**, a driving force in the first-filed suit in Illinois, about how the settlement is poised to change the real estate industry.

Lit Daily: What was at stake in this litigation?

Ben Brown: The amount of money Americans spend annually for real estate brokers is staggering and far higher than in other countries. We knew this litigation was the best chance private antitrust enforcement would have to fix this broken market. While there was potentially a significant monetary recovery if we won, we always recognized that the future value of significant injunctive relief would dwarf the amount of money that could realistically be recovered. So, from the start, the litigation team always approached this case with a goal of changing the way homes are listed and sold in the United States.

How did you and your firm get involved?

We were approached by a realtor and consumer advocate named Doug Miller. Doug had a wealth of knowledge about the industry but no formal antitrust or economics background. A small team at my firm worked for months with Doug and a couple of expert economists to build the case. Then we reached out to partners and friends in the bar to build a formidable litigation team to share the considerable risk of a litigation of this scope and magnitude.

Who all ultimately ended up working on the plaintiffs' team and how did you divide the labor?

There were many folks involved, but the key attorneys on the *Moehrl* team were my partner, **Robby Braun** and myself, **Steve Berman** and **Rio Pierce** from Hagens Berman, and **Marc Seltzer** and **Beatrice Franklin** at Susman Godfrey. Robby was really the ringmaster throughout the case but the three firms worked as equal partners. Later, we joined forces with **Brandon Boulware's** and **Mike Ketchmark's** firms from the Kansas City follow-on case. Their team's commitment to the litigation and trial skills added tremendous value. Despite the size of the combined team, we have managed to work well together as equal partners.

NAR has been the subject of a couple of DOJ probes over the past decades. Why did it take so long for a private antitrust suit of this sort to come together?

Private and public antitrust enforcers had been discussing broker commissions seemingly forever. But this was a particularly daunting case. Many firms could not afford it because the case required tens of millions of dollars of investment and looked like one that could never settle prior to trial. I also think previous antitrust cases, public and private, were not properly focused on the buyer broker commission rule. The industry currently mandates that sellers offer a blanket and effectively non-negotiable commission to buyer brokers. I think in a decade, people will look back and marvel at how it was that this persisted for so long.

The plaintiffs in the Missouri suit made it to trial first. Was there any tension over that pacing? You filed your case first and they made it to trial first, after all.

Candidly, there was a bit of tension at first. The Missouri case was a smaller case with smaller firms that piggybacked on our filing. But we litigated alongside those firms and soon saw how invested they were in doing the case the right way. Obviously, Mike Ketchmark in particular is a very experienced trial lawyer and the Missouri verdict has benefited all plaintiffs.

What did you learn about your claims by how that trial played out with [a \\$1.8 billion conspiracy verdict](#) in November against NAR and two brokerage firms?

The biggest thing we learned from the trial was how easily the jury understood our case. When you live with a case for years and get into the weeds, sometimes it's easy to lose sight of the forest. People understand that when the brokers together set up a rule that effectively eliminates all price competition for their services, prices are going to be inflated. People understand it's unnatural to have sellers paying for the brokers on the other side of their negotiations.

What do you anticipate the changes to industry practices included in this settlement agreement will mean for the residential real estate market across the country? How is it going to affect buyers and sellers?

The critical barriers to competition are coming down with this settlement. For a brief period, many brokers will try to hold onto the status quo, but change will come relatively quickly as aggressive brokers start offering better pricing and services to both buyers and sellers. Competition will drive lower pricing, better service and more choice. Brokers who are nimble and get in front of these trends will prosper. Brokers who dig in their heels will not. When the dust settles, lower transaction costs will be reflected in lower listing prices, relatively speaking.

After this NAR settlement, what remains of the broader antitrust litigation against other players in the industry? What

comes next?

The last chapters here have not yet been written. Both the *Moehr/* litigation and the Kansas City case continue against Berkshire Hathaway HomeServices and our team is also pursuing separate litigation against other large brokerages and companies that participated in the same conspiracy. There are also some brokerages and [Multiplre Listing Services] that may decline to opt-in to the MLS settlement and will not then enjoy a release for similar claims. Looking into a crystal ball, I think we will see a host of additional settlements and possibly some additional trials in coming years. But the injunctive relief in the NAR settlement is really the game-changer for future transactions.

What will you remember most about this matter?

Probably the microscope under which we litigated. I’ve litigated some other very high-profile cases, but this was on another level. When we first filed, I had 20 interview requests by the next day. I remember Robby Braun argued at a run-of-the-mill status conference where the only real agenda item was a briefing schedule, and press wanted quotes on it for stories they were running the next day. Within the days of the NAR settlement, the President of the United States mentioned it in a speech. That has been surreal.

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QUICK TAKES

Litigator of the Week Runners-Up and Shout Outs

Runners-up this week include litigators from Quinn Emanuel, Keller Postman, Latham, MoFo and Steptoe.

March 22, 2024 at 07:25 AM



Ross Todd

Editor/columnist



First up this week is **Ben Finestone** of **Quinn Emanuel Urquhart & Sullivan** who secured [a preliminary injunction](#) from a Delaware bankruptcy court this week for lenders who claim Indian edtech company Byju fraudulently transferred funds to a Florida hedge fund. U.S. Bankruptcy Judge John Dorsey in Wilmington, who previously issued [a bench warrant](#) for the hedge fund's manager after he no-showed a contempt hearing, this week issued an order freezing more than \$533 million in transferred funds.

A trial team at **Keller Postman** won a [\\$60 million verdict](#) last week against Mead Johnson in the first trial considering claims that cow's milk-based infant formula injures babies born prematurely. A state court jury in St. Clair County, Illinois, last week sided with plaintiff Jasmine Watson, whose baby was taking formula before he died at the hospital. Jurors found Mead Johnson was negligent and failed to warn that its formula could cause gastrointestinal inflammation called necrotizing enterocolitis, or NEC. The plaintiff's trial team included **Ashley Keller**, **Ben Whiting** and **Amelia Frenkel** of Keller Postman, **David Cates** of The Cates Law Firm, and **Sean Grimsley** of Olson Grimsley Kawanabe Hinchcliff & Murray.

Litigators at **Latham & Watkins** persuaded New York's high court to revive a challenge to New York City's property tax system. In [a 4-3 decision](#) this week, the Court of Appeals found that the plaintiff, an advocacy group called Tax Equity Now New York, or TENNY, had adequately pled claims under the federal Fair Housing Act and the state's property tax law "on the general basis that the system is unfair, inequitable and has a discriminatory disparate impact on certain protected classes of New York City property owners." Now-retired partner **Richard Bress** argued the case at the Court of Appeals. The Latham team also includes partners **Jimmy Brandt** and **Michael Bern**, of counsel **Jonathan Lippman**, the state's former chief judge, and associates **Eric Konopka** and **Graham Haviland**.

An intellectual property litigation team at **Morrison & Foerster** beat back a trade secret suit against client Kaiser Foundation Health Plan Inc. where the plaintiff was seeking more than \$900 million in damages. In a summary judgment opinion issued last month but [made public this week](#), Alameda County Superior Judge Stephen Kaus found that the plaintiff, ViQual Medical Technology, hadn't shown that Kaiser accessed or used any trade secret-protected information to develop its own wearable devices to transmit encrypted patient data. The judge wrote that despite "confusion over

what ViQual claims is a trade secret” there was “no evidence” that Kaiser either breached its non-disclosure agreement with ViQual or misappropriated any trade secrets. The MoFo team includes **Timothy Chen Saulsbury, Allyson Bennett, Whitney O’Byrne, Katherine McNutt and Joyce Li.**

A Steptoe team led by senior counsel **Carol Brophy** and partner **Dennis Raglin** represented Gulf Pacific Rice Co. in a case where a consumer advocacy group was seeking to force the company to flag products’ lead content under California’s chemical “right-to-know” warnings law, Proposition 65. Plaintiffs were also seeking civil penalties of up to \$2,500.00 per day per individual exposure. After a three-week bench trial, Los Angeles County Superior Judge Elihu Berle last week agreed with Gulf Pacific’s method for calculating the level of lead exposure from its products. The judge found that those levels fell within the law’s safe harbor for instances of naturally occurring toxins, and—crucially—the products required no warning label. The Steptoe trial team also included of counsel **Jade Jurdi**, and associates **Alex Avery and Jennifer Singh.**

Shout out to a team at **Cleary Gottlieb Steen & Hamilton** that got the firm’s defense win in a five-week bench trial for AG Financial Products Inc., or Assured, upheld in litigation seeking more than \$1.4 billion in the wake of the collapse of Lehman Brothers. New York’s Appellate Division, First Department turned back a request from Lehman Brothers International (Europe) to revive its claim regarding the valuation of certain financial contracts and upheld Assured’s win of more than \$50 million in counterclaims and interest. The appellate court last week found “no basis to disturb the trial court’s determination, which is based upon its resolution of conflicting expert testimony.” Cleary’s **Roger Cooper** argued the appeal for Assured.

Shout out to **Gary Sorden** and his team at **Cole Schotz** who scored a \$34.6 million infringement verdict for client GeigTech in a patent fight over window shade technology. A federal jury in Manhattan found all six claims of GeigTech’s patent were valid and willfully infringed and awarded the company nine times what it asked for. The trial team also included Cole Schotz members **Donald Ottaunick, Brian King, James Perkins, Aaron Davidson and Vishal Patel**, and associates **Pekham Pal, Gianna Zapata and Kristopher Ruiz.**

Shout out to **Peter Barbur** and **Rachel Skaistis** of **Cravath, Swaine & Moore.** A federal judge in Manhattan this week granted summary judgment to their client Keppel Offshore & Marine Ltd. in a lawsuit claiming the company’s failure to disclose its involvement in a Brazilian bribery scheme aided and abetted fraud on investment funds that poured more than \$220 million into Sete Brasil Participações S.A., a company under the control of Brazilian oil giant Petróleo Brasileiro S.A. U.S. District Judge Paul Gardephe found a lack of evidence that Keppel had actual knowledge that Petrobras and Sete were defrauding the funds or that Keppel provided any substantial assistance to any fraud.

Shout out to a team at **Pillsbury Winthrop Shaw Pittman** that got a ruling this week upholding an arbitration award of about \$450 million for client Huzhou Chuangtai Rongyuan Investment Management Partnership in a dispute over a Chinese LLC that owns and operates movie theaters. The Second Circuit this week upheld two district court summary judgment rulings confirming the award, the largest-ever Chinese arbitral award recognized in the U.S. The Pillsbury team included partners **Geoffrey Sant, Andrew Smith, Carol Lee, Ronald Cheng and Hugh Ray III** and associates **Sarah Madigan and Fangwei Wang.**

Shout out to **Bob Giuffra** and **Hilary Williams** of **Sullivan & Cromwell** who previously helped the U.S. subsidiary of German financial services giant Allianz SE reach a \$5.8 billion global settlement with the DOJ and SEC over the collapse of its Structured Alpha Funds. Last week they secured a ruling from a federal judge in Los Angeles dismissing securities claims brought on behalf of investors in Allianz ADRs who claimed they’d been misled by the subsidiary’s statements about the risk management of the funds and Allianz’s own broader risk management statements. U.S. District Judge Dale Fischer wrote that the risk management claims “are not automatically rendered false by the subsequent discovery of corporate mismanagement that circumvented those controls.”

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\$125 million settlement approved in class action over excessive Pacer fees

 [courthousenews.com/125-million-settlement-approved-in-class-action-over-excessive-pacer-fees](https://www.courthousenews.com/125-million-settlement-approved-in-class-action-over-excessive-pacer-fees)

Ryan Knappenberger

The settlement comes after the Federal Circuit ruled the judiciary can only use Pacer fees to cover the costs of electronic docketing and the system itself, nothing more.

WASHINGTON (CN) — A federal judge approved a \$125 million settlement deal in a class action Thursday, ordering the reimbursement for eligible users of the Pacer electronic court system.

The suit, brought by the National Veterans Legal Services Program, National Consumer Law Center and Alliance for Justice argued that the government had wrongfully charged excessive fees — by law only meant to cover the cost of providing records — to cover unrelated projects.

According to the plaintiffs' suit, initially brought in 2016, the Administrative Office of the U.S. Courts had used the excessive fees through the Public Access to Court Electronic Records system to cover the costs of installing audio systems to flat-screen televisions for jurors.

As of 2016, the government had additionally increased Pacer fees twice since 2002, when Congress passed the E-Government Act to limit costs for users, the plaintiffs said, placing further hurdles in the way of public access to the nation's judicial system.

U.S. Senior District Judge Paul Friedman noted Pacer's — and the case's — long and fraught history in an opinion issued Thursday.

"For over 15 years, Pacer fees ... have been a subject of controversy," the Bill Clinton appointee wrote. "As a result of the litigation in this case, the United States will return over \$100 million of these fees to users of Pacer. Today, this litigation substantially comes to a close."

Friedman noted that when Congress passed the E-Commerce Act 22 years ago, Pacer fees were set at \$0.07 per page.

"But Pacer fees continued to rise," Friedman said, at first by a single cent, to \$0.08 per page in 2005. At the time, the director of the judicial Administrative Office pointed to "congressional guidance that the judiciary is expected to use Pacer fee revenue to fund CM/ECF operations and maintenance."

Friedman pointed out in his opinion that by 2006, the judiciary had raised \$32.2 million of excess revenue from Pacer fees and expanded the sorts of programs funded by the fees.

Such programs included courtroom technology upgrades, an online “Jury Management System,” a Violent Crime Control Act notification system and a study to assess the feasibility of adding state court documents to the system.

The fees increased again in 2012 to \$0.10 per page, where the fees stand today.

Between fiscal years 2010 and 2016, Friedman said, the judiciary collected over \$920 million in Pacer fees, with the total amount collected each year in 2010 around \$102.5 million and increasing to \$146.4 million by 2016.

Throughout the nearly decadelong litigation, the government insisted the E-Government Act should be interpreted more broadly to allow the judiciary to charge fees “as it deems necessary” and make the additional funding categories lawful. Former U.S. District Judge Ellen Segal Huvelle, also a Clinton appointee, presided over the case until her retirement, after which Friedman took over.

The plaintiffs argued the statute barred the judiciary from charging more in fees “than is necessary to recoup the total marginal costs of operating Pacer.”

Huvelle rejected both arguments, finding the government’s too broad and the plaintiffs’ too narrow. She ruled that the judiciary was justified in using the fees to cover costs of managing the electronic filing systems, but should not have used them to fund studies and technology upgrades.

“Using Pacer fees for these expenses was improper because the programs failed to further ‘the public’s ability to access information on the federal court’s CM/ECF docketing system,’” Huvelle wrote at the time.

Both parties appealed Huvelle’s decision to the Federal Circuit. In August 2020, the appeals court affirmed, saying Huvelle “got it just right” in her determination that Congress had limited fees to just cover electronic docketing fees, not studies and upgrades.

The case was remanded to the lower court, where both parties moved to settle the suit, agreeing upon the \$125 million figure in May 2021 with the help of a mediator, reaching a final agreement in April 2023.

In July, a claims administrator sent a settlement notice to over 500,000 Pacer account holders, with 80% of the total \$125 million, or \$100 million, to be distributed. The remaining 20% — \$25 million — was set aside for attorney’s fees, litigation expenses and service awards to the named plaintiffs, with a \$10,000 limit on the awards per plaintiff.

Each account holder will either be allocated \$350, or the exact amount they paid during the relevant class period if less. Those who paid more will also receive a pro rata allocation from the remaining common fund.

The settlement will be disbursed by a claims administrator who will use the records of Pacer account holders to identify members and distribute the payments.

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Lawyer fight breaks out in PFAS case with huge settlement on the line

 legalnewsline.com/stories/657191495-lawyer-fight-breaks-out-in-pfas-case-with-huge-settlement-on-the-line

March 22, 2024

Attorneys & Judges

Richard M. Gergel | lapa.princeton.edu

CHARLESTON, S.C. (Legal Newsline) - The lawyers who negotiated a \$1 billion-plus settlement with DuPont and stand to take \$95 million in fees want a federal judge to punish lawyers trying to stand in the way.

Plaintiff lawyers from firms like Motley Rice and Napoli Shkolnik have filed a motion to sanction attorneys representing Metropolitan Water of Southern California in litigation over chemicals known as PFAS that have found their way into water systems across the country.

DuPont has agreed to pay \$1.185 to resolve their claims, and South Carolina federal judge Richard Gergel has given final approval of the settlement.

However, class counsel claims Met's lawyers - Jeff Kray of Marten Law, Met general counsel Marcia Scully and deputy GC Jill Teraoka - are now trying to cause problems with the settlement despite already opting out of it.

Met now wants to intervene in the case, possibly to preserve standing to appeal the settlement, which it wants to modified to address concerns. An email from Teraoka on March 9 demanded the changes and threatened intervention if they weren't made.

"Rather than timely file a motion to intervene, Met waited and launched a last-minute Saturday afternoon take-it-or-leave-it ultimatum, unilaterally demanding a response within 18 hours to its proposed changes, without any advanced notice to Class Counsel," the motion for sanctions says.

"This latest example of Met's flouting of the Local Rules, together with its counsel's long-documented antics of bad-faith conduct, should not be countenanced any longer."

Weeks earlier, Met's lawyers wrote Judge Gergel claiming an "improper and coercive communication sent by Class Counsel to a represented person (Met)."

The email was sent to Met's manager of water system operations and encouraged Met to rejoin the class. The letter complains class counsel did not send the email to Met's lawyers.

Met opted out of the class settlement on Nov. 30 but only now moves to intervene, class counsel complains.

"This recent dilatory conduct is emblematic of the bad faith in which Met and its counsel have conducted themselves throughout these proceedings, through repeated practices of misconduct and judicial abuse," the motion for sanctions says.

"Moreover, as their excuse for having waited until the last minute to file an untimely intervention, Met's counsel disingenuously states that their motion to intervene was occasioned by the Court's issuance of the Final Order and Judgment Approving the Settlement Agreement.

"But nothing in the law required them to wait for that order to issue."

PFAS are a group dubbed "forever chemicals" because they persist in groundwater and human tissue for years. They are found in firefighting foam and consumer products.

The federal government is attempting to set a maximum contaminant level for PFAS, even as groups call the move premature. Much of the research regarding their effect on the human body is disputed.

Class members are local water districts that will implement PFAS remediation measures. It is estimated that DuPont is responsible for only 3% to 7% of the total PFAS liabilities.

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NEWS

'There Is No Conspiracy': Lawyer Fires Back Against Sanctions Motion in DuPont Water Settlement

Jeff Kray, of Marten Law in Seattle, accused of holding up DuPont's \$1.19 billion water contamination settlement, called class counsel's sanctions motion an "intimidation tactic" based on a "fantastical conspiracy theory."

March 21, 2024 at 05:27 PM

Legal Ethics and Attorney Discipline



Amanda Bronstad
staff reporter



What You Need to Know

- Kray called the sanctions motion full of 'innuendo, conjecture, spurious allegations, and conclusions unsupported by fact or law.'
- The sanctions motion comes after the Metropolitan Water District of Southern California filed a notice to appeal the Feb. 8 final approval of the DuPont deal.
- DuPont's settlement resolves claims from thousands of retail water providers with public water drinking supplies contaminated with the toxic chemical PFAS.

A Seattle lawyer accused of holding up DuPont's \$1.19 billion water contamination settlement fired back on Wednesday, insisting that class counsel's sanctions motion was an "intimidation tactic" based on a "fantastical conspiracy theory."

Jeff Kray, of Marten Law, said class counsel failed to meet with him before filing a [March 15 sanctions motion](#) against him and two in-house attorneys for his client, the Metropolitan Water District of Southern California. The sanctions motion comes after another attorney for the water district, Mitchell Tilner, of Horvitz & Levy in Burbank, California, filed a notice before the U.S. Court of Appeals for the Fourth Circuit to appeal the [Feb. 8 final approval](#) of the DuPont deal.

Far from alleged "abusive, unreasonable and vexatious behavior," Kray's response says he is merely representing the best interests of his client, who opted out of the settlement but has moved to intervene for purposes of appealing.

"Rather than allow the process to play out, however, at each step class counsel has used its leadership position to strong-arm those who voice concerns about the settlement's terms," he wrote. "Now, discontented by the filing of a notice of appeal, class counsel lash out again with an unjustified motion for sanctions."

The motion, he wrote, was full of “innuendo, conjecture, spurious allegations, and conclusions unsupported by fact or law.”

“There is no conspiracy,” Kray argued. “The situation is simple. Metropolitan remains sincerely concerned with the scope of the settlement terms and the impact it will have on Metropolitan and other wholesalers and their customers.”

Kray declined to comment. He previously told Law.com, “We’re confident we and our clients are using the proper judicial processes to raise objective concerns about this settlement.”

In a statement on behalf of class counsel, Paul Napoli, of Napoli Shkolnik, said it would have been improper for plaintiffs to bring up the sanctions motion.

“The legal process requires a formal notification through appropriate channels, not informal discussion or threats,” he wrote in an email. “Moreover, Mr. Kray, as a seasoned professional, should have been aware that his conduct could potentially lead to a sanctions motion.

“It is expected that individuals in his position have a clear understanding of the legal standards and ethical obligations governing their actions,” Napoli added. “His denial of any sanctionable behavior does not align with our observations and the evidence we have presented.”

Napoli is class counsel with Elizabeth Fegan, of FeganScott; Michael London, of Douglas & London; Joe Rice of Motley Rice; and Scott Summy of Baron & Budd.

‘Not Some Cloak-and-Dagger Maneuver’

DuPont’s settlement resolves claims from thousands of retail water providers whose public drinking water supplies were contaminated with the toxic chemical PFAS, or perfluoroalkyl and polyfluoroalkyl substances. 3M [reached a similar settlement](#) for between \$10.5 billion and \$12.5 billion.

The sanctions motion accuses Kray and the water district’s in-house lawyers, General Counsel Marcia Scully and Deputy General Counsel Jill Teraoka, of holding up the settlement by filing frivolous objections, libeling class counsel and disseminating the wrong information to class members.

In his response, Kray said U.S. District Judge Richard Gergel, at a Dec. 14 final approval hearing, had instructed lawyers to work out their differences. On Dec. 27, he wrote class counsel with his concerns, which included releases in both settlements that appeared to prevent the water district, which is a wholesaler, not a retailer, from future claims against DuPont or 3M. Class counsel rejected his suggested amendments to resolve those issues, he wrote.

He also clarified that he represented four other clients who objected to the settlement—the Washington cities of DuPont, Tacoma and Vancouver, and the North Texas Municipal Water District—at the final approval hearing. The Southern California water district had similar concerns but by then had opted out of the settlement, so it couldn’t object.

“Metropolitan’s decision to opt-out was not some cloak-and-dagger maneuver,” he wrote.

The first he heard of the sanctions motion was the day it was filed, he wrote, noting that class counsel had informed another lawyer for Metropolitan, Eric Fastiff, of San Francisco’s Lieff Cabraser Heimann & Bernstein, days earlier.

Fastiff declined to comment.

“Class counsel cannot, and have not, shown bad faith,” Kray wrote. “Stripped down, the motion is a grossly improper attempt to eliminate any serious involvement by class members in the carefully designed settlement process set out by the federal rules and overseen by the court. The manner in which class counsel wield the authority the court has

entrusted to them is patently wrong, and their coercive tactics should not be permitted to proceed.”

Gergel, who is overseeing multidistrict litigation in the District of South Carolina over PFAS in aqueous film-forming foams used by firefighters, heard oral arguments on Feb. 2 in the 3M settlement but has yet to grant final approval.

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Litigation

March 22, 2024, 5:49 AM PDT

Wozniak’s Success in YouTube Case May Cue Blue Check Liability

By [Maia Spoto](#)

- YouTube may be liable for verification badges in Bitcoin scam
- Judge mulls opinion in separate social media addiction case

Bloomberg Law News 2024-03-22T13:59:35282448781-04:00
Wozniak’s Success in YouTube Case May Cue Blue Check Liability

By [Maia Spoto](#) 2024-03-22T08:49:57000-04:00
YouTube may be liable for verification badges in Bitcoin scam
Judge mulls opinion in separate social media addiction case

A California court will weigh whether social media platforms’ verification badges are platform-created speech that could trigger liability for companies like Google’s YouTube and X over harmful content created by others.

California’s Sixth Circuit Court of Appeal ruled in a March 15 published opinion that YouTube isn’t responsible for a hoax that altered footage of Apple Inc. co-founder Steve Wozniak and other tech icons to sell a fake Bitcoin giveaway—with one potential exception.

YouTube’s verification badges, present on content creators’ channels where the hoax ads appeared, might count as YouTube’s speech and could be enough to put the tech company on the hook, the appeals court said, remanding the case back to a trial court to decide.

Wozniak’s attorney, Brian Danitz, said the ruling is recognition that the federal law that protects internet companies from liability for third-party speech on their platforms—Section 230 of the Communications Decency Act—“is not a get out of jail free card.”

“It’s very difficult to get these cases against these social media companies past go because Section 230 is read so broadly by courts,” said Danitz, of Cotchett, Pitre & McCarthy LLP. “That’s why this is such an important decision.”

The idea that verification badges could be considered a form of first-party speech could threaten Elon Musk’s X, the social media platform formerly known as Twitter. As part of a trend of spoofs in 2022, an X user who paid for a blue check posed as Eli Lilly & Co. and posted, “We are excited to announce insulin is free now.” The pharmaceutical giant’s stock subsequently fell more than 4%.

“If the court really does come back and say any service that uses verification is essentially holding out that account as legitimate and therefore adopts, in part, the content the account is putting out there, that’s going to serve as quite a big problem for Musk, who allows anyone to become verified,” said Jess Miers, Senior Counsel at Chamber of Progress. Chamber of Progress is a trade group that represents technology companies.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X43QM6H0000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93...> 1/3

'An Easy Case'

Section 230 of the Communications Decency Act has been considered a very strong protection for technology companies—and has been interpreted as such to allow companies on the internet to grow rapidly. The bulk of this opinion confirms the strength of Section 230, said Eric Goldman, a professor at Santa Clara University School of Law and co-director of the High Tech Law Institute.

The federal law applied “in the face of a very vigorous attempt by the plaintiffs to overcome it, and in a circumstance where consumers suffered substantial harm,” Goldman said. “And yet, the court treated it as an easy case.”

The appeals court didn't rule or make any findings about whether the badges actually contributed to the Bitcoin scam's harms. It only returned the case to the trial court, where Wozniak can amend his claim about the badges and try again.

There, it's likely that Wozniak will have a hard time making his argument stick, said Felix Wu, a professor at the Benjamin Cardozo School of Law. Wu is also the faculty director of the Cardozo Data Law Initiative.

Wozniak will need to convince the court that harm arises from the interaction between a badge that wrongly states an account is his and the content of the scam, Wu said.

“There's some skepticism about the extent to which the plaintiffs' claims are really hinging on the existence of the verification badges, as opposed to the existence of the scam itself, which the court says YouTube is not ultimately responsible for,” Wu said.

Social Media Addiction Cases

The opinion comes as hundreds of social media addiction lawsuits allege that companies like Meta Platforms Inc. bear responsibility for a youth mental health crisis.

The social media defendants in Los Angeles County Superior Court, including YouTube, Google LLC, and Alphabet Inc., pointed to the Wozniak opinion in a Monday court filing, saying the appeals court's ruling shows plaintiffs can't avoid Section 230 by presenting negligent design claims.

These kinds of claims typically argue that the underlying content isn't responsible for harming users, but instead point blame at the design of the service, like its recommendation algorithm.

When presented with this argument during a hearing Wednesday, Judge Carolyn B. Kuhl was skeptical that the Wozniak ruling helped the social media platforms in the case before her.

The fact that the appeals court didn't strike every one of Wozniak's claims and let him take another shot at the negligent design argument shows that at least some of these claims can be viable against Section 230, she said.

The appeals court opinion suggests, Kuhl said, that YouTube could be liable for harm that “flows at least in large part from what was done by the third party content.”

Wilson Sonsini Goodrich & Rosati is representing YouTube.

The case is Wozniak v. YouTube LLC , Cal. Ct. App., 6th Dist., No. H050042, opinion published 3/15/24 .

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Meta can't escape class action claiming Facebook 'Potential Reach' for ads misled advertisers

 norcalrecord.com/stories/657197385-meta-can-t-escape-class-action-claiming-facebook-potential-reach-for-ads-misled-advertisers

March 21, 2024

U.S. Ninth Circuit Court of Appeals Judge Sidney Thomas | Administrative Office of the United States Courts, Public domain, via Wikimedia Commons

Social media giant Meta can't delete a class action accusing them of allegedly misleading advertisers on Facebook by overstating the number of human eyes that may see their ads when boosted on Facebook, a divided appeals panel has ruled.

However, the ability to move forward with the case could still hang in the balance, as the panel has directed a lower court to take another look to determine if one of the businesses that served as a lead plaintiff on the suit should be allowed to continue suing.

On March 21, a panel of judges from the U.S. Ninth Circuit Court of Appeals in San Francisco split 2-1 on the question of whether Meta's estimates of "Potential Reach" for boosted posts and ads on Facebook should expose them to potentially big money class action fraud claims.

The majority decision was authored by Ninth Circuit Judge Sidney R. Thomas, with concurrence from Circuit Judge J. Clifford Wallace.

Circuit Judge Danielle J. Forrest dissented, saying the majority got the case wrong.

The majority opinion upheld a decision from U.S. District Judge James Donato, of the Northern District of California.

The case has been pending in San Francisco federal court since 2018, when attorneys from the firms of Cohen Milstein Sellers & Toll, of Washington, D.C. and New York, and the Law Offices of Charles Reichmann, of Kensington, California, filed the lawsuit against Facebook.

The lawsuit was filed on behalf of named plaintiffs, business DZ Reserve and individual Cain Maxwell. According to court documents, DZ Reserve is a now-closed e-commerce business that allegedly spent over \$1 million on 740 advertising campaigns on Facebook. Maxwell allegedly sold firearm mounts online and allegedly spent \$379 on 11 Facebook advertisements.

The appellate decision notes the court is unsure if Maxwell remains in operation.

The lawsuit specifically claims that Meta greatly overstated the "potential reach" of Facebook ads when estimating "reach" to potential advertisers at the time they "boosted" their posts or created an ad to post on Facebook.

The plaintiffs asserted that Facebook would inflate their "reach" estimates by measuring "reach" by number of Facebook accounts on the social media platform to which the ad might be pushed. However, the complaint said those Facebook accounts perhaps greatly exceed the number of actual humans who might see the ad, allegedly misleading advertisers into paying more than they otherwise would have to post their ads on Facebook.

They claim Meta's alleged "Reach" inflation amounted to fraud and violations of California's unfair competition law.

The appellate decision notes that Meta "has taken steps to increase the accuracy of Potential Reach by working to remove fake and duplicate accounts, as well as by updating the calculation of Potential Reach to include only accounts that were shown an advertisement in the last 30 days."

However, the judges noted that the changes weren't enough to bring into balance the number of accounts and the number of "living humans" to which the ads might be shown. They noted "non-human entities like businesses and clubs have accounts, some people have multiple accounts, and some people and bots create fake accounts."

Meta fought back against the lawsuit by asserting the claims can't be allowed to proceed as a class action.

While they did not dispute the "Potential Reach" estimates did not match actual humans seeing the ads, Meta asserted the actual experience of advertisers varied too greatly to make all the claims similar enough to lump together into one case.

They further argued that since at least one of the named plaintiffs is out of business, and the other's status is unclear, the class action also should end because the case no longer has actual plaintiffs with standing to sue.

The majority partially sided with Meta on the question of standing, ruling that DZ Reserve no longer exists as a viable business, and can't have standing to sue. They, however, returned the case to Judge Donato to determine if Maxwell can continue to sue.

But the majority sided with the plaintiffs on the broader question of whether they can demand Meta pay for allegedly committing fraud.

The majority said Meta "misstates the misrepresentation at issue, insisting that the misrepresentation is the numerical discrepancy between people and accounts, rather than the fact that Meta substituted people for accounts."

"It is undisputed that Potential Reach was shown to every advertiser on Meta's Ads Manager, Potential Reach was always expressed as a number of people, and Potential Reach always estimated a number of accounts," the majority said. "Class members were thus exposed to uniform misrepresentations about the potential reach of their advertisements."

In dissent, Judge Forrest said the panel should have sided with Meta on all counts. Forrest said too many questions still remain about the degree to which advertisers did rely - or should have relief - on Facebook's "Potential Reach" estimates.

"In the cases where we have upheld certification of a fraud class based on misrepresentation of an estimate, the class members were given the same estimate," Forrest wrote. "That is not what happened here, and the evidence does not establish that the millions of unique Potential Reach calculations that Meta provided to the class had the same degree of inflation."

Forrest noted that judges "could conclude that some, but not all, Potential Reach calculations presented to the class members were fraudulently misleading."

The judge said these questions should have persuaded the court to pull the plug on the class action.

The case has been remanded to Judge Donato at the Northern District of California for further proceedings.

Plaintiffs have been represented by attorneys Geoffrey Graber, Andrew N. Friedman, Karina G. Puttieva, Madelyn Petersen and Eric Kafka, of Cohen Milstein Sellers & Toll.

Meta was represented by attorneys Andrew B. Clubok, Susan E. Engel, Margaret A. Upshaw, Elizabeth L. Deeley, Melanie M. Blunschi, Nicholas Rosellini, Nicole Valco and Samir Deger-Sen, of Latham & Watkins LLP, of Washington, D.C., San Francisco and New York.

Meta Platforms must face advertisers' class action, US appeals court says

 [reuters.com/legal/meta-platforms-must-face-advertisers-class-action-us-appeals-court-says-2024-03-21](https://www.reuters.com/legal/meta-platforms-must-face-advertisers-class-action-us-appeals-court-says-2024-03-21)

Jonathan Stempel

Figurines with computers and smartphones are seen in front of Facebook logo in this illustration, July 24, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

March 21 (Reuters) - A divided U.S. appeals court said Meta Platforms (META.O) , opens new tab must face a class action by advertisers that accused the Facebook and Instagram owner of overcharging them by fraudulently inflating the number of people their ads might reach.

In a 2-1 decision on Thursday, the 9th U.S. Circuit Court of Appeals in San Francisco said advertisers could sue for damages as a group over Meta's claims about the "potential reach" of their ads.

Advertisers said the metric used measured the number social media accounts, not the lower number of actual people, and inflated the number of potential viewers by as much as 400%.

The court also decertified a separate class seeking injunctive relief, meaning the advertisers cannot sue as a group, because it wasn't clear that the main plaintiff had legal standing to sue.

A dissenting judge would have decertified both classes. The advertisers have estimated Meta could owe more than \$7 billion of damages, court papers show.

Meta and its lawyers did not immediately respond to requests for comment.

The Menlo Park, California-based company has said ads generate "substantially all , opens new tab" of its revenue, which totaled \$134.9 billion in 2023. Net income was \$39.1 billion.

Class actions afford potentially greater recoveries at lower cost than if plaintiffs are forced to sue individually.

Circuit Judge Sidney Thomas wrote for the majority that because Meta provided the same alleged misrepresentation about potential reach, advertisers could try to prove that their alleged damages stemmed from a "common course of conduct."

The class covers potentially millions of individuals and businesses that have paid for ads on Facebook and Instagram since Aug. 15, 2014.

Their lawsuit included a claim that senior executives knew that duplicate and fake accounts, including from bots, inflated the "potential reach" metric, but took steps to cover it up.

Circuit Judge Danielle Forrest, in a partial dissent, said she would decertify the damages class because of individualized questions about what advertisers understood about what Meta was telling them before they bought ads.

Geoffrey Graber, a lawyer for the advertisers, said he looked forward to taking the damages case to a jury.

The case is DZ Reserve et al v Meta Platforms Inc, 9th U.S. Circuit Court of Appeals, No. 22-15916.

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Reporting by Jonathan Stempel in New York; Editing by David Evans and Bill Berkrot

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March 21, 2024, 2:22 PM PDT

Meta to Face Class Action Claims Over Ad Reach, Court SaysBy [Mike Vilensky](#)**Documents** [Opinion](#) [Docket](#)

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- Advertisers say Meta misled them on number of ad viewers
 - 9th Circuit: Damages class can proceed; remand on injunction class

Bloomberg Law News 2024-03-22T13:20:385338019-04:00

Meta to Face Class Action Claims Over Ad Reach, Court Says

By Mike Vilensky 2024-03-21T17:22:39000-04:00

Advertisers say Meta misled them on number of ad viewers

9th Circuit: Damages class can proceed; remand on injunction class

Meta Platforms Inc. failed to persuade a federal appeals court to nix a class action lawsuit from advertisers alleging the company overstated the number of people seeing Facebook and Instagram ads.

The US Court of Appeals for the Ninth Circuit on Thursday upheld a district court ruling that the proposed group – people who purchased ads on Meta platforms from August 2014 to the present – could sue as a class.

The lead plaintiffs allege Meta expressed the reach of ads as a number of people when it was actually a number of accounts, representing fewer people. The class, which is seeking damages, could number in the millions, they said.

The Ninth Circuit rejected Meta's arguments that advertisers using its self-service ad-creation system, the Ad Manager, don't have similar enough claims to sue as a group.

"Given that all class members encountered the same misrepresentation about Potential Reach—the nucleus of the fraud—the slight variations in the other information available on the Ads Manager did not defeat the commonality of the misrepresentation," Judge Sidney R. Thomas wrote for the panel's majority.

But, the Ninth Circuit vacated lower court's ruling that the plaintiffs could lead another class suing for an injunction.

One proposed lead plaintiff doesn't have standing because he hasn't presented evidence of a future injury, such as plans to put more ads on Meta, the appeals court said. A second lead plaintiff didn't have an opportunity to argue standing to seek an injunction before the district court, so the Ninth Circuit remanded to the lower court as to that plaintiff for that inquiry.

In a dissenting opinion, Judge Danielle J. Forrest said not all class members may have been deceived even if they were given the same information, so they shouldn't be able to sue as a group.

"Meta represented to the advertiser class that Potential Reach is an estimate of people who could potentially view a given ad," Forrest said. "That Meta provided a common description of Potential Reach does not automatically establish that this description was a misrepresentation as to all class members."

Judge J. Clifford Wallace joined in the majority opinion.

Cohen Milstein Sellers & Toll PLLC represents the plaintiffs. Latham & Watkins LLP represents Meta.

The case is DZ Reserve v. Meta Platforms, Inc. , 9th Cir., 22-15916, 3/21/24

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American Express sued in merchants' class-action over 'swipe' fees

 [reuters.com/legal/transactional/american-express-sued-merchants-class-action-over-swipe-fees-2024-03-22](https://www.reuters.com/legal/transactional/american-express-sued-merchants-class-action-over-swipe-fees-2024-03-22)

Mike Scarcella

An office building with the American Express logo is seen in the Central Business District of Sydney, Australia, June 3, 2020. REUTERS/Loren Elliott/File Photo GLOBAL BUSINESS WEEK AHEAD Purchase Licensing Rights , opens new tab

March 22 (Reuters) - American Express (AXP.N) , opens new tab has been hit with a proposed class action lawsuit in Rhode Island federal court accusing it of overcharging thousands of U.S. merchants for credit and debit card fees on consumer transactions. Ten retail plaintiffs including a delicatessen, fine clothier, florist and furniture store filed the lawsuit , opens new tab on Thursday seeking a court order to block American Express policies that they said violated U.S. antitrust law.

American Express restricts competition through its use of “non-discrimination provisions” to bar merchants from encouraging customers to use payment cards with lower transaction fees, the lawsuit said.

American Express and the plaintiffs’ attorneys did not immediately respond to requests for comment.

The merchants’ claims in the case mirror swipe-fee allegations lodged against Visa (V.N) , opens new tab and Mastercard (MA.N) , opens new tab in a coordinated legal proceeding in Brooklyn federal court over payment card fees.

Visa and Mastercard by the end of 2013 had abandoned their rules stopping merchants from steering customers to use lower-cost means of payment, according to the lawsuit.

A federal appeals court last year in Manhattan upheld a \$5.6 billion settlement involving claims from about 12 million retailers against Visa and Mastercard. Other related litigation is ongoing against the two companies.

“It is Amex’s rules alone that prohibit U.S. merchants from using discounts, surcharges, verbal prompting, signage, and other techniques to incentivize shoppers to use cheaper payment cards,” the lawsuit said.

The lawsuit said binding arbitration clauses between American Express and merchants have hindered efforts to resolve the plaintiffs’ claims.

The 5,155 merchants at the heart of the new lawsuit first brought claims individually in arbitration. But American Express refused to pay a \$16 million arbitration invoice, and so the cases were administratively closed, according to the lawsuit.

The merchants' complaint said American Express was in default in the arbitration proceeding and could not now move to keep the merchants from bringing their claims in a U.S. court.

"For many of these merchants, credit-card swipe fees eat up roughly half of what the small business owner can take home at the end of the month," according to the lawsuit.

The case is 5-Star General Store et al v. American Express Company, U.S. District Court for the District of Rhode Island, No. 1:24-cv-00106-MSM-LDA.

For plaintiffs: Deepak Gupta of Gupta Wessler; Scott Harris and Peggy Wedgworth of Milberg Coleman Phillips Bryson Grossman; Tracey Kitzman of Song P.C.; and Robert Cohen of Law Offices of Robert W. Cohen P.C.

For defendant: No appearance yet

Read more:

Mastercard, Visa lose bid to end parts of swipe fee litigation

Visa, MasterCard \$5.6 bln settlement with retailers is upheld

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Reporting by Mike Scarcella

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GSK US Defeats Class Certification in Robitussin Strength Suit
By [Shweta Watwe](#)
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- Inconsistent purchase testimony hinders class representation
- Consumers allege Robitussin strength labels were misleading

Bloomberg Law News 2024-03-22T13:21:43375085385-04:00
GSK US Defeats Class Certification in Robitussin Strength Suit

By Shweta Watwe 2024-03-21T18:00:38000-04:00
Inconsistent purchase testimony hinders class representation
Consumers allege Robitussin strength labels were misleading

GlaxoSmithKline Consumer Healthcare Holdings US LLC defeated a class certification motion from consumers alleging the company was overcharging for “Maximum Strength” Robitussin cough syrup that had a lower concentration of active ingredients than its “Regular Strength” product.

The plaintiffs bringing the proposed class action gave inconsistent testimony about whether they purchased the Maximum Strength Robitussin during the relevant timeframe and would have to “devote substantial attention to overcoming their damaging deposition testimony and addressing concerns regarding their credibility” about their purchases, JudgeJ. Paul Oetken of the US District Court for the Southern District of New York said Thursday. As a result, the plaintiffs are inadequate class representatives he said.

Seven consumers from six states brought the suit in 2018 and alleged GSK reformulated the Maximum Strength Robitussin to increase the price per dose. They sought to represent a nationwide consumer class.

Before June 2016, Regular Strength Robitussin had 20mg of dextromethorphan hydrobromide and 200 mg of guaifenesin, its active ingredients. The Maximum Strength version contained 20mg of of DXM and 400 of guaifenesin.

After June 2016, GSK reformulated the Maximum Strength product by doubling the dosage's liquid volume without changing the active ingredients' concentration which meant the dose was half as concentrated as the previous formulation. Regular Strength wasn't modified, and the two versions were sold in equally sized bottles before and after the change, though Maximum Strength was more expensive. In 2018, GSK also reformulated the Maximum Strength cough syrup and similarly doubled the dose's liquid volume without changing the active ingredients' concentration.

The consumers brought claims for purchases of the Maximum Strength Robitussin between June 2016 and the summer of 2018, when the regular version was also reformulated.

GSK sought summary judgment on five plaintiffs' claims because none of them produced evidence showing they actually bought Maximum Strength Robitussin during the time period. They didn't produce receipts and their loyalty memberships didn't show they made purchases of the product between 2016 and 2018. But they also stated that they don't always use their loyalty memberships for purchases, and Oetken said they "are not necessarily required to produce such receipts."

Still, Oetken granted GSK summary judgment on plaintiff Cynthia Carillo's claims because her testimony wasn't sufficient enough to show that she likely purchased the cough syrup in the two-year window. The remaining plaintiffs can proceed with their claims, albeit individually.

Necessary Comparisons

GSK failed to argue the consumers weren't deceived by the "maximum strength" label because for a consumer to understand that label referred only to the dose and not to the fact that Maximum Strength Robitussin had the maximum concentration of active ingredients would require comparing both bottles, Oetken said. He noted that it's not reasonable to expect a consumer to cross-check ingredient lists and do math to see if she is comparing equivalent dose volumes.

Oetken also rejected GSK's argument that the consumers can't prove the alleged deception caused their purchase decision. Even if the plaintiffs read dosing instructions before their purchase, they wouldn't have had all the relevant information to make their decision since they'd need to pick up the regular strength bottle and compare, Oetken noted.

Additionally, plaintiffs who might not have had the option to purchase Regular Strength Robitussin could have still been harmed because they might not have purchased the other version but for the "maximum strength" label, Oetken said.

The consumers are represented by Hagens Berman Sobol Shapiro LLP.

GSK is represented by Skadden Arps Slate Meagher & Flom LLP.

The case is *Woodhams v. GlaxoSmithKline Consumer Healthcare Holdings US LLC*, S.D.N.Y., No. 1:18-cv-03990, 3/21/24.

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Financial Times Tells CalPERS Not to Go Further Into the Private Equity Haunted House

 nakedcapitalism.com/2024/03/financial-times-tells-calpers-not-to-go-further-into-the-private-equity-haunted-house.html

March 22, 2024

I can't recall a time where a top financial publication has taken to lobbying, hard, against an investment strategy that has boatloads of fund managers and professional hangers-on benefitting from its largesse. Yet the Financial Times has in the space of barely more than a week, published two pieces, one a very long and extremely well done FT Alphaville overview, from the early days of private equity to the present, with emphasis on how its returns have been falling, yet there are all sorts of pretenses that that isn't happening. Then after reporting that CalPERS is planning to greatly increase its allocation to private assets, both private equity and private debt, the pink paper releases a story that says, bluntly, that this looks like a Bad Idea.

Mind you, we have been writing for over a decade about how private equity did not out-perform on a risk-adjusted. And there have been tacit admissions of that. Over the last decade plus, benchmarks have been made more forgiving. Since the early days of the strategy, the rule of thumb, embraced by the likes of Wilshire and other portfolio consultants, was 300 basis points (3%) over the an equity index, which was nearly always the S&P 500. The risk premium was to compensate for private equity's higher leverage and its illiquidity. Some experts argued 300 basis points was too low. And using the S&P 500 was also a gimmie: S&P 500 members are much bigger than private equity portfolio companies, so they should have been compared to a smaller company index. But heavens, private equity might come up short!

It has now hit the point where any pretense at intellectual honesty has gone out the window. CalPERS justifies its decision to commit more bigly to private equity by saying it offers the best potential return. Not the best risk adjusted potential return, mind you. Chasing absolute return and not considering risk is a mug's game. But then again, this is CalPERS.

There is plenty of corroborating evidence for this view. For instance, dean of the quant analysis industry, Richard Ennis, has looked in depth at so-called "alts," as in alternative investments over a series of papers and articles. Some headlines from our posts making use of his findings:

Quelle Surprise! High Fee "Alternative Investments" Produce Serious "Negative Alpha" as in Underperformance as Managers Get Rich
As CalPERS Doubles Down on Private Equity, New Analysis Finds CalPERS' Private Equity Returns "Based on a Mirage;" Another Study Reaffirms that Private Equity Drags Down Performance
Endowments' Money Management

Destroying Value Demonstrates Economic Drain of Asset Management Business Quelle Surprise! New Study Confirms that Public Pension Funds Use Flattering Benchmarks to Hide Failure to Beat Simple Indexing; CalPERS Is a Case Study

But before we go deeper into the Financial Times' recent takedowns of private equity pretenses to having built a better investment mousetrap for their investors, as opposed to creating a ginormous fee machine for themselves and their many minions, these critiques miss another element, which is the societal costs. Public pension fund enthusiasm for private equity is a variant of the Lenin quip: Public pension funds are buying the rope which is being used to hang them.

Private equity is a major vehicle for wealth transfer upward. Private equity managers regularly cut pay, employment levels and benefit levels, including breaking defined benefit plans and cutting contributions to defined contribution plans. And in the not-infrequent event of bankrupting a business, the losses are bigger and wider-ranging, not just to employees but to vendors and landlords.

The effect of this asset-stripping is to stain local and state government budget by crimping real wages of ordinary workers. That in turn hurts sales and property tax receipts. CalPERS' employers, as in the government entities that pay to maintain the CalPERS benefits to their workers, are complaining about the costs, which have been taking a larger and larger share of their budgets. And exiting CalPERS is no solution; the giant fund manager has a draconian formula for assessing an exit charge (the short version is they have to immediately pay CalPERS the total actuarially expected amounts due to be paid for the employees in the plan, with very conservative, as in low, investment return assumptions).

Let us return to the Financial Times' private equity critiques. The first was an impressive long-form treatment in FT Alphaville, Is private equity actually worth it? by Robin Wigglesworth. This treatment was about as good as it gets in long-form article format, and I have to add that I am envious in the day it tidily covered many of the issues Naked Capitalism has explored over the last decade. The article starts from the decision of a private equity holdout, the Norwegian sovereign wealth fund, to join the private equity party. to the inception of private equity in the 1970s, when it was first called bootstrapping and then leveraged buyouts.

The article describes the analysis by some prominent private equity boosters, claiming private equity beats stock market returns. Wellie, private equity companies are vastly more leveraged than public companies, so if that was not happening on average, there would be something extremely wrong with that picture. Again, not a single one of these cheerleaders mentions risk-adjusted returns. The all tout absolute returns. If any of them tried that argument on an MBA or CFA exam, they'd get a failing grade.

Wigglesworth then turns to a long (but still partial!) list of academic studies questioning the notion that private outperforms, starting with the classic 2005 Private Equity Performance: Returns, Persistence and Capital Flows by Steven Kaplan and Antoinette Schoar in the prestigious Journal of Finance.

Again, due likely to length and reader patience constraints, the article includes only some of the items from the industry's rap sheet of questionable return computation: the use of internal rates of return, and later papers that pointed out that to the extent the industry outperformed, the fund managers took it for themselves in eyepopping fees (estimated by CalPERS at 7% per annum'; the fact that no limited partner knows what they are paying is another scandal).

Other known problem with private equity returns:

The lack of independent valuations, which is acceptable no where else in fund management;

The resulting fact that private equity fund managers have been found to or even are widely acknowledged to exaggerate value: right before raising big funds (as in years 3-5 into their current fund), when equity markets are bad, and late in fund life, by carrying unsaleable dogs at their purchase price. Even though the fund managers say the lying in years 3-5 is of no matter since they have to back it out later, it goose those widely used IRRs. Similarly, lying about value in bad markets makes fund risks look way lower than they are.

Another not-widely acknowledged fact is that the appearance of superior returns comes from the very early days of leveraged buyouts, where there were many over-diversified, under-valued conglomerates that could be busted up, with the parts selling for more than the value of the former whole, and vintage years 1995 to 1999, when the returns were spectacular due to the money allocated to private equity having thinned down after the late 1980s leveraged buyout crisis (masked by the bigger and more visible S&L crisis), so that from 1990 to say as late as 1995-1996, there were plenty of companies to be bought cheaply. When those spectacular return years rolled out of comparisons, the industry case looked weaker.

And the Norwegian state fund and now CalPERS bulking up in private equity continues the returns-depressing trend of too much money chasing too few deals.

The article also goes through some claims we have debunked, that co-investing is a magic solution (it isn't; there is often adverse selection in the deals the general partners offer up for that) or that a big investor can extract better terms (they can't; most investors insist on most favored nation clauses, so the way big fish get better prices is because the general partner, at fundraising time, has a pricing schedule, with larger commitments getting better prices).

Now to the even more fun Financial Times dissing of CalPERS' plan to bulk up in private equity and private debt. To quickly dismiss the private debt part, a contact just wrote:

Of course, they [private equity fund managers] don't engage at all the evidence that excess return in PE is gone. I want to a credit conference a few weeks ago where a professor gave the keynote arguing that there is no alpha in lending. So cross that off the list as well as an opportunity.

No alpha = no extra performance generated by managers. Investors might as well go to BlackRock and buy the cheapest comparable index.

Here is the Financial Times' recap from Calpers to invest more than \$30bn in private markets:

Calpers, the US's biggest public pension plan, is to increase its holdings in private markets by more than \$30bn and reduce its allocation to stock markets and bonds in an effort to improve returns.

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 throat-clearing comes in a related article, Calpers bets on leveraged equities

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. ... 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 is 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...
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.

There is a LOT more where that came from.

The article also criticized CalPERS' barmily low correlation assumptions (as in its claim as to how much private equity will reduce portfolio risk by not moving up and down in synch with other assets), which is something we have assailed before. The pretense that it happens (and the claims are typically way more modest than the CalPERS assumption), it's due to bad accounting, namely not correcting for the one-quarter reporting lag for private equity, and fibbing about losses in bad markets.

But so many are so dazzled by what is now increasingly recognized as sham superior returns that the hopium keeps growing. If someone out there is making more money, or thinks he is, others will follow the herd.

See Eileen Appelbaum and Rosemary Batt in *Private Equity at Work*, for example. They looked carefully at one seen as reputable study that found the reverse, and found a fundamental misdirection in the sample construction that when corrected, led to the opposite findings, that PE-bought companies cut pay and headcount more than carefully-matched peer companies.

This fund had previously sought the advice of Oxford professor Ludovic Phalippou, who in a very detailed analysis of industry returns, showed why private equity didn't earn enough to compensate for its additional risk. He did advise the fund to invest in private equity...but only in market downdrafts when they could buy secondary interests on the cheap.

AI can narrow justice gap, but women lawyers slower to adopt it, Berkeley study shows

 [reuters.com/legal/transactional/ai-can-narrow-justice-gap-women-lawyers-slower-adopt-it-berkeley-study-shows-2024-03-21](https://www.reuters.com/legal/transactional/ai-can-narrow-justice-gap-women-lawyers-slower-adopt-it-berkeley-study-shows-2024-03-21)

Karen Sloan

Words reading "Artificial intelligence AI", miniature of robot and toy hand are pictured in this illustration taken December 14, 2023. REUTERS/Dado Ruvic/Illustration/File Photo
Purchase Licensing Rights [↗](#), opens new tab

March 21 (Reuters) - Artificial intelligence can enhance access to justice for low-income Americans, but legal aid attorneys need better access and training on tech tools that bolster lawyer efficiency, a Berkeley Law study found.

Among the legal aid lawyers who were given access to AI tools ChatGPT-4, CoCounsel, and Gavel by Berkeley, 90% said those programs increased their productivity, and 75% said they would continue to use them, according to the Center for Law and Technology at the University of California, Berkeley School of Law. The study [↗](#), opens new tab is slated to appear in an upcoming edition of the Loyola Los Angeles Law Review.

Researchers surveyed more than 200 legal aid lawyers on their use of AI and gave 91 of them access to a slate of AI tools for one or two months to evaluate how they used the technology and its impact on productivity. The study appears to be the first field experiment of lawyers using AI, wrote Berkeley Law professor Colleen Chien and Munger, Tolles, & Olson partner Miriam Kim, who authored the report.

Overall, 21% of the legal aid attorneys surveyed said they were already using AI. But the study found a significant gender gap in the adoption of AI tools — a notable finding given that 75% of legal aid attorneys are women. Among the survey respondents, men were three times as likely as women to already be using AI in their work. That usage gap dissolved after lawyers were given access to AI through the study, however.

The report recommends AI companies and legal services organizations be proactive in encouraging attorneys, especially women, to use the technology. They should also make it affordable and provide support on how to use it effectively, the report said.

Access to justice has been ongoing problem in the U.S., where 92% of low-income Americans' civil legal needs go unmet, according to the Legal Services Corporation. Technology has long been held out as a potential solution to the so-called justice gap, though there is skepticism that AI can make much difference without significantly boosting legal aid funding.

The Berkeley field study participants used AI on a wide variety of tasks, including summarizing court opinions; brainstorming arguments and counterarguments; legal research; drafting; automating documents; and translating. The subset of participants who received added training and support on the various AI programs tended to have better outcomes, researchers found.

While the majority of study participants said they plan to continue using AI, many expressed concerns over AI tools producing inaccurate results — known as hallucinating — as well as data privacy and confidentiality, the study found. The tools cut down on the time it took to complete certain tasks, but participants noted they also spent time verifying and correcting AI-generated work.

Read more:

Artificial intelligence poised to hinder, not help, access to justice

Another NY lawyer faces discipline after AI chatbot invented case citation

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Reporting by Karen Sloan

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Karen Sloan

Thomson Reuters

Karen Sloan reports on law firms, law schools, and the business of law. Reach her at karen.sloan@thomsonreuters.com

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More AI-Related IP Lawsuits Filed Against OpenAI and Microsoft

K [dandodiary.com/2024/03/articles/artificial-intelligence/more-ai-related-ip-lawsuits-filed-against-openai-and-microsoft](https://www.dandodiary.com/2024/03/articles/artificial-intelligence/more-ai-related-ip-lawsuits-filed-against-openai-and-microsoft)

March 21, 2024



By Kevin LaCroix on March 21, 2024

Posted in Artificial Intelligence



Some readers may recall that at the end of last year, the New York Times very publicly sued OpenAI and Microsoft for copyright infringement, in connection with the defendants' alleged use of the newspaper's content for purposes of training chatbots and

other AI tools. Although this kind of lawsuit is pretty far outside the blog's usual bailiwick, the litigation is still of interest as the landscape of AI-related litigation continues to develop. Now it appears that other media organizations are joining the bandwagon, as two different groups have now filed lawsuits against OpenAI, and, in one case, also against Microsoft. These latest cases are described in an interesting March 5, 2024 post on the *SDNY Blog* ([here](#)).

The two new lawsuits were both filed by news organizations, one suit brought by The Intercept Media ([complaint here](#)), and the other brought by Raw Story Media and AlterNet Media ([complaint here](#)). Both lawsuits allege copyright infringement in violation of the Digital Millennium Copyright Act (DMCA). The plaintiffs allege that their copyrighted works were used to train OpenAI's generative artificial intelligence systems and large language models, including OpenAI's artificial intelligence ChatGPT model.

The complaint filed by Raw Story Media and AlterNet Media alleges that in deciding what information to include in the ChatGPT training materials,

Defendants had a choice: they could train ChatGPT using works of journalism with the copyright management information protected by the DMCA intact, or they could strip it away. Defendants chose the latter, and in the process, trained ChatGPT not to acknowledge or respect copyright, not to notify ChatGPT users when the responses they received were protected by the journalists' copyrights, and not to provide attribution when using the works of human journalists.

The plaintiff allege that the defendants knew that including in their training sets plaintiffs' content without identifying author, title, and copyright information would "induce ChatGPT to provide responses to users that incorporated material from Plaintiffs' copyright protected works or regurgitated copyright-protected works verbatim or nearly verbatim." The plaintiffs allege further that ChatGPT users would be "less likely to distribute ChatGPT responses" if they were made aware of the author, title, and copyright information applicable to the material used to generate those responses.

The plaintiffs seek to injunctive relief to require all of the plaintiffs' copyrighted material from the defendants' training sets, as well as statutory damages.

Discussion

These new lawsuits, and others like them that other media sources have filed against OpenAI and other AI companies, certainly represent an interesting test for the DMCA. The statute is now 26 years old and was built for a very different technological time and place. The Act's effectiveness in handling alleged AI-generated violations depends on how courts interpret its provisions and adapt them to emerging technologies like AI.

Even if the DMCA can be made to apply to AI as the plaintiffs seek to do in these lawsuits, the defendants are not without defenses. Among other things, the defendants are likely to argue that their use of plaintiffs' material is permitted under the copyright law, as the law permits users to use copyrighted material to create new, different, or innovative products.

It may well be that the plaintiffs' objective in bringing this litigation is to try to bring OpenAI to the negotiating table, so that the parties can hammer out acceptable use policies for the plaintiffs' copyrighted material.

However, if it ever gets to that stage, the potential statutory damages available could be significant, depending on how many of its works with respect to which the plaintiff is able to show that the defendants infringed; the Act provides for statutory damages of not less than \$750 per work infringed and not more than \$30,000 per work infringed. However, if the infringement is willful, the court can award up to \$150,000 per work. If the plaintiffs are able to show that many of its works were infringed, the aggregate damages could be substantial.

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NEWS

Revenue, Profits Soar at Susman Godfrey as Fees Pour in From Trial Wins, Settlements

Houston-founded trial firm Susman Godfrey nearly doubled its revenue in 2023, and more than doubled profits per equity partner as lawyers handled high-stakes, high-profile matters.

March 19, 2024 at 01:52 PM



Brenda Sapino Jeffreys
Senior reporter



The original version of this story was published on [Texas Lawyer](#)

What You Need to Know

- Houston-founded trial firm Susman Godfrey posted a record 2023, with significantly higher revenue and profits.
- The firm handled 25 trials or arbitrations in 2023, and it added lawyers to meet demand.
- One large matter was representing Dominion Voting Systems in a defamation suit against Fox News that settled on the eve of trial with the defendant agreeing to pay \$787.5 million.

Taking at least 25 matters to trial in 2023, growing trial firm [Susman Godfrey](#) nearly doubled its revenue in 2023 and more than doubled its profits per equity partner, as fees poured in from a string of trial victories and settlements.

A number of high-profile matters contributed to the revenue boost in 2023, including the highly watched [Dominion Voting Systems](#) defamation suit against Fox News that settled on the eve of trial with the defendant agreeing to pay \$787.5 million to Dominion, a Susman Godfrey client.

Revenue at the Houston-founded firm soared to a record \$744.2 million in 2023, up 98.9% when compared with \$374.2 million in 2022. Even with 8.9% more lawyers, revenue per lawyer was \$3.595 million, 82.6% higher than \$1.969 million the year before.

Net income reached \$629 million at the Houston-founded trial firm, an increase of 118% when compared with \$288.5 million in 2022. With 7.1% more equity partners, profits per equity partner came in at \$6.989 million, 103.5% higher when compared with \$3.435 million the prior year.

The firm had 207 lawyers in 2023 on a full-time-equivalent basis, up 8.9% when compared with 190 in 2022. Equity partners totaled 90 on an FTE basis, up 7.1% when compared with 84 year year before. The firm has no non-equity partnership, and all six of the new equity partners were promoted from the associate ranks.

The firm's growth stems from hiring more associates and of counsel to meet client demand. The lawyer head count includes equity partners, partnership-track associates, of counsel who are typically more senior and experienced lawyers who are not on partnership track, and staff attorneys, said Vineet Bhatia, a partner in Houston who is a co-managing partner of the firm.

"The hiring was done, because there is a need for additional lawyers to service our clients and the new matters being brought in by the partners," he said.

Kalpana Srinivasan, a partner in Los Angeles who also is a co-managing partner, said the firm's lawyers participated in at least 25 trials and arbitrations during the year, including some that settled mid-trial, a level of work that resulted from the backlog coming out of the pandemic, but also growth of the firm's practice and its partnership. While partners at all levels bring in work, she said the firm's lawyers are sometimes also brought in other firms to handle big-ticket trials.

Trial work was exceedingly profitable for Susman Godfrey in 2023. The firm's founder, Stephen Susman, who [died](#) in 2020 from COVID-19 while recovering from a bicycle accident, was among the first trial lawyers use contingency fees on commercial litigation.

According to Srinivasan, 71% of the firm's fees in 2023 came from contingent-fee work, 21% from fixed-fee hybrid work, and 8% from hourly. That compares with 43% contingent-fee, 41% from fixed-fee hybrid, and 16% from hourly in 2022.

Those percentages reflect the lifecycle of litigation, Srinivasan said. "We had some very big hits in 2023," she said.

"We have 40-plus years of experience in contingent-fee matters. We know you can't precisely designate when a case is going to resolve or generate revenue, but that's OK, because we have so many of them in the pipeline," she said.

Knowing the firm would set a revenue record in 2023, Susman Godfrey [beat the market](#) in December 2023, paying year-end associate bonuses ranging from \$140,000 to \$360,000—amounts that triple the Big Law scale at the upper levels—and also pay associates at the new, higher market salary scale next year.

Ensuring that everyone working at the firm shared in its success, the firm additionally paid special bonuses on top of traditional annual bonuses to all 270 employees, including 131 non-attorney employees. (For associates, the special bonus was included in their year-end bonuses.)

In addition to fees from Dominion, other suits that resulted in fee revenue in 2023 include the firm's representation of the city of Baltimore in class action litigation against Bank of America related to the setting of the Libor rate during the financial crisis. The firm also received a reported \$101 million in fees from a \$307.5 million settlement in "cost-of-insurance" litigation, representing the non-profit Brach Family Foundation on behalf of policyholders against AXA Equitable Life Insurance Co.

3/22/24, 9:07 AMRevenue, Profits Soar at Susman Godfrey as Fees Pour in From Trial Wins, Settlements | The Recorder

In addition to Houston, the firm has offices in New York, Los Angeles and Seattle, but other locations are not top of mind at the firm, Srinivasan said. The firm’s practice is national, she notes.

“If you look at those trials from 2023, they span all parts of the country, places where we do have offices like Texas, and places where we absolutely don’t like Florida,” she said. “We really do work as a single firm and have a very single-firm culture and that’s allowed us to work collaboratively.”

Bhatia said 2024 is “off to a great start,” and the firm won a \$287 million verdict against Samsung in February, with a couple very large trials set for later in the year.

The courtroom and financial success in 2023 is a signal of what the firm has accomplished and the potential for the future, particularly because of the breadth of the matters that contributed to the revenue and the number of partners involved, Srinivasan said.

“We had partners in their 30s, 40s, 50s, all generate substantial matters. It felt like a critical mass. As the partnership has grown, it’s given us more opportunity to handle significant litigation for clients,” Bhatia said.

“We are on a good trajectory,” he said.

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Apple antitrust suit mirrors strategy that beat Microsoft, but tech industry has changed

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Mike Scarcella

The iPhone 15 Pro is presented during the 'Wonderlust' event at the company's headquarters in Cupertino, California, U.S. September 12, 2023. REUTERS/Loren Elliott/File Photo Purchase Licensing Rights , opens new tab

March 22 (Reuters) - The U.S. government's antitrust lawsuit against Apple (AAPL.O) , opens new tab draws on the watershed 1998 case that broke Microsoft's stranglehold on desktop software, but that may prove to be an imperfect blueprint for addressing smartphone competition.

The market for the iPhone today looks very different from the near-monopoly enjoyed by Microsoft's (MSFT.O) , opens new tab Windows operating system two decades ago, and the government as a result may face a tougher time in taking on Apple, legal experts said.

The Department of Justice, along with 15 state governments, accused Apple of unlawfully monopolizing the smartphone market through restrictions on app developers that curb choice and innovation, which it said forces consumers to pay higher prices.
Apple said the government is wrong on the facts and law.

The government has to prove that Apple's business practices were "exclusionary" and harmed consumers by degrading the quality of rival products, according to several legal experts.

The government accused Apple of suppressing technologies that would have increased competition among smartphones in five areas: so-called "super apps," cloud streamed gaming apps, messaging apps, smartwatches and digital wallets.

One example the government gave is familiar to anyone who texts from an iPhone to a user of an Android phone — the dreaded "green bubble" that results in hindrances such as grainy photos sent by text that don't apply when texting between two phones using Apple's iOS operating system.

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Antitrust enforcers said Apple was rapidly expanding its influence and power in industries including content creation and financial services.

By comparison, Microsoft was accused of abusing its market dominance to impede users from freely installing software on computers using the company's operating system.

That might sound similar to Apple's control over the app store, but legal experts said there are important differences.

Apple can contract with whom it wants and design products as it sees fit, legal experts said.

It becomes a problem when a company with monopoly power takes steps to lessen short-term profit in order to keep rivals out in the longer term, said Douglas Ross, an antitrust scholar at University of Washington's law school.

"The fundamental assumption DOJ seems to have is that Apple must cooperate with its rivals to allow rivals to compete with Apple," Ross said. "That has antitrust law backwards."

MARKET SHARE

Microsoft was forced to open its operating system because it controlled 95% of desktop operating systems in the 1990s. By comparison, Apple had 55% of the North American market for smartphones at the end of September based on shipments, with the rest largely made up of phones using Google's Android operating system, according to Canalys, a market analysis firm.

The Justice Department seeks to define the market as that of smartphones in the United States. Apple representatives said they will try to persuade the court to define the market as the global smartphone market.

Apple and rival Samsung Electronics (005930.KS) , opens new tab each had about a 20% market share globally in 2023, though Apple beat Samsung slightly on shipments, Canalys data showed.

Microsoft "clearly was a monopolist and there were no effective competitors in the PC operating system space," Ross said. On the other hand, Android "is very popular, especially in the rest of the world, and is a very effective competitor with iOS."

Ross predicted it would be harder for the Justice Department to prevail against Apple than it was in the Microsoft case.

Some of these allegations have been touched upon before in court.

In 2021, in an antitrust case brought by "Fortnite" creator Epic Games, a federal judge found after a trial that Epic failed to prove that Apple users were "locked-in" to their iPhones and would not switch to Android devices.

Of course, government attorneys know these differences and still brought the case.

Legal experts said that reflects the viewpoint within the DOJ and the Biden Administration's Federal Trade Commission about challenging cases.

"They are happy to take on the risk of a really big case," said plaintiffs' lawyer Patrick McGahan, whose firm is involved in litigation against Apple.

Litigator Melissa Maxman in Washington said the Microsoft case changed the tech landscape and lauded the government's lawsuit as a step toward greater competition in the smartphone market.

"If you open up the market for other competitors to get in you will see prices go down and quality go up," Maxman said. "That's exactly what was said in Microsoft — and guess what, it was true."

(This story has been refiled to fix a typo in paragraph 11)

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Reporting by Mike Scarcella; Editing by Tom Hals and Jamie Freed

Apple Inc**'Apple is going to war': US lawsuit adds to iPhone maker's antitrust woes**

Regulators in Washington and the EU have tech giant in their crosshairs at particularly challenging time



Tim Cook, left, and Jonathan Kanter, the Department of Justice's assistant attorney-general for antitrust © FT montage/Bloomberg/AP

Michael Acton in San Francisco YESTERDAY



A famed Apple advertising campaign exhorted customers to “think different”. In a sweeping antitrust lawsuit the US on Thursday alleged that the iPhone maker had betrayed that slogan, locking millions of its users into a powerful monopoly that has made it one of the most valuable companies in the world.

The [long-awaited lawsuit](#) is a watershed moment for Apple. For years it was one of the few Big Tech companies to avoid major antitrust action by the US. Now it is under intense scrutiny from regulators in two of its key markets, the US and the EU. Its responses have indicated it is steeling itself for an existential battle.

Apple said the US case “threatens who we are and the principles that set Apple products apart in fiercely competitive markets”. A loss would set a “dangerous precedent” by allowing the government to influence how technology markets developed, it added.

[The new US lawsuit](#) is broad and detailed, painting a picture of a company that has spent years knowingly heading off competitive threats to its ecosystem, be it on the App Store, in messaging with rival Android phones, on its “tap to pay” service, or in the smartwatch market.

The US has portrayed the alleged scheme as stretching all the way back to Steve Jobs, the company's iconic founder who died in 2011. It was Jobs' vision to maintain an oppressive monopoly, identifying at an early stage the power the iPhone could wield over the online economy — and going so far as to direct executives to “force” developers to use only its own payment system to keep them locked into its ecosystem, the US alleged.

The core of the claim is that Apple uses its market-leading device to draw a growing share of services revenue from users, excluding competitors from access. [Services revenue](#) — which includes its App Store, Apple Pay, and TV and music streaming — has been a continuing success story and an increasingly important source of growth for the company as its hardware sales face challenges.

The lawsuit makes plain that the purpose of the case is not just to hold Apple to account for prior violations but also to prevent it from stifling innovation and competition in future product categories, such as in-car systems and financial services.

For the company, the timing of the lawsuit could hardly be worse. Global smartphone sales [have slowed in the last year](#). Apple is specifically struggling with a decline in sales for the devices in China that has left investors skittish. Its shares are down nearly 8 per cent since the start of 2024.

As the US unveiled the lawsuit on Thursday, chief executive Tim Cook was in [Shanghai](#) for a public relations offensive. “He surely knew it was coming this week,” said Gene Munster at Deepwater Asset Management. “Apple is going to war with the DoJ, and settlement is not an option.” Munster estimated that the potential changes the DoJ could force on Apple's services business, should its lawsuit succeed, could have a negative impact on earnings of 2 per cent to 4 per cent.

Apple representatives said the US government's intervention showed it trying to tip the scales in the favour of large multinational companies attempting to [break open](#) its devices, a similar issue it faces in the EU.

Apple was recently forced to make a [series](#) of U-turns by the EU regulator over its plan to comply with a new competition law, and has already [changed](#) parts of its business model in the bloc as a result. An EU investigation into whether it has gone far enough could soon follow.

As early as next week, EU regulators are set to begin a probe into whether Apple is properly complying with the new Digital Markets Act, according to people familiar with the matter. Some app developers have complained about Apple's new terms and fees, as the DMA forces the company to open up its tightly controlled App Store.

Google and Meta are also likely to face investigations over their DMA compliance plans, these people said. But privately, regulators say Apple's handling of the new law has caused the greatest outrage in Brussels.

While Apple's problems in Europe deepen, the US legal fight is one that the company has, in some respects, already gone through. Epic Games sued the company over its App Store policies in 2020, claiming the company imposes an unfair 30 per cent "tax" on certain transactions — [a case that Epic largely lost](#). But on Thursday, those same claims were echoed by US attorney-general Merrick Garland.

Apple says the DoJ is twisting the facts to match its theory, pointing to what it says is a 20 per cent share of the global smartphone market, which is far from a monopoly. The government contends that the company wields far more power in the US: around a 70 per cent share by revenue of the high-end smartphone market, and more than 65 per cent of all smartphones.

Apple believes that, post-Epic, case law and the facts are on its side. Yet a win in one case does not assure the same result in another. Rivals have been circling as well, with Meta, Microsoft and X this week teaming up to tell a court that Apple is failing to comply with an order forbidding it from stopping businesses from steering customers outside of the App Store to make payments.

"The DoJ's case shows pretty keen learning from the other legal matters that have involved Apple," said Bill Kovacic, a former Federal Trade Commission chair and professor of competition law and policy at George Washington University Law School.

The DoJ's case, he said, "avoids some of the vulnerabilities" from Epic's fight, and the case law governing the New Jersey federal court where the lawsuit was filed may be more favourable to the government than California's, where Epic's case was brought.

Antitrust cases can take years to go to trial, and even if Apple loses, any enforcement of the ruling would almost certainly be put off for longer by subsequent appeals. In the meantime, its business in the US continues as usual.

There is also the prospect that Joe Biden — and by extension his zealous antitrust enforcers, including Jonathan Kanter, the DoJ's assistant attorney-general for antitrust — will be swept out of office in November's election. But a second Donald Trump presidency would not necessarily improve Apple's situation, Kovacic said, as the investigation had been launched under his previous administration.

"My intuition, based on Trump's continued expressions of suspicion about the big tech information sector, is that he would likely turn to his justice department and say: 'Carry on,'" he said.

Additional reporting by Javier Espinoza in Brussels

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Reckitt Benckiser Group PLC

Fight, settle or split? How a \$60mn damages verdict is piling pressure on Reckitt

US award is latest problem for consumer group after disastrous baby formula acquisition

Madeleine Speed in London and Joe Miller in New York 7 HOURS AGO



It took just 98 minutes for a dozen ordinary Americans in an Illinois court to unanimously land a \$60mn blow against a consumer goods giant based thousands of miles away in the UK.

Reckitt, headquartered in the town of Slough just outside London, was [handed the verdict](#) last week after a jury voted in favour of a mother who said her baby died after consuming one of the company's formulas for premature babies — Enfamil Premature 24 — in a US neonatal intensive care unit.

The damages sum awarded makes Reckitt the latest European company in danger of falling foul of the US's mass tort litigation system, following [Bayer and its glyphosate lawsuits](#), and Boehringer Ingelheim and blood thinners.

It is also one of a series of calamities at Mead Johnson, the US baby formula business [Reckitt](#) acquired for \$17.9bn in 2017, making the home of Nurofen and Dettol more vulnerable to activist calls for a break-up.

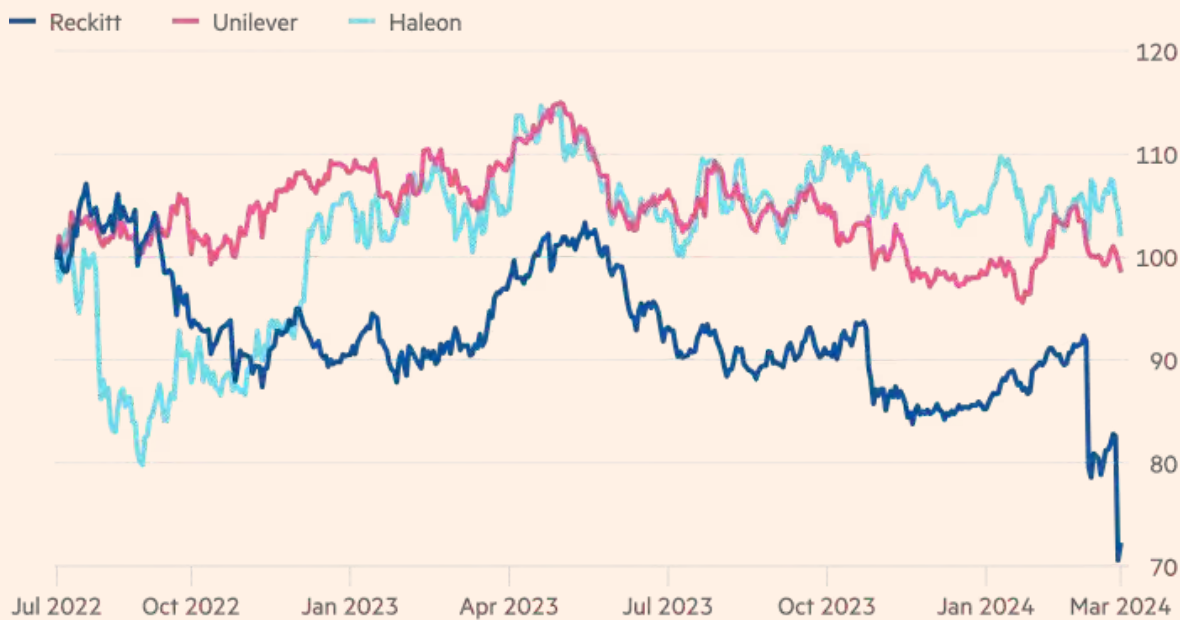
Investors are likely to call for Reckitt to settle, analysts said. However, Reckitt's chief executive Kris Licht has [vowed to overturn](#) the damaging verdict and the company is seeking to appeal.

"It is going to be hard to button this thing up nicely," said Brian Fitzpatrick, an expert on class-action litigation at Vanderbilt University, arguing that Reckitt — which is facing many more claims in relation to Enfamil — would have to fight it out over several trials. "That is going to take a while, and it is going to require victories," he said.

Shares in the company plummeted last Friday as investors scrambled to calculate how big a dent further plaintiff awards might leave, and whether its liability could reach the dizzying amounts shelled out by Bayer and others. Analyst estimates vary from between £400mn and £8bn.

Reckitt has underperformed consumer peers

Share prices rebased



Source: LSEG via markets.ft.com

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London-listed Reckitt, whose portfolio also spans hygiene products such as Finish and consumer health brands including Strepsils, has frustrated investors over the past year with a spate of bad news, including an accounting issue in its Middle East business, which emerged in its full-year results a few weeks ago.

Shares in the group have fallen more than a quarter over the past year.

The company's push into baby formula through the acquisition of Mead Johnson is widely seen to have been a failure. In 2020 the company reported a £5bn writedown on the [acquisition](#), which it attributed to falling birth rates and local competition in China. Reckitt sold its Chinese formula businesses to private equity firm Primavera the following year.

Last year, the US food and drugs watchdog sent Reckitt and two other manufacturers a warning over its baby formula manufacturing safety standards.

Reckitt previously sought a sale of the business in 2022. Speaking to the Financial Times following the Illinois verdict, Licht did not confirm or deny that the company was exploring a sale again.

“Who is going to want to buy an infant formula business?” asked one consumer sector banker, adding that as well as the litigation liability, the category as a whole was unattractive due to declining populations in Europe and North America.

In the latest case, the US plaintiff’s baby died of Necrotising Enterocolitis (NEC), an often fatal condition in premature infants. Feeding a child breast milk or a breast milk formula is known to substantially reduce the risk of NEC, and the plaintiff in Illinois successfully claimed that Reckitt failed to warn that formula feeding increased the risk.

Reckitt rejected the verdict by arguing it had no scientific basis. “We are pursuing all options to have the verdict overturned and we believe the science is on our side,” Reckitt said.

“When a premature infant goes into the [neonatal intensive care unit], because they are premature, they are at risk of NEC regardless of what they are feeding,” said Susan Sholtis, who heads up the company’s nutrition division, adding that neonatal doctors “believe if we don’t have these options, babies will die in the NICU.”

The US plaintiff’s lawyers are hoping future juries will be more likely to be swayed by grieving parents than a large corporation.

There are approximately 450 claims filed in federal courts against Mead Johnson and rival manufacturer Abbott Laboratories in relation to NEC, grouped together under one judge. Four cases have been selected as so-called bellwether trials but are not expected to proceed this year.

Once appealed, the award could be reduced by a judge but that process could take more than a year, and there are thousands more state claims waiting in the wings, filed on behalf of plaintiffs in Illinois, Missouri, California and Pennsylvania, among others.

The next state trial is scheduled to take place in St Louis, Missouri, in the autumn. Lobbyists at the American Tort Reform Association, which campaigns against excessive awards, has ranked the city as one of its “judicial hellholes”, arguing that judges there “allow junk science to be presented in their courtrooms” and courts “are a prolific producer of nuclear verdicts”.

A representative of the 22nd Judicial Circuit in Missouri declined to comment.

Reckitt is hoping that some of the cases will be thrown out during the lengthy pre-trial process over a lack of evidence.

Bernstein analyst Bruno Monteyne said that while the company’s legal arguments were in his view sound, the situation would remain uncertain for another 1-2 years.

“Many investors do not need to have a position on Reckitt, and may choose to simply ignore the stock while this is ongoing,” he said, arguing that they may prefer to focus on companies in the attractive consumer health category “without any of the accounting scandals, or exposure to risky US infant nutrition”.

Despite the company’s misfortunes, analysts agree that Reckitt is at its core a strong business, with successful brands in a desirable category. Throughout the cost of living crisis consumer health businesses have benefited from customers not trading down to cheaper alternatives, as they have in other sectors such as packaged food.

Barclays analysts see £2bn as “an extreme worst case”, and expect a gradual share price recovery in the coming months.

Jefferies analyst David Hayes, who estimated the total liability at between \$2.5 and \$7.5bn, argued that Reckitt should seek settlement soon.

The company had previously agreed to pay up to \$1.4bn to settle a long-running investigation into the sale and marketing of an opioid addiction treatment by its former subsidiary Indivior.

But if Reckitt does offer to settle, individuals could still choose to opt out of a settlement and pursue their claims individually.

A more immediate threat is if activist investors begin to circle.

“If an activist investor comes forward, the most likely strategic option they’ll push for is probably to break up the company at this point,” said Barclays analyst Iain Simpson. “But before that can happen, legal risk needs to come off the table.”

Any pressure from investors for a settlement may damage Reckitt’s negotiating position with plaintiffs. “Publicly you’d expect Reckitt to be saying they’ll appeal everything until the end of time. That strengthens their hand in negotiations,” said Simpson.

He added that in a worst-case scenario, the company could split off Mead Johnson “to create a firewall between the legal risk there and the rest of the company.”

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FTX Customers' Claims Against Silvergate Bank Allowed to Proceed

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Class Action

- Token holders seek to hold bank liable on various claims
- Bank's challenges to complaint all fall short, court says

Cryptocurrency investors who say they lost money in the collapse of the now-defunct FTX exchange and its Alameda Research sibling have adequately pleaded claims against Silvergate Capital Corp., a federal court ruled.

Silvergate, which is liquidating, failed to dislodge any of the claims in the token holders' proposed class action, Judge Ruth Bermudez Montenegro said Wednesday for the US District Court for the Southern District of California. The investors alleged Silvergate and its Silvergate Bank subsidiary aided and abetted fraud, conversion, and breaches of fiduciary duty, according to the opinion. They also brought claims of negligence, violations of California consumer law, and unjust enrichment.

Silvergate was the first bank to shut down in the regional bank turmoil of 2023 that affected Silicon Valley Bank, Signature Bank, and First Republic Bank. It announced the step in March 2023. By November, it said it had fully repaid all remaining deposit liabilities.

"The present case is a novel one involving the burgeoning crypto industry," Montenegro said in assessing factors for a duty of care to third parties in connection with the negligence claim. But recent California precedent supports finding a duty of care here, she said.

"Plaintiffs adequately allege Silvergate 'defied industry norms' by banking Alameda, FTX, and other crypto companies" and by developing a speed-oriented payment network, she said. The investors also adequately alleged that FTX "owed fiduciary duties to its customers and breached those fiduciary duties when it transferred customer funds to Alameda," the judge said.

The case is *Bhatia v. Silvergate Bank*, 2024 BL 93979, S.D. Cal., No. 3:23-cv-01406, 3/20/24.

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

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March 21, 2024, 1:49 PM PDT

Emboldened Crypto Participants Shrug Off SEC's Probe of Ethereum

By Olga Kharif and Isabelle Lee

- The SEC is asking companies about Ethereum Foundation
- Prices of Ether and nonfungible tokens have increased

Bloomberg Law News 2024-03-22T10:31:4619101701-04:00

Emboldened Crypto Participants Shrug Off SEC's Probe of Ethereum

By Olga Kharif and Isabelle Lee2024-03-21T16:49:50645-04:00

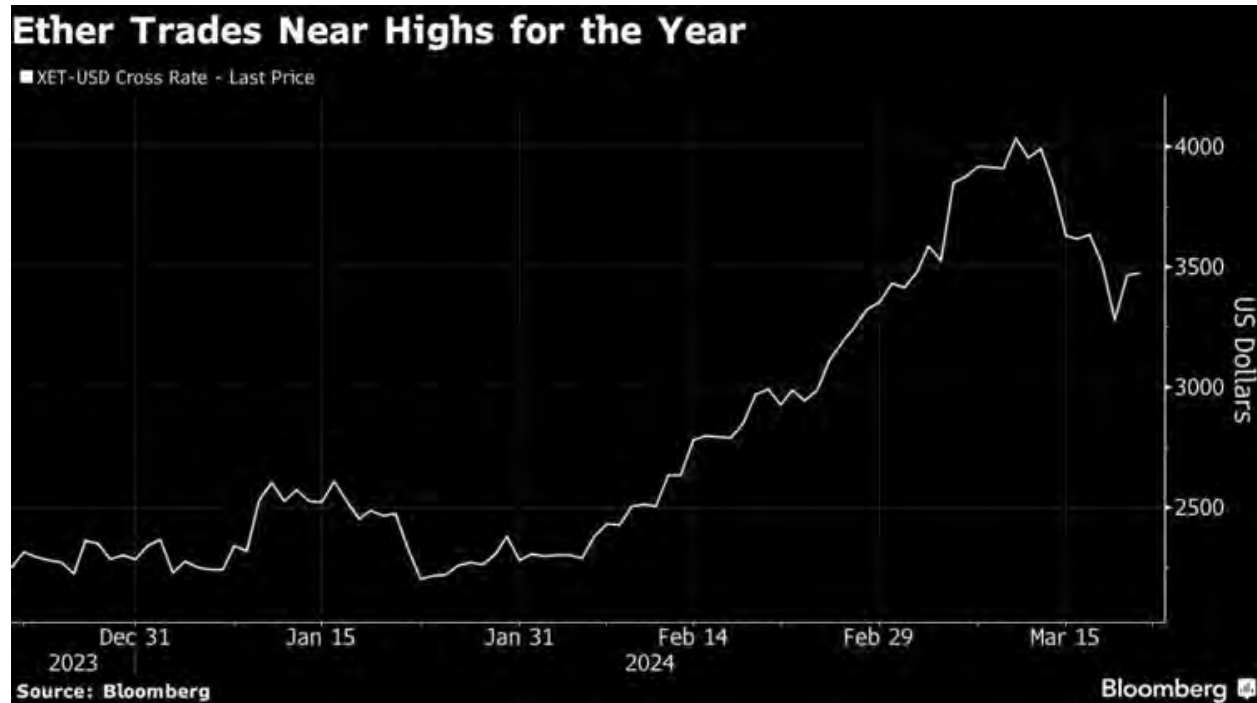
- The SEC is asking companies about Ethereum Foundation
- Prices of Ether and nonfungible tokens have increased

The digital-asset world is going about business as usual despite some worrisome issues that may be raised by the US Securities and Exchange Commission's probe of the Ethereum Foundation, the organization that supports the second-biggest cryptocurrency.

The unspecified investigation highlights the long-running debate over whether Ether, a token used on the blockchain, is a security. If declared as such, that would make the token commonly referred to as ETH subject to SEC guidelines that many in the industry have bristled against. Even so, Ether has gained about 5% since Tuesday.

That's a big change from when the threat of pending action by the SEC would often send the prices of tokens lower. Market observers point to a series of legal setbacks suffered by the SEC over the last year that have undermined Chairman Gary Gensler's enforcement crackdown. Just Monday, a federal judge accused the SEC of "gross abuse of power" in pursuing a crypto company known as DEBT Box.

"Securities law risk is table stakes for any company operating in this industry," said **Michael Selig**, a partner at the law firm of Willkie Farr & Gallagher. "All of this will be litigated in court and may become moot as a result of the upcoming elections."



Bloomberg

Read more: [Crypto Exuberance Hits Overdrive as SEC Battle Over Ether Looms](#)

The biggest immediate impact is probably on whether the probe puts in question the likelihood of an approval by the agency of exchange-traded funds investing directly in Ether. A number of issuers, from VanEck to Fidelity, have filed for permission to launch them. Bloomberg Intelligence analysts figure there's only a 25% chance of approval.

"That would be a very difficult hill to climb in terms of seeking ETF approval because effectively the regulator would be approving an ETF on an asset they'd labeled as illegal," **Stephane Ouellette**, chief executive of digital-asset platform FRNT Financial.

A security designation could also put pressure on exchanges to delist Ether. When the SEC named 19 tokens as securities in lawsuits last year, platforms such as Bakkt, Robinhood Markets and Bitstamp delisted some of the tokens. Even so, many of the tokens actually saw an increase in trading volume as investors shrugged the designation off.

If Ether is designated as a security, that may also create trouble for decentralized exchanges, known as dexes, that run on the Ethereum blockchain.

"The SEC has few hooks today to enforce against the decentralized finance protocols being run globally on top of [such] chains," said **Lex Sokolin**, co-founder of Generative Ventures. "Perhaps if ETH is a security, they would have further reach to treat the Dexes as exchanges, the lenders as debt issuers, and so on."

Other digital assets, like nonfungible tokens such as CryptoPunks and Bored Apes that are minted on Ethereum network and bought and sold with Ether could also be impacted. Still, the so-called floor, or lowest, prices of many NFTs surged in the last 24 hours. Pudgy Penguins' floor price increased 20%, and Bored Apes' rose by 5%, according to data compiled by NFT Price Floor.

"The entire ecosystem could take a short-term hit if ETH was classified a security mostly due to the uncertainty it creates rather than it being a blanket cause for every [Ethereum-technology]-based token to become a security, as that would be very unlikely," said **Yat Siu**, co-founder of Animoca Brands, which invests in blockchain games that use NFTs.

Even so-called Layer-2 blockchains, which overlay Ethereum to provide cheaper transaction costs, may need to change "their operational structure or compliance measures to meet SEC regulations," said Pedro Herrera, co-founder of PrimeTrader, a gamefied tokens platform. "The added regulatory burden could either slow down innovation (due to the need for compliance) or potentially stimulate it, as projects seek to navigate or leverage the new regulatory environment."

On the other hand, blockchains that compete with Ethereum, such as Solana, could benefit as some Ethereum businesses and users migrate over, if Ether is deemed a security.

The SEC is investigating Ethereum after its 2022 software upgrade drastically altered the way the network orders transactions. The upgrade, called the Merge, allowed people to stake their Ether to earn interest, and that raised fresh questions of whether it's a security. There's also the question of whether a small group of people has an outsized influence on Ethereum's development and operations.

In last year's lawsuit against crypto exchange KuCoin, New York Attorney General Letitia James called Ether a security, saying that Ether's development and growth have been managed by a small number of developers who "stand to profit from the growth of the network and the related appreciation of ETH." She said that co-founder **Vitalik Buterin** and the Ethereum Foundation hold significant influence over Ethereum's development.

In its solicitations for public comments on the proposed spot Ether ETFs, the SEC asked, "Are there particular features related to ether and its ecosystem, including its proof of stake consensus mechanism and concentration of control or influence by a few individuals or entities, that raise unique concerns about ether's susceptibility to fraud and manipulation?" Since the Merge, there have been worries of too few entities controlling some aspects of Ethereum's operations.

"This suggests that the SEC may be examining Ethereum governance and upgrade management processes that could reveal 'control or influence by a few individuals or entities,'" Ouellette said in a newsletter Thursday.

The agency has demanded information from companies about dealings with the Ethereum Foundation as part of a review of aspects of Ether, Bloomberg reported Wednesday.

Of course, 2024 is an election year in the US, and depending on the outcome, Gensler may not even be in office in a matter of months. And then there are the courts for crypto companies to fall back on.

"He is not an emperor," said **Michael Terpin**, a long-time crypto investor who owns Ether and Bored Apes.

--With assistance from **Muyao Shen**.

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Actual legal question: Now that Truth Social is public, is every false statement Trump makes securities fraud?

11:17 AM · Mar 22, 2024 · 1,449 Views



7



3



18



Post your reply

Reply



Daniel Rubin @DanielYRubin · 2m



You mean even if not related at all to the performance of the company? Or is it a two-part question: is his every statement necessarily related to TMTG and thus is his every false statement necessarily securities fraud



1



1



5



@annmlipton@esq.social @AnnMLipton · 51s



it's an interesting question. truth social is a meme stock - it's a way to financially bet on trump himself.



5



Ricky Shah @RickyShahatty · 19m



There will be a giant risk disclosure in the prospectus.



1



59



@annmlipton@esq.social @AnnMLipton · 18m



you cannot risk disclose your way out of false statements. for real, it only works for projections of future performance, and even then, not if the risk has already materialized



1



1



1



76



Ezekiel Healy @EzekielHealy · 19m



They'll post the "For Entertainment Purposes" boilerplate that you used to see on psychic/astrology hotlines...



1



44



Vince Buccola @vsjbuccola · 22m



No because it's per se unreasonable to rely on his statements for their truth value?



1



71



Rob Schmied @rschmied · 30m



maybe he will offer to take it private at \$420.



Joe Dudek @JoeDudekJD · 29m



If he can't distinguish reality, is he really leveraging material nonpublic information?



2



71



Christian @csiebott · 30m



You know it's inevitable.



1



56



Trump's Truth Social merger sends stock into immediate free fall: report

 rawstory.com/truth-social-stock

March 22, 2024

Moments after Digital World Acquisition Corporation voted to merge with Trump Media, the parent company for Donald Trump's Truth Social platform, its stock took a quick drop — losing 12 percent of its value at one point.

According to a report from CNBC, stock for the company which will be listed as DJT starting next week, began the day at \$44.20 before taking a quick nosedive to below \$38, before a bounceback to 3.5 percent below opening.

The former president was expected to see a \$3 billion windfall after the merger was completed but, by the time he is able to sell any portion of his stock, that dollar figure could change radically downward as other investors cash out.

As CNBC is reporting, "A total of 11% of the tradable shares of DWAC are being sold short, FactSet data shows."

"This means investors holding these positions are betting the price will fall before they have to buy the shares back and return them to the entities who loaned the shares to them," the report adds.

Criminal defense lawyer Robert DeNault had warned investors should expect to see drops now that the merger was approved.

"The [Special purpose acquisition companies] merger between Digital World and Trump Media/Truth Social is vastly overvalued and the stock price will plummet in short order," he wrote.

You can read more here.

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Take Advantage of All-time High Interest Rates - See the List

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<https://www.wsj.com/finance/stocks/who-is-fueling-the-surge-in-shares-of-the-trump-spac-fcfb6f92>

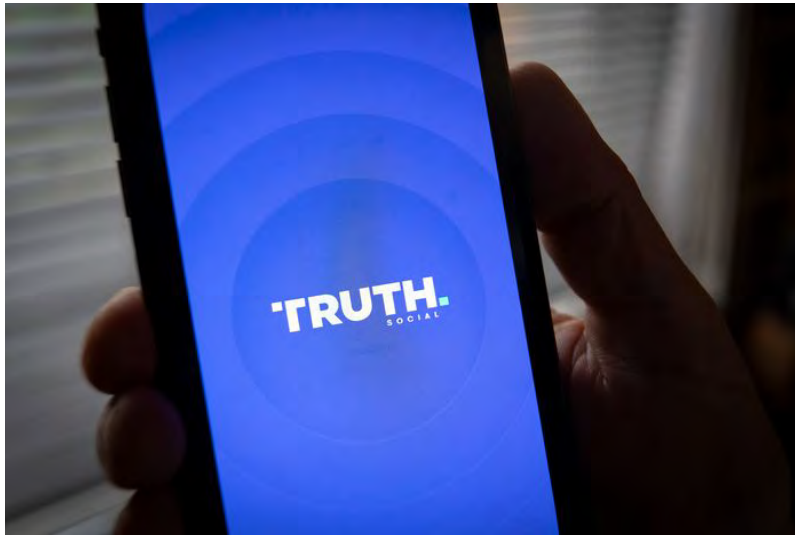
FINANCE | STOCKS

Who Is Fueling the Surge in Shares of the Trump SPAC?

Shares have risen sharply, potentially sending a financial lifeline to a presidential candidate whose finances are under stress

By [Charley Grant](#) [Follow](#)

Updated March 22, 2024 12:02 am ET



Truth Social's parent is set to go public by combining with a special-purpose acquisition company.
PHOTO: JAAP ARRIENS/GETTY IMAGES

History says Republican presidential nominee Donald Trump and the stock market are a poor combination. Some of his most ardent supporters are piling into his latest deal anyway.

Small investors have aggressively bought up shares of a shell company whose investors are voting on whether to take public his social-media company, Truth Social. Shares of the acquirer, known as Digital World Acquisition Corp., DWAC **-4.30%** ▼ are up 140% this year—and, judging by the comments in a forum of nearly 8,000 Truth Social users, not because buyers are anticipating long-term business success.

Digital World Acquisition stock price

\$60 a share



Source: FactSet

“I bought several times last Monday & Tuesday, little by little to show support of the stock,” said a Truth Social user going by the handle of fantasticblush.

“This is a Truth Movement and no matter what happens tomorrow this merger will happen tomorrow or in the future,” said Truth Social user ajdelval. “We will win this war no matter what.”

The episode is reminiscent of the 2021 meme stock craze, when investors bought up shares of businesses with poor growth prospects such as GameStop and Bed

Bath & Beyond, causing the stocks to surge. But the stakes extend far beyond the stock market this time. The Republican nominee is in line to earn a windfall of about \$3.5 billion if the vote goes through, potentially easing a financial crunch stemming from a \$454 million judgment against him in a civil-fraud case.

The social network’s parent is set to go public by combining with a special-purpose acquisition company, or SPAC. A shareholder vote to approve the merger is scheduled for Friday. Trump’s company could replace the shell company in the stock market as soon as Monday. The new ticker would be DJT, a nod to Trump’s initials.

Truth Social faces a challenging business outlook. The company booked about \$3.4 million in revenue in the first nine months of 2023, according to a securities filing, and a net loss of about \$49 million over that same period. The social network competes against such well-established competitors as Meta Platforms’ Facebook and Elon Musk’s X.

DWAC shares, which closed Thursday at \$42.81, are “not trading on fundamentals, absolutely not,” said Kristi Marvin, chief executive of SPACInsider.com. “Institutions are not trading this.”

This isn't the first time DWAC shares have surged. They closed as high as \$97.54 in March 2022, then fell 87% over the next 15 months, in the midst of a broad stock-market selloff.

"What a message it would be if we closed at \$45.47 today," said user PrattyDaddy, an apparent reference to Trump's status as the 45th and potentially 47th U.S. president. "Great way to say 'Patriots in Control' or 'Trust the Plan'."



Donald Trump at a campaign rally in Rome, Georgia, this month. PHOTO: ALYSSA POINTER/REUTERS

Nor would this be the first time a Trump-branded stock graced U.S. markets. Trump Hotels & Casino Resorts was a publicly listed company that filed for chapter 11 bankruptcy protection in 2004.

The history of that venture was rocky. In 1996, Trump, serving as chairman of the company, received a large bonus and salary increase despite a 70% drop in the stock, which earned the ire of corporate-governance experts and shareholder advocates.

The Securities and Exchange Commission said the casino company's release for its third-quarter 1999 results showed earnings that beat Wall Street's expectations but failed to disclose that the results were chiefly due to an unusual \$17.2 million gain. At the same time, the pro forma results noted the exclusion of an \$81.4 million charge for discontinued operations.

Those distant memories aren't slowing down enthusiasts in the present day, however.

"I just bought more shares because of reasons! #LetsmakeTrumpTrillionaire," wrote a poster going by Looney Tunes Meets Karl Marx.

"This is not financial advice," the poster added.

Write to Charley Grant at charles.grant@wsj.com

Donald Trump

Potential \$3.5bn windfall for Donald Trump hangs on fight over Spac deal

Litigation with a former partner hangs over Friday's vote to take Truth Social network public



The Truth Social account of Donald Trump. The question over the listing comes as the former president is facing mounting legal bills © John Minchillo/AP

Ortenca Aliaj and **Antoine Gara** in New York YESTERDAY



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A legal stand-off between Donald Trump and a former business partner is coming to a head, with a vote set to determine whether or not the former US president can unlock a potential \$3.5bn windfall by taking the company behind his Truth Social network public.

A shareholder vote to approve a deal between a [special purpose acquisition company](#) called Digital World Acquisition Corporation and Trump Media & Technology Group is planned for Friday. But Patrick Orlando, whose Arc Global Investments is the largest investor in DWAC, has so far held out on casting his vote.

Orlando is the former chief executive of the blank-cheque company and sits on its board. But he has threatened to withhold his support for the transaction.

In a lawsuit filed by DWAC against Arc Global on Tuesday, lawyers acting on behalf of the Spac allege that Orlando must vote in favour of the deal and accuse him of holding the vote “hostage for his personal financial gain”.

Orlando, who in February sued to block the deal unless he receives a larger distribution from the transaction, did not respond to a request for comment.

The question over the listing, which if approved will go ahead next week, comes as [Trump is facing mounting legal bills](#). The former president has said he may need to offload prized properties in a fire sale to raise almost \$500mn to prevent the enforcement of a fraud judgment in New York.

Spacs raise money through a stock exchange listing and then look to acquire a company that will eventually go public. A 145 per cent surge in DWAC’s shares since the start of this year has boosted the implied fully diluted valuation of TMTG, the business it is seeking to take public, to about \$9bn.

Though Trump is subject to a lock-up agreement that prevents him from selling his shares for six months, his stake of more than 40 per cent could provide a much needed financial lifeline if the deal goes through.

Orlando’s sway stems from free shares he received as a reward for setting up the Spac. The Florida-based businessman controls 14.8 per cent of DWAC’s outstanding shares. Regulatory filings show that if he does not back the deal, DWAC would have to rally almost 60 per cent of its remaining stockholders, who are mostly retail investors, to support it.

DWAC has on several occasions [struggled to rally its shareholders](#) to vote for resolutions it proposed and it recently warned that it could face difficulty hitting the voting threshold necessary to approve the TMTG deal.

“The professional relationship between Mr Orlando and Digital World became strained and has continued to deteriorate such that there is no assurance that Mr Orlando as a current member of our board or as a controlling affiliate of the sponsor will be co-operative,” DWAC warned in a filing last month.

“Accordingly, it could prove difficult for us to obtain the requisite vote for approval . . . in a timely fashion or at all, which could lead to our liquidation,” it added.

Orlando, a little-known Miami businessman prior to his dealings with Trump, oversaw DWAC during a tumultuous period. The company was subject to a number of regulatory probes, which delayed the closing of the TMTG deal, initially announced in late 2021.

DWAC dismissed Orlando as chief executive in March 2023 and installed Eric Swider, a businessman living in Puerto Rico, in the position. Shortly afterwards, the company [paid \\$18mn](#) to settle a Securities and Exchange Commission investigation over disclosures made around its 2021 initial public offering.

Beyond Trump's potential payout from the deal, three hedge funds also stand to make a significant profit. Anson Funds, Mangrove Capital Partners and All Blue Capital, which agreed to participate in a \$50mn convertible debt offering this year after other funds had walked away, are sitting on more than \$400mn in gains as of DWAC's closing price of \$42.81 on Thursday, according to calculations by the Financial Times.

Anson, Mangrove and All Blue Capital did not respond to requests for comment.

"The return will be amazing," said a person involved in the financing. "Trump's advisers have been keeping him on the sidelines . . . they want to get this vote clear with no issues with the government. Then, on Tuesday when it starts trading, it is game on for Trump."

Additional reporting by Sujeet Indap in New York

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<https://www.wsj.com/finance/trump-makes-a-new-fortune-with-public-listing-of-truth-social-93790821>

FINANCE

Trump Makes a New Fortune With Public Listing of Truth Social

Presidential candidate's investment is worth roughly \$3 billion, potentially easing his current financial struggles

By [Amrith Ramkumar](#) [Follow](#)

Updated March 22, 2024 12:24 pm ET



Truth Social is expected to start trading on the stock market next week. PHOTO: JOHN MINCHILLO/ASSOCIATED PRESS

Investors approved a plan to take Donald Trump's struggling social-media company public, putting him one step closer to a roughly \$3 billion windfall that could end a financial squeeze that is weighing on his presidential run.

Truth Social, with few users and little revenue, is expected to start trading on the stock market next week at a staggering valuation around \$5 billion. The valuation is the result of frenzied buying by Trump supporters of shares of the shell company that merged with the former president's social-media platform.

Trump's approximately 60% stake is worth roughly \$3 billion, depending on how the stock trades.

The stock's ticker will become DJT, Trump's initials, when Truth Social starts officially trading as a new public company under its parent's name, Trump Media & Technology Group.

The vote caps off a 2 ½-year saga to take Truth Social public that included charges of insider trading and a fine to settle a Securities and Exchange Commission investigation. It makes the fledgling platform Trump founded after getting kicked off mainstream sites in 2021 perhaps his best investment ever.

It marks another twist in Trump's tumultuous financial history, which includes bankruptcies and more recently big civil penalties for inflating his other assets for financial gain. As shareholders voted to approve the deal that could create a windfall for Trump, he was facing a deadline to obtain a bond to guarantee payment of a \$454 million judgment against him in a civil-fraud case.

He had been unable to get the bond and on Monday, New York's attorney general could start the process of seizing Trump's assets. It is unclear if the windfall would help him in that situation.

To sell shares or borrow against them in the next six months, he would need a waiver from the executives in charge of the shell company taking Truth Social public. Although they are supporters of Trump, granting the waiver could prompt other investors to sell their shares and dent the stock price.

There are also potential limits on how much stock he could sell at one time in a three-month period tied to the weekly trading volume or number of shares outstanding.

The waiver would be a boon for Trump, who also trails President Biden's campaign in fundraising entering their rematch in the presidential race. The deal will also give new life to Truth Social, providing it with a badly needed cash infusion it could use to attract more eyeballs and advertisers in a crowded social-media landscape.

Both before and during his time as a political candidate, Trump has touted the idea that he is a savvy and successful businessman. A windfall from the Truth Social deal would likely become part of Trump's campaign narrative as he looks to return to the White House.

While Trump trails well behind Biden in fundraising so far, it isn't clear whether he plans to pump any of his own fortune into his campaign. In 2016, Trump put \$66 million into his campaign, while in 2020 he largely avoided self-funding.

The new company's chief executive will be Devin Nunes, the former member of Congress who has been running Truth Social. Among the directors will be Donald Trump Jr., the former president's son. Independent directors include Robert Lighthizer, who was the U.S. Trade Representative in the Trump administration, and Linda McMahon, who led the Small Business Administration under Trump and co-founded World Wrestling Entertainment with her husband, Vince.

Trump's political supporters made the unlikely merger a winner, banding together on social media to buy shares of the shell company just as individual investors bought shares of videogame retailer GameStop during the pandemic. The high share price gave Trump and other insiders enormous rewards for completing a deal, helping it get done despite the forecasts of many Wall Street prognosticators that the stock would drop and the merger would fall apart.

"It's a testament to Trump's popularity with his supporters and this group of investors," said Julian Klymochko, chief executive of Accelerate Financial Technologies, who has followed the deal closely. "Since it's trading so well, everyone was financially incentivized to get this through."

The publicly traded shell company that is merging with Truth Social is known as Digital World Acquisition Corp. It was shareholders of Digital World that voted to approve the deal Friday. Shares of Digital World are up some 130% this year, and rose steadily as Trump moved closer to clinching the Republican nomination for president.

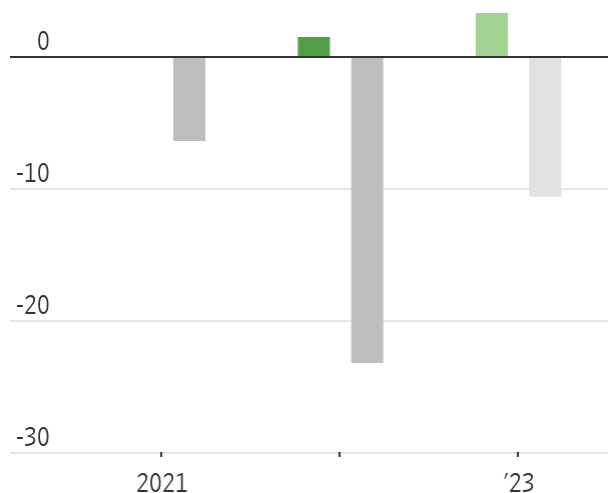
The stock was recently down about 5% around \$40. At that price, Truth Social would be valued above \$5 billion. Trump will own roughly 60% of the newly public company.

Financials for Truth Social's parent company

■ Revenue ■ Loss from operations

\$10 million

One risk to Trump is that the stock tumbles after the deal, when it is clear that he could be a big seller. Other so-called meme stocks that



Notes: 2023 figures through end of September; 2021 figures include no revenue and began in February, when company was launched.

Source: Trump Media & Technology Group

were driven higher by small investors collapsed after their dramatic run-ups.

“It’s the mother of all meme stocks because it’s Trump,” said Matthew Tuttle, CEO of Tuttle Capital Management, which oversees a fund that holds special-purpose acquisition companies, or SPACs, such as Digital World.

Many of Trump’s most ardent fans gathered on video-sharing website Rumble to watch the shareholder

meeting and celebrate the results. Nearly 3,000 people tuned in to the livestream at one point.

“We made it!” said Chad Nedohin, a pro-Trump social media influencer on the livestream. “It’s Trump’s company. We got the merger. It goes from here up, it gets bigger and bigger, Amen, Amen,” he added, as Queen’s 1977 hit song “We Are the Champions” blared in the background.

Traders are girding for more volatility now that Truth Social will have to justify its lofty valuation. At the stock’s current price, it would be one of the best performing SPAC deals ever.

“I have no idea how it’s going to play out, but I know it’s going to be interesting,” Tuttle said.



Devin Nunes, a former member of Congress, has been running Truth Social. PHOTO: GO NAKAMURA/REUTERS

Also called blank-check firms, SPACs are shell companies that raise money from investors and trade publicly with the sole intent of combining with a private company to take it public. After regulators and investors approve a deal, the company going public replaces the SPAC in the stock market.

Such mergers have fallen by the wayside in recent years after a euphoric bubble that took hundreds of startups public in 2020 and 2021 burst due to collapsing share prices and regulatory scrutiny.

In many deals, low share prices eroded the amount of cash a company could raise by going public this way, making the mergers less attractive.

Truth Social was able to buck the trend. The company will now likely get the nearly \$300 million held by Digital World to try to grow its business, which has posted about \$5 million in sales and tens of millions of dollars in losses since its launch.

Shares of Digital World rocketed higher immediately after the deal was announced in October 2021, with investors hoping that Truth Social could use Trump's popularity to compete with Facebook and X, formerly known as Twitter.

At the time, mainstream platforms had kicked Trump off following the Jan. 6, 2021 attack on the U.S. Capitol.

Shares fell for much of 2022 and 2023 after Elon Musk restored Trump's X account and Trump returned to Facebook. The former president's followings on

those platforms dwarf his reach on Truth Social.

An SEC investigation into whether the SPAC and Truth Social held premature deal talks and a probe by federal prosecutors into insider trading by three Digital World investors, including a former board member, also muddied the outlook for the merger.

The company cleared regulatory and legal obstacles last summer, when the SPAC agreed to pay the SEC \$18 million and prosecutors charged the investors.

Trump's political momentum as he moved closer to securing the Republican nomination then reignited the stock earlier this year, helping get the deal done.

—Charley Grant contributed to this article.

Write to Amrith Ramkumar at amrith.ramkumar@wsj.com

Trump-Pardoned Lawyer Tamman Gets California License Back

By Joyce E. Cutler

- License restored for Southern California transactional law attorney
- Work with nonprofit Second Chance cited in rehabilitation

Bloomberg Law News 2024-03-22T10:29:44590605188-04:00

Trump-Pardoned Lawyer Tamman Gets California License Back

By Joyce E. Cutler 2024-03-21T14:48:35000-04:00

- License restored for Southern California transactional law attorney
- Work with nonprofit Second Chance cited in rehabilitation

David Marsh Tamman, pardoned by then-President Donald Trump after conviction in a \$20 million securities scheme, had his law license reinstated by the California Supreme Court.

Justices during their weekly conference Wednesday adopted the State Bar Court recommendation to restore Tamman's law license. A State Bar Court judge, rejecting bar prosecutors' opposition, concluded Tamman "has clearly and convincingly established that he meets the requirements for reinstatement."

Tamman, a partner at Greenberg Traurig LLP and Nixon Peabody LLP before the firms fired him, completed the requisite exams, doesn't owe the client security fund any money, and paid all discipline costs and fees. He also received support for his reinstatement from nonprofit Aleph Institute for his work assisting Project Second Chance, an initiative to help release worthy individuals from federal prison through executive clemency.

The only disputed issues the Office of Chief Trial Counsel raised were whether Tamman has "sustained his heavy burden of proving that he is rehabilitated; established his present moral qualifications for reinstatement; and established his present learning and ability in the general law, notwithstanding proof of his passage of the Attorneys' Examination," State Bar Court Judge Dennis Saab said.

The supreme court disbarred Tamman after his 2012 conviction for assisting client Newpoint Financial Services, whose CEO asked him to review and revise various documents, including electronic versions of recent and past drafts of Newpoint's investment documents. Tamman, who specialized in transactional law, represented Newpoint while at Liner Yankelevitz Sunshine & Regenstreif and Nixon Peabody. The Securities Exchange Commission opened a formal investigation of Newpoint related to its disclosures to investors shortly after Tamman's assistance, Saab noted.

A federal appeals court upheld the conviction in 2015. He was released from prison in February 2019 after serving 55 months, Saab said.

Trump pardoned Tamman on Jan. 20, 2021, one of the 143 pardons and commutations issued on the president's last day in office.

The case is Tamman on Reinstatement , Cal., No. S283743, order 3/20/24 .

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Ex-Steinhoff CEO Jooste Dies Day After He's Fined \$25 Million

By Janice Kew

- Police in his hometown say a man of his age died by gunshot
- He had received a record fine by regulator just one day before

Bloomberg Law News 2024-03-22T10:31:14682062366-04:00

Ex-Steinhoff CEO Jooste Dies Day After He's Fined \$25 Million

By Janice Kew2024-03-21T14:00:57426-04:00

- Police in his hometown say a man of his age died by gunshot
- He had received a record fine by regulator just one day before

Markus Jooste, former chief executive officer of scandal-ridden retailer Steinhoff International Holdings NV, has died at 63.

His death comes just one day after South Africa's financial regulator levied a 475 million rand (\$25 million) fine against him for making and publishing false, misleading or deceptive statements about the company. That was in addition to a 20 million rand previously levied by the regulator for insider trading.

Jooste's death occurred in his hometown of Hermanus, South Africa, according to a person familiar with the situation who wasn't authorized to comment and therefore asked not to be named.

Police in Hermanus, a seaside community about 120 kilometers (75 miles) south of Cape Town, confirmed the death of a 63-year-old man Thursday afternoon, without identifying him by name. The police statement said the cause of death was a fatal gunshot wound to the head.

No foul play was suspected, the police said. The investigation was continuing.

Steinhoff, the former owner of Conforama in France and Mattress Firm in the US, had been battling to survive ever since auditors refused to sign off on its financials in late 2017. That prompted Jooste to resign and led to a dramatic share-price collapse as well as the start of police and regulatory investigations in both Europe and South Africa.

From 2018: A Chronicle of Collapse at Retail Giant



Markus Jooste

Photographer: Rodger Bosch/AFP/Getty Images

Artificial transactions were allegedly used to manipulate balance sheets by more than €1.5 billion (\$1.6 billion). Additionally, the value of real estate assets was inflated, prosecutors have said. A forensic probe by auditor PwC uncovered €6.5 billion of irregular transactions with eight firms over eight years.

Jooste was charged in Germany on allegations that he was the architect of the accounting scandal, which he denied.

The ex-CEO kept a low profile, barring one public appearance before South African lawmakers in 2018 to explain his role in the collapse.

With his wife, Ingrid, Jooste had a son and two daughters.

--With assistance from **Adelaide Changole, Mike Cohen, Colleen Goko and Paul Vecchiatto.**

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NMC Founder Blames Fraud at Collapsed Firm on His Ex-CEO (1)

By Tiffany Tsoi

- Shetty says in defense that fraud was done behind his back
- Former CEO Manghat controlled the firm's finances, Shetty says

Bloomberg Law News 2024-03-22T10:28:10067569849-04:00

NMC Founder Blames Fraud at Collapsed Firm on His Ex-CEO (1)

By Tiffany Tsoi2024-03-21T09:02:06230-04:00

- Shetty says in defense that fraud was done behind his back
- Former CEO Manghat controlled the firm's finances, Shetty says

NMC Health Plc's founder said he was the victim of fraud at his own firm because it was perpetrated behind his back by a former executive and his associates, according to court documents in a London lawsuit.

Bavaguthu Raghuram Shetty, the hospital operator's founder, said he was misled by NMC's former chief executive officer and chief financial officer, in his defense filings in the suit with audit firm Alvarez & Marsal Europe LLP and NMC's joint administrators.

Lawyers for Shetty said he believed that NMC was a "successful and robust business" and that he saw **Prasanth Manghat** "almost as a family member."

NMC's financial affairs were controlled by Manghat during the time period in which the fraud was orchestrated, Shetty's lawyers said. He accused Manghat and his associates of misleading Shetty into signing documents and forging his signature.

"Mr. Manghat denies the claims made by Dr. Shetty, and will be responding to specific allegations in his defense scheduled to be filed next month," Paul Hughes, Manghat's lawyer at Kobre & Kim, said.

The health care company was put into administration in 2020 by a London court as the depths of the firm's troubles emerged. In November, the UK's markets regulator accused the once-FTSE100 listed firm for misleading investors about its debt position by as much as \$4 billion.

The regulator said the firm used dual sets of accounting records, but repeatedly published financial statements that understated its debts to the tune of billions of dollars.

However, Shetty claimed in court filings that he did not use a computer, nor did he have access to the electronic accounting systems of NMC, precluding his ability to have knowingly perpetrated the fraud. He said his emails were run for him by his assistant.

The fallout has triggered investigations and lawsuits and dragged in auditors Ernst & Young who are accused of turning a blind eye to multiple misstatements. The auditor, now known as EY, has denied the allegations.

(Updates with comment from Manghat's lawyers in the fifth paragraph)

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SEC Climate Rule Suits Head to Eighth Circuit After Lottery (3)

By Ufonobong Umanah and Andrew Ramonas

Documents

 [Consolidation Order](#)

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- Move consolidates nine challenges across six courts
 - Competing petitioners argue SEC went too far or not far enough

Bloomberg Law News 2024-03-22T10:23:49205843131-04:00

SEC Climate Rule Suits Head to Eighth Circuit After Lottery (3)

By Ufonobong Umanah and Andrew Ramonas 2024-03-21T14:55:00000-04:00

- Move consolidates nine challenges across six courts
- Competing petitioners argue SEC went too far or not far enough

Litigation over whether the SEC can require public companies to disclose their greenhouse gas emissions and other climate-related information to investors will be consolidated and reviewed by the conservative-leaning Eighth Circuit, as the result of a lottery drawing Thursday.

The Judicial Panel on Multidistrict Litigation lottery selected the US Court of Appeals for the Eighth Circuit as the venue for hearing a case consolidating nine lawsuits against the March 6 Securities and Exchange Commission regulations filed in six different circuits, according to an order. Of the St. Louis-based court's 17 judges, only one was appointed by a Democratic president.

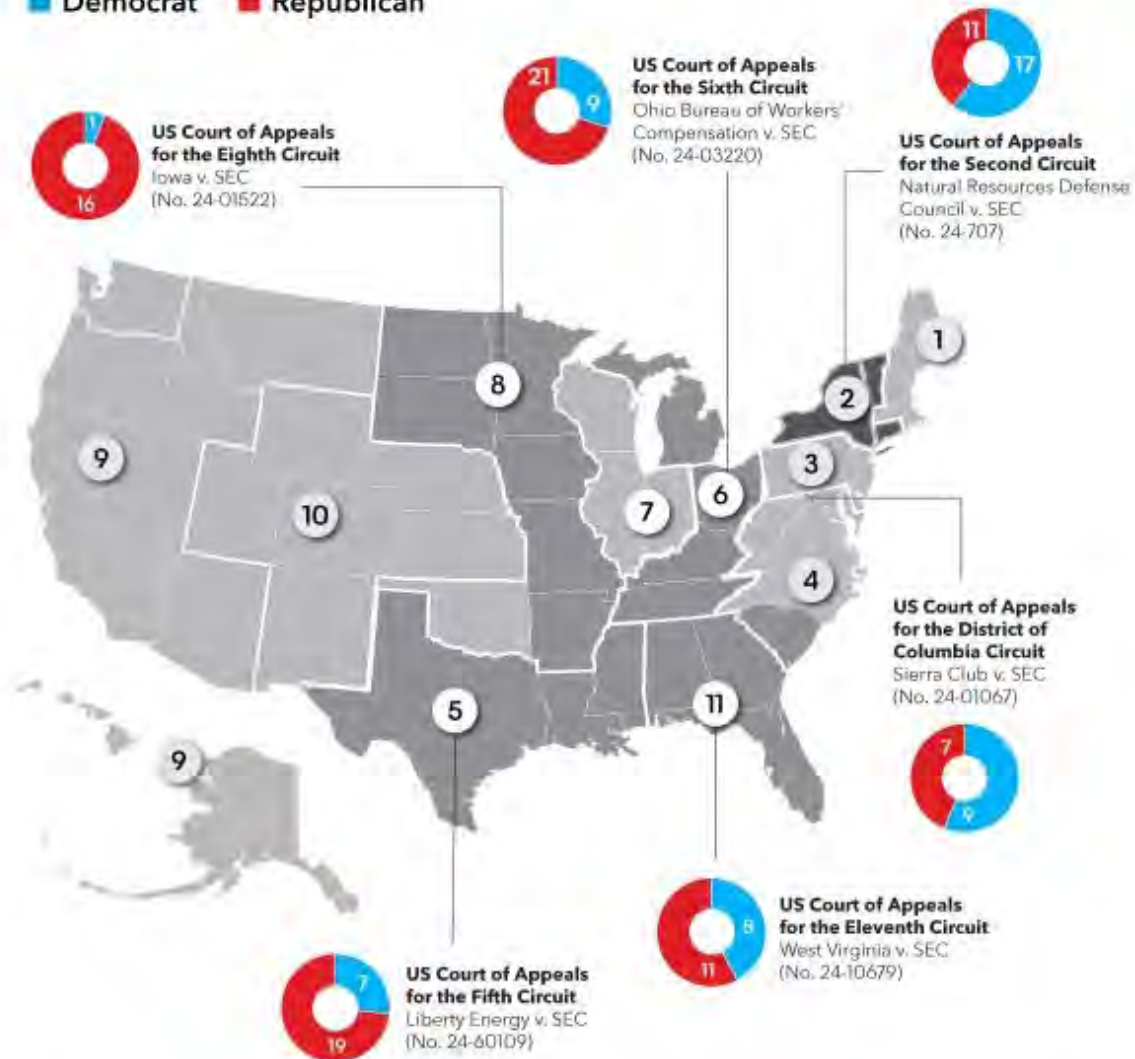
Twenty-five states joined energy companies and business advocates in arguing the regulation exceeds the SEC's authority. The Republican attorneys general and business interests filed petitions to review the rules in the US courts of appeal for the Fifth, Sixth, Eighth and Eleventh circuits, which have a conservative bent. Iowa led the lawsuit in the Eighth Circuit.

The rules also drew challenges in liberal-leaning courts from the Sierra Club and the Natural Resources Defense Council that argue the SEC scaled the rules back too much. The Sierra Club filed in the US Court of Appeals for the District of Columbia, while the Natural Resources Defense Council sued in the US Court of Appeals for the Second Circuit.

Climate Rules Spark Legal Fights

At least nine petitions in six circuits courts have been filed challenging the SEC's new climate disclosure rules.

■ Democrat ■ Republican



Source: Court records
Graphic: Cordelia Gaffney

Bloomberg Law

Tom Zimpleman, senior attorney at the Natural Resources Defense Council, said in a statement his organization looks "forward to presenting our case."

Hana Vizcarra, an Earthjustice senior attorney representing the Sierra Club, also said: "We look forward to moving on to the merits of the case."

An SEC spokesperson declined to comment on the lottery results. A representative of Iowa Attorney General Brenna Bird didn't immediately respond to a request for comment.

(The Sierra Club has received funding from Bloomberg Philanthropies, the charitable organization founded by Michael Bloomberg. Bloomberg Law is operated by entities controlled by Michael Bloomberg.)

'Merit Neutral'

Investors are increasingly seeking information on climate-related risks, the SEC said when it approved 3-2 a final rule requiring many public companies to report emissions from their direct operations and energy use, as well as risks they face due to a changing climate. The rule has been paused since the Fifth Circuit last week granted a request for a stay from Liberty Energy Inc., a fracking company. But the Eighth Circuit can lift the stay.

"There is no clear authority for the SEC to effectively regulate the controversial issue of climate change," Liberty Energy said in the Fifth Circuit. Democratic SEC Chair Gary Gensler has said the commission is "merit neutral" on investment decisions based on climate change.

Boyden Gray PLLC represents Liberty Energy and the American Free Enterprise Chamber of Commerce, which joined Iowa, Arkansas, Idaho, Missouri, Montana, Nebraska, North Dakota, South Dakota and Utah in their Eighth Circuit challenge.

A lawyer with the law firm didn't immediately respond to a request for comment.

The Judicial Panel on Multidistrict Litigation order to put all the litigation in the Eighth Circuit came after a clerk randomly selected the name of the court from a "drum." Each court that collected a suit received one entry in the lottery.

The case is In Re: Securities and Exchange Commission, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Issued on March 6, 2024, J.P.M.L., MCP No. 180, consolidation order issued 3/21/24.

(Updates with comment from an attorney representing the Sierra Club in the sixth paragraph)

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Challenges to SEC's climate rules sent to conservative-leaning US appeals court

 [reuters.com/legal/challenges-secs-climate-rules-sent-conservative-leaning-us-appeals-court-2024-03-21](https://www.reuters.com/legal/challenges-secs-climate-rules-sent-conservative-leaning-us-appeals-court-2024-03-21)

Clark Mindock

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 21 (Reuters) - A U.S. judicial panel on Thursday consolidated at least nine lawsuits challenging the U.S. Securities and Exchange Commission's new rules requiring public companies to report climate-related risks in a venue favored by Republican-led states and a business group.

The St. Louis-based 8th U.S. Circuit Court of Appeals was chosen randomly via a lottery and will consider the legal challenges to the landmark rule, which aims to standardize public company disclosures about greenhouse gas emissions, weather-related risks and how they are preparing for the transition to a low-carbon economy.

The court, which has 10 Republican-appointed active judges and one appointed by a Democratic president, was the venue where nine Republican-led states including Iowa, Montana and North Dakota and the business lobbying group American Free Enterprise Chamber of Commerce filed their challenge.

Representatives for the Republican-led states and industry challengers did not immediately respond to requests for comment. The SEC declined to comment.

First proposed in 2022, the rules are part of Democratic President Joe Biden's efforts to leverage federal agency rulemaking to address climate change threats.

They were approved by the SEC on March 6, and the first lawsuit seeking to block them was filed later that day.

The consolidated lawsuits include challenges filed by at least 25 Republican-led states, energy industry companies and business groups, including the U.S. Chamber of Commerce, the nation's largest business lobby, seeking to overturn the rules.

They have argued, among other things, that the disclosure requirements amount to back-door environmental regulations that go beyond the SEC's legal authority.

Challengers on the other side of the issue like the environmental organization the Sierra Club and Natural Resources Defense Council have meanwhile said the rules do not go far

enough to protect investors, and arbitrarily stripped the final version of stronger reporting requirement rules.

Representatives for the environmental groups said they look forward to arguing before the court.

The conservative-dominated 5th Circuit, the court where Texas and energy companies filed their challenges, temporarily paused the rules from going into effect on Friday.

The SEC is expected to ask the 8th Circuit to revisit that ruling. It had told the 5th Circuit a pause was unnecessary, since the rules have extended compliance deadlines that do not require disclosures before March 2026.

The agency has also said the rules "fit comfortably within" its authority to require disclosure of information important to investors, and that they would provide "consistent, comparable and reliable information" about climate risks.

The nine lawsuits were filed in six appeals courts. The 8th Circuit had previously set a deadline for the challengers who sued in that court to file their opening brief in May.

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Reporting by Clark Mindock; Editing by Alexia Garamfalvi and Bill Berkrot

U.S. Chamber, critic of forum shopping, questioned for doing just that

 [reuters.com/legal/government/us-chamber-critic-forum-shopping-questioned-doing-just-that-2024-03-21](https://www.reuters.com/legal/government/us-chamber-critic-forum-shopping-questioned-doing-just-that-2024-03-21)

Alison Frankel

The United States Supreme Court building is seen as in Washington, U.S., October 4, 2023. REUTERS/Evelyn Hockstein/File Photo Purchase Licensing Rights , opens new tab

March 21 (Reuters) - The U.S. Chamber of Commerce is the staunchest of allies for companies that want the U.S. Supreme Court to restrict plaintiffs' ability to pick where they can file lawsuits.

The Chamber has filed amicus briefs supporting corporations in all kinds of recent Supreme Court disputes over the proper venue for lawsuits. It sided with Bristol-Myers (BMY.N) , opens new tab, for instance, in the case that limited courts' jurisdiction over corporations in suits by out-of-state plaintiffs. It backed venue restrictions in a case that would have required plaintiffs claiming certain securities law violations to sue in federal court rather than state court and in a case that would have made it harder for accident victims to sue in the state where the accident occurred. It also was a friend of the court in a suit challenging an expansive Pennsylvania jurisdictional statute.

The issues in these Supreme Court jurisdictional disputes were varied and complex. But the theme that ties them together is the persistent warning by defendants and their allies that courts should be wary of forum-shopping by plaintiffs trying to gain a litigation advantage by picking a friendly venue.

The Chamber is now being scrutinized for doing exactly that.

Earlier this month, the Chamber, the American Bankers Association, two Texas Chambers of Commerce and a few other plaintiffs sued , opens new tab to block a new rule from the U.S. Consumer Financial Protection Board that limits late fees charged by credit card issuers with more than a million accountholders.

The plaintiffs filed their suit in federal court in Fort Worth, Texas – a favorite venue, as my Reuters colleague Nate Raymond has reported, for companies and business groups challenging Biden administration initiatives.

Neither the Chamber nor the bankers' group is based in Fort Worth. Nor, for that matter, is the CFPB.

But the Chamber's complaint asserted that Fort Worth nevertheless has jurisdiction over the case because one of the plaintiffs, the Fort Worth Chamber of Commerce, is based in the district and, like the other plaintiffs, has members that will be affected by the rule limiting late

fees.

That theory has worked before for the Chamber, which asserted similar arguments last year in a lawsuit challenging the consumer watchdog's authority to address discriminatory banking practices. That suit was filed in federal court in Tyler, Texas, where both judges are Republican appointees. And although the CFPB argued that Tyler was an improper venue, U.S. District Judge Campbell Barker rejected [it](#), opens new tab the argument because one of the plaintiffs, the Longview Chamber of Commerce, is based in the district. (Barker also sided with the plaintiffs on the merits, holding that the CFPB is not empowered to root out discrimination.)

More recently, as you know, judge-shopping in cases with nationwide consequences has become a matter of hot debate. Less than a week after the Chamber sued to block the CFPB's credit card late fee rule, the U.S. Judicial Conference announced a new policy that would require cases seeking to block state or federal laws to be randomly assigned among all of the judges in a federal judicial district, not just among judges assigned to particular courthouses within those districts.

The Judicial Conference has since said, after backlash from Republican lawmakers and some conservative judges, that courts can exercise discretion in implementing the policy. But in the meantime, the judge overseeing the Chamber's credit card fee case, U.S. District Judge Mark Pittman of Fort Worth, seems to have taken concerns about forum-shopping to heart. (Pittman was assigned to the case on March 14 after the recusal of U.S. District Judge Reed O'Connor.)

On Monday, as Raymond reported, Pittman called for briefing on whether Fort Worth is the proper venue for the suit, given that only one plaintiff in the case "has even a remote tie" to the forum.

Pittman said his order was prompted by a briefing on the Chamber's motion [it](#), opens new tab for a preliminary injunction to block the CFPB rule. The bureau's opposition brief [it](#), opens new tab highlighted the venue issue, arguing that none of the 30 or 35 credit card issuers that will be affected by the new rule is based in Fort Worth. Only one member of the Fort Worth Chamber of Commerce, according to CFPB, is subject to the new rule -- and that member is "a forum-shopping Utah bank."

"Far-flung entities cannot just pay membership fees to an association in their venue of choice to gain access to that venue," the CFPB brief said.

The agency notified Pittman on Tuesday that it intends to file a brief on Thursday asking him to transfer the case. A CFPB spokesperson declined to comment.

The Chamber and its fellow plaintiffs defended their venue choice in filings this week asking [it](#), opens new tab Pittman to expedite his consideration of their request to enjoin the new rule and responding [it](#), opens new tab to the CFPB's opposition brief.

In essence, the plaintiffs said many members of the Fort Worth Chamber will be impacted by the rule, including smaller credit card issuers that may be forced to cut late fees to compete with big issuers. Moreover, the plaintiffs argued, members of the other groups that have sued have Fort Worth customers who will be affected by the new rule.

I asked the Chamber about the contrast between its expansive view of venue in the CFPB case and the group's amicus briefs calling for restriction on venue choices for plaintiffs suing corporations. "The U.S. Chamber of Commerce brings lawsuits with local partners across the country, where government micromanagement over businesses is often felt most acutely," said Jennifer Dickey of the U.S. Chamber Litigation Center in an email statement. "It's important to confront the real harm these rules have to American businesses where these businesses operate."

Pittman refused [link](#), opens new tab on Wednesday to rush a ruling on the preliminary injunction motion, hinting that the Chamber might have gotten a faster result if it had sued in Washington, D.C., where caseloads are lighter.

The Chamber and other plaintiffs said in filings that they would seek 5th Circuit review if Pittman did not issue an injunction ruling by Friday. The Chamber did not respond when I asked if it would now head to the appeals court.

Read more:

Texas judge questions venue in CFPB credit card fee rule challenge

US judiciary says courts have discretion to adopt 'judge shopping' policy

US federal judiciary moves to curtail 'judge shopping' tactic

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Alison Frankel

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Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.



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Social Media Cos. 'Can't Hold Back' Execs In MDL, Judge Says

By **Dorothy Atkins**

Law360 (March 21, 2024, 10:05 PM EDT) -- A California federal magistrate judge warned social media companies Thursday that they must disclose relevant executive witnesses in high-stakes multidistrict litigation over social media's allegedly addictive design after plaintiffs' counsel complained that Meta and Snap's CEOs weren't identified in initial disclosures, telling defense counsel "you can't hold them back."

U.S. Magistrate Judge Peter H. Kang's comments came during an hourlong hearing in San Francisco over the latest discovery disputes in the sprawling **consolidated personal injury litigation** initially launched in 2022 against social media tech giants, including Snap Inc., Meta Platforms Inc., TikTok Inc. and YouTube.

The litigation involves claims by parents of minors, school districts and state attorneys general who allege that the tech companies, whose platforms draw in billions of dollars annually in ad revenues, are designed to be addictive to the detriment of minors' mental health and livelihood.

During the hearing Thursday, counsel for the minors and families, Previn Warren of Motley Rice LLC, complained to the judge that the defendants have inexplicably excluded certain high-profile employees from their Feb. 22 initial disclosures identifying potential witnesses, including omitting Meta CEO Mark Zuckerberg and Snap CEO Evan Spiegel, even though both executives have spoken publicly about the allegations.

According to the discovery letter brief filed before the hearing, the defendants have also disclosed only three of the 31 custodians associated with more than 1,000 documents the defense has produced.

Warren noted that in comparison, plaintiffs' counsel have identified eight times as many Meta employees as witnesses, five times as many Snap employees and roughly six times as many YouTube and TikTok employees as potential witnesses. Warren added that he doesn't understand the defense's rationale for the purported deficient initial disclosures, given the national significance of the case, and wonders whether the defense is "sitting on information on witnesses."

"We're troubled that there wasn't a fulsome disclosure," he said.

But TikTok's counsel, Geoffrey Drake of King & Spalding LLP, argued that the defense has a different view of "what these cases are about," which purportedly narrows the universe of potentially relevant witnesses, and he also noted that the plaintiffs have already identified certain executives as witnesses in their own initial disclosures.

After hearing arguments on the issue, Judge Kang acknowledged that the defendants still have more time to identify potential witnesses in their supplemental disclosures, since fact discovery doesn't close until December.

But he warned both parties that he won't look kindly on belated requests to supplement their initial disclosures, especially if they are seeking to add dozens of witnesses days before the discovery deadline. The judge also noted that such conduct could spur U.S. District Judge Yvonne Gonzalez Rogers to bar those witnesses from testifying for the defense at trial.

"You do need to list them," Judge Kang said. "You can't hold them back."

Aside from the debate over initial disclosures, Judge Kang also ordered the 35 state plaintiffs to file individual one-page letter briefs explaining whether they believe their state law prevents their respective attorneys general from accessing state agency documents and whether the communications between the state agencies and the state attorneys general, which the defense has sought in discovery, are privileged.

The judge ordered the defense to do the same, so that he can review the 70 pages of briefs and decide whether the states must produce the communications.

In a separate discovery hearing earlier this week, Judge Kang **laid out incentives** to spur depositions and document production, rejecting defense counsel's arguments the incentives are "lopsided" and telling Snap's counsel that document production is "not as hard as you're saying it is."

The next case management conference in the MDL is set for Friday afternoon before Judge Gonzalez Rogers, where the parties are expected to discuss the criteria for selecting the first bellwether trials in the litigation, which are set to go to a jury in **October 2025**.

Meta's **motion to dismiss claims against Zuckerberg** and the defendants' motion dismiss the personal injury plaintiffs' remaining "non-priority claims" are currently fully briefed and pending before Judge Gonzalez Rogers. Meta's motion to dismiss the attorneys general complaints and the personal injury plaintiffs' consumer protection and misrepresentation claims is also fully briefed and pending a decision, according to the court docket.

The state attorneys general were represented in the hearing by Joshua Olszewski-Jubelirer of the California Department of Justice's Office of the Attorney General and John Christian Lewis of the Kentucky Office of the Attorney General.

The personal injury plaintiffs were represented in the hearing by Annie E. Kouba and Previn Warren of Motley Rice LLC and Lexi J. Hazam of Lieff Cabraser Heimann & Bernstein LLP.

TikTok was represented in the hearing by Geoffrey Drake of King & Spalding LLP.

Meta was represented in the hearing by Ashley M. Simonsen, Gregory Lawrence Halperin and Isaac D. Chaput of Covington & Burling LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

--Editing by Rich Mills.



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Tribe's Opioid Suit Can Head To State Court, Okla. Judge Says

By **Donald Morrison**

Law360 (March 21, 2024, 8:07 PM EDT) -- An Oklahoma federal magistrate judge has granted the Cherokee Nation's bid to move to state court its suit accusing pharmaceuticals distributor Morris & Dickson of flooding the tribe's communities with opioids, saying the company only fulfilled one of four prongs necessary for establishing federal jurisdiction.

U.S. Magistrate Judge D. Edward Snow on Tuesday approved the Oklahoma-based tribe's request to move its state law negligence and unjust enrichment claims back to state court, in the wake of Morris & Dickson Co. LLC arguing that the tribe's allegations belong in federal court because they're predicated on U.S. regulations of controlled substances.

"There are no substantial federal issues within [The Cherokee Nation's] petition that would swing this factor towards a federal review," Judge Snow said. "Furthermore, these issues have been addressed in other courts and have been found to not upset the balance of federal and state judicial responsibilities."

Judge Snow pushed back against Morris & Dickson's assertion that the Federal Controlled Substances Act is "at the heart of the Cherokee Nation's tort claims," saying the Oklahoma Supreme Court decision it cites is inapplicable because it alleges public nuisance claims rather than negligence and gross negligence claims.

"The undersigned magistrate judge does not believe it is within the purview of this court to scrutinize an Oklahoma Supreme Court case for validity," Judge Snow said. "Furthermore, the interpretation of the duties imposed by the FCSA are not the only duties plaintiff relies on for its negligence and gross negligence claims. Therefore, no substantial federal issue exists."

Judge Snow said Morris & Dickson only met one of the four requirements of the so-called Grable test, which determines that federal jurisdiction is warranted over a state law claim when a federal issue is "necessarily raised," "actually disputed," "substantial" and "capable of resolution in federal court without disrupting the federal-state balance approved by Congress," according to the U.S. Supreme Court's 2005 ruling in [Grable & Sons Metal Products v. Darue Engineering & Manufacturing](#).

The only prong to be satisfied from the Grable test was the one stating whether a federal claim is "actually disputed," with Judge Snow saying "a federal issue may be disputed. Nonetheless, there are four prongs of the Grable test and all four must be satisfied to establish federal jurisdiction."

The tribe **urged an Oklahoma federal judge** in August 2023 to deny Morris & Dickson's request to move the litigation to federal court, saying that the FCSA doesn't even allow private parties to sue under it and that the claims do not "necessarily raise a substantial question of federal law."

Morris & Dickson **attempted to move** the suit to federal court in July 2023, saying in a removal notice that interpretation of federal law is an essential element of the Cherokee Nation's theory of liability to the negligence claims.

The tribe filed its complaint in June 2023 **accusing the Louisiana-based company**, which is the largest privately owned drug distributor in the country, of fueling the opioid crisis by ignoring suspicious orders. The suit was filed only one month after the U.S. Drug Enforcement Administration **pulled the company's** controlled substances license for shipping large quantities of

opioids despite red flags, finding the company had "long-term, egregious" failures to control against illicit diversion.

Judge Snow also denied the tribe's request for attorney fees, saying Morris & Dickson ultimately had a reasonable basis for seeking to remove the suit to federal court.

Representatives for the tribe and counsel for the two parties did not immediately respond to a request for comment on Thursday.

The tribe is represented by Sara Hill of the Cherokee Nation Attorney General's Office, Richard W. Fields of Fields Han Cuniff PLLC and Frank Sullivan III of Sullivan & Sullivan PLLC.

Morris & Dickson is represented by George S. Freedman and Andrew W. Lester of Spencer Fane LLP.

The case is The Cherokee Nation v. Morris & Dickson Co. LLC, case number 6:23-cv-00237, in the U.S. District Court for the Eastern District of Oklahoma.

--Editing by Rich Mills.

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Chemours Faces Investor Suit Over Alleged Exec Misconduct

By **Emilie Ruscoe**

Law360 (March 21, 2024, 11:04 PM EDT) -- Chemical company The Chemours Co. and four of its current and former executives face claims they hurt investors by manipulating a certain financial metric so the executives might receive greater compensation under the company's incentive plans.

In a **complaint filed Thursday** in Delaware federal court, plaintiff Robert H. Taylor Jr. claimed Chemours investors saw losses as trading prices for the company's shares sank following company announcements about a probe related to the alleged manipulation.

Most significantly, Taylor said, Chemours shares fell by more than 31%, or more than \$9 a share, from nearly \$38 to under \$29, at the end of February, when the company announced that three of the named executives would be on administrative leave as the board's audit committee finished an internal review, the scope of which included the company's "practices for managing working capital, including the related impact on metrics within the company's incentive plans."

According to Taylor, the company's free cash flow — which is how much money it has on its book after its operating expenses are paid and its capital expenditures are balanced — was the metric at issue.

Taylor said the company's public criteria for executive compensation included annual incentive plans, which entitled senior executives to cash compensation for meeting certain free cash flow targets, and long-term incentive plans that entitled the same executives to stock compensation for meeting certain free cash flow conversion targets.

According to the complaint, a week after its administrative leave announcement, the investigating board committee found that the executives on leave had made moves to delay payouts to some vendors while speeding up collection of certain receivables, so the company would have more money on its books when the third quarter of 2023 ended.

The investor cited the audit committee's finding that "these individuals engaged in these efforts in part to meet free cash flow targets that the company had communicated publicly, and which also would be part of a key metric for determining incentive compensation applicable to executive officers," the complaint says.

The audit committee also determined similar measures were taken a year earlier "to a lesser extent" as the 2022 fiscal year ended, Taylor noted.

On Thursday, market records showed Chemours closed out the day trading at about \$27, down from the trading price Taylor cited at the end of his proposed class period.

The proposed class would include those who purchased shares of the company between Feb. 10, 2023, and Feb. 28, 2024.

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

Taylor is represented by Gregory V. Varallo of Bernstein Litowitz Berger & Grossmann LLP, and Naumon A. Amjed, Ryan T. Degnan and Jonathan Z. Naji of Kessler Topaz Meltzer & Check LLP.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Taylor Jr. v. The Chemours Co. et al., case number 1:24-cv-00361, in the U.S. District Court for the District of Delaware.

--Editing by Lakshna Mehta.

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CymaBay Investor Sues For Books On \$4.3B Gilead Merger

By **Sydney Price**

Law360 (March 21, 2024, 8:03 PM EDT) -- A shareholder of liver disease-focused biopharmaceutical company CymaBay Therapeutics Inc. sued the company in Delaware Chancery Court to extract more information over a proposed \$4.3 billion merger with Gilead Sciences Inc., saying CymaBay has refused to hand over previously requested documents regarding the valuation analyses without a legitimate excuse.

On Feb. 12, CymaBay announced it would be acquired by Gilead for \$32.50 per share in an all-cash transaction. At the time, the companies said they anticipated full regulatory approval of the merger in the third quarter of the year.

According to Wednesday's suit by CymaBay shareholder Isabelle Saubadu, the company's board of directors based its approval of the merger on a recommendation statement indicating one of CymaBay's financial advisers accounted for "an assumed equity raise in 2024," even though the documents did not provide any information regarding this equity raise, and CymaBay's other financial adviser did not account for it.

Saubadu also said valuation analyses in the recommendation statement are based on financial projections that were not approved until Feb. 9 — two days before the merger was approved — and not provided to Gilead.

Saubadu said she filed a so-called Section 220 demand — which allows shareholders access to corporate books and records under certain circumstances — on Feb. 26 and is still waiting for the company to produce the materials.

According to CymaBay, the Section 220 demand did not establish a "proper purpose" and was too broad.

However, Saubadu argues the documents will allow investors to determine if the board was "disinterested and independent" when approving the merger.

"It is well established that the investigation of potential breaches of fiduciary duty and/or corporate wrongdoing are proper purposes under Section 220," Saubadu said.

Earlier this month, CymaBay rejected a standing agreement with the plaintiff intended to ensure Saubadu's right to seek books and records did not lapse because of the merger closing, according to the suit. CymaBay also issued an amended recommendation statement on March 15, but Saubadu said it does not fully address the concerns raised in her demand.

Counsel for Saubadu declined to comment Thursday. A representative of CymaBay did not immediately respond to a request for comment.

Saubadu is represented by Guri Ademi and Jesse Fruchter Ademi LLP and Ryan M. Ernst of Bielli & Klauder LLC.

Counsel information for CymaBay was not immediately available.

The case is Saubadu v. CymaBay Therapeutics Inc., case number 2024-0281, in the Court of

Chancery of the State of Delaware.

--Editing by Drashti Mehta.

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Silvergate Must Face Investor Suit Over FTX Ties, Judge Says

By **Katryna Perera**

Law360 (March 21, 2024, 11:13 PM EDT) -- The now-defunct Silvergate Bank and its CEO must face a proposed class action brought by customers of bankrupt cryptocurrency exchange FTX, a California federal judge ruled Wednesday, finding that Silvergate owed a duty to FTX customers and that its conduct harmed them.

U.S. District Judge Ruth Bermudez Montenegro issued an **order** on Wednesday denying a **dismissal motion** filed by the defunct bank in June in which it argued that the customers' negligence proposed class claim can't go forward because Silvergate "did not owe plaintiffs — customers of FTX, not [Silvergate] — any duty of care."

The FTX Trading Ltd. customer group bringing claims against Silvergate alleges the bank knowingly facilitated FTX's "dissipation" of extraordinary sums of money in the lead-up to the exchange's November 2022 collapse, which rocked the fintech sector and led federal prosecutors to level fraud, money laundering and campaign finance charges against FTX founder Sam Bankman-Fried the following month.

The FTX customers' complaint accuses the bank of failing to "account for its actions and inactions" regarding its relationship with FTX. It notes that the run on deposits that led to Silvergate's failure was precipitated by FTX's own collapse.

Judge Montenegro disagreed with Silvergate's assertion that it did not owe a duty of care to the FTX customers, noting that FTX customers were the intended beneficiaries of the Silvergate Exchange Network, a "virtually instantaneous" payment network for digital currency industry participants.

Based on the framework of this network and its instantaneous nature, it was foreseeable that "allowing FTX customer funds to be deposited into non-FTX accounts would lead to fraud and harm the owners of those funds," the judge said.

Their injury was certain, the judge said, and the customers have adequately alleged that Silvergate benefited from FTX's fraud.

"Silvergate had a strong incentive to continue accepting FTX and Alameda customer deposits and executing transfers because Silvergate's business centered around the adoption of the FTX exchange platform and app," the judge said. "Silvergate also earned income from transaction fees and interest on money deposited in FTX accounts."

According to the order, Silvergate argued in its dismissal motion that its alleged conduct was not a "substantial factor" in causing the customers' injury since their inability to withdraw their deposited funds was a direct cause of fraudulent actions by FTX and Bankman-Fried. Additionally, the bank argued that had it not processed the FTX transfers, the exchange would have simply found another bank.

However, Judge Montenegro disagreed and said the suggestion that FTX would have found another bank "is highly speculative."

Silvergate also moved for dismissal of the customers' aiding and abetting claims, saying they fail because there is no evidence that Silvergate had any "actual knowledge" of FTX's wrongdoings, and

FTX and Bankman-Fried did not owe any fiduciary duties to their customers as a matter of law.

Again, the judge disagreed, saying the customers adequately and directly alleged that Silvergate knew about FTX's fraudulent scheme and that FTX owed a fiduciary duty to its customers.

"Plaintiffs allege defendants discovered through their compliance and due diligence programs that FTX and Alameda never retained an outside auditor, never generated audited financial statements, did not observe corporate formalities, accepted several billion dollars from FTX customers which was deposited in trading accounts in the name of or associated with Alameda, and more. Therefore, the court finds that plaintiffs have adequately pled 'actual knowledge,'" the order said.

Judge Montenegro added that the allegations "sufficiently plead several theories under which a fiduciary relationship existed between plaintiffs and FTX — one based on contract, one based on FTX's representations that they would act for the benefit of its customers, and one based on the confidential relationship between FTX and its customers."

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

The customers are represented by Daniel C. Girard, Adam E. Polk and Tom Watts of Girard Sharp LLP, Jack Fitzgerald, Paul K. Joseph, Melanie Persinger, Trevor M. Flynn and Caroline S. Emhardt of Fitzgerald Joseph LLP, Timothy G. Blood, Thomas J. O'Reardon and James M. Davis of Blood Hurst & O'Reardon LLP, Michael J. Reiser, Matthew Reiser and Isabella Martinez of Reiser Law PC, Jason Kellogg, Victoria J. Wilson and Marcelo Diaz-Cortes of Levine Kellogg Lehman Schneider & Grossman LLP and Jason S. Hartley and Jason M. Lindner of Hartley LLP.

The defendants are represented by Polly Towill, John M. Landry and Madalyn A. Macarr of Sheppard Mullin Richter & Hampton LLP.

The case is Bhatia et al. v. Silvergate Bank et al., case number 3:23-cv-01406, in the U.S. District Court for the Southern District of California.

--Editing by Brian Baresch.



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3rd Circ. Agrees Investors Have No Case Against Vax Maker

By **P.J. D'Annunzio**

Law360 (March 21, 2024, 6:24 PM EDT) -- The Third Circuit on Thursday upheld a Pennsylvania federal judge's ruling that a putative class of investors alleging biopharmaceutical company Ocugen Inc. made misleading statements about its ability to quickly produce a COVID-19 vaccine failed to state a claim against the company.

A three-judge panel affirmed U.S. District Judge Chad F. Kenney's order dismissing lead plaintiff Andre Galan Bernd Benayon's lawsuit, reasoning the investors **failed to identify** a false statement made by Ocugen regarding its pursuit of U.S. Food and Drug Administration clearance of a COVID-19 vaccine candidate called Covaxin.

The suit stems from Ocugen's February 2021 announcement that it partnered with an Indian company to seek emergency use authorization, or EUA, from the FDA for Covaxin. Obtaining an EUA allows a drug to enter the market quickly, but when news of Ocugen's failure to obtain one broke, the company's stock plummeted, the investors claimed.

The investors then sued, claiming Ocugen misled them about its ability to obtain an EUA, which they said happened because it didn't provide sufficient information to the FDA. The agency instead had more questions about the drug and recommend that the company instead seek a biologics license, the investors said.

"Although the investors plausibly claim that the EUA path requires an applicant to work with the FDA, they fail to plead that Ocugen made any omission or misrepresentation in this regard, let alone a material one," U.S. Circuit Judge Cindy K. Chung wrote in the court's **opinion**.

"As the district court correctly observed, the investors do not identify any point in the EUA process at which Ocugen did not actually engage with the FDA as it had announced. The amended complaint instead relies on mere speculation and conclusory statements, which are insufficient to support a securities fraud claim," it said.

The panel also said the investors had access to FDA guidance regarding the likelihood of approval of an "inactivated virus" drug, like Covaxin, for an EUA.

"The investors claim that the FDA guidance can be interpreted to make EUA of an inactivated virus vaccine extremely unlikely. Yet both that guidance and Ocugen's plan to market an inactivated virus vaccine were well known to investors," it said. "To the extent the investors complain that Ocugen made overly optimistic statements about its expectation of Covaxin's EUA approval notwithstanding contrary FDA guidance, such optimism is immaterial because it is not the sort of information on which a reasonable investor would rely."

The proposed class action was filed in July 2021. The class included investors who bought Ocugen stock between Feb. 2, 2021, and June 10, 2021, and suffered losses.

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

U.S. Circuit Judges Cindy K. Chung, Cheryl Ann Krause and David J. Porter said on the panel for the Third Circuit.

The investors are represented by Michael I. Fistel Jr. of Johnson Fistel LLP, and James M. Ficaro of The Weiser Law Firm PC.

Ocugen is represented by Jay A. Dubow and Whitney R. Redding of Troutman Pepper Hamilton Sanders LLP.

The case is In re: Ocugen Inc. Securities Litigation, case number 23-1570, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Adam LoBelia.

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Healthcare Co. Beats Suit Over TDF Funds' Performance

By **Emmy Freedman**

Law360 (March 21, 2024, 7:50 PM EDT) -- A California federal judge granted a win to a healthcare company and its investment adviser in a class action challenging what former workers claim are shoddy target-date-funds included in the company's 401(k) plan, saying the funds at issue performed better than comparable investments.

Following a six-day bench trial in November, U.S. District Judge Stanley Blumenfeld Jr. on Wednesday **ruled** in favor of Molina Healthcare Inc. and investment adviser flexPATH Strategies LLC in an Employee Retirement Income Security Act class action brought by seven former employees.

The former employees said Molina provided poorly performing target-date funds, or TDFs, from flexPATH, which lined its own pockets while saddling workers' retirement accounts with excessive fees. But Judge Blumenfeld said the companies showed that the plan didn't suffer any losses, and it had higher returns than three retirement index funds.

"Using any of these indices as a comparator, the plan earned more through its investment in the flexPATH TDFs than it would have earned if the plan's funds had been otherwise invested in a prudent alternative selected by a prudent and loyal fiduciary," Judge Blumenfeld said. "Accordingly, even using the most profitable reasonable benchmark, the selection and retention of the flexPATH TDFs as the plan's [qualified default investment alternative] did not cause a loss to the plan."

Because it's undisputed that the flexPATH TDFs outperformed all three benchmark indices, Judge Blumenfeld said he does not need to wade into the debate over which party bears the burden of establishing causation, which courts on split on.

And because there was no loss to the plan, Judge Blumenfeld said it's also not necessary to determine whether any defendants engaged in a prohibited transaction or breached their fiduciary duties of prudence or loyalty.

The former employees filed their complaint in March 2022, naming Molina, flexPATH and NFP Retirement Inc., Molina's investment adviser, in the suit. NFP, which Judge Blumenfeld **dismissed from the suit** in December 2022, was closely associated with flexPATH at the time of the lawsuit's filing, the two companies once sharing the same CEO and office space, according to court records.

The workers said Molina's investment committee wrongfully replaced well-performing Vanguard investment funds with flexPATH TDFs that charged higher fees and were new to the marketplace. They said Molina should have properly vetted these funds before investing nearly \$400 million into the flexPATH TDFs, and therefore violated their fiduciary duties under the federal benefits law.

As a result of Molina's decisions, the former employees said the plan's assets would have increased by between \$9.4 million and \$26.7 million if the plan had retained the other TDFs instead of the flexPATH ones.

Judge Blumenfeld largely denied Molina's bid for summary judgment in September, determining the company couldn't pass off all the blame to flexPATH.

In its motion for summary judgment, Molina put forward its own calculations to show that the plan did not suffer any losses, but Judge Blumenfeld said the question of which calculation method is best

should be determined during the bench trial.

Molina, which is based in Long Beach, California, provides health plans and services under Medicaid and Medicare programs to about 5 million people across the country, according to its website.

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

The workers are represented by Nathan D. Stump, Heather Lea, Jerome J. Schlichter, Kurt C. Struckhoff, Michael A. Wolff, Patrick R. Kutz, Scott A. Bumb, Sean E. Soyars and Troy A. Doles of Schlichter Bogard and Denton LLP and by William H. Edmonson of the Law Office of Will Edmonson.

Molina is represented by David Tetrick Jr., Benjamin B. Watson, Darren A. Shuler, Lauren N. Smith and Jeanne A. Fugate of King & Spalding LLP.

flexPath is represented by Catalina J. Vergara, Gregory J. Comeau, Meaghan VerGow, Patrick V. Plassio, Brian D. Boyle, Jacob N. Chambers, Kevin Alan Kraft and William D. Pollak of O'Melveny & Myers LLP.

The case is Michelle Mills et al., v. Molina Healthcare Inc. et al., case number 2:22-cv-01813, in the U.S. District Court for the Central District of California.

--Editing by Amy Rowe.

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\$114M Discord Stock Case Tossed Ahead Of Jury Trial

By Catherine Marfin

Law360 (March 21, 2024, 9:29 PM EDT) -- A Texas federal judge has dismissed a 21-count indictment against seven men accused of operating a multimillion-dollar "pump-and-dump" stock scheme over social media platform Discord two weeks before they were set to be tried before a jury, writing that the government's case was unable to survive two recent appellate court decisions that reined in corruption prosecutions.

In a **12-page order** Wednesday, U.S. District Judge Andrew S. Hanen relied in part on the 2023 U.S. Supreme Court case **Ciminelli v. United States**, which rejected the "right to control" theory of fraud contemplated by the Second Circuit and limited fraud cases to those that deprive victims of traditional property rights such as property or money.

"The scheme did not deprive investors of their money or property through any misrepresentation; the misrepresentations deprived them only of accurate information necessary to make discretionary economic decisions," Judge Hanen wrote of the case against the traders.

Judge Hanen's order was entered following a two-day pretrial conference, according to court records.

Eric Samuel Rosen of Freedman Normand Friedland LLP, counsel for defendant John Rybarczyk, who led the dismissal motion, told Law360 that he "thanks the court for its careful consideration of the many legal issues" created through the recent appellate decisions.

Luis A. Reyes of Ashcroft Sutton Reyes LLC, counsel for defendant Perry "PJ" Matlock, told Law360 that "this is how the justice system is supposed to work."

"When all was said and done, the court analyzed the matter and correctly applied the proper standard as defined by the United States Supreme Court," Reyes said. "The court properly concluded that Mr. Matlock's alleged conduct, and that of the other defendants, did not amount to any scheme to defraud as a matter of law. We are very gratified with yesterday's results."

Judge Hanen wrote Wednesday that as outlined in the government's indictment, defendants Rybarczyk, Matlock, Edward Constantinescu, Gary Deel, Stefan Hrvatin, Tom Cooperman and Mitchell Hennessey's scheme was "totally indifferent to its effect on the alleged victims," indicating that the financial losses "happened incidentally" and were not the "object of" their actions, the opinion reads.

"Many of the alleged victims may have actually made money. This was confirmed at oral arguments," Judge Hanen wrote. "The investors' trading losses are one step too far removed from the defendants' alleged fraudulent misrepresentation."

In addition to **charging the group** in December 2022 with conspiracy to commit securities fraud, counts two through 21 of the government's indictment charge various men with securities fraud based on social media postings about 19 different stocks.

The indictment claims that the defendants coordinated decisions to buy and sell shares of certain publicly traded companies, and coordinated mischaracterizations about their trading strategies they then shared with online followers to manipulate the market and maximize their own trading profits.

According to the government, the alleged scheme ran from January 2020 to April 2022 and was worth around \$114 million.

A second piece of Judge Hanen's analysis Wednesday stemmed from the 2023 Fifth Circuit case **USA v. Greenlaw** , in which the appellate court **left in place** a combined 20-year prison sentence for United Development Funding officials who were convicted of participating in a Ponzi scheme involving loans for housing development.

The motion to dismiss, filed by Rybarczyk in September and joined by the other defendants, relied on both the Greenlaw and Ciminelli cases, according to court filings.

Judge Hanen wrote that the government was required to prove under the securities fraud statute that there was a "scheme to defraud" and that the defendants had an "intent to defraud" their victims. Judge Hanen noted that while neither phrase is defined in the statute, the Greenlaw and Ciminelli cases touch on both definitions.

In Greenlaw, the Fifth Circuit held that an "intent to defraud" must include both an intent to deceive and an intent to cause harm through that deceit. Greenlaw and Ciminelli, taken together, define a "scheme to defraud" as one which deprives a person of money or property where the defendant receives financial gain as a result, Judge Hanen wrote.

"Here, the language of the indictment uses the terms 'intent to defraud' and 'scheme to defraud,'" Judge Hanen wrote. "There are allegations that the defendants in fact profited from their activities. These allegations adequately allege that obtaining financial gain was an object of the defendants' scheme to defraud; obtaining financial gain, however, is only half the equation. It is the other half of the equation — harming a victim's traditional property right — that is lacking."

The "most glaring issue" with the government's indictment is the "dearth of factual allegations" connecting the alleged scheme to investors' traditional property interests — money or property, as required under Ciminelli, Judge Hanen wrote.

Only one statement in the government's indictment indicates that the group intended to take the victims' money — a message from an eighth defendant, Daniel Knight, who struck a plea deal with the government, to an unnamed co-conspirator in which Knight says, "We're robbing f*cking idiots of their money," according to court documents.

But Judge Hanen wrote that while the statement may survive the Greenlaw analysis of "intent to defraud," it doesn't survive Ciminelli.

"Just because a conspirator believed he was 'robbing ... idiots,' does not make it so, especially when the mechanism or object of the scheme, as alleged, did not deprive others of their traditional property rights," Judge Hanen wrote. "As defendants point out, the indictment 'fatally does not allege' that any defendant intended to or actually deprived any individual investor of any money or property."

Matthew Aaron Ford of Ford O'Brien Landy LLP, counsel for lead defendant Constantinescu, told Law360 that the "government's flawed indictment ... lacked any legal basis."

"We are pleased with Judge Hanen's thoughtful decision granting our motion to dismiss the indictment against all defendants, which represents a historic victory for the First Amendment and our right to speak freely," Ford said.

Laura M. Kidd Cordova of Jackson Walker LLP, who represented Hennessey, said it was "clear" from the beginning of the case that her client "did not commit any crime."

"It is incredibly gratifying that the judge recognized that and dismissed all charges against him," Cordova said.

Carlos M. Fleites of Carlos M. Fleites PA and Neal Andrew Davis, counsel for Hrvatin and Deel, respectively, expressed their gratitude in Judge Hanen's order and said they were grateful their clients can "get their lives back."

"I'm elated because justice won the day," Davis said. "The judge was very clear that what happened here was not a crime. ... This case law is developing, so for the judge to have been so attentive and

studious in trying to obtain the right result and grasp the issues, that's a tremendous task."

Chip Lewis of Chip Lewis Law, counsel for Cooperman, called Judge Hanen's decision a "victory" for a "great young man," telling Law360 that he commended the court for its "fastidious application" of recent case law in the mens' "intricate" case.

The U.S. Department of Justice and the Office of the U.S. Attorney for the Southern District of Texas did not immediately return a request for comment Thursday.

It was unclear Thursday whether the order affects Knight's agreement with the government. Counsel for Knight did not immediately return a request for comment.

The government is represented by Thomas Heyward Carter of the Office of the U.S. Attorney for the Southern District of Texas and Scott Philip Armstrong and John J. Liolos of the U.S. Department of Justice.

Constantinescu is represented by Matthew A. Ford, Jamie Hoxie Solano and Stephen R. Halpin III of Ford O'Brien Landy LLP.

Matlock is represented by Luis A. Reyes and Johnny Sutton of Ashcroft Sutton Reyes LLC.

Rybarczyk is represented by Philip H. Hilder, Q. Tate Williams and Stephanie K. McGuire of Hilder & Associates PC, and Eric Samuel Rosen of Dynamis LLP.

Deel is represented by Neal Andrew Davis.

Hrvatin is represented by Carlos M. Fleites of Carlos M. Fleites PA.

Cooperman is represented by Chip Lewis of Chip Lewis Law.

Hennessey is represented by Laura M. Kidd Cordova and Michael J. Murtha of Jackson Walker LLP.

Knight is represented by Cordt Cullen Akers of The Akers Firm.

The case is USA v. Constantinescu et al., case number 4:22-cr-00612, in the U.S. District Court for the Southern District of Texas.

—Additional reporting by Ivan Moreno, Elliot Weld, Khadrice Rollins and Spencer Brewer. Editing by Michael Watanabe.



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9th Circ. Partially Backs Meta Class Cert. In Ad Reach Row

By **Lauren Berg**

Law360 (March 21, 2024, 10:52 PM EDT) -- A split Ninth Circuit panel on Thursday affirmed certification of a damages class of Meta Platforms advertisers who were allegedly deceived about Facebook's "potential reach" tool, but upended certification of an injunction class, telling the district court to take a fresh look at whether the lead plaintiff actually has standing.

The panel majority, in a published **opinion**, affirmed a California federal judge's order certifying a class of advertisers who claim Meta raked in money by misrepresenting the potential reach of advertisements to Facebook users by allegedly including fake and duplicate accounts, rejecting Meta's argument that this misrepresentation does not present a common question across the class.

The advertisers allege that Meta inflated the potential reach of ads on its platforms by stating that "potential reach" was an estimate of people, when it's actually an estimate of accounts, according to the opinion. Meta argues that this alleged misrepresentation is a numerical discrepancy between people and accounts, rather than people being substituted for accounts, the opinion states.

"Under its theory, Meta contends the misrepresentations materially varied because the numerical value of the discrepancy differed for each individual advertiser based on its advertising budget and targeting, and thus there was no common misrepresentation among the class," the majority said. "We disagree."

Differences in the size and sophistication of the advertisers in the class don't matter, the opinion states, noting that, in this case, the question is the same for every member: "would substituting people for accounts in Potential Reach be material to the reasonable consumer?"

"It is undisputed that Potential Reach was shown to every advertiser on Meta's Ads Manager, Potential Reach was always expressed as a number of people, and Potential Reach always estimated a number of accounts," the majority said. "Class members were thus exposed to uniform misrepresentations about the potential reach of their advertisements."

The advertisers' litigation **launched in August 2018** when Danielle Singer, the owner of a Kansas-based aromatherapy fashion company, sued the company over the estimates.

Singer and her business were voluntarily dismissed from the suit in March 2020, according to court records, and advertiser plaintiff DZ Reserve, a fitness products seller that joined the suit later, took the helm as a named plaintiff.

DZ Reserve claimed it spent more than \$1 million on Facebook ads after relying on the company's allegedly bogus potential ad reach estimates. Another lead plaintiff, Cain Maxwell, says he spent \$379 on Meta on 28 ads for firearm mounts from September 2018 to May 2019.

In 2019, the advertisers' claims of breach of contract, implied duty and covenant of good faith and fair dealing were trimmed off, but their fraudulent misrepresentation, fraudulent concealment and unfair competition claims were allowed to move forward. Maxwell and DZ Reserve **moved for class certification** in April 2021.

In March 2022, U.S. District Judge James Donato **certified the class** and was critical of **Meta's opposition**, saying many of the company's arguments were not suited for that stage of the case and

its allegedly unfocused "blunderbuss of objections" to certification did not hold up to scrutiny.

Meta quickly appealed the ruling and at **oral argument in September**, U.S. Circuit Judge Danielle Jo Forrest voiced doubts about the certification order, saying the class definition pushes against "a little bit of a common sense principle" by including millions of advertisers, including mom-and-pop businesses and Fortune 500 companies.

In its opinion Thursday, the appellate panel majority affirmed certification for a damages class, but vacated certification for an injunctive-relief class, finding that DZ Reserve didn't present any evidence that would support its standing to seek such relief and that Maxwell's standing might need some factual development.

To establish standing for injunctive relief, a plaintiff has to show they are under threat of a concrete and particularized injury, that the threat is actual and imminent, that it can be fairly traced to the challenged action of the defendant, and that it's likely a favorable judicial decision will prevent or redress the injury, according to the opinion.

The majority instructed the district court to look at whether Maxwell can meet those requirements, the opinion states.

In a partial dissent, Judge Forrest echoed the comments she made at the September hearing, saying she agrees with the majority that the injunction class must be vacated and remanded for the district court to reconsider whether Maxwell has standing, but that the damages class also doesn't hold water.

She said the advertisers have not established predominance, pointing to three issues that involve individualized inquiries: whether each advertiser in the class was subject to a misrepresentation, whether any misrepresentation was material and whether each advertiser relied on a material misrepresentation.

Contrary to what the majority found, Judge Forrest said Meta's substitution of accounts for people "is not inherently misleading," adding that "potential reach" as described is only misleading if there is a significant deviation between the number of accounts and the number of people that may see advertisements.

If these two populations neatly correlate, characterizing Potential Reach as a calculation of people is accurate," the judge said. "Moreover, whether a deviation between the number of accounts and the number of people is a misrepresentation must consider Meta's express disclosure that Potential Reach is an estimate."

"Properly framed, plaintiffs' assertion that there is a cohesive class for which common questions predominate begins to unravel," she added.

Geoffrey Graber of Cohen Milstein Sellers & Toll PLLC, lead counsel for the advertisers, told Law360 on Thursday, "We are very happy with today's Ninth Circuit ruling. We now look forward to showing the evidence at trial that Meta knew about this inflated reach issue for years and yet continued to take advantage of advertising customers."

Representatives for Meta did not immediately respond to requests for comment.

U.S. Circuit Judges J. Clifford Wallace, Sidney R. Thomas and Danielle J. Forrest sat on the panel for the Ninth Circuit.

The advertisers are represented by Geoffrey Graber, Andrew N. Friedman, Karina G. Puttieva, Madelyn Petersen and Eric A. Kafka of Cohen Milstein Sellers & Toll PLLC and Charles Reichmann.

Meta is represented by Andrew Clubok, Susan E. Engel, Margaret A. Upshaw, Melanie M. Blunski, Nicholas Rosellini, Nicole C. Valco and Samir Deger-Sen of Latham & Watkins LLP.

The case is DZ Reserve et al. v. Meta Platforms Inc., case number 22-15916, in the U.S. Court of Appeals for the Ninth Circuit.



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6th Circ. Probes Outside Firm's Outreach To Class Members

By Carolyn Muyskens

Law360 (March 21, 2024, 11:00 PM EDT) -- A Sixth Circuit judge suggested Thursday that there may be free-speech issues with an order barring outside attorneys from sending solicitation letters to potential class members poised to benefit from a pending settlement over Michigan counties' tax foreclosure practices.

U.S. Circuit Judge Raymond M. Kethledge made the comments during oral arguments in which Visser & Associates is fighting a gag order preventing the law firm from contacting people who might be class members in a large class settlement between property owners and dozens of Michigan counties that allegedly improperly profited from seizing and selling properties over unpaid tax debt.

Judge Kethledge suggested that while the situation was complicated by other alleged misconduct by the Visser firm, in general he struggled to find a "legal impediment" that would prevent lawyers not involved in the litigation from contacting class members who are unrepresented in a pending class action settlement.

The judge said there were situations in which it would be "quite important" for an outsider to be able to inform potential class members if a settlement was a bad deal for the class.

"It would seem like the First Amendment issue here is an important one," Judge Kethledge said.

Visser & Associates was hit with an order prohibiting the firm from communicating with class members it was not already retained to represent, after the firm **sent letters** to potential class members criticizing the proposed settlement and encouraging them to hire Visser and opt out of the settlement class. Visser was also criticized for contacting named plaintiffs in the class, who were already represented by class counsel.

Visser complained in its appeal that the order was overbroad and cut its attorneys off from communicating with unrepresented class members who had expressed interest in retaining the firm, and the Sixth Circuit partly stayed the order to allow the firm to talk to certain class members who had already established a relationship with Visser.

Judge Kethledge asked counsel for the class, David Fink of Fink Bressack, whether anything was legally wrong with an outside firm contacting class members to discuss concerns with the settlement.

"The legal impediment is that there is an attorney-client relationship," Fink said, clarifying that it's a "limited" relationship in the class-action context.

That idea received pushback from U.S. Circuit Judge Rachel S. Bloomekatz, who said, "You have duties to the class, but that doesn't mean that every counsel from any other firm can't reach out to an unnamed absent class member, who maybe you've never even spoke to, who maybe could use some truthful basic information about what's going on in the case."

Judge Kethledge said that question got to the heart of the matter: whether other lawyers can reach out to class members to express concerns about a settlement, absent other "extraordinary circumstances" such as abusive or misleading communications.

"As a general matter, do you think people can't come in and express concerns about a settlement?"

Judge Kethledge asked.

Fink said the real question was whether an outside attorney could run "a campaign" targeted at his clients.

"But they're not your clients," Judge Kethledge shot back.

"I think we disagree on this point," Fink said.

Fink also said many of the letters did not mention that a class settlement had received preliminary approval and that the class members might be entitled to relief through that settlement.

"We think that is misleading," Fink said.

During Visser's turn at the podium, Judge Kethledge said he "understood" Visser's constitutional free speech argument, but asked Philip L. Ellison of Outside Legal Counsel PLC, an attorney for Visser, about a judge's ability to "maintain order in his court and in his proceedings."

Visser received a reprimand from as a sanction after the judge said the Visser firm had lied to him when it told the court it had stopped communicating with class members after the preliminary approval of the settlement, when in reality the firm continued to send the letters.

U.S. District Judge Paul L. Maloney "thought the Visser firm had told him an untruth in a hearing and that they had contacted represented parties. Why isn't that a basis for the finding here?" Judge Kethledge said.

Ellison said Judge Maloney's sanction was not at issue in the appeal but added that the protective order "has to be the least restrictive means" to remedy the wrong.

The lower-court judge's order prevented attorneys from communicating with certain class members who had expressed interest in retaining the firm before the class was conditionally certified but who had received the post-certification communications that were found to be improper, which Ellison said went too far and violated the Visser firm's First Amendment rights.

Ellison, Visser and The Miller Law Firm have also represented objectors to the class settlement who appeared in February for a **marathon final approval hearing** to argue that the settlement was collusive and a bad deal for the class.

Under the deal awaiting approval, class members whose homes were foreclosed for nonpayment of taxes between 2013 and 2020 will take home 64% of the surplus proceeds from the sale of their properties if their county treasurer sold their home at a profit.

U.S. Circuit Judges Raymond M. Kethledge, Chad A. Readler and Rachel S. Bloomekatz sat on the panel for the Sixth Circuit.

Visser and Associates PLLC, Donald R. Visser and Donovan J. Visser are represented by Philip L. Ellison of Outside Legal Counsel PLC and Donald R. Visser.

The class is represented by David H. Fink and Nathan J. Fink of Fink Bressack, Owen D. Ramey and Ronald W. Ryan of Lewis Reed & Allen PC and James Shek.

The counties are represented by Matthew T. Nelson and Ashley G. Chrysler of Warner Norcross + Judd LLP, Charles A. Lawyer, Cynthia Filipovich and Magy Shenouda of Clark Hill, Theodore W. Seitz of Dykema Gossett PLLC and Allan Vander Laan and Douglas J. Curlew of Cummings McClorey Davis & Acho.

The case is Wayside Church et al. v. Van Buren County MI et al., case number 23-1471, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Peter Rozovsky.



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Autonomy Jury Hears Of 'Handshake Deal' To Pad Revenue

By **Bonnie Eslinger**

Law360 (March 21, 2024, 10:49 PM EDT) -- A onetime Autonomy Corp. customer took the stand Thursday in the California federal criminal trial of former CEO Michael Lynch, describing a "handshake" deal to pay the company \$7.5 million with the understanding the funds would be returned — part of an alleged plot to fraudulently inflate Autonomy's revenues.

John Baiocco, founder of software company Capax Discovery Inc., testified that an Autonomy executive convinced him to enter into a \$7.5 million contract for data-processing software by promising that Autonomy would ultimately provide Capax with the funds to pay for it. Baiocco said the software would allow his company to provide more efficient "e-discovery" software for sifting through documents.

Prosecutor Adam Reeves asked Baiocco what he recalled about the deal he struck with Stouffer Egan, Autonomy's head of sales.

"It was not in writing," Baiocco said. "It was like a handshake promise that we would buy the software, and somehow they would find a way to get us the funds to pay for it."

That deal included Capax later getting paid for services it did not perform and getting commissions on software reseller deals with third parties that Autonomy set up, Baiocco said.

Starting in or about March 2009, Capax enter into a series of deals with Autonomy over the next two and a half years, Baiocco said.

"For many millions of dollars?" Reeves pressed. The Capax founder agreed.

One way that Autonomy funneled funds to Capax was by paying for work that the discovery company never provided, Reeves said.

During opening statements on March 18, a different government prosecutor told jurors that these side agreements allowed Capax to purchase Autonomy's software, saying it was an example of "Autonomy cooking its books."

On Thursday, Reeves reviewed invoices that showed that Autonomy paid Capax for electronic discovery processing services.

"At any time, did Capax Discovery actually perform the services?" Reeves asked. Baiocco said no.

"This was a mechanism for them to request services that were not performed so that they could then pay you to repay the license," Reeves said. Baiocco agreed.

Reeves noted that over the years, the invoices added up to hundreds of thousands of dollars.

In mid-2009, Capax also began acting as a reseller for Autonomy, earning a 10% commission on each deal, Baiocco testified.

"Some of those reseller deals were for millions of dollars," Reeves said. "So in the long run was this a lucrative form of business for Capex Discovery?"

Baiocco agreed.

Reeves asked who actually coordinated the reseller deals, including closing the deal with the end users.

Baiocco said it was someone in Autonomy's sales department.

"I'm not sure who did it, but it wasn't us," he said.

Later, when looking at one deal, in which Autonomy software was resold through Capax to Bank of America, Reeves asked Baiocco what work he did to earn the \$945,000 commission.

"Sweat," Baiocco said glumly, adding, "No work."

During cross-examination, a lawyer for Lynch, Christopher Morvillo of Clifford Chance LLP, noted that Autonomy's CEO had been missing from Baiocco's testimony.

"You just testified for a few hours this morning. And during that entire time, you never mentioned Mike Lynch's name once did you?" Morvillo said. "And the government introduced dozens of documents during your testimony into evidence. Not one mentioned Mike Lynch did it?"

Baiocco said no.

Morvillo pressed on the issue, saying the two men had only met once and that there had never been any email exchanges.

"You never spoke with him on the phone," Morvillo said. "You never exchanged any handshakes with him?"

Baiocco said, once, at a party when he met Lynch.

"Other than that ... you never communicated with Mike Lynch about any of the transactions that you testified about here today, right?" Morvillo said.

Baiocco said that was correct.

Later, Morvillo brought up the \$7.5 million contract, and had Baiocco explain that it included a shared royalties provision once Capax had its electronic discovery operations up and running.

"So it was in Autonomy's interest for you to get up and running to be able to provide services because after you've hit certain thresholds, they would get money for work that you were doing?" Morvillo asked.

Baiocco said yes.

Lynch's lawyer also had Baiocco look at contract language that said the written agreement supersedes all prior proposals including oral or understandings.

"You know what it means?" Morvillo said. "It means no handshake agreements."

The lawyer also pointed out that Autonomy provided Capax with hardware worth over \$800,000.

There was no sure deal from Autonomy, Lynch's lawyer later suggested.

Baiocco said his company took a "mitigated risk," and when Morvillo asked him what that meant, the Capax chief replied, "the handshake."

Lynch is on trial over 16 felony counts of conspiracy and fraud alongside Autonomy's former vice president of finance, Stephen Chamberlain, as well as an additional count of securities fraud on claims he duped HP into buying his company at the inflated price of \$11.7 billion.

The **trial kicked off** on Monday, with prosecutor Adam Reeves telling the 12 jurors that before Autonomy's acquisition, Lynch met with HP executives at their Palo Alto headquarters in 2010 and "spun a fabulous tale" about the software company's success that wasn't true.

Lynch and Chamberlain used a variety of accounting tricks to make Autonomy's revenue growth look better than it really was, including backdating contracts and pretending to ship goods that had not really shipped, Reeves said. Autonomy was also reselling millions and millions of dollars' worth of computer hardware, such as laptops and monitors, to make the software company look like it was growing faster than it really was, the prosecutor told jurors.

The evidence will show Lynch "was the driving force behind this massive fraud," Reeves said.

Reid H. Weingarten, an attorney for Lynch, told jurors that the real story behind HP's buyer's remorse would surface through the defense. He told jurors his client had no reason to commit fraud.

Chamberlain's lawyer told jurors that his client is innocent and is nothing more than a "pawn" in the fight between Autonomy and HP.

During Tuesday's trial proceedings, Autonomy's former director of accounting from 2009 to 2012 took the stand. Ganesh Vaidyanathan talked about his concerns over accounting irregularities he saw. His boss Brent Hogenson, whom the government identified Monday as a whistleblower who Autonomy later fired, had brought those concerns to the company's higher-ups, Vaidyanathan said.

During Vaidyanathan's cross-examination, a different lawyer for Lynch underscored that a \$1.5 million embezzlement scheme was carried out by another employee under Hogenson's watch, who was chief financial officer of Autonomy Americas at the time.

On Tuesday, Lynch and Chamberlain's lawyers also urged U.S. District Judge Charles R. Breyer to **dismiss a juror** who contacted a federal prosecutor during voir dire seeking law career advice. On Wednesday, after talking to the assistant U.S. attorney — who is not on the prosecution team — the judge declined to boot the juror.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California, and Zachary G.F. Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste L.M. Koeleveld and Daniel S. Silver of Clifford Chance LLP, and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Boxer Wolpert Nessim Drooks Lincenberg & Rhow PC.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Richard Crump and Christopher Crosby. Editing by Emily Kokoll.



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BREAKING: Trump-Tied SPAC Merger Approved By Shareholders

By **Tom Zanki**

Law360 (March 22, 2024, 10:36 AM EDT) -- Digital World Acquisition Corp. shareholders on Friday approved a proposal to acquire former President Donald Trump's social media platform, setting in motion long-delayed plans to take Trump's startup public despite unresolved litigation tied to the merger.

Digital World shareholders agreed to back the special-purpose acquisition company's plans to combine with Trump Media & Technology Group Corp., the owner of Truth Social, during a shareholder vote held Friday morning.

Friday's approval came after **repeated extensions** to Digital World's deadline to complete the merger, first proposed in October 2021. The combined company has applied to trade on the Nasdaq under the symbol "DJT" upon closing.

Trump would own 78.8 million shares in the combined company, or about a 58% stake, which would be worth more than \$3 billion based on Digital World's recent stock price. Shares of Digital World closed Thursday at \$42.81.

Trump would not be able to sell any shares until at least six months after the merger closes under lock-up provisions that apply to existing stockholders. Many SPACs and traditional IPOs contain lock-up agreements to prevent a rash of selling shortly after a company goes public.

SPACs, also called blank-check companies, are shell vehicles that conduct IPOs with the intention of acquiring and taking public a private business within a given period. The acquisition target inherits the SPAC's stock listing and related proceeds if shareholders approve the merger.

Digital World's attempt to acquire Trump Media has run into financial, legal, and regulatory roadblocks over the past two years, including U.S. Securities and Exchange Commission and **grand jury investigations** into whether laws and regulations were followed as both parties negotiated the merger.

Securities **regulators investigated** whether Digital World considered other acquisition targets besides Trump Media. SPACs are not permitted to have a particular target in mind when they launch their IPO.

Digital World last July agreed to **pay the SEC \$18 million** to settle charges that it failed to disclose its ties with Trump Media. The SEC last month **cleared the registration statement** for Digital World's combination with Trump Media, enabling the merger vote to take place.

The merger has also drawn multiple lawsuits.

Earlier this week, Digital World **sued its largest founding investor** in New York state court to force a vote in favor of the deal. Digital World argued in a complaint filed Tuesday that investment firm ARC Global Investments II LLC violated a contractual obligation to support the merger.

ARC, whose managing member is former Digital World CEO Patrick Orlando, has said it believes the ratio for converting its shares into new Trump Media shares is "too low." Orlando was **fired** as Digital World's CEO in March 2023 as the merger was going through trouble.

The deal also **attracted two lawsuits** last month in Delaware Chancery Court as investors on both sides alleged that the long-delayed merger would cheat them out of their shares. The Delaware court on March 7 **denied an injunction** sought by Orlando to stop the deal, clearing the way for shareholders to vote on the merger Friday.

Digital World **raised \$287.5 million** in its September 2021 IPO, with ARC as its sponsor and Orlando as its CEO. The following month, Digital World **unveiled plans** to merge with Trump Media in a deal that was then valued at \$1.7 billion.

Efforts to finance the deal have also hit obstacles. The companies had locked an additional \$1 billion in committed capital through a private investment in public equity, or PIPE, from institutional investors in December 2021. But that agreement was later **scrapped** following investor redemptions, and Digital World has sought more modest funding agreements instead.

A trial is also **set for April** for three venture capitalists who pled not guilty in Manhattan federal court to insider trading on confidential plans related to the SPAC deal.

Despite the **various legal issues** the deal and Trump himself are facing, Digital World shares have rallied as Trump emerged as the likely Republican nominee for president, more than doubling year-to-date to a nearly \$1.6 billion market cap as of Thursday.

Trump has said he created the social media platform to "stand up to the tyranny of Big Tech." Trump was banned from X, formerly known as Twitter, after the Jan. 6, 2021, assault on the U.S. Capitol.

Despite being reinstated on X by new owner Elon Musk, Trump does most of his social media communication through Truth Social, which has far fewer users than X.

Digital World is represented by Ellenoff Grossman & Schole LLP.

Trump Media is represented by Nelson Mullins Riley & Scarborough LLP.

--Additional reporting by Al Barbarino, Jeff Montgomery and Leslie Pappas. Editing by Alyssa Miller.



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Burford, Sysco Get OK To Swap Bid In Price-Fixing Cases

By **Hailey Konnath**

Law360 (March 22, 2024, 12:17 AM EDT) -- An Illinois federal judge on Thursday agreed to allow an affiliate of legal investment firm Burford Capital to substitute for food giant Sysco in price-fixing litigation against broiler chicken producers, a ruling that comes a month after a Minnesota federal judge refused to allow the same Burford unit to substitute for Sysco in similar pork and beef price-fixing litigation.

U.S. District Judge Thomas M. Durkin granted a motion to allow Carina Ventures LLC to substitute for Sysco, noting that the defendant chicken producers haven't pointed to anything "improper or unusual" about Burford's funding agreement with Sysco.

According to the decision, Sysco assigned its claims to Carina — a "specially created Burford affiliate" — after Sysco and Burford butted heads as to how to manage the litigation. Burford has also funded Sysco's claims in other litigation, including similar price-fixing litigation against beef and pork producers.

Major producers including Tyson, Pilgrim's Pride and Sanderson Farms had urged the court not to allow the substitution, arguing that it would make the case even more challenging to manage. They also contended that Sysco's assignment of claims isn't valid.

Judge Durkin on Thursday disagreed, saying that the producers' first argument "ignores reality."

"This case is already complicated and slow, and Sysco's litigation funding agreement with Burford and the ensuing assignment to Carina is only one small aspect of many complications and delays this case has suffered," the judge said.

The funding agreement is "unsurprising" and "logical," he added.

As for their issues with the claims assignment, Judge Durkin said it "does not appear to be a very unusual circumstance either."

"Like litigation funding agreements, such assignments are a fact of modern litigation," the judge said. "Even if defendants are correct that the assignment might add some time to an already extended case, absent some palpable prejudice to case management or the rights of the parties, it is generally not the court's place to interfere with sophisticated parties' business decisions about the value of their claims."

Judge Durkin's finding is in stark contrast to that of U.S. Magistrate Judge John F. Docherty in Minnesota. In February, Judge Docherty **refused to allow** the substitution in pork and beef price-fixing litigation, finding that it would draw out the case just so Burford could maximize its return on investment. The move would also remove control over the decision to settle the suits and on what terms from the parties who claim to have actually been harmed and from those accused of doing that harm, Judge Docherty said.

And it would go against public policy, the magistrate judge said at the time. That's not just because Carina is looking to extend litigation, in part to extract larger settlements from the parties, but also because if the lower settlements go through, they would set benchmarks for other settlements that have yet to be finalized, according to the ruling.

The chicken litigation goes back to 2016, when consumers sued the country's biggest producers of broiler chicken, accusing them of conspiring to limit chicken supply and raise prices.

In Thursday's ruling, Judge Durkin held otherwise. He said there is "no question" that the claims assignment gives Carina standing, and "ironically, standing is key" to the producers' argument that the assignment is "champertous" and against public policy.

"This is because defendants lack standing to make it," the judge said.

He pointed to U.S. Supreme Court precedent, which he said established that the defense of champerty can only be used by a party to a contract. And even if they had the standing to bring that argument, it wouldn't invalidate the claims assignment to Carina, Judge Durkin said.

"Sysco's relationship with Burford, including the recent assignment to Carina, are simply not the kind of circumstance contemplated by the ancient law prohibiting champerty," the judge said.

He said the bottom line is that the chicken producers "have not identified any authority" that their concerns will frustrate the litigation or future settlement talks.

"The concern alone is insufficient," Judge Durkin said. "An invalid assignment might have been a reason to deny the motion. But the court has rejected those arguments."

Tyson, Sanderson, Pilgrim's Pride, Sysco and Burford didn't immediately respond to requests for comment late Thursday.

Sysco is represented by Ryan P. Phair and Carter C. Simpson of Paul Hastings LLP and Julie B. Porter of Salvatore Prescott Porter & Porter PLLC.

Carina is represented by Scott E. Gant and Colleen A. Harrison of Boies Schiller Flexner LLP and Christopher A. Seeger and Jennifer Scullion of Seeger Weiss LLP.

The chicken producers are represented by ArentFox Schiff LLP, Venable LLP, Rose Law Firm, Falkenberg Ives LLP, Armstrong Teasdale LLP, Mayer Brown LLP, Shook Hardy & Bacon LLP, Vedder Price PC, Hogan Lovells US LLP, Miller Canfield Paddock & Stone PLC Vaughan & Murphy, Proskauer Rose LLP, Kutak Rock LLP, Eversheds Sutherland (US) LLP, Amundsen Davis LLC, Joseph D. Carney & Associates LLC, Axinn Veltrop & Harkrider LLP, Miller Shakman Levine & Feldman LLP, D. Klar Law, Lipe Lyons Murphy Nahrstadt & Pontikis Ltd., Quinn Emanuel Urquhart & Sullivan LLP, Edward C. Konieczny LLC and Smith Gambrell & Russell LLP.

The case is In re: Broiler Chicken Antitrust Litigation, case number 1:16-cv-08637, in the U.S. District Court for the Northern District of Illinois.

—Additional reporting by Jack Karp. Editing by Michael Watanabe.



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Chancery Denies Icahn Midcase Appeal In Illumina Board Suit

By **Leslie A. Pappas**

Law360 (March 21, 2024, 1:21 PM EDT) -- Carl Icahn can't interrupt his Chancery Court lawsuit against biotech Illumina Inc.'s board to appeal a decision about redactions to the Delaware Supreme Court, a vice chancellor ruled Wednesday, saying there are no "exceptional circumstances" that call for a midcase review.



In an order refusing to certify an interlocutory appeal, a Delaware vice chancellor said Carl Icahn had not identified "a substantial issue of material importance" warranting a midcase review in his suit against Illumina. (Photo by Rafael Henrique / SOPA Images/Sipa USA)(Sipa via AP Images)

Icahn-controlled conglomerate Icahn Enterprises LP and two affiliates sought to appeal two rulings from Vice Chancellor Paul A. Fioravanti: a **Jan. 23, 2024, order** to strike portions of their complaint that were based on confidential information, and a Feb. 19 order denying reargument of the motion to strike.

In a 15-page order Wednesday refusing to certify an interlocutory appeal, Vice Chancellor Fioravanti said the Icahn plaintiffs had not identified "a substantial issue of material importance warranting appellate review before a final judgment."

"Allowing the case to proceed in the normal course would be the most efficient and just way to resolve this case," the vice chancellor wrote. "There are no exceptional circumstances meriting interlocutory review."

The three Ichan entities **sued** Illumina Inc. and its board of directors in October 2023, accusing them of breaching their fiduciary duties to stockholders in connection with the company's decision to reacquire cancer-testing firm Grail Inc. for \$8 billion. Illumina founded Grail, spun it off and then said in 2020 it planned to repurchase it.

The **proposed securities class and derivative action** names Illumina's former CEO Francis deSouza and several former and current board members. Icahn claims the defendants caused Illumina to "break the law" by voting in August 2021 to close the Grail acquisition.

The suit came a few months after Icahn initiated a proxy battle over Illumina's Grail decision, calling it "ill-advised" and "frankly inexplicable."

The plaintiffs in the case — Carl Icahn-controlled Icahn Partners LP, Icahn Partners Master Fund LP and Matsumura Fishworks LLC — collectively hold about 1.4% of Illumina's outstanding common stock and proposed a slate of three candidates to challenge Illumina's board at its 2023 stockholders meeting.

The Federal Trade Commission **ordered** Illumina to unwind the re-acquisition in April 2023, finding it would hurt competition in an emerging market for new tests that screen for multiple types of early-stage cancers.

Illumina **announced in December** it would divest in Grail after the Fifth Circuit largely upheld the FTC's findings.

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

Icahn Partners LP, Icahn Partners Master Fund LP and Matsumura Fishworks LLC are represented by C. Barr Flinn and M. Paige Valeski of Young Conaway Stargatt & Taylor LLP and Michael A. Hanin, Christian T. Becker, Andrew L. Schwartz and Andrew M. Meerwarth of Kasowitz Benson Torres LLP.

Directors named in the suit are represented by A. Thompson Bayliss, Eric A. Veres and Michael T. Manuel of Abrams & Bayliss LLP and William Savitt, Jonathan M. Moses, Lauren M. Kofke and Emily R. Barreca of Wachtell Lipton Rosen & Katz.

Illumina Inc. is represented by Peter J. Walsh Jr., Michael A. Pittenger and Justin T. Hymes of Potter Anderson & Corroon LLP and Kevin J. Orsini and Brittany L. Sukiennik of Cravath Swaine & Moore LLP.

The case is Icahn Partners LP et al. v. Francis deSouza et al., case number 2023-1045, in the Court of Chancery of the State of Delaware.

--Additional reporting by Hailey Konnath, Matthew Perlman, Josh White, Katryna Perera and Jeff Montgomery. Editing by Philip Shea.



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Judge Worries Clothing PFAS Theory Could Open Floodgates

By **Lauraann Wood**

Law360 (March 21, 2024, 7:14 PM EDT) -- An Illinois federal judge seemed unsure Thursday whether he will allow consumer fraud claims to proceed against a children's clothing store that sells allegedly contaminated uniforms, suggesting the plaintiffs' liability theory could open the door too wide for future suits.

Weighing The Children's Place Inc.'s bid to toss the plaintiffs' suit, U.S. District Judge Matthew Kennelly seemed unconvinced by consumers Angala Garland and Joelis Saldana's assertion that the clothing company has an independent duty to disclose the existence of so-called forever chemicals on certain articles of clothing.

Garland and Saldana's lawsuit does not point to a particular statement they reviewed before purchasing the children's clothing at issue, only a statement they read in an environmental report for investors and their assertion that the children's clothing retailer is independently required to disclose the so-called forever chemicals on its clothing. But "if what you say is right ... it basically seems like everybody's got a lawsuit against everybody they've ever bought anything from within the statute of limitations," Judge Kennelly said.

Representing the consumers, Debra Nicole Guntner of Aylstock Witkin Kreis & Overholtz PLLC argued her clients' claims were appropriately based on testing the company conducted and limited to its uniforms since they don't have knowledge about the company's entire clothing line. But Judge Kennelly seemed unconvinced, saying "somebody else is going to."

Guntner acknowledged the possibility, but argued that the existence of polyfluoroalkyl substances, or PFAS, on The Children's Place's clothing is material information, and its failure to disclose their existence on the uniforms is important. No state or federal appellate precedent exists that directly supports Garland and Saldana's assertion, but the clothing company's "half-truth" about testing its products should be enough to allow their claims to proceed, she argued.

Judge Kennelly seemed skeptical still, noting Garland and Saldana's case is different from others in which an alleged half-truth was enough to support consumer fraud claims.

"The difference is, here, the half-truth wasn't reviewed by anybody," the judge said.

The consumers' suit, which Garland initially launched in July, claims The Children's Place, which holds itself up as a "global best" children's specialty retailer and claims to provide clothing with "quality, value and style" through its brick-and-mortar and online stores, knowingly sells uniform clothing containing the so-called forever chemicals. Saldana joined the suit with an amended complaint filed in November

Garland claimed she bought several pieces of clothing for her child because his Chicago-area school requires them, and she turned to The Children's Place because it represents itself as offering high-quality clothing for children. However, independent, industry-standard testing has shown that the clothing contains multiple PFAS, which are a known safety hazard. The consumers say the company unlawfully fails to inform consumers that they risk buying contaminated clothing from its stores.

Children's Place attorney Phillip Craig Cardon of Sheppard Mullin Richter & Hampton LLP attacked not only the form and substance of the consumers' claims, but also their standing to bring a lawsuit at

all. For instance, the company's alleged half-truth states that it tests products to meet regulatory compliance, and no existing regulation requires the kind of disclosure Garland and Saldana seek, the attorney argued.

"There isn't a duty to disclose everything in the world," Cardon argued.

The consumers' complaint also focuses on several items the plaintiffs allegedly purchased, but a PFAS-positive test for only one of Garland's items, conducted by a lab that itself calls the result questionable, Cardon told the court. They should be required to plead more to be able to claim consumers risk buying contaminated clothes from the company, he argued.

However, Judge Kennelly said that argument seems more like a challenge over the scope of the consumers' potential class than a challenge to their legal standing. And that issue seems better suited for resolution later in the litigation, he said.

Garland and Saldana are represented by Debra Nicole Guntner, Ephraim Samuel Geisler and Bryan F. Aylstock of Aylstock Witkin Kreis & Overholtz PLLC and Kiley Lynn Grombacher and Lisa Johnston Nicholes of Bradley Grombacher LLP.

The Children's Place is represented by Phillip Craig Cardon, Jeffrey Parker, Abby Meyer and David Poell of Sheppard Mullin Richter & Hampton LLP.

The case is Garland v. The Children's Place Inc., case number 1:23-cv-04899, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Mike Curley. Editing by Kelly Duncan.

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MDL Claims Over Merck's Gardasil Vax Get Trimmed

By Jonathan Capriel

Law360 (March 21, 2024, 10:16 PM EDT) -- Pharmaceutical giant Merck need not face many of the claims by patients who allege their autoimmune conditions were caused by its HPV vaccine, a North Carolina federal judge overseeing multidistrict litigation ruled, saying the National Childhood Vaccine Injury Act bars most claims made in the first two bellwethers.

Like so many of the lawsuits against Merck over its human papillomavirus vaccine, Gardasil, the two complaints at issue here were a slog to read, said U.S. District Judge Kenneth D. Bell in a 27-page **order** issued Wednesday. Despite this, Judge Bell said it was clear that the majority of the claims — manufacturing defects, failure to warn and negligence — were totally blocked under the federal Vaccine Act.

Judge Bell's order largely granted Merck much of what it asked for in its motion to dismiss, denying only the company's request to toss fraudulent concealment claims and its bigger request to throw out the entirety of the complaints as "shotgun pleadings."

"Notwithstanding the flaws in the complaint[s], the court finds that even to the extent plaintiffs are on a fishing expedition, Merck is plainly aware of where plaintiffs' boat is headed and what they are trying to catch (as evidenced by the course and detail of the MDL proceedings to date)," Judge Bell said. "So, the court declines to dismiss any portion of plaintiffs' complaints as a 'shotgun pleading.'"

Merck has been hit with numerous lawsuits related to Gardasil, which is administered to prevent HPV infections and the cancers the virus causes. Many who have sued, including the co-lead plaintiffs in the MDL, Payton Bergin and Ashley America, have complained of numerous health problems, including autoimmune disorders, neurologic issues and other serious complications.

Bergin and America both specifically claim they've developed postural orthostatic tachycardia syndrome — which can cause dizziness and fainting — after receiving their two shots of Gardasil.

Merck has disputed these claims, saying the suits promote unfounded "anti-vaxxer" rhetoric.

Judge Bell was careful to note that he "expresses no view at this time" as to the merits of the actual claims lodged against Gardasil. But on the issue of which claims should survive at this stage of litigation, he sided largely with arguments that Merck made **a year ago** in its motion to dismiss.

Specifically, the company argued the plaintiffs were trying to disguise their claims as anything but product liability claims in order to avoid running into the childhood vaccine act.

Despite plaintiffs' implicit and explicit statements — such as saying this "is not a design defect claim" — Judge Bell said he "must look at the true nature" of the claims being made.

"Viewing the complaints through that substantive lens, it is clear that plaintiff[s] have asserted a number of preempted 'design defect' claims within their 'negligence' and 'manufacturing defect' causes of action," Judge Bell said.

The judge took a few sentences to note that it wasn't easy for him to come to this conclusion, for no other reason than the complaints were a "challenging" read.

"Despite this length and breadth, it is challenging for the court to discern the precise nature of plaintiffs' claims, which in many instances rely on sprawling and conclusory allegations and lump

numerous theories of liability together," the order said. "Other courts have criticized similar Gardasil complaints as 'lengthy, difficult to follow, and replete with run-on sentences,' while making claims 'in blunderbuss fashion.'"

The parties for both sides did not respond to requests for comment.

Merck is represented by Allyson M. Julien of Goldman Ismail Tomaselli Brennan & Baum LLP.

The plaintiffs are represented by Andrew Downing of Downing Allison & Jorgenson, Tracy L. Turner of Pendley Baudin & Coffin LLP, Allison Mullins of Mullins Duncan Harrell & Russell PLLC and Bijan Esfandiari of Wisner Baum.

The case is In Re: Gardasil Products Liability Litigation, case number 3:22-md-03036, in the U.S. District Court for the Western District of North Carolina.

--Editing by Linda Voorhis.

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Robins Kaplan, Funding Firm Must Pay Sanctions, Court Told

By **Katryna Perera**

Law360 (March 21, 2024, 6:34 PM EDT) -- An investment firm has urged a New York state appellate court to uphold a \$156,000 sanction levied against a litigation funding firm and its counsel from Robins Kaplan LLP over the law firm's access to the opposing party's Dropbox account, saying a trial court acted within its discretion in imposing the sanction.

Investment fund plaintiff Pursuit Special Credit Opportunity Fund LP filed a **brief** Wednesday arguing that a trial court properly awarded attorney fees to Pursuit **in October** following KrunchCash LLC and Robins Kaplan's "unauthorized access into Pursuit's corporate file directory and subsequent attempt to use the documents obtained to gain a litigation advantage."

The brief states that the trial court correctly concluded that the sanctions and attorney fees were necessary to reimburse Pursuit for being "forced" to file a protective order for the documents accessed by the defendants in its Dropbox account.

In January, KrunchCash and Robins Kaplan argued that the **sanctions were unwarranted** because the trial court did not find violations of any orders, rules or statutes.

However, Pursuit said Wednesday that this argument doesn't have merit since the trial court premised the award on its discretionary powers under Civil Practice Law Rule 3103 — which covers protective orders — and Rule 4.4 of the New York Rules of Professional Conduct — which covers respect for rights of third parties. This, in turn triggered the court's ability to "fashion [an] appropriate remed[y]" based on the defendants' conduct.

According to Pursuit, the trial court then "took care to assess" the ways the defendants' conduct violated relevant statutes, rules and case law, finding first that the defendants violated Rule 4.4 when they "'conduct[ed] an unauthorized remote search' of Pursuit's Dropbox rather than having 'notified opposing counsel and/or sought guidance from the court.'"

The trial court then determined that the defendants' attempt to use the documents from the Dropbox account to obtain a litigation advantage "constitute[d] a breach of the orderly disclosure scheme set forth in CPLR [A]rticle 31." And finally, the court found relevant case law supporting the imposition of attorney fees and costs.

"As the trial court fittingly explained, appellants' conduct was 'something ... akin to corporate espionage' and their decision to 'surreptitiously and repeatedly access[]' Pursuit's live corporate directory was undertaken 'under circumstances that should have raised professional alarm bells — loud ones,'" the brief states.

Therefore, the court imposed appropriate remedies, Pursuit said, and it was well within its right to do so.

"Appellants briefly argue that the 'monetary sanctions ... [are] not commensurate with the alleged misconduct.' In doing so, they fail to grasp that the remedy awarded by the trial court was intended to compensate Pursuit for the costs it reasonably incurred as a result of appellants' refusal to mitigate the damages caused, not as a penalty," the brief states.

According to the brief, KrunchCash and Robins Kaplan also argued that the trial court was obligated

to hold a hearing to determine the appropriate monetary amounts to be awarded but failed to do so.

Pursuit pushed back against this assertion on Wednesday, saying that under "well-established" case law, no hearing was required to be held. Instead, the court was only required to provide the defendants with a "reasonable opportunity to be heard," which it did.

However, according to the brief, KrunchCash and Robins Kaplan chose not to address the issue of attorney fees, costs or sanctions when given the opportunity to do so. Therefore, their objections now are not preserved for appellate review, Pursuit argued.

Wednesday's brief arises from fees Pursuit was awarded by New York Supreme Court Justice Joel M. Cohen in October in a 2022 suit accusing KrunchCash of squandering a \$10 million investment that was supposed to be deposited as advances to a Maryland law firm and a Texas-based pharmaceutical company.

In his order, Justice Cohen excoriated Robins Kaplan for waiting a week before informing opposing counsel that it had gained access to Pursuit's files via a Dropbox link accidentally shared with the firm by an outside party.

In the sanctions order, Justice Cohen said attorneys "should have ceased reviewing the Dropbox files as soon as they realized that they had obtained unauthorized access."

"Instead, the directory was surreptitiously and repeatedly accessed by counsel and their client under circumstances that should have raised professional alarm bells — loud ones," the order said.

The judge ordered Robins Kaplan and KrunchCash to pay nearly \$156,000 to refund Pursuit for having to pursue sanctions.

In November, Justice Cohen **denied** Robins Kaplan's motion to renew and re-argue the amount of legal fees and expenses awarded to Pursuit but agreed to stay the ruling pending appeal.

Counsel for Pursuit declined to comment Thursday, and KrunchCash's counsel at Robins Kaplan did not immediately respond to requests for comment.

Pursuit is represented by Kimberly Grinberg, Evan Fried and Renee Bea of Slarskey LLC.

KrunchCash is represented by Gabriel Berg of Robins Kaplan LLP and James M. Catterson of Pillsbury Winthrop Shaw Pittman LLP.

The case is Pursuit Special Credit Opportunity Fund LP v. KrunchCash LLC et al., case number 2023-04998, in the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

—Additional reporting by Rose Krebs. Editing by Michael Watanabe.



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Sen. Warren Wants SEC To Probe Musk Control Of Tesla Board

By **Henrik Nilsson**

Law360 (March 21, 2024, 10:31 PM EDT) -- Sen. Elizabeth Warren, D-Mass., urged the U.S. Securities and Exchange Commission on Thursday to investigate whether Tesla's board of directors is independent from CEO Elon Musk, saying recent reports suggest the billionaire controls the board for his personal benefit.

In a letter to SEC Chair Gary Gensler, Warren requested that the agency investigate Musk's personal and financial ties to Tesla board members, many of whom have invested in his private companies, the lawmaker claimed. Warren pointed to a recent court decision in the Delaware Court of Chancery and potential conflicts of interest related to Tesla and X, formerly known as Twitter, which Musk owns.

"The board has a legal obligation to address and disclose business risks, such as financial conflicts of interest or other risks to the board's ability to remain independent," Warren wrote. "Despite the growing concerns posed by Mr. Musk's conflicting roles at Tesla and his private companies, the board appears to have taken no action to address these risks or protect its shareholders. By all appearances, it seems that the board continues to operate as if Mr. Musk is the 'Technoking' who can do no wrong."

An SEC spokesperson told Law360 that Gensler will respond to members of Congress directly. A representative for Tesla did not immediately return a request for comment.

The letter comes after Warren raised similar concerns with the SEC in July. Since then, more details have emerged about Musk's alleged control over the Tesla board, Warren said.

For example, a Delaware chancellor in January **struck down** Musk's proposed \$55 billion Tesla pay package, finding that disclosure failures, murky terms, conflicted director architects and Musk's own hand on the tiller warranted an order to roll back the award.

The plan went to a weeklong trial in November 2022 after it was challenged by stockholders. The compensation scheme included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

Tesla argued that the plan was designed to incentivize Musk with equity awards for achieving "breathtakingly difficult milestones," Tesla's general counsel testified regarding formulation of the plan, adding the board never considered requiring Musk to work a certain number of hours as part of the package.

In her order squashing the plan, Chancellor Kathaleen St. J. McCormick found that "Musk dictated the timing of the process, making last-minute changes to the timeline or altering substantive terms immediately prior to six out of the ten board or compensation committee meetings during which the plan was discussed."

Following the decision, Musk said Tesla **would hold a shareholder** vote to transfer its state of incorporation from Delaware to Texas after he created a poll asking his followers on X to weigh in on the proposition.

He also **took steps** to change the state of incorporation for his rocket ship company SpaceX and brain chip implant company Neuralink.

Warren on Thursday noted that "there is no public indication that the board addressed any of Mr. Musk's statements or actions regarding the potential reincorporation."

Musk has also allowed Tesla to launch paid advertisements on X, "raising further concerns that Mr. Musk may have acted based on his conflicts of interest, and that the board may have breached their fiduciary duties to Tesla shareholders," according to Warren.

The senator cited recent news reports revealing Musk's relationship with directors that have allegedly profited from the partnership, which has spurred shareholders to question the independence of board members. In January, Musk also floated the idea of increasing his ownership share in Tesla to roughly 25% in order to feel comfortable about allowing Tesla to develop artificial intelligence products, Warren noted.

"The board made no public statements in response to Mr. Musk's request for greater control and took no public action to address these shareholder concerns," Warren's letter stated.

"This pattern of inaction coupled with the lack of disclosure about the board's diminished independence raises questions about possible violations of securities laws and exchange rules, which fall under SEC's jurisdiction," Warren wrote.

--Additional reporting by Lauren Berg, Madeline Lyskawa and Jeff Montgomery. Editing by Michael Watanabe.

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