

Sorrento Therapeutics Wins Appeal Over Covid Treatment Remarks

By Martina Barash

- Statements in May 2020 reflected excitement, court says
- Investor failed to adequately allege manipulative intent

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Sorrento Therapeutics Wins Appeal Over Covid Treatment Remarks

By Martina Barash 2024-03-25T17:04:43000-04:00

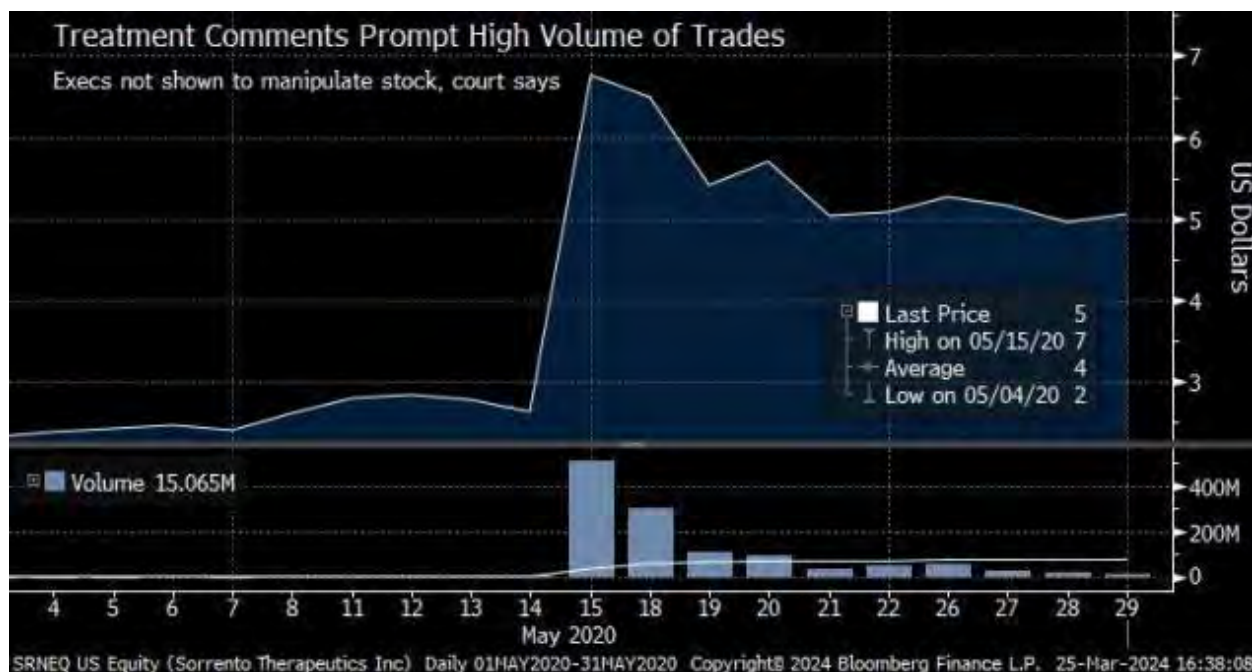
- Statements in May 2020 reflected excitement, court says
- Investor failed to adequately allege manipulative intent

A Sorrento Therapeutics Inc. investor came up short in alleging that the biopharmaceutical company misled the public in May 2020 about a Covid-19 antibody it was developing, the Ninth Circuit said Monday.

Shareholder Andrew Zenoff didn't adequately plead that statements by Sorrento and two executives, "when viewed in context, were false as opposed to overstated," Judge Consuelo M. Callahan said. The appeals court unanimously affirmed a lower court's April 2022 dismissal of the proposed shareholder class action.

Zenoff also failed to show the necessary level of intent for securities fraud, Callahan said. "At best, we can infer that Defendants' excitement about the development of STI-1499 (and the public's excitement) produced a one-week bump in the price of Sorrento's stock," she said, referring to the antibody.

Sorrento, a cancer and pain treatment developer, spent the early days of the Covid pandemic attempting to develop and commercialize a monoclonal antibody treatment. According to the lawsuit, Sorrento publicly claimed to have developed a cure for Covid, causing a sharp jump in stock price followed by a decline when articles questioning the validity of these assertions were published.



It was also under financial stress, allegedly facing high-interest debt, and receiving a “going concern” qualification from its auditor, according to the opinion. Zenoff alleged it manipulated its stock price to raise cash.

The US Court of Appeals for the Ninth Circuit said the dismissal was appropriate. “A fair reading of the press release and the articles reveals that there was no promise of an immediate 100% cure,” Callahan said. All the articles Zenoff complained of indicate the treatment was just at the stage of an in vitro experiment, she said.

And as to intent, Zenoff didn’t point to “any particular stock sales or purchases by Sorrento or either of the individual defendants,” she said. “Indeed, in the spring of 2020, the possibility of a cure for COVID-19 generated many innocent explanations for Defendants’ statements and the market’s reaction to those statements.”

Judge Richard C. Tallman joined the opinion, as did Judge Robert S. Lasnik of the Western District of Washington, who sat by designation.

Robbins Geller Rudman & Dowd LLP represented Zenoff. Paul Hastings LLP represented Sorrento and its executives.

The case is *Zenoff v. Sorrento Therapeutics, Inc.*, 2024 BL 98867, 9th Cir., No. 22-55641, 3/25/24.

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Coming up today

- The **Ohio Supreme Court** will consider whether **CVS, Walmart** and **Walgreens** can be held liable under state law for creating a public nuisance that fueled an opioid epidemic in two local counties that won a \$650 million judgment against them. A federal appeals court [last year asked the high court to consider](#) the issue, saying the judgment raised "novel and unresolved questions" of whether state law permits the public-nuisance claim the case was centered on.
- A federal judge said **ConAgra Brands** [must face a lawsuit](#) claiming it misled U.S. consumers into believing that nine **Mrs. Paul's** and **Van de Kamp's** fish products were sustainably sourced. **U.S. District Judge Virginia Kendall** in Chicago [rejected](#) ConAgra's argument that the phrase "Good for the Environment" on packaging was "puffery," meaning an overstatement or exaggeration that could not support the proposed class action.
-

Rite Aid reaches bankruptcy settlement with lenders, DOJ, McKesson

 [reuters.com/business/retail-consumer/rite-aid-reaches-bankruptcy-settlement-with-lenders-doj-mckesson-2024-03-26](https://www.reuters.com/business/retail-consumer/rite-aid-reaches-bankruptcy-settlement-with-lenders-doj-mckesson-2024-03-26)

Dietrich Knauth

Item 1 of 4 A Rite Aid sign is seen outside one of their stores in New York, April 11, 2013.
REUTERS/Shannon Stapleton/File Photo

[1/4]A Rite Aid sign is seen outside one of their stores in New York, April 11, 2013.
REUTERS/Shannon Stapleton/File Photo [Purchase Licensing Rights](#) , opens new tab

NEW YORK, March 26 (Reuters) - Pharmacy chain Rite Aid (RADCQ.PK) , opens new tab has reached a settlement with its lenders, the U.S. Department of Justice, and drug supplier McKesson Corp (MCK.N) , opens new tab, clearing a path for Rite Aid to complete its bankruptcy case by late April, a company lawyer said Tuesday.

"We have reached an agreement on all key points with all key economic stakeholders," Rite Aid attorney Aparna Yenamandra said at a bankruptcy court hearing in Trenton, New Jersey. Yenamandra did not provide details about the settlement, saying that some issues needed to be worked out before it can be presented in court.

The deal is not opposed by creditors who have sued Rite Aid over its sale of opioid medications, Yenamandra said. Before it filed for bankruptcy, Rite Aid faced over 1,600 lawsuits alleging that pharmacy chain ignored red flags and illegally filled prescriptions for addictive opioid medication.

Rite Aid's lawyers said they will work to resolve concerns with the deal by Thursday.

"The time has come to reach a resolution, and that is exactly what everyone is going to do in the next 48 hours," Rite Aid attorney Joshua Sussberg said at the hearing.

Rite Aid will return to court on Thursday, when it will ask U.S. Bankruptcy Judge Michael Kaplan to allow the company to begin gathering votes for its bankruptcy plan. Kaplan said he is "very much intrigued" to hear more details about the settlement at the upcoming court hearing.

If Rite Aid can begin the voting process this week, it should be able to get final court approval of its bankruptcy restructuring by April 22, Yenamandra said.

Rite Aid filed for bankruptcy in October, seeking to address its high debt, shut down underperforming retail locations, and sell off non-core business units. Rite Aid received bankruptcy court approval to sell its pharmacy benefit company, Elixir, in January.

(This story has been corrected to say opioid creditors don't oppose deal, in paragraphs 2 and 3)

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Reporting by Dietrich Knauth, Editing by Nick Zieminski and Chizu Nomiyama

Mastercard Inc

Visa and Mastercard agree \$30bn settlement over US transaction fees

Sellers will be able to charge different prices to consumers based on the card they use



The agreement will be paid out to merchants via savings on lower transaction rates over the next five years © Bloomberg

Stephen Gandel in New York 4 HOURS AGO



Visa and Mastercard have agreed to cut their US transaction fees in a landmark settlement that merchants say will save them \$30bn over five years.

The deal, announced on Tuesday, will require the payments companies to lower the so-called swipe fees they charge sellers over the next five years.

It will also allow merchants to charge different prices to consumers based on which credit card they use.

The settlement does not include a requirement for merchants to pass on the savings from lower fees to consumers.

The agreement concludes a long-running case brought by merchants, which alleged the credit card companies inflated payment processing fees.

Lawyers for the merchants called the settlement one of the largest ever for a class-action antitrust suit, although the agreement does not require Visa and [Mastercard](#) to make payments upfront.

Instead, the companies agreed to reduce sellers' swipe fees by at least 0.04 percentage points for a minimum of three years and to hold swipe fees at or below the rates posted at the end of last year for the next five years.

Mastercard, Visa and other credit card processors had previously agreed to pay \$5.6bn to US merchants under a separate settlement, which did not cap future fees.

"These are extraordinary concessions by Visa, Mastercard and the banks," said Jaret Seiberg, an analyst at brokerage TD Cowen, who added that the settlement could represent a threat to credit card rewards and small banks as merchants gained the ability to steer customers to preferred credit cards.

Swipe fees — otherwise known as interchange fees — have long been a point of contention between merchants and credit card companies.

Fees are set by the payment network operators, Mastercard and Visa, as a percentage of each transaction and can be as high as 3 per cent. Mastercard and Visa then split the fees received with the banks that issue the cards and the tech firms that facilitate the payments.

Merchants are currently able to charge an extra fee for consumers who use American Express cards, but Visa and Mastercard have blocked sellers from doing so for their users.

Even cards from the same issuer can carry different fees for merchants based on the rewards such as airline miles or cashback that the cards offer consumers. Merchants will for the first time be able to customers different rates for all cards, rather than being able to differentiate based only on the credit card network.

"By negotiating directly with merchants, we have reached a settlement with meaningful concessions that address true pain points small businesses have identified," said Kim Lawrence, president of Visa North America.

Rob Beard, chief legal officer, general counsel and head of global policy at Mastercard, said: "This agreement brings closure to a long-standing dispute by delivering substantial certainty and value to business owners, including flexibility in how they manage acceptance of card programmes."

Credit card companies have come under increasing pressure by regulators to lower the rates they charge for processing transactions.

Credit card processing fees tend to be higher in the US than in the EU, where they are capped.

Last year, UK regulators proposed to reintroduce a cap on cross-border card fees, after Mastercard and Visa ramped up charges on businesses after Brexit.

In the US, lawmakers have renewed an earlier effort to pass the Credit Card Competition Act, which would give merchants more flexibility to choose their payment networks. In October, the Fed found payment card networks in the US charged nearly \$32bn in interchange fees in 2021, up almost a fifth on the previous year.

Shares in Visa and Mastercard were trading close to flat in New York on Tuesday morning.

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<https://www.wsj.com/finance/banking/visa-mastercard-agree-to-lower-swipe-fees-settling-long-running-lawsuit-d6e5f0a8>

FINANCE | BANKING

Visa, Mastercard Agree to Lower Swipe Fees, Settling Long-Running Lawsuit

Card networks would cap credit-card interchange fees for five years as part of a settlement

By [Angel Au-Yeung](#) [Follow](#)

Updated March 26, 2024 1:15 pm ET



Visa and Mastercard face other battles over their dominance in the card industry. PHOTO: MARK LENNIHAN/ASSOCIATED PRESS

Visa $\uparrow$ 0.36% $\blacktriangle$, Mastercard MA 0.26% $\blacktriangle$ and the largest U.S. credit-card issuing banks have agreed to a settlement with merchants that have been suing them for nearly two decades over the fees they charge for swiping credit cards.

In the deal, the credit-card networks and banks will lower the fees that merchants pay to accept credit cards. There is a range of these fees, typically referred to as swipe fees or interchange fees, with an average of around 2%.

The pact would lower the rates by 0.04 percentage point and keep them there for five years.

The legal team that struck the deal for the merchants said that would amount to eliminating \$30 billion in fees over five years. The networks and banks collected \$72 billion in total interchange fees last year, according to card data company Nilson Report.

The proposed settlement would create some changes to give merchants more choice on accepting cards, allowing them to guide consumers to cards that have lower fees.

It would also give small businesses the ability to form groups to negotiate swipe fees, similar to what large retailers already do today.

The settlement requires approval from a federal judge in Brooklyn, N.Y. Earlier deals have dragged through years of rulings and appeals, which could happen again with this pact given the wide range of merchants involved and their varying opinions.

Doug Kantor, general counsel of the National Association of Convenience Stores, said the settlement provides only modest relief while failing to meaningfully address the core issue of Visa and Mastercard allegedly fixing swipe fees with the banks.

“I would expect there to be a lot of merchant opposition to this settlement,” said Kantor.

Visa said Tuesday it was making meaningful concessions to small businesses. Mastercard said the settlement will bring closure and value to business owners.

The legal team representing the merchant plaintiffs said the proposed settlement would provide immediate relief on fees and help eliminate restraints on their businesses.

Merchants first brought this contentious class-action lawsuit against Visa, Mastercard and banks in 2005. They alleged the card network companies and banks have colluded to keep interchange fees inflated.

Interchange fees are set by the card network companies. Merchants then pay these fees to banks whenever consumers use credit cards to purchase goods and

services. Though small individually, they add up to billions of dollars a year. The merchants wanted the ability to negotiate fees directly with the banks.

Visa, Mastercard and the banks have already settled part of the suit, agreeing to pay the merchants nearly \$6 billion. Last year, an appeals court affirmed that settlement.

This new proposed settlement aims to tackle the remaining aspects of the suit, where retailers wanted to address what they said was the anticompetitive nature of the card networks.

Visa and Mastercard face other battles over their dominance in the card industry.

U.S. senators are pushing legislation to give merchants the ability to process Visa and Mastercard credit cards over other payment networks.

There is also a bill aiming to cap the interchange fees on credit cards, similar to legislation that already regulates the fees on debit cards.

The Justice Department has asked for documents about debit cards in an antitrust investigation, both companies have said.

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March 26, 2024, 9:23 AM PDT
Visa, Mastercard Reach \$30 Billion Deal With US Retailers (2)
By Paige Smith

- Networks, retailers have fought over interchange for decades
- Concessions likely to crimp revenue of banks like BofA, Citi

Bloomberg Law News 2024-03-26T12:59:07776536535-04:00
Visa, Mastercard Reach \$30 Billion Deal With US Retailers (2)

By Paige Smith2024-03-26T12:23:39894-04:00
Networks, retailers have fought over interchange for decades
Concessions likely to crimp revenue of banks like BofA, Citi

Visa Inc. and Mastercard Inc. agreed to cap credit-card swipe fees – a deal that US merchants say will save them at least \$30 billion over five years – in one of the most significant antitrust settlements ever, following a legal fight that spanned almost two decades.

The deal, which is subject to court approval, also would allow retailers to charge consumers extra at checkout for using Visa or Mastercard credit cards and use pricing tactics to steer customers to lower-cost cards, according to a statement Tuesday from attorneys representing the merchants.

“This settlement achieves our goal of eliminating anti-competitive restraints and providing immediate and meaningful savings to all US merchants, small and large,” Robert Eisler, co-lead counsel for the plaintiffs, said in the statement.

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A sticker for Mastercard, Visa and Discover credit cards displayed on a street cart in New York on Oct. 17.

Photographer: Angus Mordant/Bloomberg

The legal fight over credit card swipe fees dates back to at least 2005 – before both Visa and Mastercard were spun off from the banks that owned them to become publicly traded companies. The fees, also known as interchange, are a key driver of profit for card-issuing banks and they are the primary mechanism used to fund popular rewards programs.

In recent years, merchants have grown increasingly vocal about their opposition to these fees, which typically amount to about 2% of a purchase and totaled more than \$100 billion last year. While Visa and Mastercard set the level of these fees, it's the banks that issue the cards that actually collect most of that revenue.

That means banks including JPMorgan Chase & Co., Bank of America Corp. and Citigroup Inc. that issue cards with Visa and Mastercard are likely to take a hit with these concessions. JPMorgan, the biggest US bank, collected \$31 billion of interchange and merchant processing income last year, leading to total card income of \$4.8 billion after it accounted for customer rewards, payments to partner companies and other costs.

Shares of JPMorgan, Bank of America, Citigroup, Visa and Mastercard were all up slightly at 12:22 p.m. in New York.

"For decades, Visa and Mastercard have used their duopoly to fleece retailers of all sizes," the Retail Industry Leaders Association said in a statement. The trade group's members include more than 200 retailers, manufacturers and suppliers, including Apple Inc., Dollar Tree Inc., Starbucks Corp. and Home Depot Inc. "This settlement is a mere drop in the bucket. It proves that merchants deserve injunctive relief, but whether the settlement terms proposed are sufficient to remedy the harm caused by the current interchange system needs to be carefully reviewed."

Stephanie Martz, chief administrative officer and general counsel of the National Retail Federation, said her organization is also reviewing the terms of the settlement.

"The fact remains that these fees are an unfair business practice that harms merchants and consumers and benefits banks," she said in a statement.

Settlement Terms

As part of the settlement, Visa and Mastercard agreed to reduce the swipe fees they charge each merchant by at least 4 basis points for at least three years, lawyers for the retailers said. And, for a period of five years, the average systemwide swipe fee for both networks must be at least 7 basis points below the current average, subject to review by an independent auditor.

Retailers will now be able to charge consumers for using a Visa or a Mastercard card and they'll be able to adjust their prices based on the cost of accepting different credit cards. That could mean, for instance, that a consumer with a Chase Sapphire Reserve card, which carries the Visa Infinite branding and therefore comes with a higher interchange fee, would be charged more at checkout than a customer using a Chase Freedom Unlimited card.

That should help address a pain point among those merchants who despise Visa and Mastercard's "honor all cards" rules, which stipulate that if a merchant accepts one of the brands' cards, then it has to accept all of the brands' cards. Some retailers have said those rules are behind the surge in interchange fees in recent years because Visa and Mastercard have worked with banks to issue more cards that run on their [premium networks](#), which typically cost retailers more.

"This agreement brings closure to a long-standing dispute by delivering substantial certainty and value to business owners, including flexibility in how they manage acceptance of card programs," **Rob Beard**, general counsel and head of global policy at Mastercard, said in a statement.

Merchants will also now be allowed to offer discounts to consumers using cards from a certain bank.

The latest agreement comes about five years after Visa and Mastercard agreed to pay around \$6 billion to millions of merchants, in what was then the largest-ever class-action settlement of a US antitrust case.

While that agreement addressed monetary damages associated with the lawsuit, it didn't resolve the merchants' concerns about interchange and other business practices.

"We have reached a settlement with meaningful concessions that address true pain points small businesses have identified," Kim Lawrence, Visa's president of North America, said in a separate statement. "Importantly, we are making these concessions while also maintaining the safety, security, innovation, protections, rewards and access to credit."

(Updates with trade-group comments starting in eighth paragraph.)

--With assistance from **Lyla Du**.

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Visa, Mastercard reach \$30 billion settlement over credit card fees

 [reuters.com/business/finance/mastercard-visa-reach-30-bln-settlement-over-credit-card-fees-2024-03-26](https://www.reuters.com/business/finance/mastercard-visa-reach-30-bln-settlement-over-credit-card-fees-2024-03-26)

Jonathan Stempel

Item 1 of 2 A screen displays the company logo for Mastercard Inc. on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., February 29, 2024.

REUTERS/Brendan McDermid

[1/2]A screen displays the company logo for Mastercard Inc. on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., February 29, 2024. REUTERS/Brendan McDermid [Purchase Licensing Rights](#) , opens new tab

- Fees would decline over five years, consumers may benefit
- Critics say settlement offers merchants little relief
- Court approval required, likely not before late 2024

NEW YORK, March 26 (Reuters) - Visa (V.N) , opens new tab and Mastercard (MA.N) , opens new tab reached an estimated \$30 billion settlement to limit credit and debit card fees for merchants, with some savings likely to be passed on to consumers through lower prices. The antitrust settlement announced on Tuesday is one of the largest in U.S. history, and if it received court approval would resolve most claims in nationwide litigation that began in 2005. Some opponents believe it may not go far enough.

Merchants have long accused Visa and Mastercard of charging inflated swipe fees, or interchange fees, when shoppers used credit or debit cards, and barring them through "anti-steering" rules from directing customers toward cheaper means of payment.

Swipe fees typically include small fixed fees plus percentage of total sale amounts, and average about 1.5% to 3.5% per transaction according to Bankrate.com.

Under the settlement, Visa and Mastercard would reduce swipe rates by at least four basis points (0.04 percentage points) for three years, and ensure an average rate that is seven basis points below the current average for five years.

Both card networks also agreed to cap rates for five years and remove anti-steering provisions.

Merchants will have more discretion to offer discounts, or impose surcharges on cards with higher interchange fees.

The video player is currently playing an ad.

Many already warn customers at checkout they will pay more using cards instead of cash.

The fee rollbacks and caps alone are worth \$29.79 billion, according to court papers, and Visa estimated that small businesses comprise more than 90% of the settling merchants.

Visa and Mastercard denied wrongdoing in agreeing to settle.

In separate statements, Visa's North American president Kim Lawrence said the accord addressed "true pain points" identified by small businesses, while Mastercard General Counsel Rob Baird said it offered "substantial certainty" to businesses.

Visa and Mastercard shares were each up less than 1% in afternoon trading, with Baird analyst David Koning writing that the settlement removes an "overhang of uncertainty."

The settlement requires approval by U.S. District Judge Margo Brodie in Brooklyn, New York, likely not before late 2024 or early 2025, and appeals are possible.

OPPOSITION EXPECTED

"It's a bad deal for merchants," said Doug Kantor, general counsel of the National Association of Convenience Stores, in an interview. "It provides very small, very temporary relief, but afterward Mastercard and Visa will be free to raise rates, and the agreement doesn't provide a mechanism to slow an increase."

The Retail Industry Leaders Association, which represents businesses that employ more than 42 million Americans, said the settlement required closer review but amounted to "a mere drop in the bucket."

TD Cowen analyst Jaret Seiberg wrote that small banks and credit unions may object because big retailers such as Walmart (WMT.N) [opens new tab](#) could cut deals with larger banks for cards that offer discounts at checkout.

But he said the accord reflects "extraordinary concessions" by Visa, Mastercard and banks because merchants can impose surcharges on airline and cash-back credit cards, though few may because they would rather complete sales than save on fees.

Last March, the federal appeals court in Manhattan upheld a \$5.6 billion class-action settlement by Visa and Mastercard, covering damages for about 12 million merchants, but did not resolve what kinds of fees could be imposed.

Tuesday's settlement attempts to do that, but would not resolve damages claims by merchants that opted out of \$5.6 billion settlement and sued separately.

Joseph Stiglitz, a Nobel Prize-winning economist and expert hired by the settling merchants, in an affidavit said the settlement "greatly enhances merchants' freedom to steer customers using the linchpin of competition--prices," and could lead to "very substantial" savings for merchants.

"Competition among merchants results in these cost savings being passed on to customers in the form of lower prices," Stiglitz added.

Some U.S. senators have promoted legislation, the Credit Card Competition Act, to let merchants process Visa and Mastercard credit cards through other payment networks.

Darrin Peller, an analyst at Wolfe Research, wrote that Tuesday's settlement "likely takes some wind out of the sails" of that effort.

The court case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, U.S. District Court, Eastern District of New York, No 05-md-01720.

Reporting by Jonathan Stempel in New York; Editing by Chizu Nomiya, Alexandra Hudson

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March 25, 2024, 12:49 PM PDT

Solar Power Parts Maker Allegedly Hid Extent of Wiring Problems

By Ben Miller

Bloomberg Law News 2024-03-26T10:17:16749516574-04:00

Solar Power Parts Maker Allegedly Hid Extent of Wiring Problems

By Ben Miller 2024-03-25T15:49:25000-04:00

Shoals Technologies Group Inc. and its top executives hid issues with solar energy infrastructure parts the company manufactured for more than a year, touting quality and reliability until wire insulation problems and more than \$50 million in related warranty expenses were disclosed to investors, a proposed shareholder class action says.

Two days after Shoals revealed that it expected the wire “shrinkback” issue on its solar components would cost between \$59 million and \$184 million to remedy, the company’s stock had fallen more than 20% to close at \$12.95 on Nov. 9, 2023, according to the suit filed in US District Court for the Middle District of Tennessee.

- Pension fund plaintiff seeks to recover damages for “hundreds or thousands” of investors who acquired Shoals stock between May 17, 2022 and Nov. 7, 2023
- Shoals derived more than 81% of revenues from the production of “electrical balance of system products” in 2023, but allegedly hid how extensively those products used faulty wires
- Proposed class action alleges that company, executives violated Securities Exchange Act by downplaying issues, artificially inflating stock price

Stranch, Jennings & Garvey PLLC and Saxena White PA represent the plaintiff and the proposed class.

The case is Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund v. Shoals Techs. Group Inc. , M.D. Tenn., No. 3:24-cv-00334, complaint filed 3/21/24 .

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Electric Last Mile Leaders' \$2.5 Million Deal Nears Initial Nod

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- Relatively small settlement amount justified by trial risk
- Investors must make changes to notice process, judge says

Five executives of Electric Last Mile Solutions Inc. are likely to get a \$2.7 million settlement with shareholders preliminarily approved if the investors make two changes to the class notice process, a federal judge ruled.

The bankrupt electric vehicle maker itself is out of the proposed class action, which concerns accounting corrections after its merger with a blank-check company, Judge Michael E. Farbiarz said in an opinion docketed March 22 in the US District Court for the District of New Jersey. Accounting firm BDO USA LLP—named as a defendant for its alleged auditing role—hasn't floated a settlement, Farbiarz said.

The risk to the investors that the individual defendants would win at trial is “a large one,” justifying the relatively small settlement amount on an approximate aggregate loss of \$41 million, he said.

But the language of the notice should be plainer and class members should be able to comment or opt out by electronic means, he said.

The investors sued over shares issued to ELMS co-founders Jason Luo and James Taylor in the run-up to the company's June 2021 merger with a special purpose acquisition company, a transaction that took the EV maker public.

The company announced the need for restatement in February 2022 because “certain Electric Last Mile Inc. executives purchased equity in the Company at substantial discounts to market value without obtaining an independent valuation,” the investors said. The company also announced the resignations of Taylor and Luo, who were described as participating in the transactions.

Farbiarz denied BDO's request to dismiss the claims against it in August 2023.

Here, Farbiarz said that proving the five executives' intent “would be a high and hard bar to clear” at trial, given that they weren't accountants, didn't prepare the allegedly erroneous financial statements, and relied on the auditor's opinion.

More SPAC Litigation

EV companies have faced considerable difficulties lately. A number were formed in so-called de-SPAC mergers and have been targeted in shareholder lawsuits, including Lordstown Motors Corp. and Lightning eMotors Inc. Some of the suits have settled. A suit against Rivian Automotive Inc. and its initial public offering underwriters is proceeding on claims the company made misleading statements about its supply chain and underpriced its vehicles.

Lordstown's former chairman and CEO has settled fraud charges brought by the Securities and Exchange Commission, according to March 22 court filings.

More broadly, numerous companies that formed through de-SPAC mergers have faltered following the deals' peak in 2020 and 2021, sending scores of companies' disgruntled investors to the courts.

Luo and Taylor lost a bid in January to end separate litigation over the de-SPAC transaction in Delaware's Chancery Court. That court said the investors raised "a reasonable inference that Luo and Taylor either misled the board for their own benefit or colluded with the board for the benefit of all the defendants."

The Rosen Law Firm PA is lead counsel for the proposed class. Barnes & Thornburg LLP represents Taylor. Paul, Weiss, Rifkind, Wharton & Garrison LLP represents Luo. Dechert LLP represents defendants David Boris and Marshall Kiev. Riker Danzig LLP represents Albert Li. McDermott Will & Emery represents BDO.

The case is *Hacker v. Elec. Last Mile Sols. Inc.*, 2024 BL 97808, D.N.J., No. 22-545, entered 3/22/24 .

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March 26, 2024, 9:39 AM PDT
GW Pharma to Settle Jazz Pharma Buyout Suit for \$7.5 Million
By [Ben Miller](#)
Documents

-  [Order](#)
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Bloomberg Law News 2024-03-26T13:03:4826067035-04:00
GW Pharma to Settle Jazz Pharma Buyout Suit for \$7.5 Million

By Ben Miller 2024-03-26T12:39:48000-04:00

GW Pharmaceuticals and its leaders will pay \$7.5 million to end shareholder allegations that they filed a deficient proxy statement to win votes for Jazz Pharmaceuticals PLC’s 2021 buyout of the cannabinoid drugmaker.

The \$7.2 billion acquisition of the British company that produced the first cannabis derived drug to win US regulatory approval drew the legal challenge in 2021 from holders of GW’s American Depositary Shares. The investors sought to recover damages for those who acquired the shares between March 10, 2021 and May 5, 2021, the day the merger closed.

- Settlement amount represents nearly 1% of the maximum potential damages estimated by expert, but plaintiffs said in their request for approval that the deal represents “excellent result in light of the facts of this case”
- If all holders of more than 30 million ADS in the class submit a claim, the average settlement distribution will be \$0.25 per share, according to the Monday order approving the deal in the US District Court for the Southern District of California
- Class counsel at Monteverde & Associates PC and Kahn Swick & Foti LLC will receive \$2.6 million in fees and costs, while the two lead plaintiffs will each receive \$5,000 each

Wachtell, Lipton, Rosen & Katz; Barnes & Thornburg LLP; and DLA Piper LLP represent GW Pharmaceuticals and the individual defendants.

The case is Ziegler v. GW Pharms. PLC , S.D. Cal., No. 3:21-cv-01019, 3/25/24 .

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Opinion

Finally, Liman rejected the participants' claims for prohibited transactions under the Employee Retirement Income Security Act. A company's decision to keep affiliated funds in its retirement plan can't form the basis of a prohibited transaction claim, he said, and there are no allegations of improper fees that could support such a claim.

The lawsuit accuses AllianceBernstein of violating ERISA by offering its own affiliated collective trusts in its workers' \$1.5 billion 401(k) plan. Workers said these trusts underperformed their benchmarks and saw decreased holdings from other 401(k) investors, and they accused AllianceBernstein of using their retirement savings as "seed money" to promote its business.

Dozens of lawsuits have targeted companies that put affiliated investment funds in their workers' 401(k) plans. These cases have garnered hundreds of millions of dollars in settlements in recent years, with settling employers including General Electric Co. (\$61 million), Reliance Trust Co. (\$39.8 million), McKinsey & Co. (\$39.5 million), Wells Fargo & Co. (\$32.5 million), and Deutsche Bank AG (\$21.9 million).

Milbank LLP represents AllianceBernstein. Scott & Scott Attorneys at Law LLP and Peiffer Wolf Carr Kane & Conway LLP represent the plaintiffs.

The case is Bloom v. AllianceBernstein LP , S.D.N.Y., No. 1:22-cv-10576, 3/25/24 .

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Class Action

March 26, 2024, 8:01AM PDT

3M Gets Enough Participation to Finalize \$6 Billion Earplug Pact

By [Martina Barash](#)

Bloomberg Law News 2024-03-26T12:29:2961503347-04:00

3M Gets Enough Participation to Finalize \$6 Billion Earplug Pact

By Martina Barash 2024-03-26T11:01:19000-04:00

3M Co.'s agreement to pay service members with hearing loss \$6 billion has garnered more than 99% participation by claimants who used its combat earplugs, surpassing a threshold for finalizing the deal, the company said Tuesday.

3M could have walked away from the accord if fewer than 98% of claimants—mostly veterans—participated. The service members alleged 3M subsidiary Aearo Technologies LLC's Combat Arms version 2 earplugs were ineffective.

More than 293,000 people filed claims in the multidistrict litigation in the US District Court for the Northern District of Florida, according a press release.

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NEWS

'I Was Kind of Dumbfounded': J&J Lawyers Testify in Talc Disqualification Hearing

Johnson & Johnson's worldwide vice president of litigation, Erik Haas, and Jim Murdica, outside counsel at Barnes & Thornburg, testified on Monday that they were shocked to find out a former member of their team had been working with plaintiffs' lawyer Andy Birchfield as early as April 2023.

March 26, 2024 at 05:00 AM

Legal Ethics and Attorney Discipline



Amanda Bronstad
staff reporter



What You Need to Know

- The hearing, before Atlantic County Superior Court Judge John Porto and U.S. Magistrate Judge Rukhsanah Singh, both in New Jersey, comes after Johnson & Johnson filed motions to disqualify Andy Birchfield and his firm from leadership of the talc litigation
- The disqualification motions allege Birchfield partnered with John Conlan, who was a partner at Faegre Drinker Biddle & Reath until 2022, to push a talc settlement that was more than double the amount Johnson & Johnson offered as part of the second bankruptcy of its subsidiary, LTL Management.
- 'Listen to my question for once,' Birchfield's lawyer, Jeffrey Pollock, told Haas in a contentious cross examination. 'The process is not the Erik Haas show.'

A senior in-house attorney for Johnson & Johnson told a pair of judges on Monday that an alliance between a former member of his legal team and talc plaintiffs’ attorney Andy Birchfield was the “most egregious breach of ethical obligations I have ever heard of, ever seen.”

At [an evidentiary hearing](#), Erik Haas, Johnson & Johnson’s worldwide vice president of litigation, told Steve Brody, a partner at O’Melveny & Myers in Washington, D.C., that he was shocked when his former outside counsel, John Conlan, teamed up with Birchfield, of Montgomery, Alabama’s Beasley Allen, to propose settling the talc litigation for \$19 billion.

“We were utterly shocked and appalled that our former counsel was conferring with our adversary,” Haas said, “by proposing an alternative transaction based upon the same matter and same issues he had represented us extensively for 21 months.”

He called it an “egregious violation” of the ethical duties of both Conlan and Birchfield.

But he and an outside lawyer for Johnson & Johnson, Jim Murdica, of Barnes & Thornburg in Los Angeles, had more recent revelations: they had no idea Conlan began working with Birchfield as early as April 2023, about six months before they originally learned about the alliance, until plaintiffs' lawyers submitted a privilege log a few weeks ago in the multidistrict litigation describing confidential communications between them.

"I was kind of dumbfounded—and I was in close contact with the mediators," Murdica testified on Monday. "I was extremely concerned. In my career, I've never seen anything like that."

Jeffrey Pollock, a partner at Fox Rothschild in Princeton, New Jersey, who represents Birchfield, objected to testimony about the communications in the privilege logs, calling it "rank speculation."

The hearing, before Atlantic County Superior Court Judge John Porto and U.S. Magistrate Judge Rukhsanah Singh, both in New Jersey, comes after Johnson & Johnson filed [motions to disqualify](#) Birchfield and his firm from leadership of the talc litigation. Beasley Allen principal Leigh O'Dell is co-lead plaintiffs' counsel in the talc MDL.

The disqualification motions allege Birchfield partnered with Conlan, who was a partner at Faegre Drinker Biddle & Reath until 2022, to push a talc settlement that was more than double the amount Johnson & Johnson offered as part of the second bankruptcy of its subsidiary, LTL Management.

Birchfield's lawyer, Pollock, has [called the allegations "smear tactics"](#) and an unprofessional "locker-room brawl."

Monday's hearing continued to be contentious, with objections back and forth.

"Listen to my question for once," Pollock told Haas on cross-examination. "The process is not the Erik Haas show."

Porto intervened several times to halt the bickering.

"I want to keep the scope tight and don't want it to get too far afield," the judge told the lawyers at the start of Monday's hearing. "It's a limited issue: Is there an actual conflict of interest here?"

'A Side-Switching Lawyer'?

The [disqualification motions](#) asked for orders to show cause why Birchfield and his firm shouldn't be disqualified or, at the very least, that O'Dell be removed from the plaintiffs' steering committee in the litigation.

Both Porto, the judge in the talc multicounty litigation in New Jersey state courts, and Singh, who is overseeing the talc multidistrict litigation in the U.S. District Court of New Jersey, found that more evidence was needed.

The motions are centered on the second Chapter 11 case of LTL, which had arranged to resolve 60,000 talc cases for \$8.9 billion. Birchfield and other plaintiff lawyers, most of whom represent ovarian cancer victims, opposed the deal.

Haas, on direct examination, said he was "intimately familiar" with Conlan's work on the Johnson & Johnson talc litigation, calling him a "central figure in strategic decision making in connection with this team."

"We would have weekly calls where we were collectively litigating and adjudicating the talc litigation," he said. "From the very first conversation I had and throughout the entire time Mr. Conlan was representing Johnson & Johnson, we had repeated discussions—many, many discussions—over whether and to what extent the cases should be resolved in bankruptcy or completely outside bankruptcy."

He said Conlan, who now runs Legacy Liability Solutions, approached him about a proposal to resolve the talc litigation, but he didn't know at the time Birchfield was working with him. The idea was for Legacy to administer funds to settle talc claims, absorbing LTL and other entities with talc liabilities. Johnson & Johnson turned him down, citing its auditor's

concerns.

Conlan's Oct. 18 letter was the first time he revealed working with Birchfield—that is, until the privilege logs came up a few weeks ago showing a longer relationship between the two of them.

“We now know it's even more egregious, because it wasn't the first time,” Haas said.

Conlan's offer came with a matrix outlining the various talc claims. The judges asked Haas more about those figures, and Brody later delved into the details with Murdica. On cross examination, Murdica said the matrix looks similar to one he created with Conlan in 2020.

“I'm more concerned about this now than I was when I came up here,” he told Pollock.

“Mr. Conlan was my closest confidante on all of this,” Murdica said. “He learned the way J&J thinks about talc claims; how they value them.”

Pollock attempted to downplay the accusations that his client was pushing for a settlement with a dollar figure that would provide more legal fees for him. He brought up two experts for Johnson & Johnson in its bankruptcy that estimated the cost to resolve the talc litigation would be \$11 billion to \$21 billion.

He also questioned whether Conlan had breached any ethics.

“You accused him of being a side-switching lawyer,” Pollock told Haas. “How can he be a side-switching lawyer if he's not representing a client in the matter other than himself?”

Haas explained that Conlan is working with Johnson & Johnson's adversary on the same matters.

“That is a side-switching lawyer,” he said.

Porto previously ordered that both Conlan and Birchfield must testify at the hearing. On Monday afternoon, he said he would schedule another day of the hearing at a later date.

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NEWS

'Much More Unsettled': Recent Lawsuits, Court Actions Kick Up Uncertainty Over Section 230's Application to Social Media

"It's a signal to judges, and it's a signal therefore to litigants as well, that you might as well just start bringing these cases," Alan Rozenshtein, an associate law professor at the University of Minnesota. "You might win."

March 26, 2024 at 11:41 AM



Riley Brennan



As litigation around the country against tech companies and social media platforms continue to develop, questions remain around Section 230 of the Communications Decency Act and the limited federal immunity it provides to these companies.

Recent lawsuits against social media sites like TikTok, Meta, and Snapchat, and circuit court considerations of Section 230, has brought the statute to the forefront. However, the scope and reach the statute has in granting immunity to online computer services and publishers regarding user-generated, third-party content remains unclear.

Alan Rozenshtein, an associate law professor at the University of Minnesota contributes part of the ongoing uncertainty and the increase in suits against various social platforms to the Supreme Court's 2023 decision in *Gonzalez v. Google*, where the court was expected to address Section 230 and its meaning, but declined to do so.

According to Rozenshtein, the court's decision to not address the statute signals "that this question of what does Section 230 actually mean, is much more unsettled then I think has long been assumed."

"It was really striking that the Supreme Court didn't say anything about Section 230, despite taking the case specifically to do that. It doesn't mean that the Supreme Court, when it finally does answer the question, is necessarily going to limit Section 230, but I do think that it is a signal that this is much more of an open game than has previously been assumed," Rozenshtein said. "And so, it's a signal to judges, and it's a signal therefore to litigants as well, that you might as well just start bringing these cases. You might win."

Some courts have shown an increased willingness to consider cases against these social media companies.

One such court is the U.S. Court of Appeals for the Third Circuit, which held oral arguments at the beginning of the year considering whether TikTok's personalized algorithm is considered first-party speech not immune from civil liability by Section 230.

Further, the U.S. Court of Appeals for the Ninth Circuit has taken up an appeal by Apple, Google, and Meta to overturn a 2022 decision that found Section 230 didn't protect them from all claims in lawsuits alleging their casino-style apps violated state gambling laws.

However, questions remain regarding the potential impact of these circuit court rulings on the statute and future litigation.

James Grimmelmann, a professor of digital and information Law at Cornell Law, found potential impacts were hard to narrow down.

"It's very hard to say. The reason is that if you look at the Supreme Court's cases last term, in [*Twitter v.*] *Taamneh* and *Gonzalez*...it actually becomes clear that there's a tough interaction between Section 230 and substantive law," Grimmelmann said, noting the pair of cases were predicted to resolve the first party, third party question for algorithmic speech on platforms, but the justices ultimately decided the case based on substantive law.

Further, Grimmelmann said that "if 230 doesn't apply to protect algorithmic decisions and the For You Page, and the order in which videos are shown, it's not at all clear which causes of action survive that."

"I don't know that there are many common law claims in these lawsuits that get through there. I mean, you might have some based upon privacy law, because those are really about the retention and use of user data, and you might have some about addition as such, but even that starts to look like that is a subject for state regulation, and something that can simply be brought under common law," Grimmelmann said.

Rozenshtein noted that justices expressed confusion regarding the meaning of Section 230 during oral arguments in *Gonzalez*, finding this reaction from the Supreme Court highlights the complexity of the issue.

"I think reading between the lines, it was a really strong signal that the court thinks this is a very hard problem," Rozenshtein said. "If the court thinks this is a very hard problem, then clearly Section 230 isn't as straightforward as we've all been assuming it's been for almost 30 years now."

Congressional Action?

Despite the Supreme Court's avoidance of the statute in recent litigation, many believe Congress reconsidering Section 230 is a possibility, including Mary Graw Leary, a professor of law and senior associate dean at The Catholic University of America, who said there are currently at least five pieces of legislation to protect children on the Internet in the Senate, some of which she says directly address Section 230's outdated immunity provision.

According to Graw Leary, change to the statute is needed, noting the internet "is in a very different place today than it was two decades ago."

"I think it is no longer necessary in its current version—if it ever was—as the Internet is not a nascent industry and needs no further business protection," Graw Leary said. "We see the Internet is thriving throughout the world and in countries with much more regulation."

She further noted that increased regulation would be asking the companies "to behave like any other business," making them aware of risks and requiring them to take steps to mitigate those risks.

Rozenshtein echoed a similar sentiment.

"These are the biggest companies in the world. They completely dominate our lives, completely dominate our information space. I think that like every giant industry, it needs to be regulated to some degree," Rozenshtein said. "Now, what that regulation looks like, I don't know."

Jeff Kosseff, an associate professor of cybersecurity law in the U.S. Naval Academy’s Cyber Science Department, similarly believes Congress revisiting the statute is a possibility, noting Congress’s 2018 amendment which provided an exception for sex trafficking, stemming from *Jane Doe No. 1 v. Backpage.com*. Kosseff notes there have been numerous proposals in recent years, but none have gotten enough support to pass.

“Part of the problem is people have very different views of what the platform should be doing. Some think less aggressive in moderation, while others think more monitoring,” Kosseff said, noting there is no change that would satisfy everyone. “230 can only get you so far. By June we will see what the First Amendment rights of the platforms are because of the *NetChoice* [*v. Paxton*] cases before the Supreme Court.”

The increased willingness of courts to hear cases against these platforms could open the door to further conversations regarding the statute and social media regulation, which Section 230 normally disallows, Rozenshtein noted.

“What Section 230 has done, is because it’s been interpreted so expansively, we haven’t even thought about regulation, at least through the civil litigation system for 25 years. We haven’t even started that process, and that’s just very different from other industries,” Rozenshtein said. “If your toaster blows up you can sue them. If you get harmed by a drug, you can sue them. That’s not always a good thing, and there are plenty of people that think there’s too much litigation. Fine, we can have that debate. But we can’t even have that debate right now. We haven’t been able to have that debate over the last 25 years, because Section 230 has been like a buzzsaw to all this litigation.”

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Apple in Hot Seat: Crop of Class Actions Piggyback on Feds' Antitrust Suit

Like the U.S. Justice Department suit, the consumer class actions claim Apple engages in exclusionary conduct to shut competitors out of the markets for revenue from areas such as its App Store, Apple Pay and music streaming.

March 25, 2024 at 03:33 PM

Class Actions

By Charles Toutant | March 25, 2024 at 03:33 PM

The original version of this story was published on [New Jersey Law Journal](#)



The U.S. Department of Justice’s lawsuit accusing Apple Inc. of obstructing competitors from accessing the iPhone’s software and hardware features is not the only antitrust action targeting the tech giant.

Two class actions filed against Apple in the Northern District of California, and one in the District of New Jersey, mirror the Department of Justice’s claims that the company hinders other software developers’ efforts to create products for iPhone users.

The three latest suits are styled as class actions brought on behalf of iPhone owners, but they closely parallel the claims raised by the Department of Justice.

Apple did not respond to a reporter’s question about the three consumer class actions. Counsel for Apple has not entered appearances in any of those cases. Firms that filed the suits also did not respond to requests for comment.

Kirkland & Ellis to Represent Apple in Landmark Antitrust Lawsuit

Like the Department of Justice suit, the consumer class actions claim Apple engages in exclusionary conduct to shut competitors out of the markets for revenue from areas such as its App Store, Apple Pay and music streaming.

The Department of Justice filed its suit in the District of New Jersey on March 21.

Suits emerged the next day from Hausfeld and Carella Byrne Cecchi Brody & Agnello in the District of New Jersey, and in the Northern District of California from Hagens Berman Sobol & Shapiro and Sperling & Slater.

Two days after the Department of Justice suit was filed, Apple was hit by another class action in the Northern District of California, filed by Israel David of New York and Moya Law Firm of Oakland, California.

Kirkland & Ellis is expected to represent Apple in the government’s antitrust suit. No counsel have entered appearances in the class suits.

The consumer class actions closely resemble the suit filed by the Department of Justice. They repeat several parts of the government’s suit verbatim.

Repeated word-for-word from the government action, for instance, is this claim in the two California suits: “Apple wraps itself in a cloak of privacy, security, and consumer preferences to justify its anticompetitive conduct. Indeed, it spends billions on marketing and branding to promote the self-serving premise that only Apple can safeguard consumers’ privacy and security interests.”

The New Jersey suit also repeats the passage with one change, claiming Apple wraps itself in “a cloak of privacy, security, and alleged consumer preferences.”

The New Jersey suit is brought on behalf of a nationwide class of individuals and entities who purchased iPhones directly from Apple between March 22, 2020 and the present, as well as a New Jersey class with the same characteristics.

The Hagens Berman suit is brought by a direct purchaser class of persons and entities that, as residents of the United States, purchased an iPhone from Apple.

Meanwhile, the Israel David suit is brought on behalf of all individuals, businesses and entities who purchased iPhones from Apple from March 21, 2020 until the time that the anticompetitive conduct ceases.

The Israel David suit is also brought on behalf of a New York sub-class with similar attributes and a subclass consisting of individuals, businesses and entities purchasing iPhones directly from Apple in Alaska, Arkansas, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota and Tennessee.

To control creation and distribution of apps, Apple “slowed its own iPhone innovation and extracted more revenue and profit from its existing customers through subscriptions, advertising, and cloud services. These services increase the cost of switching from the iPhone to another smartphone because many of these services—including its proprietary gaming, cloud storage, and news service—are exclusive to the Apple ecosystem, causing significant frictions for iPhone users who try to use alternative services on another smartphone,” the Hausfeld suit said.

“Each step in Apple’s course of conduct built and reinforced the moat around its smartphone monopoly,” the suit alleged. “The cumulative effect of this course of conduct has been to maintain and entrench Apple’s smartphone monopoly at the expense of the users, developers, and other third parties who helped make the iPhone what it is today.”

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Litigation: Editor's Picks



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NEWS

MDL Judge: 'Significant Number of Plaintiffs' Can't Allege Paraquat Exposure

Chief U.S. District Judge Nancy Rosenstengel, in the Southern District of Illinois, has issued a series of discovery orders after finding many of the 5,200 lawsuits over paraquat are "implausible on their face."

March 25, 2024 at 05:00 AM

Litigation



Amanda Bronstad
staff reporter



What You Need to Know

- The judge has issued a series of orders that plaintiffs issue subpoenas and be deposed in order to produce more evidence of paraquat exposure.
- Judge Nancy Rosenstengel's orders exemplify rising criticism, particularly in the defense bar, that meritless cases are being drawn into multidistrict litigation.
- Lead plaintiffs attorneys said the orders would reveal the 'horrific impact that Syngenta’s and Chevron’s misconduct has had on farmworkers.'

A federal judge has ordered depositions and subpoenas after growing concern that “a significant number of plaintiffs” in the paraquat multidistrict litigation do not “plausibly allege exposure” to the herbicide.

Judge Nancy Rosenstengel, chief judge of the U.S. District Court for the Southern District of Illinois, is overseeing more than 5,200 lawsuits alleging paraquat causes Parkinson’s disease. Last year, the judge began issuing orders to obtain more information about the cases after plaintiffs voluntarily dismissed lawsuits selected for discovery for bellwether purposes.

Over the next several months, Rosenstengel ordered lawyers for the defendants, Syngenta Corp. and Chevron USA Inc., to depose plaintiffs in dozens of cases. And, last month, after several of those cases were voluntarily dismissed, she ordered all plaintiffs in the multidistrict litigation to subpoena third parties, such as employers and feed stores, for records backing up their claims.

“This additional limited third-party discovery will provide plaintiffs an opportunity to better determine the strength of their claims, as well as expose non-meritorious claims,” she ruled in the Feb. 26 order.

Rosenstengel’s orders exemplify rising criticism, particularly in the defense bar, that meritless cases are being drawn into multidistrict litigation. Those concerns fueled calls for the first Federal Rule of Civil Procedure for multidistrict litigation, although the proposal that is pending does not address the vetting of cases.

Syngenta, represented by Kirkland & Ellis partner Ragan Naresh, in Washington, D.C., declined to comment.

A Chevron representative did not respond to a request for comment, nor did its lawyer, Steve Geise, a Jones Day partner in San Diego.

“Judge Rosenstengel’s orders will ultimately illustrate the horrific impact that Syngenta’s and Chevron’s misconduct has had on farmworkers across the country,” co-lead plaintiffs counsel wrote in a statement. “Paraquat has caused thousands of people to develop Parkinson’s disease, and the court’s process will more quickly ready their cases for trial, which we look forward to prosecuting later this year.”

Co-lead class counsel are Khaldoun Baghdadi, of San Francisco’s Walkup, Melodia, Kelly & Schoenberger; Sarah Doles of Levin, Papantonio, Rafferty, Proctor, Buchanan, O’Brien, Barr & Mougey in Pensacola, Florida; and Peter Flowers of Chicago’s Meyers & Flowers.

‘Concerns About the Integrity of the Docket’

The paraquat orders came up earlier this month at a panel on multidistrict litigation during Western Alliance Bank’s Class Action Law Forum, hosted by the University of San Diego School of Law.

Alexandra Walsh, of Washington, D.C.’s Walsh Law, who was a defense lawyer before jumping to the plaintiff side, acknowledged the problem is also one for the plaintiffs bar.

“There’s a lot of vetting going on, and a lot of recognition among the plaintiffs bar about the need for this,” she said.

The lawsuits allege that paraquat, first sold in the 1960s to professionals to kill weeds and grasses prior to planting crops, caused Parkinson’s disease.

Early on, Rosenstengel, who was [assigned the cases in 2021](#), sought to get a handle on the growing paraquat docket. Within months, she outlined the process of filing sworn plaintiff assessment questionnaires, submitted through an online portal.

But last year, in a May 15 order, she had “concerns about the integrity of the docket in this litigation.” Responding to a sealed motion from the defendants alerting her to cases filed on behalf of deceased plaintiffs, Rosenstengel ordered lawyers to provide information to the special master, Louisiana mediator Randi Ellis, clarifying whether a plaintiff was living or deceased. Those cases that failed to certify such information face dismissal, she wrote.

She then ordered the parties to meet within the next two weeks to discuss “any pending cases that present theories of proof that are so implausible on their face that good faith demands their voluntary dismissal.”

The order came after two of the six bellwether cases selected for discovery were voluntarily dismissed “due to evidentiary issues,” she held.

Given both developments, “the court is concerned about the presence of cases on its docket that present implausible or far-fetched theories of liability, and therefore would not have been filed but for the availability of this multidistrict litigation,” she wrote.

Rosenstengel cited a well-known 2016 decision from U.S. District Judge Clay Land, of the Middle District of Georgia, who threatened sanctions against plaintiffs lawyers in the multidistrict litigation over Mentor ObTape slings if they had no good-faith basis for pursuing cases through summary judgment.

Land also said that multidistrict litigation in product liability cases, which often leads to global settlements, “does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.”

“At a minimum,” he added, “transferee judges should be aware that they may need to consider approaches that weed out nonmeritorious cases early, efficiently and justly.”

Plaintiffs lawyers, in a June 19 motion, accused defense lawyers of turning her order “into a vending machine for dismissal.”

“Just because a plaintiff may have used paraquat on a golf course or school grounds at a time when it was not authorized for such use does not mean paraquat did not cause Parkinson’s disease,” they wrote. “Just because a minor may have used paraquat on a family farm does not mean paraquat did not cause Parkinson’s disease.”

Three days later, defense lawyers filed a “motion for docket control order,” citing plaintiffs in more than 650 cases with no information about whether they were exposed to paraquat and no medical evidence of Parkinson’s disease. Some claimed they used paraquat in forms that never existed, such as powder or pellets.

Syngenta and Chevron blamed the growth of cases in the multidistrict litigation on lead generators and aggressive advertising on TV, emails, print publications and online that cost tens of millions of dollars.

“Beginning in 2021, plaintiffs’ counsel and lead generators began an aggressive and misleading nationwide advertising campaign that, by its very nature, virtually guaranteed that individuals never exposed to paraquat would file lawsuits,” their lawyers argued. Those include home gardeners and golfers, even though paraquat isn’t used for those purposes. They also targeted people who lived near farms.

They asked Rosenstengel to order plaintiffs to provide more evidence, which could be available from third parties.

“Entering a docket control order now would advance the bedrock goal of managing this MDL efficiently by scrutinizing, and potentially dismissing, cases in which plaintiffs cannot realistically allege paraquat exposure or PD [Parkinson’s disease],” they wrote.

‘Getting That Docket Cleaned Up’

On Aug. 24, the last day of a four-day expert evidence hearing, Rosenstengel said she would postpone a planned October trial so that plaintiffs lawyers could have more time to provide the missing information about their clients.

“I want your time in the coming weeks to be focused on getting that docket cleaned up,” she told the lawyers at the hearing, according to a transcript.

In addition to the cases flagged by defendants with alleged implausible theories, Ellis, the special master, found dozens of plaintiff assessment questionnaires had missing information and should be dismissed.

Last month, Ellis told the judge that many plaintiffs still had not produced any documentary evidence about their exposure. That prompted Rosenstengel to issue a Feb. 26 order requiring plaintiffs in every case to issue subpoenas to third parties to obtain such evidence.

In a Jan. 22 order, Rosenstengel said she “remains concerned that a significant number of plaintiffs in the MDL—which now total over 5,000—do not plausibly allege exposure to paraquat.”

She ordered plaintiffs in 25 specific cases to be deposed.

“The court believes additional discovery regarding these individuals will provide representative data about plaintiffs, determine where plaintiffs’ claims are plausible and substantiated, and expose non-meritorious claims,” she wrote. “Should the additional discovery taken of the above-identified individuals reveal that there was no good faith basis to file the individual’s suit in the first place, the court will consider imposing costs and fees in an amount deemed appropriate.”

After nine of those plaintiffs voluntarily dismissed their cases, she ordered nine more to complete depositions and discovery by April 8. Earlier this month, Rosenstengel ordered depositions for nine more plaintiffs by May 7 after another nine were dismissed.

In the March 7 order, she wrote, “These dismissals only reinforce the court’s concern about the proliferation of non-meritorious claims on the docket of this MDL.”

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Georgia-Pacific spinoff urges US Supreme Court to skip review of Texas two-step tactic

 [reuters.com/legal/government/column-georgia-pacific-spinoff-urges-us-supreme-court-skip-review-texas-two-step-2024-03-25](https://www.reuters.com/legal/government/column-georgia-pacific-spinoff-urges-us-supreme-court-skip-review-texas-two-step-2024-03-25)

Alison Frankel

A general view of the U.S. Supreme Court building, where justices were hearing arguments in the federal government's bid to reinstate Boston Marathon bomber Dzhokhar Tsarnaev's death sentence in Washington, U.S. October 13, 2021. REUTERS/Jonathan Ernst Purchase Licensing Rights , opens new tab

March 25 (Reuters) - A new U.S. Supreme Court brief , opens new tab by the Georgia-Pacific spinoff Bestwall is a case study in why appellate lawyers, with apologies to F. Scott Fitzgerald, are different from you and me.

I'll end the suspense, such as it is: Bestwall, which was created as a vehicle for Georgia-Pacific's liability from tens of thousands of asbestos claims, does not want the Supreme Court to entertain plaintiffs' arguments about the validity of the so-called Texas two-step – a corporate defense maneuver in which an otherwise healthy corporation spins off its mass tort liability into a separate company, then uses the Chapter 11 bankruptcy of the spinoff to enjoin litigation against the parent company.

But what's notable about Bestwall's brief is how thoroughly Bestwall's lawyers at Jones Day have managed to suck all the heat out of the debate over the two-step. Instead of a full-throated defense of the device as a means to manage out-of-control mass tort litigation, Bestwall highlighted lawyerly, technical arguments for why there's nothing particularly interesting about its case.

You probably know that courts around the country have reached different conclusions about the viability of the Texas two-step as a way for healthy companies to pause mass tort litigation.

The 3rd U.S. Circuit Courts of Appeal refused in 2023 to allow Johnson & Johnson to use the bankruptcy of a liability-laden subsidiary to enjoin cases accusing the parent company of selling asbestos-tainted talc. (J&J denies its talc products are dangerous.) When 3M tried a similar tactic to halt epic multidistrict litigation over allegedly defective military earplugs, a federal bankruptcy judge in Indiana dismissed the bankruptcy of the 3M subsidiary to which the parent company had transferred all of its liability. (3M appealed the decision to the 7th Circuit but settled before any appellate decision.)

But the 4th Circuit reached a contrary conclusion in June 2023, ruling that Georgia-Pacific, the Koch-Industries-owned manufacturing behemoth, was entitled to an injunction to pause thousands of asbestos suits because the cases were related to the bankruptcy of its Bestwall

spinoff. (Georgia-Pacific, I should note, has said it stopped producing products containing asbestos back in the 1970s. It also argues that Bestwall's bankruptcy will allow the parent company to address valid claims in a timely manner.)

Seems like an obvious split among the courts on the viability of the Texas two-step, right? That would make the controversy a perfect candidate for Supreme Court review, given the significance of a legal strategy that affects not just the gigantic corporations that have deployed it but also hundreds of thousands of plaintiffs and, arguably, the entire apparatus of mass tort litigation in the U.S.

If only things were that simple.

Last December, two groups of asbestos plaintiffs in the Bestwall case asked the Supreme Court to weigh in. The official committee of asbestos claimants, represented by David Frederick of Kellogg, Hansen, Todd, Figel & Frederick, told [this](#), opens new tab the justices that the 4th Circuit decision would allow thriving companies like Georgia-Pacific to abuse the bankruptcy process to deny plaintiffs their day in court. In a separate but overlapping petition [here](#), opens new tab, a lawyer for future asbestos claimants, Edwin Harron of Young Conaway Stargatt & Taylor, argued that unless the Supreme Court intervenes, healthy companies will routinely engage in corporate reshuffling to obtain injunctions in bankruptcy court without otherwise subjecting themselves to the strictures of Chapter 11.

Their arguments were sufficient compelling, as my Reuters colleague Dietrich Knauth reported in January, to prompt amicus briefs from 24 state attorneys general [here](#), opens new tab and three U.S. Senators [here](#), opens new tab who warned the Supreme Court that well-off companies are improperly stretching the bounds of the U.S. Bankruptcy Code to dodge liability.

To be sure, plaintiffs' petitions acknowledged that the context of the 4th Circuit's ruling was different from decisions in the Johnson & Johnson and 3M cases. The 4th Circuit's opinion did not address plaintiffs' motions to dismiss the entire Bestwall bankruptcy, analyzing only the bankruptcy court's authority to issue an injunction halting claims against Bestwall parent Georgia-Pacific.

Both plaintiffs' petitions nevertheless told the Supreme Court that the federal circuits are divided on key questions arising from Texas two-step maneuvers, including the degree of jurisdictional scrutiny that courts should apply to corporate restructurings. The asbestos claimants committee also argued that the federal circuits are split on the scope of a bankruptcy judge's power to issue injunctions and on the test for determining whether lawsuits against a solvent parent are related to the bankruptcy of a subsidiary.

Bestwall's new brief opposing the committee's petition, filed on Friday by former Solicitor General Noel Francisco, downplayed any assertion of a split among the circuits and portrayed the case as an unnecessary venture into exceptionally weedy terrain.

Francisco did not respond to my query on the new brief.

Claimants committee counsel Frederick declined to comment on Bestwall's opposition arguments. The company is due to file a separate brief in opposition to the future claimants' petition on March 29.

In essence, Bestwall told the justices to disregard plaintiffs' primary jurisdictional argument – that courts should presume corporations are engaged in collusion when they use restructurings to “manufacture” jurisdiction – because the relevant statute has never been applied in a bankruptcy case. And even if the statute extended to bankruptcy court jurisdiction, Bestwall argued, any division among the circuits on the precise degree of scrutiny to give to such restructurings is unimportant because the 4th Circuit concluded that Georgia-Pacific had a legitimate purpose for spinning off Bestwall.

Bestwall also said there's no meaningful divide among the circuits on the test for whether claims are related to a debtor's bankruptcy. Because plaintiffs' claims against Georgia-Pacific are identical to those against Bestwall, the company said, every circuit would deem them to be related to the bankruptcy — and that relationship, according to Bestwall, negates all of the plaintiffs' other jurisdictional arguments.

“The only question here is whether the bankruptcy court had subject-matter jurisdiction, according to a universally accepted standard, to enter a preliminary injunction,” Bestwall told the Supreme Court. “Nothing about that question or its answer merits this court's review.”

Read more:

Georgia-Pacific unit's "two-step" bankruptcy survives dismissal, again
Senators, states ask US Supreme Court to curb 'two-step' bankruptcy abuse
Georgia-Pacific's 'Texas two-step' pits state AGs against U.S. Chamber
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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

In Stanley cups litigation, consumers push to consolidate cases

 [reuters.com/legal/litigation/stanley-cups-litigation-consumers-push-consolidate-cases-2024-03-25](https://www.reuters.com/legal/litigation/stanley-cups-litigation-consumers-push-consolidate-cases-2024-03-25)

Diana Jones

REUTERS/India Walton/File Photo Purchase Licensing Rights , opens new tab

March 25 (Reuters) - Consumers suing the maker of the ultra popular Stanley Quencher tumblers over claims the company failed to disclose that the cups are made with lead are asking a federal judge to consolidate the lawsuits in federal court in Washington state, court records show.

Lawyers for plaintiffs who have filed three proposed class actions against Stanley parent Pacific Market International asked U.S. District Judge Tana Lin on Friday to consolidate those cases and any other current or future lawsuits over the claims in her courtroom in Seattle, where Pacific Market is based.

Consolidation would allow Lin to rule on discovery and other disputes in all of the cases at once, which the plaintiffs say would prevent disparate rulings in the different cases.

Counsel for Stanley did not immediately respond to requests for comment on the push to consolidate the cases. The company would not agree to the motion, the lawyers for the plaintiffs said in their filing.

Stanley has acknowledged in a statement posted on its website that lead is present in the seal for the cup's vacuum insulation, but it said "no lead is present on the surface of any Stanley product that comes into contact with the consumer nor the contents of the product."

Court records show at least five nearly identical lawsuits have been filed against Pacific Market. Three were filed in Seattle federal court, and a fourth is expected to be transferred there, according to court filings. A fifth is pending in North Carolina federal court.

The lawsuits claim Pacific Market sold the cups for years as part of a healthy lifestyle without disclosing that they contained lead. The consumers suing say they would not have purchased the cups or would not have paid the full price – as much as \$50 – had they known. All of the lawsuits are proposed class actions, with several seeking to cover any consumer in the U.S. who purchased one of the cups. The plaintiffs do not allege that they were harmed by lead.

Alan Mansfield of Whatley Kallas, one of the plaintiffs' lawyers who is asking for the consolidation, declined to comment beyond the filing.

Recent sales of the Stanley Quencher cups, driven largely by social media, propelled the 100-year-old, privately held Stanley brand to \$750 million in revenue in 2023, according to CNBC in December.

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Reporting by Diana Jones

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Diana Novak Jones

Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

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Class Action

March 26, 2024, 9:22 AM PDT

Meta to Defend Bulk of Tax Privacy Claims After Dismissal Order

By [Skye Witley](#)

- Meta gets six state law claims dismissed in privacy lawsuit
- Company still faces alleged violations of state, federal laws

Bloomberg Law News 2024-03-26T12:31:04467228681-04:00
Meta to Defend Bulk of Tax Privacy Claims After Dismissal Order

By [Skye Witley](#) 2024-03-26T12:22:30000-04:00
Meta gets six state law claims dismissed in privacy lawsuit
Company still faces alleged violations of state, federal laws

Meta Platforms Inc. is still facing the bulk of a class action accusing the company of illegally collecting consumers' tax return data without their consent even after convincing a federal judge to cut several causes of action from the lawsuit.

Judge P. Casey Pitts found that plaintiffs had adequately pleaded that data collection from online tax-filing companies including H&R Block Inc., TaxAct, and TaxSlayer violated numerous state and federal statutes in a Monday order partially granting and partially denying Meta's motion to dismiss the lawsuit, which has been consolidated in the US District Court for the Northern District of California.

The ruling is the latest development in a wave of lawsuits filed against Meta and the tax-filing entities ignited by July 2023 report from congressional Democrats calling into question taxpayers' financial privacy protections. The report and three class actions filed against Meta, which were consolidated in February 2023, revealed concerns about how the tax websites transmitted detailed financial information including annual income to Meta via the company's pixel technology, which tracks track how users engage with websites.

Pitts dismissed six state-law claims, with leave to amend.

A claim citing the Washington Privacy Act failed because that law protects only communications between individuals, not communications with an automated platform like the e-filing websites, Pitts ruled. Alleged violations of deceptive business practice laws in Illinois and New York were both dismissed because Pitts found the plaintiffs had alleged only that Meta failed to disclose its collection of their financial data, not that Meta intentionally distributed any deceptive statements to consumers. Another claim under Illinois deceptive trade law was dismissed because the plaintiffs didn't allege how that statute entitled them to injunctive relief.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XE18UV2O000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...>

1/3

The consolidated complaint didn't adequately describe the plaintiffs as Meta consumers under the California Legal Remedies Act, only that they used the e-filing websites, the dismissal order said. A claim under the state's penal code on property theft failed because plaintiffs didn't allege Meta was actively stealing their sensitive data, only that its pixel was passively receiving the information.

Pitts allowed three claims filed under the California Invasion of Privacy Act to survive because Meta's arguments favoring dismissal raised factual questions about the users' consent for information collection and Meta's intent to receive the data that require more evidence than the motion to dismiss stage provides. The key to determining Meta's intent lies in what steps the company did or didn't take to prevent receiving taxpayer's financial data, the order said.

Alleged violations of the Missouri Wiretap Act and federal Wiretap Act survived for similar reasons.

Meta also made "premature" arguments about the contents of its Terms of Service that convinced Pitts to deny the company's motion to dismiss claims of unjust enrichment and under Illinois eavesdropping law.

Accusations of negligence survived because the plaintiffs adequately pleaded Meta owed them a duty to prevent improper disclosures of sensitive information when it created and made available to businesses a tracking pixel, the order said. The judge trimmed fraudulent-conduct claims under California's Unfair Competition Law because the plaintiffs didn't allege that Meta distributed fraudulent statements, but otherwise allowed the claim to survive.

The Hoda Law Firm PLLC; Smith Krivoshey PC; Foster Yarborough PLLC; George Feldman McDonald PLLC; The Law Offices of Steven C. Vondran PC; Bursor & Fisher PA; Lockridge Grindal Nauen PLLP; Barrack Rodos & Bacine; and Emerson Firm PLLC represent the plaintiffs. Gibson, Dunn & Crutcher LLP and Cooley LLP represent Meta.

The case is In Re Meta Pixel Tax Filing Cases , N.D. Cal., No. 5:22-cv-07557, motion to dismiss partially granted 3/25/24 .

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March 26, 2024, 8:15AM PDT
Ex-Ohio House Speaker Faces New Charges in FirstEnergy Scandal
By [Eric Heisig](#)
Documents
 [Indictment](#)

- COURT:** Cuyahoga County Common Pleas Court
- CASE NUMBER:** CR-24-690479-A

Bloomberg Law News 2024-03-26T12:58:29077722945-04:00
Ex-Ohio House Speaker Faces New Charges in FirstEnergy Scandal
By Eric Heisig 2024-03-26T11:15:37000-04:00
COURT: Cuyahoga County Common Pleas Court
CASE NUMBER: CR-24-690479-A

Former Ohio House Speaker Larry Householder, who is in prison for a federal racketeering conviction related to the FirstEnergy Corp. scandal, was indicted on state charges.

Householder, a Republican, faces 10 new counts filed Monday in Cuyahoga County Common Pleas Court, including theft in office, money laundering, and tampering with records, among others. The office of Ohio Attorney General Dave Yost (R) alleges that Householder, 64, illegally used more than \$750,000 of money from his campaign to pay for his criminal defense lawyers in the federal case for which he is serving 20 years. He will be arraigned April 12.

- An anti-corruption task force led by Yost’s office also alleges that Householder didn’t properly detail financial relationships, creditors, and gifts on his legislative ethics disclosure forms.
- The new indictment adds to the legal woes he faces as part of the fallout of the 2019 passage of House Bill 6, a \$1.3 billion legislative package that bailed out two nuclear power plants that the Akron-based FirstEnergy owned at the time.
- It also comes after a separate state grand jury indicted former utility executives Charles Jones and Michael Dowling, and former top Ohio regulator Samuel Randazzo.

The case is Ohio v. Householder , Ohio Ct. Com. Pl., No. CR-24-690479-A, indictment 3/25/24 .

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Imprisoned Householder now faces state charges in bribery scandal

B [toledoblade.com/local/politics/2024/03/25/imprisoned-householder-faces-state-charges-bribery-scandal/stories/20240325109](https://www.toledoblade.com/local/politics/2024/03/25/imprisoned-householder-faces-state-charges-bribery-scandal/stories/20240325109)



Jim Provance

The Blade

jprovance@theblade.com

Mar 25, 2024

4:00 PM

COLUMBUS — Already serving 20 years in federal prison for racketeering, former Ohio House Speaker Larry Householder now faces 10 state felony charges related to that bribery scandal.

The indictment filed Monday in Cuyahoga County includes a single count of theft in office for which conviction could add state time to the federal sentence Householder is now serving.

"This case seeks to hold Mr. Householder accountable for his actions under state law, and I expect that the results will permanently bar him from public service in Ohio," Attorney General Dave Yost, a fellow Republican, said in announcing the indictment.

"State crimes have state penalties, and a conviction will ensure that there will be no more comebacks from the 'Comeback Kid,'" he said.

Federal law does not include a similar bar against future public office in such cases.

The grand jury indictment also includes two counts of aggravated theft and one count of telecommunications fraud, all second-degree felonies, as well as a single count of money laundering and five counts of tampering with records, all third-degree felonies.

Half of the counts relate to the accusations that Householder, 64, of Glenford, took more than \$750,000 from his campaign committee to pay for his criminal-defense bills in the federal case.

"The evidence will demonstrate that Mr. Householder was aware he did not have the authority to pay for his criminal defense with this money from supporters in his campaign account," said Deputy Attorney General Carol O'Brien, head of the Ohio Organized Crime Investigation Commission.

If convicted, Householder would have to repay the diverted funds to his campaign committee.

He is also accused of failing to publicly disclose in multiple annual ethics filings his financial relationship with Akron utility giant FirstEnergy Corp., lobbyist gifts, credit card debt, loans, and legal fees owed due to separate litigation. Some of the information related to this came from Householder himself when he took the stand to testify in his federal trial in Cincinnati last year.

"These omissions are much more than simple mistakes," Ms. O'Brien said. "The sheer breadth and continuity of these omissions show a concerted effort by Mr. Householder to hide his obligations, to hide his personal finances, and his business connections."

Householder's attorneys could not immediately be reached for comment on these latest charges.

Householder and Matt Borges, a consultant and former Ohio Republican Party chairman, were both convicted for their roles in a \$61 million bribery scheme in which FirstEnergy was admittedly the primary source of cash.

The end result of the deal was Householder's return as powerful speaker of the Ohio House of Representatives, where he was then able to shepherd passage of a \$1.3 billion customer bailout of two struggling Lake Erie nuclear power plants then owned by a FirstEnergy subsidiary.

"The corruption that followed what we now know as the House Bill 6 scandal is still being unraveled," Mr. Yost said. "Mr. Householder has appealed his federal conviction, of course, and should the conviction be overturned on appeal he might well try for a third bite at the apple, a possibility that legislators have raised in private with me."

Last month the commission brought 25 charges against Samuel Randazzo, former chairman of the Public Utilities Commission of Ohio, and two former FirstEnergy executives, Charles “Chuck” Jones and Michael Dowling, for their alleged roles in the broader bribery scheme. These were the first state charges brought in the scandal.

Mr. Randazzo also awaits trial on federal charges, while Borges is serving a five-year federal sentence for his role. Both Borges and Householder have appealed their convictions.

The charges were brought now because the statute of limitations on one of the charges is about to expire on April 9. Mr. Yost said he couldn't predict whether more charges may be brought.

"It's impossible to tell where the road ahead leads," he said.

Why bring these charges now when Householder has already been sentenced to 20 years?

"He committed crimes against the state of Ohio," Ms. O'Brien said. "He violated his oath of office. He committed offenses against justice and public administration, and he violated the trust of the people who financially supported his campaign and the trust of the people of Ohio."

First Published March 25, 2024, 1:32pm



Jim Provance

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March 25, 2024, 11:31 PM PDT

Andrew Left, Banned for Evergrande Warning, Now Wants an Apology

By Kiuyan Wong

- The short-seller was banned from the Hong Kong market in 2016
- Citron Research's founder says he is optimistic about China

Bloomberg Law News 2024-03-26T10:13:42558352142-04:00

Andrew Left, Banned for Evergrande Warning, Now Wants an Apology

By Kiuyan Wong2024-03-26T02:31:44142-04:00

- The short-seller was banned from the Hong Kong market in 2016
- Citron Research's founder says he is optimistic about China

US short-seller **Andrew Left** wants an apology from Hong Kong's market regulator — and a refund.

The founder of Citron Research was fined HK\$1.6 million (\$204,580) and hit with a five-year trading ban from a city tribunal in 2016 for questioning the financial soundness of China Evergrande Group years before the developer's collapse. The verdict came after Hong Kong's Securities and Futures Commission accused Left of market misconduct and making "reckless" allegations about Evergrande's accounting and finances in a 2012 research report.

Evergrande has now defaulted on its debt, been ordered into liquidation, and has been accused by China's securities regulator of vastly inflating its revenue and profits in 2019 and 2020.



Andrew Left

Photographer: James Jackman/Bloomberg

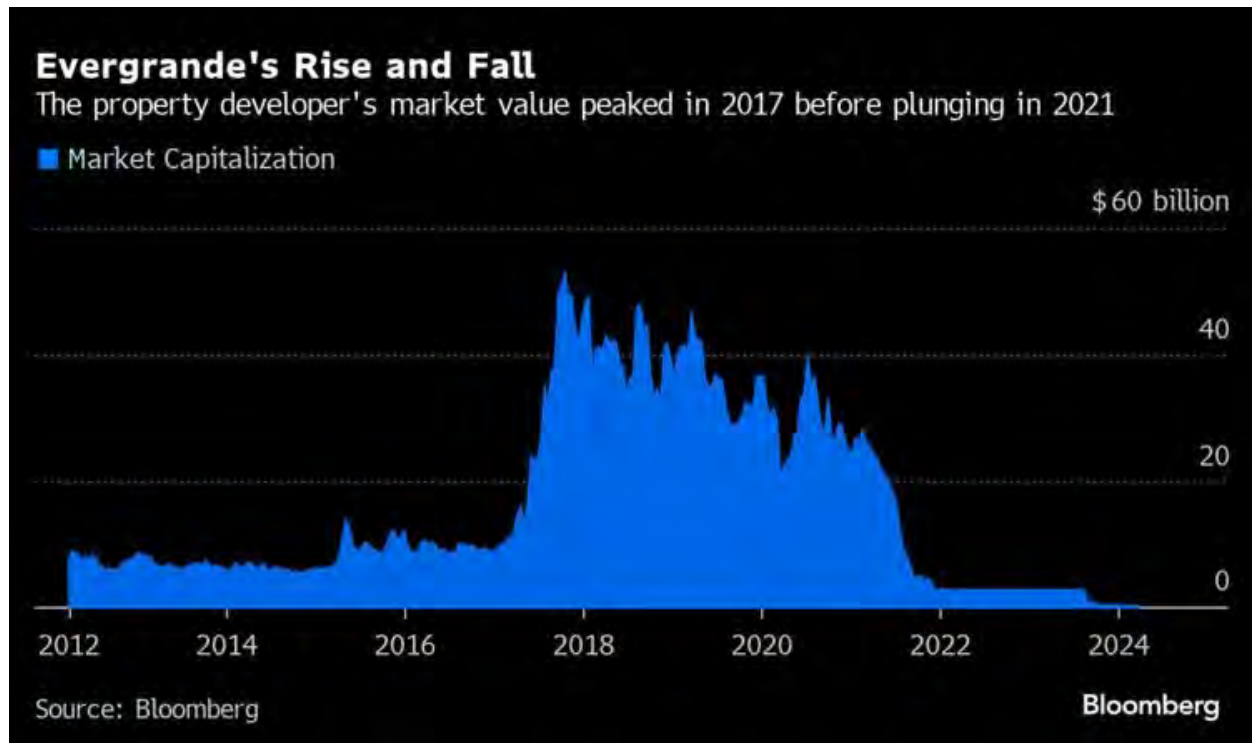
"I would like an apology and it would be fair to refund my penalties," Left said in response to a Bloomberg News inquiry. That "would be a gesture of good faith," he said. Left added he is not expecting to recover his Evergrande-related legal fees, which totaled more than \$1 million.

A spokesman for the SFC said the regulator had no comment. An Evergrande representative didn't respond to a text message seeking comment.

Left was among the earliest high-profile critics of Evergrande. His June 2012 report said the developer — then China's second-largest by sales — used "accounting tricks" and presented fraudulent information to hide the fact that it was insolvent. The report triggered a big stock decline, and Left made a HK\$1.6 million profit from his short position on Evergrande that he was forced to disgorge.

Evergrande at the time decried the allegations as false, and filed a police report against the short-seller. The city's Market Misconduct Tribunal commenced proceedings against Left in 2014, and banned him from trading Hong Kong securities in 2016. He was also ordered to pay the SFC's investigation and legal costs. Left appealed the ruling twice, but lost.

Evergrande's market capitalization was about \$9 billion when Citron published its report on the developer, and soared to more than \$50 billion at its peak in 2017. The shares plunged after the developer started having cash flow problems in 2021, and were worth about \$275 million before they were suspended from trading last year.

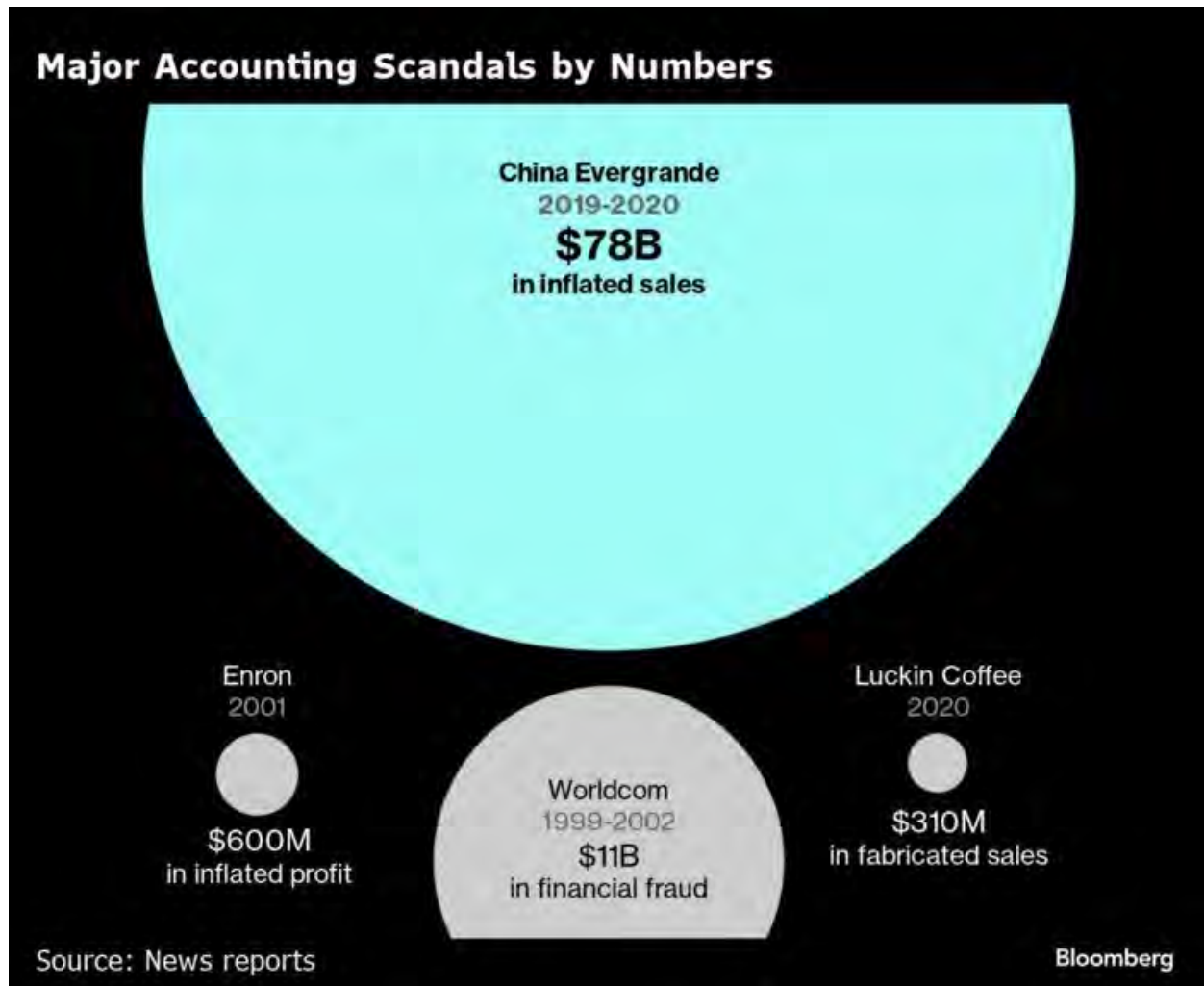


Last week, the China Securities Regulatory Commission said Evergrande's main onshore subsidiary, Hengda Real Estate Group, inflated its revenue in 2019 and 2020 by \$78 billion by reporting much of its sales in advance.

Hengda also overstated a total \$12.7 billion in profit, or more than three-quarters of its reported income in those years, the CSRC said. That's about 20 times the inflated profit in Enron Corp.'s 2001 scandal. The inflated numbers enabled Evergrande to report significantly lower liabilities and leverage ratios.

Chinese regulators blamed Evergrande's management of the fraud, and have detained its chairman and founder Hui Ka Yan. Regulators are also scrutinizing PricewaterhouseCoopers LLP's role in Evergrande's accounting practices, Bloomberg News reported last week. PwC was Evergrande's auditor for more than a decade until it resigned last year.

Hong Kong's financial-reporting watchdog has been investigating PwC since 2021, after the accounting firm failed to identify Evergrande's inability to operate as a going concern.



The 53-year-old used to be one of the most active short-sellers on Wall Street. In 2012, after Left targeted Evergrande, a group of 61 Chinese entrepreneurs and executives signed an open letter that accused Citron Research and other short sellers of smearing Chinese companies and taking advantage of an information gap between China and the US. Citron said at the time that the allegations ignored its track record of exposing wrongdoing at both Chinese and US companies.

Among the targets of roughly 200 reports that Citron has published on US and global companies, about a dozen companies ended up being delisted or filing for bankruptcy, and some of their executives had civil or criminal charges filed against them.

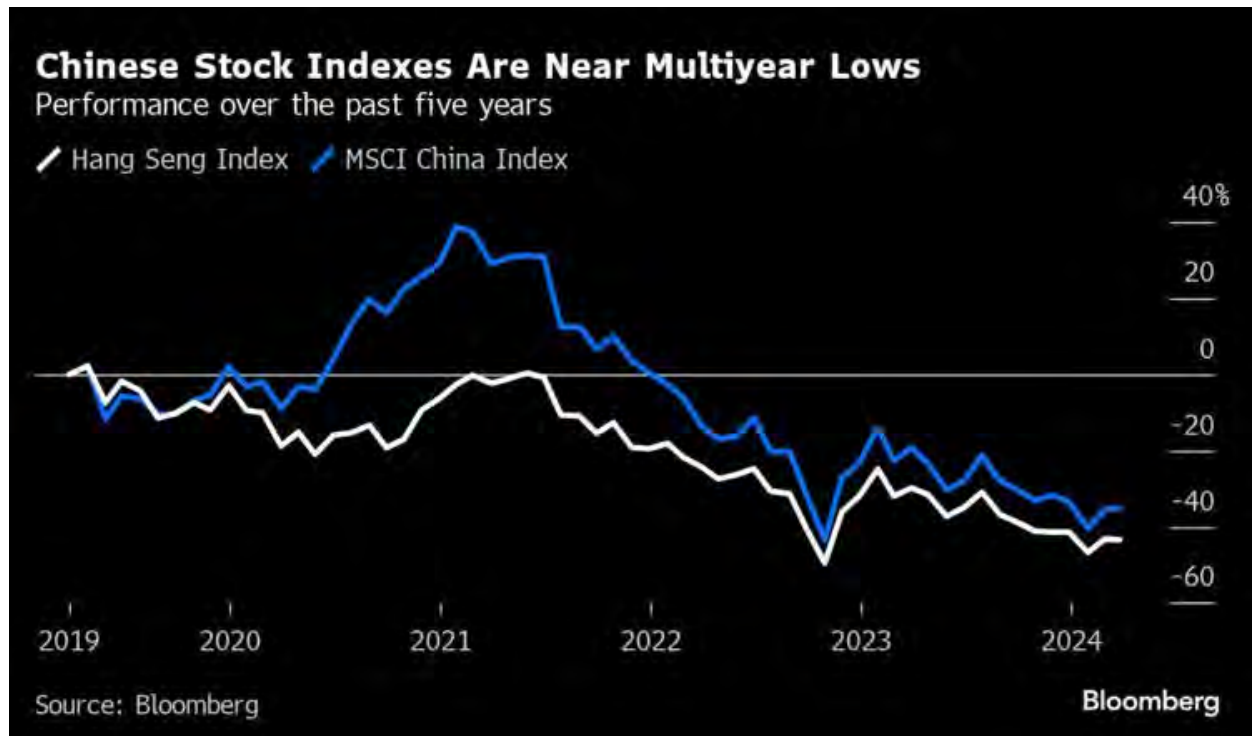
Left has kept a relatively low profile over the past few years. The US Justice Department and the Securities and Exchange Commission have been investigating the tactics of activist short sellers in a wide-ranging probe that has sent a chill through the industry. Left has deleted social-media posts and turned his focus to his family.

Read More: Short Seller Andrew Left Lives in Fear of the Feds at His Door

Left said he is optimistic about China's future, and thinks the country should turn away from real estate and shift its economic focus back to manufacturing and important technology.

"Evergrande can be isolated if they treat (it) as such," Left said. "Punish the executives but at the same time they should praise CEOs and founders of innovative companies."

Left said country should also incentivize people to invest in the stock market. "China still has one of the highest savings rate in the world yet the stock market is at decades-low multiples. That is because people do not trust the system. That is a problem," he said.



Hong Kong's Hang Seng Index, which is dominated by Chinese companies, is down 2.6% so far in 2024, after ending four consecutive years in the red. It is trading at a price-earnings multiple of 8.67 times, according to data compiled by Bloomberg.

Left said China can become technologically independent from the US by fostering innovation and allowing people to make money legally. "Population decline and unemployment are a problem but the Chinese people are smart, creative, and most of all want the change," Left said.

In order for that to happen, the stock market also needs to go higher, he added. "The whole country feels better and people will go back to spending money once the stock market finds a bottom."

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SEC Insider Trial Targets Executive Who Bought Rival's Stock (1)

By Rachel Graf

- Closely watched enforcement case expands trading restrictions
- Defense lawyer tells jury SEC can't prove intent to defraud

Bloomberg Law News 2024-03-26T10:14:44867179571-04:00

SEC Insider Trial Targets Executive Who Bought Rival's Stock (1)

By Rachel Graf2024-03-26T08:22:24031-04:00

- Closely watched enforcement case expands trading restrictions
- Defense lawyer tells jury SEC can't prove intent to defraud

A lawyer for the US Securities and Exchange Commission told a jury that a former biotech executive's \$120,000 windfall on a trade in a competing company's stock was "like betting on a game when you know who's going to win" because he knew the pending takeover of his firm would likely boost its rival.

The civil trial that began Monday in San Francisco will answer the novel question of whether buying or selling another company's stock based on specialized industry knowledge constitutes insider trading.

Under Chair Gary Gensler, some critics have said that the regulator has stretched its enforcement powers far beyond its jurisdiction. Enforcement chief **Gurbir Grewal** has brought cases that have covered new territory for the securities regulator, including over a McDonald's Corp. chief executive officer's relationship with an employee and the workplace culture at a video-game developer. The agency also is waging several cutting-edge court fights to assert greater control over cryptocurrency.

Securities traders and lawyers are closely watching the San Francisco case of Matthew Panuwat, the SEC's first attempt to pursue so-called shadow trading. It also underscores how Congress has never explicitly defined insider trading, leaving courts to decide when the SEC oversteps its authority.

In his opening argument, SEC lawyer **Matthew Meyerhofer** said Panuwat took advantage of being part of the "inner circle" at biomedical technology developer Medivation Inc. to make a lucrative bet on a likely deal.

Seven Minutes

Seven minutes after receiving an August 2016 email from Medivation's CEO that said Pfizer Inc. was interested in acquiring it, Panuwat invested more than \$117,000, or almost half of his annual salary, on call options in rival Incyte Corp., according to the agency.

Pfizer announced the \$14 billion Medivation deal days later. By taking one mid-cap biopharma company off the market, the deal made Incyte a more valuable acquisition target, the SEC alleged in its suit against Panuwat.

Panuwat was a sophisticated trader who "knew exactly what he was doing," Meyerhofer said.

"He made a high-risk, high-reward bet," the SEC lawyer said. "Except it wasn't risky for him because he knew what was going to happen."

Panuwat's attorney, **Jack DiCanio**, told jurors that the SEC won't call any witnesses who have first-hand knowledge of why Panuwat made the trades that he did. DiCanio said Panuwat simply traded Incyte options because he believed they were undervalued.

"The evidence will show that the entire SEC case is an attempt to put thoughts in Mr. Panuwat's head that were not there when he made the trades," DiCanio said.

Intent to Defraud

DiCanio also argued that the trades weren't based on confidential information because the merger had been covered publicly by the press. And the SEC can't prove that Panuwat had an intent to defraud because he didn't know it was illegal to trade in a company that wasn't his employer and that didn't conduct business with his employer.

The agency is arguing that Panuwat signed a confidentiality agreement that required him not to share or use information learned during his employment, as well as an insider trading policy that barred employees from profiting off material nonpublic information.

If the jury finds that Panuwat violated the insider trading policy, the verdict could have far-reaching implications since most businesses have some similar policy, said Northwestern Pritzker School of Law professor Alex Lee.

It could also prompt companies to revisit their insider trading policies and close any gaps, he said. Pfizer's policy, for example, barred trading securities of customers, suppliers or other companies with which it "has or may be considering a relationship," meaning that an employee likely could have traded a number of other stocks that benefited from stay-at-home orders during the pandemic based on internal knowledge about Pfizer's Covid vaccine trials.

US District Judge William Orrick, who is overseeing the case, in November rejected Panuwat's request for a ruling dismissing the case without a trial. Orrick said the SEC had sufficiently alleged that Panuwat received material, nonpublic information from Medivation and breached an agreement with his employer when trading the call options.

The case is Securities and Exchange Commission v. Panuwat, 21-cv-06322, US District Court, Northern District of California (San Francisco).

(Adds to analysis of case's implications in last section.)

--With assistance from **Austin Weinstein** and Matthew Bultman.

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SEC says Terraform Labs built a 'house of cards' as US civil fraud trial begins

 [reuters.com/technology/terraform-labs-civil-fraud-trial-set-begin-new-york-2024-03-25](https://www.reuters.com/technology/terraform-labs-civil-fraud-trial-set-begin-new-york-2024-03-25)

Jody Godoy

Do Kwon, the cryptocurrency entrepreneur, who created the failed Terra (UST) stablecoin, is taken to court in handcuffs, to face charges of forging official documents, in Podgorica, Montenegro, March 24, 2023. REUTERS/Stevo Vasiljevic/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, March 25 (Reuters) - Terraform Labs and its founder Do Kwon built a "house of cards" and lied to investors about the stability of a cryptocurrency whose collapse rippled through markets in 2022, a lawyer for the U.S. Securities and Exchange Commission told a Manhattan jury as its civil fraud trial began on Monday.

The SEC accused Kwon and the Singapore-based blockchain company of misleading investors in 2021 about the stability of TerraUSD, a stablecoin designed to maintain a value of \$1. The regulator also accused them of falsely claiming Terraform's blockchain was used in a popular Korean mobile payment app.

"Terra was a fraud, a house of cards, and when it collapsed, investors lost nearly everything," SEC attorney Devon Staren said at trial.

Louis Pellegrino, an attorney for Terraform, said the regulator's case relies on cherry-picked evidence and the testimony of witnesses hoping for whistleblower payouts if the SEC wins.

Kwon's attorney David Patton said the crypto entrepreneur never represented Terra's cryptocurrency as risk-free.

"Failure doesn't equal fraud," Patton said.

Kwon will not attend the trial, which is expected to last around two weeks. He was arrested in Montenegro in March 2023 and is awaiting extradition to his native South Korea, where he faces criminal charges. A Montenegro court on Friday delayed his extradition after the prosecutor's office there voiced concerns about the process.

Federal prosecutors in New York have also charged Kwon with fraud and are seeking his extradition to the United States.

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Kwon designed TerraUSD and Luna, a more traditional token that fluctuated in value but was closely linked to TerraUSD.

The SEC estimates that investors lost more than \$40 billion on the two tokens combined when the TerraUSD peg to the dollar could not be maintained in May 2022.

Their collapse also dragged down the value of other cryptocurrencies, including bitcoin, and caused wider havoc in the crypto market, leading several companies to file for bankruptcy in 2022.

The SEC has said Kwon and Terraform secretly arranged to have a third party purchase large amounts of TerraUSD to prop up the price when the stablecoin slipped from its peg a year earlier, in May 2021. Kwon falsely attributed the recovery to the reliability of TerraUSD's algorithms, according to the regulator.

The SEC also has said Kwon and Terraform falsely touted Terraform's blockchain as being used to process and settle transactions between customers and merchants on the Chai payment app.

The SEC is seeking civil financial penalties and orders barring Kwon and Terraform from the securities industry.

U.S. District Judge Jed Rakoff granted the SEC a partial win in December, ruling that Terraform Labs unlawfully sold digital assets without registering them as securities. The judge dismissed the SEC's allegations that Terraform and Kwon illegally offered security-based swaps through a feature that let users create digital assets that mirrored the price of another asset, such as a different cryptocurrency or stock.

The judge has not yet determined the amount of damages that Terraform must pay. The company, which filed for bankruptcy protection in January, has said a penalty could exceed its assets.

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Reporting by Jody Godoy in New York Editing by Nick Zieminski, Will Dunham and Marguerita Choy

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EY

EY drops appeal against German sanctions over Wirecard audits

Big Four firm seeks to conclude years-long crisis triggered by work for defunct payments firm



EY says it does not agree with all of the watchdog sanctions but will 'fully comply' with them © Jakub Porzycki/NurPhoto via Getty Images

Olaf Storbeck in Frankfurt 3 HOURS AGO



EY has abandoned an appeal against unprecedented penalties imposed following its audits of fraudulent payments company Wirecard, as the Big Four firm seeks to draw a line under years of crisis in Germany.

Germany's audit watchdog Apas [last year](#) banned EY from taking on new listed audit clients for two years and levied a €500,000 fine over alleged flaws in its audits of Wirecard, which collapsed in June 2020.

EY Germany said on Tuesday that, while it “does not agree with all findings” by Apas, it has decided to “fully comply with the sanctions” in a move that “will bring a conclusion to these proceedings”. The ban on new clients was on hold pending the appeal, which EY has withdrawn and so is likely to take effect immediately, a person familiar with the matter said.

EY and some of its partners still face an array of other legal cases, which are expected to take years to work their way through the Germany courts. The auditor faces law suits from former Wirecard shareholders and the group's administrator seeking damages over [its work for the defunct company](#). Munich prosecutors are also pursuing an investigation against several EY partners who were in charge of Wirecard audits, after Apas in 2020 identified potential misconduct in a criminal complaint.

Even without the ban on new clients, in the four years since Wirecard crashed into insolvency EY Germany has not won any blue-chip mandates and has lost several. The two-year ban taking effect now means that EY would be free to take on clients from late March 2026, which is just before when many annual shareholder meetings take place, in which auditors are formally appointed.

The number of EY's audit clients in the Dax 40 index of big companies almost halved last year, from 11 to 6, said Jörg Hossenfelder, partner at the consultancy Lünendonk & Hossenfelder. The remaining clients include Volkswagen and Deutsche Bank, he said. But EY's overall audit revenue in Germany still rose 8.4 per cent to €714mn in 2023, compared with a year earlier, he added.

Apas, the watchdog, last year concluded that EY violated its professional duties "during the audits of Wirecard and Wirecard Bank from 2016 to 2018". EY had issued a series of unqualified audits for the disgraced payments group, missing that half of the revenue and the bulk of the profits did not exist.

Apas did not publicly disclose the details of EY's alleged misconduct. People with direct knowledge of the ruling told the Financial Times that the regulator did not address the question if EY acted with intent or just with negligence, which will be an important factor in deciding the firm's criminal and civil liabilities.

EY said on Tuesday that it "has learned important lessons from this particular case" as it improved its quality control and puts more focus on preventing fraud. Previously, EY had stated that it regrets that "the collusive fraud at Wirecard was not discovered sooner".

Last year, Apas [also announced](#) that it would impose individual fines of between €23,000 and €300,000 on five current and former EY employees over alleged failures in their work on Wirecard.

Apas did not immediately respond to an FT request for comment.

Audit Plan to Flag Illegal Acts Needs Do-Over, Critics Charge

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- Proposal widens auditor search for corporate law violations
- Audit board re-opened comment period under pressure

Critics of a draft rule requiring auditors to dig deeper into possible corporate lawbreaking urged the US accounting oversight board to scale back the controversial project before issuing a fresh proposal.

The Public Company Accounting Oversight Board re-opened the comment period under pressure from critics of its 2023 proposal that would overhaul the regulator's illegal acts standard. Accounting firms, companies, and corporate directors are among those who consider the draft standard a costly expansion of the financial statement audit.

Stakeholders submitted 38 additional comment letters as of their March 18 due date. Many of them called on the PCAOB to submit a fresh draft of the rule for another round of public comments before issuing any final standard.

Under the proposal, auditors would need to consider a wider range of wrongdoing that could alter the financial statements when they vet corporate earnings and balance sheets. Investors have long called for rules that shed more light on legal risks that could sink the value of their shares—from environmental breaches to high-pressure sales tactics.

“Change can be incremental, or moderately paced, without a military coup. The Proposal offers little insight into why the Board is proposing revolution,” wrote Richard Murray, former in-house counsel for Deloitte's global audit practice and a former chair of the US Chamber of Commerce's Center for Capital Markets Competitiveness.

Ernst & Young LLP and RSM US LLP urged the board to host more public discussions about how to best narrow the scope of which laws and regulations should warrant auditors' attention.

The issue was debated at a daylong roundtable held earlier this month—an event overshadowed by the Securities and Exchange Commission's same-day release of its new rule requiring companies to report on risks stemming from climate change.

“The scope of the proposal is the definitive issue,” the Pennsylvania Institute of CPAs said in its letter to the PCAOB.

The Travelers Companies Inc. joined other commenters asking the board to reconsider the bar for determining whether investors would consider the financial impact to be material. The board should rely on the same materiality threshold used for financial accounting that focuses on what would be important to a reasonable investor, Travelers told the regulator.

The insurer tracked more than 5,000 changes in requirements for its insurance business in the US last year, the company said.

The Society of Corporate Compliance and Ethics and Health Care Compliance Association said the board should allow auditors to rely on internal processes many companies already have in place to track and assess risks stemming from crimes or regulatory violations, rather than asking auditors to duplicate that work.

Deloitte LLP suggested that the board should borrow from similar international audit standards and consider expanding auditors’ risk assessments to include “certain laws and regulations that may have an indirect effect on the financial statement amounts and disclosures such as those fundamental to the operating aspects of the business.”

Fresh Risks

Investors, however, widely support setting a higher bar for auditors, whose work is meant to ensure that corporate financial reporting is reliable, and free from overly rosy assumptions that could mask fraud or market risks that threaten the value of the business.

“There are few issues in the auditing space that are more important to older investors and savers than concerns over fraud,” AARP said in its letter, supporting the board’s efforts to update standards that date to 1988.

The proposal, known as noncompliance with laws and regulations, would replace rules that were largely written by the audit industry, predating modern corporate governance practices and several decades worth of securities law changes, including those that created the PCAOB.

A coalition including Public Citizen, the Sierra Club and 17 other progressive organizations welcomed the PCAOB’s efforts, and called for the auditor review to be broad in scope.

New corporate climate reporting mandates pose fresh opportunities for companies to game their results and “misrepresent” the financial toll that the transition away from fossil fuels could pose for oil companies and other industries, the progressive groups said in a joint letter

to the board. Those risks justify the board's proposal but the regulator could go further to ensure that auditors carefully vet how climate commitments and decarbonization could alter assumptions that shape asset values or trigger writedowns.

"An audit that does not consider emerging climate-related regulation and growing social and environmental litigation risk misunderstands the actual financial position of and risks to a company," the groups said in the joint letter.

Board staff will consider the latest feedback on the project as they draft possible revisions. The project is currently slated to be finalized later this year.

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March 26, 2024, 7:34AM PDT

Ripple Should Pay More than \$2 Billion for Sales, SEC Says (1)

By Chris Dolmetsch

Bloomberg Law News 2024-03-26T12:57:40602354108-04:00

Ripple Should Pay More than \$2 Billion for Sales, SEC Says (1)

By Chris Dolmetsch2024-03-26T10:34:40480-04:00

Ripple Labs Inc. should pay more than \$2 billion in fines and penalties for selling its XRP token to institutional investors, the US Securities and Exchange Commission told a federal judge, saying that the company has increased sales of the cryptocurrency since it was sued by the regulator, hasn't accepted responsibility and intended to evade the law.

The punishment is needed to stop Ripple from violating securities laws "given Ripple's enormous amount of unregistered sales of XRP over the last three years," the SEC told US District Judge Analisa Torres in a brief filed in federal court in Manhattan late Monday. The company hasn't accepted responsibility for its actions, has made statements interpreting a July ruling in the case as a "total victory" and ignored the advice of lawyers to not sell the token for cash or promote it as an investment, the agency said.

"It opted for the money it gained by promoting an investment it sold for cash, while acting with the apparent fear that the disclosure of its finances and business activities required by law of those who sell securities would interfere with its profitable plan," the SEC said. "Only a significant sanction from this court and the return of the ill-gotten gains Ripple made from its violations will cause Ripple to correct its conduct, either by registering its securities sales and making the disclosures required, or not selling securities."

Stuart Alderoty, chief legal officer for Ripple, said on X.com on Monday that the SEC "remains bent on wanting to punish and intimidate Ripple - and the industry at large," and that he trusts the judge to "approach the remedies phase fairly." The company is scheduled to respond to the agency's brief next month.

The SEC sued Ripple in 2020, claiming the firm broke its rules when it raised money by selling the digital token without registering it as a security. The case is being closely watched by crypto enthusiasts because of its implications for the scope of the SEC's turf. In what's been seen by many as a loss for the agency's jurisdiction, Torres in July ruled that sales of XRP to retail investors on exchanges didn't amount to investment contracts.

XRP fell 2.7% to 63 cents on Tuesday. The token has increased around 2.4% this year.

(Adds details of SEC filing, beginning in the first paragraph.)

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Some Traders Redeemed DWAC Shares at 75% Loss Ahead of SPAC Vote

By Bailey Lipschultz

- One or more investors swapped \$212,000 of stock for \$54,000
- Redemptions are 'as smart as lighting money on fire': Tuttle

Bloomberg Law News 2024-03-26T10:12:45602603627-04:00

Some Traders Redeemed DWAC Shares at 75% Loss Ahead of SPAC Vote

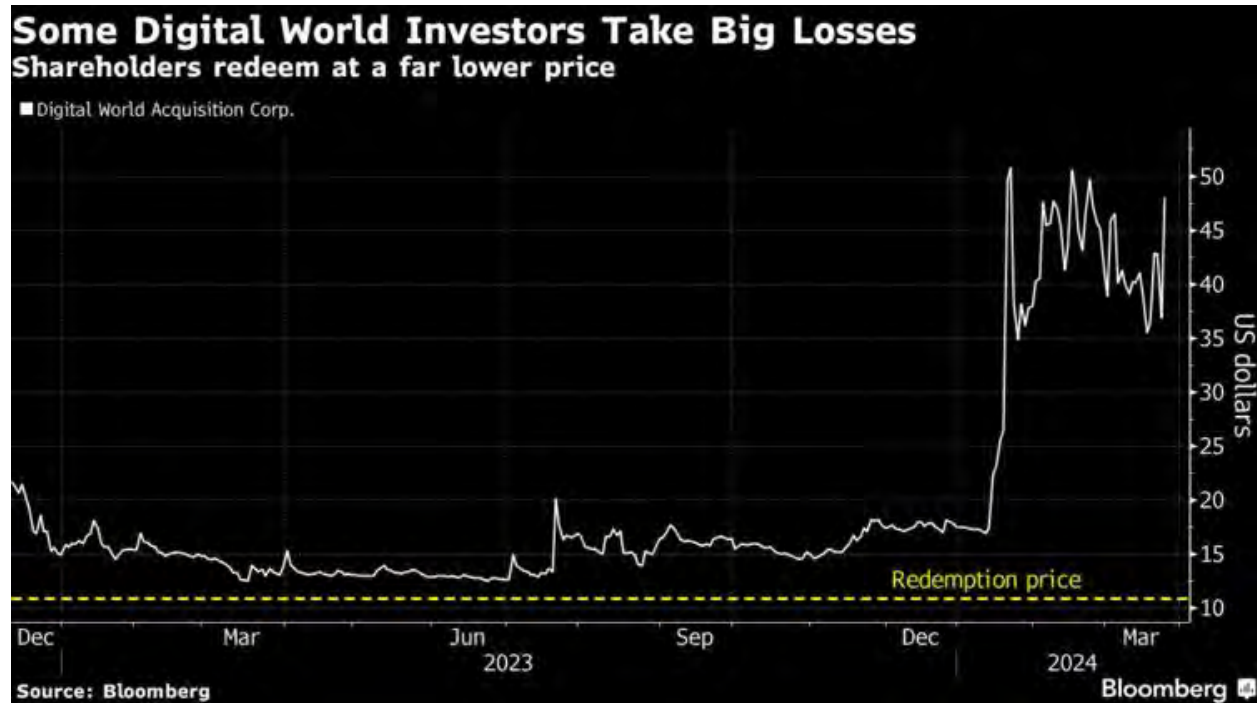
By Bailey Lipschultz2024-03-25T14:45:15494-04:00

- One or more investors swapped \$212,000 of stock for \$54,000
- Redemptions are 'as smart as lighting money on fire': Tuttle

Some investors in the blank-check firm taking Donald Trump's nascent media company public voluntarily took a 75% loss by pulling out of the deal.

Nearly 5,000 Digital World Acquisition Corp. shares were redeemed for \$10.87 each ahead of a vote to approve the special-purpose acquisition company's deal to take Trump Media & Technology Group public, according to a Friday filing. DWAC, as the SPAC is known, hasn't traded below the redemption value since the tie-up with Trump Media was announced in October 2021.

The stock closed at \$42.90 on Wednesday, the redemption deadline, meaning one or more investors swapped shares worth roughly \$212,000 for about \$54,000. The money came out of the more than \$275 million the parent of Trump's Truth Social platform is set to receive from the SPAC.



“Either they had no clue what they were doing — and perhaps thought they could redeem at current market price” or they did it out of spite for the former president, said **Matthew Tuttle**, the chief executive officer of Tuttle Capital Management.

Regardless, redeeming shares at a huge discount to what they trade for on the open market is “as smart as lighting money on fire,” he said.

SPAC deals typically offer shareholders the option to swap shares for about \$10 — the price many SPACs go public at — plus interest and added sweeteners. The potential to redeem rather than participate in the merger has been a way for SPACs to protect investors from bad deals. Redemption rates have topped 90% on average since the SPAC boom cratered over the past two years.

Representatives for DWAC didn’t respond to a request for comment.

For DWAC, it’s not the first time investors redeemed shares for a fraction of the money they could’ve sold it for on the Nasdaq.

Some 29,000 shares were redeemed in September when investors extended the deadline for DWAC, according to an earlier filing. In the two years since DWAC’s market debut, about 40,000 shares have been redeemed, according to SPAC Research calculations.

The SPAC merger completed on Monday, and the combined company is expected to begin trading on the Nasdaq under the ticker DJT Tuesday. DWAC, which is up 185% this year, is trading at about \$50 on Monday.

Opinion **Lex**

Donald Trump taps superfans to make Spacs great again

TMTG looks like a rightwing meme stock combined with the classic pathologies of the blank cheque bubble



TMTG estimates that Truth Social — where Donald Trump posts his daily thoughts — could have 10mn users this year, but the \$14bn valuation is fanciful © AFP via Getty Images

2 HOURS AGO



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Once again, Donald Trump is defying the establishment. The blank cheque merger phenomenon that swept US capital markets during the pandemic has largely abated. Cash shell companies brought a series of immature businesses to public markets. High interest rates and low profits quickly sent many into the dustbin. Regulators stepped in to add shareholder protections.

But Trump's nascent venture, Trump Media & Technology Group, has closed its Spac merger, against long odds. On Tuesday, in early trading, TMTG shares soared to a level that implied a diluted equity valuation of \$14bn.

The stake of the former president and current Republican candidate is valued at \$5.5bn. In its investor presentation shared in December, TMTG estimated that its valuation could perhaps touch only \$1.6bn on aggressive forecasts.

Much of the shareholder base of TMTG is retail holders. Given the company's scant revenues (just \$3.4mn in revenue in the first nine months of last year) and the competitive digital media marketplace, TMTG looks like a rightwing meme stock combined with the classic pathologies of the Spac bubble.

TMTG is supposed to have two elements. First is a classic social network that generates ad revenue from user impressions. The company estimated that Truth Social — where [Trump](#) posts his daily eclectic thoughts — could have 10mn such users this year, doubling by next.

It seems like a modest target. Trump garnered 74mn votes in 2020. Facebook has billions of users; X in the hundreds of millions. Yet, so far in 2024, data trackers calculate Truth Social has fewer than 1mn monthly users.

TMTG also says it can create a paid subscription tier known as “Truth +” to provide “non-woke” entertainment — for 4mn users by the end of 2026. It is all supposed to add up to \$400mn of revenues some years away.

Given the difficulties that long-standing media and social network companies have in generating growth and profit, the \$14bn valuation, essentially out of thin air, is fanciful. (Reddit's blockbuster listing left it with a market cap of almost \$10bn on about \$1bn of revenue). Then there is the question of how long Trump will hold on to his shares given his potential need to stump up \$500mn in cash for legal judgments.

Based on the merger with the cash shell, TMTG should have more than \$300mn to build its business. But users, market share, revenues and cash flows probably miss the point.

TMTG shareholders may be just superfans wishing to soak up the Trump stardust. Monetising Maga in the public markets may be Trump's greatest business success.

sujeet.indap@ft.com

Trump-Tied SPAC Jumps 35% as New Firm Set to Trade Tuesday (3)

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Securities Law News

March 25, 2024, 2:06 PM PDT

Bailey Lipschultz



Shares of the blank-check company merging with former president Donald Trump's social media startup surged 35% Monday, after the combined firm announced it is set to begin trading Tuesday, potentially bringing him a financial windfall.

Trump Media & Technology Group is expected to trade on the Nasdaq under the symbol DJT after completing a deal with Digital World Acquisition Corp., according to a statement, following more than two years of snags.

DWAC shares soared to \$49.95 each in the biggest one-day gain since January, according to data compiled by Bloomberg. The stock more than recouped the 14% drop on Friday when the deal's shareholder vote passed as expected. Warrants tied to the SPAC were up 26% to \$23.15, the highest in two years.

The merger could potentially hand Trump more than \$5 billion worth of shares, though they would be subject to lock-up agreements and performance requirements that may temporarily hinder his ability to monetize the stock and ease his present cash crunch.

Read More: Trump Wealth Hits Record \$6.4 Billion on SPAC Deal, Slashed Bond

Digital World Chief Executive Officer **Eric Swider** will become a director of the merged company, which will be led by Devin Nunes, a former California Representative who left Congress to become CEO of Trump Media, the statement showed.

WATCH: A New York judge ruled Donald Trump's first criminal trial will start April 15 in Manhattan.

Source: Bloomberg

The windfall may come at a critical time for Trump who earlier this month became the presumptive Republican presidential nominee. He's paying millions of dollars a month to fund his ongoing legal troubles. Trump is set for the first of his criminal trials on April 15, a judge ruled.

Separately, Trump was ordered by a different judge last month to pay \$454 million after a civil ruling that he had fraudulently inflated his wealth for years. While a New York appeals court agreed on Monday to slash the amount the former president would have to put up as a bond in while he contests the verdict, he is still required to post \$175 million within 10 days.

The special-purpose acquisition vehicle has more than doubled this year as investors use it as a way to bet on Trump's push for re-election. The stock has been a favorite among the retail-trading crowd since the deal was announced in 2021 with posts across Stocktwits and Reddit Inc.'s WallStreetBets forum encouraging people to buy shares.

(Updates with legal context from sixth paragraph.)

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FTX Trading Ltd

Law firm conflicts 'permeated FTX's bankruptcy', professors allege

Two academics surface renewed concerns about the role Sullivan & Cromwell has played in the crypto exchange's saga



Sam Bankman-Fried, the founder of FTX, is due to be sentenced on Thursday © FT montage/Bloomberg

Sujeet Indap in New York YESTERDAY



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Two law professors have claimed that Sullivan & Cromwell put its own interests before that of FTX's stakeholders, reviving criticism over the law firm's role in the bankrupt cryptocurrency exchange's rise, collapse and unwinding.

The firm's "apparent conflicts of interest permeated FTX's bankruptcy filing and every aspect of the case", Jonathan Lipson of Temple University and David Skeel of the University of Pennsylvania wrote in a [paper](#) published online earlier this month.

The two academics focused on the 20 M&A and regulatory assignments that S&C worked on for [FTX](#), for which it earned just under \$10mn in the months leading up to the exchange's November 2022 bankruptcy filing.

Through that work, “S&C knew, or was in a position to know, that FTX was co-mingling customer assets”, the professors contended, referring to FTX founder Sam Bankman-Fried’s misuse of account holder funds.

The paper comes ahead of a hearing on Thursday at which Bankman-Fried is [set to be sentenced](#) after being convicted of masterminding the looting of FTX customers’ accounts.

The criminal case will not be the final word on FTX’s collapse. Earlier this month Robert Cleary, a former federal prosecutor, was appointed as an independent examiner in FTX’s bankruptcy to provide a detailed report on the events leading up to its implosion, including the work of its advisers.

John Ray, the chief executive appointed to oversee FTX, said in a statement on behalf of the company and its advisers: “The paper is simply not research but uninformed and unsupported allegations” that “grossly mischaracterises the facts”.

The involvement of [S&C](#), which represents the FTX estate, has been controversial from the start. S&C lawyers had assisted the company in the chaotic days leading up to its bankruptcy filing — including preparing its petition and appointing Ray, a restructuring expert its lawyers knew well, as its new chief executive. A former S&C partner, Ryne Miller, was FTX US’s general counsel.

The office of the US Trustee, a part of the Department of Justice that represents the public interest in bankruptcy cases, initially objected to S&C’s retention, arguing that the law firm had failed to properly disclose the full extent of its connections to FTX. Several US senators also voiced concern.

But the trustee eventually lifted its objection after the law firm provided more details of its previous work, and the court approved S&C’s hiring. According to court filings, S&C has reaped \$184mn in fees, including billings and reimbursements, between November 2022 and January 2024.

The professors criticised business decisions made by FTX during the course of the case including the failure to revive the FTX exchange, selling the LedgerX unit for what they deemed an inadequate amount and choosing not to sue Binance for withdrawing \$2bn from FTX in the autumn of 2022, a move that helped precipitate FTX’s bankruptcy.

The professors further contended that “S&C may have violated ethical duties of confidentiality, candour, and loyalty by reporting allegations of these crimes to prosecutors . . . by duping Bankman-Fried into giving control of FTX to Ray”.

“For well over a year, S&C and Ray had free rein to marshal and manage conflicting claims about the public and private interests at stake as they saw fit,” the professors wrote. “These conflicts appear to have reduced recoveries, even as they have enriched S&C.”

People close to S&C and FTX noted that all the company’s actions had to be approved by the bankruptcy court with the consent of the US Trustee and creditors, and pointed out that Bankman-Fried had several lawyers personally representing him in November 2022. Moreover, they said account holders could potentially [receive the full amount](#) of their claims by the time the bankruptcy was finished.

Lipson and Skeel said they ran into each other last autumn during oral arguments before an appeals court over the examiner’s appointment. They decided afterwards to collaborate on the article about the duties of lawyers, which is to be published in the Stanford Law Review.

They said there was a “firewall” in place so Bankman-Fried’s parents, who are Stanford law professors, had no knowledge of the article prior to submission. Skeel said he had no interaction with the Bankman-Frieds and handled all interactions with the Stanford publication. The pair did not call S&C or FTX prior to publication but said they welcomed any feedback.

Lipson said while he was not friends with Bankman-Fried’s parents, “I have spoken to Sam and his mother, Barbara [Fried], on a number of occasions, which is how we came by much of the material we have”.

“Candidly, I was pretty sceptical of [Sam] Bankman-Fried’s claims at the time, and it was only after a fairly sustained effort of putting pieces together — some from them, but most in public — that it came to appear that S&C may have some problems,” Lipson said.

A spokesperson for Bankman-Fried declined to comment.

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FTX Crypto Creditors Fight Claim That 'Sam Coins' Are Worthless

By Steven Church

- Holders seek cash for crypto pushed by Sam Bankman-Fried
- FTX says Serum, MAPS and OXY tokens have no real value

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FTX Crypto Creditors Fight Claim That 'Sam Coins' Are Worthless

By Steven Church2024-03-26T09:00:000000-04:00

Holders seek cash for crypto pushed by Sam Bankman-Fried

FTX says Serum, MAPS and OXY tokens have no real value

A small group of FTX Trading customers are demanding hundreds of millions of dollars from the bankrupt crypto firm, claiming that three digital tokens known as "Sam Coins" deserve a payout even though they are closely associated with convicted fraudster **Sam Bankman-Fried**.

Investors who hold tokens called Serum, MAPS and OXY are asking US Bankruptcy Judge **John Dorsey** to force FTX to raise the value of the crypto by overruling company experts who concluded the digital coins are nearly worthless. Before he gave up control of FTX, Bankman-Fried created Serum and cut deals to get control of the other two tokens, according to court papers.

The customers and the company are scheduled to make their final arguments to Dorsey on Tuesday in federal court in Wilmington, Delaware.

When FTX filed bankruptcy in November 2022, the company held more than 95% of all the tokens, far more than could ever be sold, even if the coins had not been tainted by the fraud that caused FTX to collapse, the company argued in a court filing.

Company advisers have asked the judge to approve their estimate that the coins are worth pennies, at most.

Holders say that estimate is flawed and in court on Monday presented their own method for calculating the tokens value. Under their approach, the crypto coins should be worth hundreds of millions of dollars. They have filed claims demanding they be paid based on their calculations.

Other former FTX customers are likely to get back 100% of what they had on the trading platform when it was put into bankruptcy, company lawyers say. That's because those customers invested US dollars, Bitcoin and other assets that still have value today.

FTX has about \$6.4 billion in cash, the company has said.

Last year, Bankman-Fried was convicted of fraud for wrongly transferring customer assets to a hedge fund he controlled. The money was then used for risky investments, political donations and expensive real estate before the FTX empire collapsed.

The "Sam Coins" played an important role in that scheme, bankruptcy officials argue. Although the tokens had their own names, they were known among crypto enthusiasts as "Sam Coins" because they were so closely associated with Bankman-Fried.

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

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Tesla Pushes to Increase Use of 'Full Self-Driving' Software as Vehicle Sales Cool

Elon Musk has said drivers with FSD enabled will get a one-month free trial starting in the coming days

By [Ryan Felton](#) [Follow](#) and [Rebecca Elliott](#) [Follow](#)

Updated March 26, 2024 12:54 pm ET



A Tesla Model 3 using the Autopilot Full Self-Driving Beta software last year. PHOTO: MIKE BLAKE/REUTERS

Tesla **TSLA 3.90%** ▲ is stepping up promotion of its driver-assistance technology, called “Full Self-Driving Capability,” seeking to expand use of the revenue-generating software feature as it confronts the prospect of lower growth in vehicle deliveries this year.

Elon Musk, Tesla’s chief executive, told employees this week in an internal email that customers must receive a test drive using the technology before they receive a car.

The system is an advanced version of the company's Autopilot technology, which is available on all new Teslas and is designed to help with driving tasks like steering and lane changes. Full Self-Driving, an upgrade available for \$12,000 up front or \$199 a month as a subscription service, includes features that can navigate cars through city streets.

"I know this will slow down the delivery process, but it is nonetheless a hard requirement," Musk said in the employee email, which was reviewed by The Wall Street Journal.

U.S. drivers whose vehicles are capable of running FSD will get a one-month free trial in the coming days, he added in a post on X late Monday.

Tesla's stock was up more than 4% in midday trading Tuesday. As of Monday's close, the stock had fallen more than 30% in 2024, making it the worst performer in the S&P 500 index.

The developments come as Tesla has been under intense regulatory and legal scrutiny over the company's development and marketing of its driver-assistance systems. It is also happening as the automaker rolls out a revamped version of Full Self-Driving Capability that Musk has said relies more on artificial intelligence.

Tesla has emphasized on its website and in users' manuals that the software doesn't allow for fully autonomous driving and requires active driver supervision.

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

Musk has long described autonomous driving as a linchpin to Tesla's lofty market valuation and a critical step in developing a future "robotaxi" model without a steering wheel or pedals. This model would allow owners to provide Uber-style rides to paying customers around the clock.

He has frequently talked up the development of Full Self-Driving over the past year as Tesla's profit margins started to narrow.

Late last year, Tesla recalled the software behind Autopilot, among the most well-known driver-assistance systems on the market today, in response to an

investigation by federal auto-safety regulators.

The recall covered nearly all Teslas sold in the U.S. at the time—about two million vehicles in total—and the automaker agreed to make changes after the regulators found that Tesla's safeguards around the technology were inadequate in certain cases, potentially leading drivers to misuse the system.

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TreeHouse Shareholders Get New Chance To Sue Execs

By Celeste Bott

Law360 (March 25, 2024, 6:15 PM EDT) -- An Illinois appellate panel reversed a Cook County judge Friday and revived a derivative lawsuit demanding that TreeHouse Foods sue three individual executives the shareholders claim materially misled them by falsely stating that two newly acquired companies were being successfully integrated into the food company's operations.

One of the plaintiffs made a formal demand of TreeHouse's board in November 2018 that it sue the company's former CEO, chief financial officer and president, and the board acknowledged its receipt of that demand in January 2019, saying in a letter that it would "take the steps it deems appropriate in response" when "it is in a position to do so," without specifying when that would be or issuing any other formal response, according to the opinion.

The trial court ruled that the shareholders did not adequately allege that the TreeHouse board failed to respond to their demand, and on appeal, the company and its executives argued that the board was justified in waiting for the conclusion of a federal securities action concerning the same alleged misstatements about the company's success.

That lawsuit was resolved with a **\$27 million settlement** in 2021, and no decision on plaintiffs' demand was made then or promptly thereafter, the appellate panel said in reviving the shareholders' case Friday.

"Further, even if the federal securities action was the reason for the delay, the board failed to state this in its letter acknowledging receipt. Instead, the board amorphously promised to take all appropriate steps and respond when 'in a position to do so' — without giving a hint when that would be or why," the panel said.

The lower court also considered facts outside the complaint and assumed those facts to be true: that an investigation was underway and that plaintiffs' demand was truly under consideration, the appellate court said.

"Given both the reasonable doubt and the error by the trial court, we have no choice but to reverse," the panel said.

Shareholders in this case as well as in the federal suit argued that Oak Brook, Illinois-based TreeHouse, which makes cereals, dressings and other prepared products for sale under other companies' brand names, hid the fact that its business was struggling in the months after buying Conagra's Private Brands.

TreeHouse maintained an aggressive acquisition business model, gambling not only on its \$2.7 billion buy of Private Brands operations in 2015, but also on an \$854 million purchase of healthy snack maker Flagstone Foods a year earlier. These moves led the food and beverage manufacturer to issue false and misleading statements to investors to protect its reputation as a seamless integrator of private-label brands and to obtain critical financing, according to the investors.

After months of claiming the company had smoothly integrated the new business, it disclosed in November 2016 that the integration had caused serious problems, and TreeHouse's shares fell 20% in value, wiping out billions of dollars in market capitalization.

Although TreeHouse's value plummeted, the individual defendants received millions of dollars in compensation, the appellate panel noted Friday.

Counsel for the parties could not be immediately reached for comment on Monday.

Justices Sharon Oden Johnson, Michael Hyman and Carl A. Walker sat on the panel for the appellate court.

The shareholders are represented by Marvin A. Miller and Lori A. Fanning of Miller Law LLC, Frank A. Richter of Robbins Geller Rudman & Dowd LLP, Michael I. Fistel Jr., Frank J. Johnson and Kristen O'Connor of Johnson Fistel LLP, and Travis E. Downs III and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP.

TreeHouse Foods and the former executives are represented by Matthew R. Carter, Elizabeth S. Deshaies, James P. Smith III and Thania Charmani of Winston & Strawn LLP.

The case is Wells et al. v Reed et al., case number 1-23-0502, in the Appellate Court of Illinois, First District.

--Editing by Peter Rozovsky.

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COVID 'Cure' Claims Can't Sustain Fraud Suit, 9th Circ. Rules

By **Jessica Corso**

Law360 (March 25, 2024, 10:18 PM EDT) -- A biopharmaceutical company's "enthusiastic" statements to Fox News and others about a potential COVID-19 cure do not amount to fraud and cannot sustain a shareholder lawsuit accusing the company and its top executives of deceiving the market by pretending that a breakthrough was much more consequential than it actually was, the Ninth Circuit ruled on Monday.

The circuit court upheld the dismissal of a proposed class action lawsuit brought against Sorrento Therapeutics Inc., its CEO Henry Ji and Senior Vice President of Regulatory Affairs Mark Brunswick.

Lead plaintiff Andrew Zenoff alleged that public statements made by the company and its officials in May 2020 about a promising COVID-19 antibody known as STI-1499 were intentionally manipulative and caused the company's stock price to skyrocket.

But a three-judge panel for the Ninth Circuit, in an opinion authored by Circuit Judge Consuelo Callahan, said that while the statements were "enthusiastic," they did not amount to fraud. In one such statement, Ji was quoted by Fox News as saying "there is a cure" for COVID-19 and a "solution that works 100%."

That same article, however, also emphasized that the antibody was still in clinical trials, the court said, as did two other statements Zenoff claimed were misleading.

"While defendants' enthusiasm for STI-1499 might have been overblown, in context, their statements were not materially misleading," Judge Callahan said, later stating that "defendants did not promise an immediate 100% cure to COVID-19."

The court also ruled that Zenoff had not proven Sorrento and its leaders intentionally deceived investors in order to financially benefit from the clinical trial announcement, which the plaintiff claims caused the stock price to increase by over 240%.

While Sorrento was experiencing financial difficulties at the time of the announcement and the announcement may have helped the company raise capital, "Zenoff has failed to point to any particular sales or purchases by Sorrento or its officers," and, therefore, "there is no inference of intent to manipulate," the circuit court stated.

Neither attorneys for Sorrento nor the proposed class immediately responded to a request for comment.

Circuit Judges Richard Tallman and Consuelo Callahan and U.S. District Judge Robert Lasnik sat on the panel for the Ninth Circuit.

The proposed class is represented by Steven Hubachek, Trig Smith and Nicole Gilliland of Robbins Geller Rudman & Dowd LLP.

The defendants are represented by Edward Han, Sean Unger and Timothy Reynolds of Paul Hastings LLP.

The case is Andrew Zenoff v. Sorrento Therapeutics Inc. et al., case number 22-55641, in the U.S.

Court of Appeals for the Ninth Circuit.

--Editing by Kristen Becker.

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What To Watch As Opioid Litigation Goes To Ohio High Court

By **Emily Field**

Law360 (March 25, 2024, 8:37 PM EDT) -- The Ohio Supreme Court on Tuesday will become only the second state high court to hear oral arguments on whether the opioid epidemic is a public nuisance, the controversial legal theory underpinning numerous suits across the country including a \$650 million award that two Ohio counties won against Walmart, CVS and Walgreens.

That federal court award prompted Tuesday's hearing, which was formally requested by the **Sixth Circuit** after the pharmacies appealed the order won by Lake and Trumbull counties and argued that revisions to the Ohio Product Liability Law bar public nuisance claims arising from the marketing, distribution and sale of a product.

The only other state high court to weigh the issue in the past six years of the ongoing opioid litigation has been the Oklahoma Supreme Court, which in **2021** overturned the first verdict in the opioid litigation, a \$465 million bench verdict against Johnson & Johnson in the state's case on the grounds that Judge Thad Balkman improperly expanded the state's public nuisance law to the manufacture and sales of legal products in his ruling.

Meanwhile, the West Virginia high court last week was asked to take up a similar question sent by the Fourth Circuit in another bellwether case in the litigation, becoming the third state court to review the issue of whether public nuisance claims can be used in the opioid litigation.

In the Ohio case, the Sixth Circuit is asking the state Supreme Court to settle whether the Ohio Product Liability Act allows the counties to claim that the opioid epidemic is a public nuisance that can be remedied. At stake is whether the two counties can keep the \$650 million awarded by a judge after a federal jury found the pharmacies liable for contributing to an opioid abuse epidemic. That 2021 finding marked the first time a jury weighed in on the controversial legal theory, which has been at the heart of similar suits nationwide.

"I think both sides felt the law is clear," said Hunter Shkolnik of Napoli Shkolnik PLLC, one of the plaintiffs attorneys in the litigation, referring to the Ohio Product Liability Law.

"We felt that our interpretation was right. They thought their interpretation was right. And the one thing we both agreed was we didn't think it was an open question of law," he added. "But obviously, the circuit and then the Supreme Court by accepting felt there is something that has to be clarified in the law, on whether or not public nuisance was subsumed or not in the statute. It will be interesting."

What's at Stake Beyond Ohio

Regardless of the outcome, it's unclear how much the state Supreme Court's ruling will affect the rest of the opioid litigation, considering that Ohio is still just one state out of the many local governments that have sued, attorneys said.

And at this point six years into the litigation, the major pharmacy, manufacturer and distributor defendants have largely settled out of the suits to the tune of billions of dollars.

Traditionally, public nuisance claims have generally been applied to conduct that harms the public's enjoyment of property, such as pollution of waterways. But the use of public nuisance claims has spread beyond the tobacco litigation of the 1990s to the opioid epidemic. The argument has also

been used by state attorneys general and others to address other social ills from youth vaping, social media addiction and strings of car thefts.

"There's not a lot of state supreme courts that have weighed in on this, and yet [public nuisance] is the kind of go-to tool for city, county and state litigants to bring all kinds of claims," said Adam Zimmerman of the University of Southern California's Gould School of Law, who studies mass torts. "So that's why I keep saying beyond the opioid litigation, [the decision] ends up being like an important data point in trying to understand the ability of cities and states to kind of prosecute mass tort cases."

The Ohio Law

States vary in how broad their definitions of public nuisance are. But the Ohio law has a somewhat unique history that compelled the Sixth Circuit to seek the high court's insight.

The Ohio Legislature amended the OPLA in 2005 and 2007 in response to a 2002 decision by the state Supreme Court that revived a city's public nuisance suit against gunmakers, which the federal appeals panel said meant that there was no state precedent for whether the pharmacies could be sued for creating a public nuisance.

The pharmacies contend that those changes mean the OPLA abrogates all public nuisance claims that involve the sale of products, no matter what kind of relief the plaintiffs are seeking. For their part, the counties argue that claims like theirs that seek an equitable remedy are still allowed.

The pharmacies argue that the Ohio Legislature "plainly meant" to walk back the Ohio Supreme Court's 2002 ruling in *Cincinnati v. Beretta U.S.A. Corp.* , which expanded public nuisance liability by changing the OPLA to bar suits like the counties'.

"The question is: Is this a product liability case?" said Richard Ausness, a product liability professor at the University of Kentucky's J. David Rosenberg College of Law. "They characterize it as a public nuisance case, and I suppose the two aren't necessarily inconsistent. It certainly involves a product, but it really involves marketing more than the product itself being defective."

--Editing by Alanna Weissman and Emily Kokoll.



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Ohio AG Says Pol Used Campaign Funds For Bribery Case Fees

By **Matthew Santoni**

Law360 (March 25, 2024, 4:30 PM EDT) -- The legal woes of former Ohio House Speaker Larry Householder were compounded Monday with state charges that he used campaign money to cover legal fees stemming from his blockbuster conviction in federal court over the FirstEnergy Corp. bailout scandal.

A state grand jury indicted Householder, 64, on 10 counts, including one count each of theft in office, telecommunications fraud and money laundering; two counts of aggravated theft; and five counts of tampering with records, Ohio Attorney General Dave Yost announced. The charges were filed in Cuyahoga County, where the financial transactions allegedly took place, Yost said.

Householder had already been convicted by a federal jury in early 2023 for **allegedly taking money** from Akron-based FirstEnergy through a nonprofit, in exchange for bailing out two FirstEnergy-owned power plants in the \$1.3 billion legislation known as House Bill 6. He was **sentenced to 20 years** in June, but has **appealed** to the Sixth Circuit.

"Today's charges, which are state charges, against Larry Householder, are the next step of accountability," Yost said in a video statement announcing the indictment. "State law provides for a bar or prohibition on ever holding public office again, and the federal law doesn't have that prohibition."

Yost said the indictment was the product of a task force under his office's Ohio Organized Crime Investigations Commission.

The task force, requested under state law by the prosecutor for the county where FirstEnergy is headquartered, also **led to the indictments** last month of ex-FirstEnergy CEO Chuck Jones, former Senior Vice President of External Affairs Michael Dowling and onetime Ohio Public Utilities Commission chair Sam Randazzo, on charges that they helped funnel the bribes behind the legislation.

The state indictment alleges that Householder improperly used more than \$750,000 in campaign funds to cover his personal legal defense in the federal case.

He is also accused of failing to accurately fill out Joint Legislative Ethics Committee filings with disclosures of all his fiduciary relationships, creditors and gifts, considering that those relationships and gifts had included the alleged bribes from FirstEnergy, along with additional debts and legal fees he'd allegedly failed to list.

Yost said that even though Householder had been removed from his leadership role in 2020, expelled from the state House in 2021 and sentenced to 20 years, the state charges were important to ensure he was barred from office in the future. He noted that Householder had first left office under a federal investigation that eventually did not result in charges, but became known as the "Comeback Kid" with his return in 2017.

"Should the conviction be overturned on appeal, he might well try for a third bite at the apple," Yost said. "A conviction on state charges in state court for theft in office means 'the Comeback Kid' will never come back to the general assembly."

Yost noted that the charges were also brought now because the statute of limitations was running out on some of the allegations.

Steven L. Bradley of Marein & Bradley, one of the attorneys representing Householder in his federal appeal, told Law360 that he and his co-counsel were working to schedule a call with the former speaker to determine the next steps and whether they would also represent him in the state case.

Ohio is represented by Carol O'Brien and Matthew Meyer of the Ohio Attorney General's Office.

Counsel information for Householder was not immediately available.

The case is Ohio v. Householder, case number CR-24-690479-A, in the Court of Common Pleas for Cuyahoga County, Ohio.

-- Additional reporting by Tracey Read and Ryan Harroff. Editing by Emily Kokoll.

Update: This article has been updated with additional information.

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Del. Justices Undo Toss Of Brookfield-TerraForm Merger Suit

By **Leslie A. Pappas**

Law360 (March 25, 2024, 7:32 PM EDT) -- Delaware's Supreme Court on Monday reversed the dismissal of a suit from former shareholders of TerraForm Power Inc. who challenged a squeeze-out merger by Brookfield Asset Management Inc., concluding a proxy statement failed to fully disclose alleged conflicts of interest involving special advisers Morgan Stanley & Co LLC and Kirkland & Ellis LLP.

In a 57-page opinion, the justices affirmed the Chancery Court's June 2023 dismissal of some of the shareholders' claims, but also found that when it came to certain alleged conflicts of interest between the special committee's advisers and Brookfield, minority stockholders of TerraForm had not been adequately informed.

"The Court of Chancery recognized that this was a close call, and we agree," Justice Karen L. Valihura wrote on behalf of the full five-member court. "But, upon a review of the record, we hold that the Court of Chancery erred as to certain of the disclosure issues concerning the special committee's financial and legal advisers' conflicts of interest."

The former TerraForm shareholders, led by pension fund shareholder City of Dearborn Police and Fire Revised Retirement System, **sued** Brookfield, TerraForm's controlling shareholder, and its several affiliates in February 2022, alleging the merger had been "procedurally and substantively unfair" to minority stockholders.

The complaint alleged the private equity firm had coerced the special committee into accepting the squeeze-out merger by threatening that if it didn't go through, Brookfield would "starve" TerraForm of future growth opportunities.

At a bench ruling in June, Chancellor Kathaleen St. J. McCormick granted the defendants' motion to dismiss in full, concluding that shareholders had failed to adequately allege coercion or that the special committee failed to satisfy its duty of care.

At a hearing in January before the Delaware Supreme Court, **shareholders argued** that a special board committee that evaluated the deal failed in their duties in part by hiring conflicted financial and legal advisers.

They argued Morgan Stanley, hired as the special committee's financial adviser, was conflicted because it held a \$470 million stake in Brookfield that wasn't disclosed in the proxy statement.

The special committee's legal adviser on the deal, Kirkland & Ellis, was also conflicted because it was working with Brookfield on an unrelated equity transaction, the shareholders argued.

In her dismissal of the suit, Chancellor McCormick expressed reservations about the alleged conflicts but nevertheless concluded Morgan Stanley's conflict was not material because its \$470 million stake was small relative to the bank's overall portfolio.

That analysis is "problematic," Delaware's highest court said in its opinion Monday.

Determination of materiality must include an examination of the alleged omission from the perspective of the stockholder, not just a comparative analysis based upon the overall size of the

adviser's portfolio of business, the opinion said.

"It is reasonably conceivable that from the viewpoint of a stockholder, Morgan Stanley's nearly half-a-billion-dollar holding in Brookfield was material and would have been material to a stockholder in assessing Morgan Stanley's objectivity," Justice Valihura wrote.

"Although the size of the investment vis-à-vis the size of Morgan Stanley's overall portfolio may be considered in the analysis, the stockholder's perspective is paramount," the opinion went on to say. "We conclude that the \$470 million investment, when viewed from the perspective of a reasonable stockholder, was material and should have been disclosed."

The court also found that the language in the proxy was misleading because it only said that Morgan Stanley "may" invest in Brookfield, but did not clearly reveal that the bank had already invested nearly half a billion dollars.

The Chancery Court also erred in its analysis of Kirkland's alleged conflicts, the opinion concluded.

"Kirkland's ongoing relationship with Brookfield raises the legitimate concern that Kirkland might not want to push Brookfield too hard given the nature of their ongoing lawyer-client relationship, which includes the ethical duty of zealous advocacy," the opinion says.

While the existence of such conflicts is not necessarily disabling, stockholders "were entitled to know about these conflicts so that they could consider them and decide for themselves," the opinion said.

The court also found that the proxy should have more clearly disclosed that the merger with TerraForm would result in Brookfield getting \$130 million more in management fees.

None of the parties responded Monday to Law360's requests for comment.

Shareholders are represented by Brendan Sullivan, John Vielandi, Ned Weinberger and Mark Richardson of Labaton Sucharow LLP, Jeremy Friedman and David Tejtcl of Friedman Oster & Tejtcl PLLC, Douglas E. Julie, W. Scott Holleman and Garam Choe of Julie & Holleman LLP, Brian J. Robbins and Stephen J. Oddo of Robbins LLP, and Peter B. Andrews, Craig J. Springer, David M. Sborz and Jackson E. Warren of Andrews & Springer LLC.

Brookfield Asset Management Inc. and the affiliated defendants are represented by John A. Neuwirth, Stefania D. Venezia, Amanda K. Pooler, Elizabeth M. Sytsma and Tanner S. Stanley of Weil Gotshal & Manges LLP and Kevin G. Abrams, Eric A. Veres and Stephen C. Childs of Abrams & Bayliss LLP.

The case is City of Dearborn Police and Fire Revised Retirement System (Chapter 23) et al. v. Brookfield Asset Management Inc., case number 241, 2023, in the Supreme Court of the State of Delaware.

The case below is City of Dearborn Police and Fire Revised Retirement System (Chapter 23) et al. v. Brookfield Asset Management Inc., case number 2022-0097, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.



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Rivian's Brass Sued In Del. Over Vehicle Pricing Whiplash

By **Katryna Perera**

Law360 (March 25, 2024, 10:08 PM EDT) -- A shareholder of California-headquartered electric vehicle manufacturer Rivian Automotive Inc. has filed a derivative suit against the company's top brass in Delaware's Court of Chancery, alleging they made false and misleading statements concerning Rivian's financial model, including about production costs and pricing for its EV pickup truck and SUV.

Evaristo Sarabia filed a sealed complaint on Friday, according to a public supplemental information sheet, which names Rivian founder and CEO Robert Scaringe and Chief Financial Officer Claire McDonough as defendants, along with other executives and board members.

The supplement information sheet also lists a related Chancery case filed by shareholder Kathleen Miller.

Miller's suit, filed in February, asserts breaches of fiduciary duty claims against the same defendants. In her complaint, she alleges they knew that Rivian's pricing for its EV pickup truck and SUV was not sustainable, but concealed this from the public.

According to the complaint, ahead of Rivian's 2021 initial public offering, the base model of its EV pickup truck was priced at \$67,500, and the EV SUV was priced at \$70,000. The company accepted preorders of the vehicles secured by a \$1,000 deposit. These prices were meant to be competitive with Tesla's Cybertruck, which was priced at \$69,900 after certain tax credits, the complaint states.

Miller says that after the IPO, Rivian's management was specifically asked by analysts whether the company was evaluating price changes, but Scaringe responded that the company's vehicles "are very aggressively priced." Miller says this statement and others "misleadingly suggested that pricing changes were not imminent."

The company then filed a Form 10-Q with the U.S. Securities and Exchange Commission, allegedly "mischaracterizing that future price increases were 'risks,' as opposed to truthfully disclosing them as a known fact that was going to occur," her complaint states.

The truth was revealed in March 2022, when Rivian informed customers who preordered vehicles that the base price of the EV pickup truck and SUV would increase by 17% and 20%, respectively, and the new pricing would be applied to all future and existing preorders, except for vehicles that were already close to delivery.

"The price change sparked customer outrage, and many customers canceled their pre-orders, opting to forfeit the \$1,000 deposit than to pay an additional \$12,000 to \$14,000 for their EV," Miller's complaint states. "In response to this backlash, Rivian reversed course and decided not to implement the price increase to the pre-orders placed before March 1, 2022, effectively guaranteeing tens of thousands of customers an unsustainably low price that the company all along had planned to increase."

Miller says the clawback of the price increases harmed Rivian by "hundreds of millions of dollars" and eventually led to the filing of a **securities class action** in California federal court.

Additionally, on March 10, 2022, Rivian published a letter to its shareholders announcing the

company's fourth quarter and full year 2021 financial results. It disclosed that it expected to recognize negative gross margins throughout fiscal year 2022 "[a]s we continue to ramp-up our manufacturing facility, manage supply chain challenges, face continued inflationary pressures, and minimize price increases to customers in the near term."

Miller says that Rivian's stock price had already been falling due to the price whiplash of its vehicles, but following the announced financial results, Rivian's stock price fell approximately 8% to close at \$38.05 the day after and plummeted again the next trading day to close at \$35.83 on March 14, 2022.

Miller's suit seeks damages, attorney fees, and reforms and improvements to Rivian's corporate governance and internal procedures.

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

Miller is represented by Ryan M. Ernst of Bielli & Klauder LLC, and Matthew M. Houston, Benjamin I. Sachs-Michaels, Robert V. Prongay and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Sarabia is represented by P. Bradford deLeeuw of deLeeuw Law LLC.

Counsel information for the defendants was not immediately available.

The cases are Sarabia v. Scaringe et al., case number 2024-0288, and Miller v. Robert et al., case number 2024-0127-MTZ, in the Court of Chancery of the State of Delaware.

--Editing by Adam LoBelia.



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Solar Co. Downplayed Exposed Wire Issue, Investors Claim

By **Sydney Price**

Law360 (March 25, 2024, 8:36 PM EDT) -- Energy company Shoals Technologies Group Inc. has been hit with a proposed class action alleging it downplayed the cost of repairing exposed wires for customers and that investors were blindsided when the company finally revealed it would need to spend at least \$60 million to fix the issue.

According to the suit filed Thursday by Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund, it was revealed last November that Shoals, which makes custom wire harnesses used in the production of solar energy, had known for months that some customers were experiencing what's known as shrinkback, or an excessive pullback of wire insulation at connection points.

The disclosure of these defective wire harnesses, which were installed in at least 300 solar fields, sent Shoals' stock price plunging by 20%, the investors say.

In addition to Shoals, the suit names five individual defendants, including Shoals President Jeffrey Tolnar, CEO Brandon Moss, Chief Financial Officer Dominic Bardos, former interim CFO Kevin Hubbard and former CEO Jason Whitaker.

During the class period, which begins May 17, 2022, the defendants affirmed that Shoals' products met its "stringent quality requirements," according to the suit.

But in a quarterly report filed in May 2023, Shoals disclosed for the first time that it had been notified that some customers were experiencing problems with excessive wire pull back, the suit states. However, Shoals refused to provide repair and replacement cost estimates to investors, saying at the time that "it is not possible to reasonably estimate those costs," according to the suit.

During the next quarter, Shoals had recorded a warranty liability of \$9.3 million related to the shrinkback issue but continued to describe quality control problems as "a mere risk," the suit claims.

The complaint asserts that the truth began to emerge on Nov. 7, 2023, when Shoals announced its third quarter 2023 earnings. The company reported that the shrinkback issue affected 30% of its wire harnesses installed between 2020 and 2022, and that it had booked a \$50.2 million warranty expense for the third quarter related to the issue. It provided a range of potential loss related to the shrinkback issue of between \$59.7 million and \$184.9 million, the suit states.

Documents from the suit Shoals brought against its supplier of the wire reveal it knew of significant issues with shrinkback by at least March 2022, the complaint contends.

Following the disclosures, the price of Shoals' shares dropped \$3.28, or more than 20%, to close at \$12.95 per share on Nov. 9, 2023.

The suit accuses the defendants of violating the Exchange Act and acting with scienter, or actual knowledge of wrongdoing or reckless disregard. It also claims the defendants' statements aren't covered by the safe harbor provisions of securities laws.

Counsel for the plaintiff and a Shoals representative did not immediately respond to requests for comment on Monday.

Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund is represented by J. Gerard Stranch IV of Stranch Jennings & Garvey PLLC and Lester Hooker, Rachel Avan and Marco A. Dueñas of Saxena White PA.

Counsel information for Shoals was not immediately available on Monday.

The suit is Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund v. Shoals Technologies Group Inc. et al., case number 3:24-cv-00334, in the U.S. District Court for the Middle District of Tennessee.

--Editing by Kristen Becker.

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How Activision Ruling Favors M&A Formalities Over Practice

By **John Stigi and Eugene Choi** (March 25, 2024, 5:34 PM EDT)

In *Sjunde AP-Fonden v. Activision Blizzard Inc.*,^[1] the Court of Chancery of the State of Delaware recently **declined to dismiss** a claim alleging that the board of directors of defendant Activision violated Section 251(b) of the Delaware General Corporation Law, or DGCL, by approving a draft merger agreement between Activision and Microsoft Inc. that was not sufficiently final.

The court held that, notwithstanding market practice, to comply with Section 251(b), the version of a merger agreement the board must consider and approve need not be "execution ready" but must be "essentially complete."

The court also found that to comply with Section 251(c), the notice of the stockholders meeting for approving the merger must contain either a Section 251(b)-compliant version of the merger agreement or a summary thereof.

Practitioners should pay close attention to the court's holdings here as they may vary from what some consider customary market practice.

Facts

The essential facts of the case are straightforward. On Jan. 17, 2022, the Activision board met to approve the merger with Microsoft.

Ahead of that meeting, the board received a draft merger agreement that did not include a company disclosure letter (which was mentioned 45 times in the draft merger agreement but was still being drafted at the time of the board meeting), the disclosure schedules (which were still being negotiated) or the surviving corporation's certificate of incorporation.

The draft merger agreement also had placeholders for the consideration amount and the name of the target. In addition, the terms of the dividend provision, an important issue of how dividends in the post-signing period will be handled, were still being negotiated by an ad hoc committee of the board.

Following the board's approval of the merger agreement, the merger agreement was executed on Jan. 18, 2022. The executed version contained several changes from the draft agreement approved by the board, including the dividend provision.

Activision filed its proxy statement seeking stockholder approval of the merger on March 21, 2022. The proxy statement attached the merger agreement as Annex A, but the attached version did not contain the disclosure letter, disclosure schedules or the surviving corporation's certificate of incorporation.

The notice of the stockholders meeting made reference to this Annex A. The proxy statement contained a summary of the merger agreement, but the notice did not.

The merger agreement was approved and adopted by the Activision stockholders with overwhelming support, and after much antitrust scrutiny, the merger was completed on Oct. 13, 2023.



John Stigi



Eugene Choi

Holdings

Section 251(b) of the DGCL provides that "the board ... shall adopt a resolution approving an agreement of merger."

The plaintiff stockholder argued that Section 251(b) required the board to approve a version of the draft merger agreement that was "execution ready."

In response, the defendants offered a market practice and practicality argument: Given "the practical realities of negotiating merger agreements, boards commonly adopt resolutions approving a merger agreement in draft or near-final draft form and declaring its advisability before the agreement has been finalized, and this is especially true with respect to ancillary documents, including disclosure schedules."

The court observed that the merger statutes, unlike many parts of the DGCL, are mandatory provisions, and that Delaware courts require strict compliance with statutory requirements governing fundamental transactions such as mergers.

The court concluded that, at a bare minimum, Section 251(b) requires the board to approve an essentially complete version of the merger agreement, and it was reasonably conceivable here that the draft merger agreement approved at the Jan. 17, 2022, board meeting fell short of that standard, as "[t]here was a lot of important stuff missing from the Draft Merger Agreement."

The court took issue with the missing consideration, the missing disclosure containing information that was important to the agreement, the missing surviving corporation's charter that is expressly required by Section 251(b)(4), and the open dividend provision issue.

The court balked at determining at this stage in the litigation whether the disclosure schedules were necessary to comply with Section 251(b), but noted that reasonable minds could reach different conclusions on this point.

The plaintiff also challenged Activision's compliance with Section 251(c) of the DGCL. Section 251(c) provides that the agreement required by Section 251(b) shall be submitted to the stockholders, and the notice of the stockholders meeting for voting on a merger "shall contain a copy of the agreement or a brief summary thereof."

Here, Activision's notice of the stockholders meeting contained a reference to Annex A of the proxy statement, which attached the merger agreement. The court concluded, however, that the attached merger agreement was deficient because it was missing the surviving company's certificate of incorporation.

The defendants then pointed to the summary of the merger agreement in the proxy statement, arguing that Activision complied with Section 251(c) through that summary.

In a technical decision, the court observed that the text of Section 251(c) requires the notice of the stockholders meeting to contain the merger agreement or the summary, and that the proxy statement is not the notice. Accordingly, the court held it was reasonably conceivable that the plaintiff could state a claim that the defendants did not comply with Section 251(c).

Practitioners will note that Item 601(a)(5) of Regulation S-K in Title 17 of the Code of Federal Regulations, Section 229.601, provides that schedules or similar attachments to exhibits — such as merger agreements — are not required to be filed with the U.S. Securities and Exchange Commission under the federal securities laws, provided that they do not contain information material to an investment or voting decision and that information is not otherwise disclosed in that document.

In particular, it is not customary to include a disclosure letter or disclosure schedules as an annex to Form S-4 or a proxy-prospectus filed with the SEC. We expect the Delaware courts will need to address this interplay in subsequent decisions.

Pushback Against Deference to Market Practice — Calls to Legislature

The ruling in *Activision* was handed down less than a week after Vice Chancellor J. Travis Laster's decision in *West Palm Beach Firefighters Pension Fund v. Moelis & Co.*,^[2] where the court, to the surprise of many, found that several stockholder agreement provisions were facially invalid under Delaware law because they impermissibly impinged on the board's rights under DGCL Section 141.

A common thread between the two cases is the tension between what sophisticated corporate planners view as market practice and what the Delaware courts interpret to be permissible under the laws of the First State.

Vice Chancellor Laster stated in *Moelis*, that "market practice is not law. Delaware courts consider market practice, because market practice can reflect the judgments of experienced counsel about what is possible under Delaware law." But, as the opinion also said, "when market practice meets a statute, the statute prevails. Market participants must conform their conduct to legal requirements, not the other way around."

However, both the chancellor and vice chancellor called out to the Delaware Legislature for assistance. In *Activision*, Kathaleen St. J. McCormick wrote in a footnote that DGCL Section 251 "could be amended to allow a corporation to include the 'brief summary' in the proxy statement," noting that in other contexts, the Delaware Legislature amended the statute in similar ways.

For example, Section 242, which governs amendments to incorporation certificates, was amended in 2014 to eliminate the requirement that the notice of the stockholders meeting contain the amendment or a summary thereof if the notice is a notice of the internet availability of proxy materials under notice and access rules promulgated by the SEC under the Securities Exchange Act.^[3]

The chancellor also referenced Section 228 governing stockholder written consents in lieu of meetings, which was amended to permit a notice of internet availability of proxy materials to be provided to stockholders that did not consent.

The vice chancellor in *Moelis*, also in a footnote, noted that Section 218, the statute authorizing the use of stockholder agreements, "is quite the bare-bones provision. The expansive use of stockholder agreements suggests that greater statutory guidance may be beneficial. ... Its author would welcome additional statutory guidance."

Market practice has evolved in the above two areas where, in the case of DGCL Section 251(c), the statute may not make practical sense, and in the case of DGCL Section 218, the statute is no longer instructive enough to give practitioners the guidance they need for proper corporate planning. We will see if the Delaware General Assembly will respond.

Conclusion

Historically, there has been little guidance from the courts regarding the interpretation of Section 251(b), and market practice influenced what practitioners believed was acceptable under the statute. But as the court noted in *Activision*, "where market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself."

Practitioners should pay careful attention to the completeness of the merger agreement submitted to the board for approval, and make sure the negotiations are settled and that the agreement form is essentially complete, has all essential exhibits attached and contains the items expressly enumerated in Section 251(b).

And, in turn, because practitioners are not likely to change practice and insert a robust merger agreement summary into the notice of the stockholders meeting, the Section 251(b)-compliant merger agreement must be referenced in the notice and presented to the stockholders for approval and adoption.

That is, unless the Delaware General Assembly responds and amends the DGCL.

John P. Stigi is a partner and co-leader of the securities enforcement and litigation team at Sheppard Mullin Richter & Hampton LLP.

Eugene Choi is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] C.A. No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024, corrected March 19, 2024).

[2] C.A. No. 2023-0309-JTL, -- A.3d --, 2024 WL 747180 (Del. Ch. Feb. 23, 2024).

[3] See 17 C.F.R. § 240.14a-16.

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Investment Firm Slips Plan Members' Self-Dealing 401(k) Suit

By **Emmy Freedman**

Law360 (March 25, 2024, 8:39 PM EDT) -- A New York federal judge on Monday threw out a lawsuit retirement plan participants lodged against investment firm AllianceBernstein accusing it of steering retirees' savings into its own poorly performing investments, saying there's no evidence the company was benefiting from these alleged actions.

U.S. District Judge Lewis J. Liman **granted** AllianceBernstein LP's motion to dismiss four 401(k) plan participants' Employee Retirement Income Security Act proposed class action, but gave them a 30-day window to file a motion to amend their case.

The plan participants alleged in their December 2022 complaint that AllianceBernstein offered its own investment options to line its pockets and promote its business interests, but the company argued this allegation is bogus because it waived all fees when including its own proprietary funds in the plan.

"Plaintiffs do not allege specific facts that directly demonstrate defendants acted for a purpose other than providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan," Judge Liman said. "Nor do plaintiffs assert that it can be inferred that defendants selected and monitored plan investments with the purpose of benefiting themselves or someone else because the proprietary funds charged plan participants fees."

The plan participants brought five counts under ERISA against AllianceBernstein along with its administrative, compensation and investment committees. They sought to represent a class of 5,560 participants who invested in the \$1.5 billion plan between Dec. 14, 2016, through the end of the case.

They said regardless of the company's arguments, its motives were clearly disloyal when it used plan assets to prop up its investment management business while other investors were exiting those investments. But Judge Liman said that's not enough evidence to show that AllianceBernstein violated its duty of loyalty under ERISA.

"Accepting plaintiffs' theory would require the court to create an inference of disloyalty whenever an employee retirement plan offered proprietary investment options, an approach that has been rejected on numerous occasions," Judge Liman said.

The plan participants alleged the company also violated its duty of prudence under ERISA because the proprietary funds it offered performed worse than benchmarks it put forward. But Judge Liman said the most that any single AllianceBernstein fund underperformed, based on the evidence in the record, was only by 4.57% compared to a benchmark.

Plus, they did not include any direct evidence about the investment evaluation process the company used, the order said.

"The alleged underperformance is not of sufficient duration or magnitude to create an inference of misconduct," Judge Liman said. "Comparable levels of underperformance have repeatedly been deemed insufficient to give rise to a claim for imprudence by courts in this circuit."

The plan participants also brought a claim alleging prohibited transactions when AllianceBernstein

steered plan assets into its own funds, but the company argued this claim is untimely.

Further, the plan participants did not dispute the company's argument that fees and expenses were waived in regard to the proprietary funds, the order said.

The only other fees that were allegedly charged because AllianceBernstein funds were included in the plan's investment lineup were those associated with an insurance feature, Judge Liman said. But the plan participants did not claim that those fees were paid to the company or any other fiduciary, according to the order.

"The insurance fees, as pleaded by plaintiffs, cannot give rise to a claim for prohibited transactions between a plan and a fiduciary because plaintiffs do not allege that the insurance fees were charged for the benefit of any fiduciary's 'own account,' or resulted in consideration for any fiduciary's 'own personal account,'" Judge Liman said.

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

The plan participants are represented by Garrett W. Wotkyns and Tanya Korkhov of Scott & Scott Attorneys at Law LLP and Agatha M. Cole of Beverly PLLC.

AllianceBernstein is represented by Sean M. Murphy, Emily Scarisbrick, Lucille Baeurle and Robert C. Hora of Milbank LLP.

The case is Bloom et al. v. AllianceBernstein LP et al., case number 1:22-cv-10576, in the U.S. District Court for the Southern District of New York.

--Editing by Amy Rowe.

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Merchants Hit AmEx With Antitrust Claims Over Its Fee Rules

By **Emilie Ruscoe**

Law360 (March 25, 2024, 10:55 PM EDT) -- American Express faces a proposed merchant class action alleging it violated federal antitrust law by barring businesses from taking certain measures to keep their credit card swipe costs down.

In a **complaint filed Thursday** in Rhode Island federal court, 10 merchant plaintiffs took aim at AmEx with claims the company violated the Sherman Act with its so-called non-discrimination provisions, or rules that bar merchants from taking measures to persuade customers from using cards with lower transaction fees.

The merchants contended that AmEx's fees explain why there is no price competition among credit card networks in the U.S. payment processing market.

"Were it not for the [non-discrimination provisions], card networks would compete with one another on the prices they offer both merchants and cardholders," AmEx said.

The co-plaintiffs, which include businesses in California, Florida and Texas, seek to represent a class comprising 5,155 merchants whom the plaintiffs say are not bound by arbitration agreements with AmEx after the company waived the right to compel arbitration.

According to the plaintiffs, small merchants in the U.S. pay fees of at least 3% on each credit card sale they make, which can add up to roughly half of what businesses such as grocery stores "can take home at the end of the month."

While swipe fees vary, the merchants claimed that AmEx swipes are costly compared to debit card swipes or Discover card swipes, estimating that AmEx fees are often double those charged for debit card transactions.

Historically, the card networks run by Visa, Mastercard and American Express had imposed rules aimed at keeping merchants from asking customers to help them reduce their card swipe fee payments.

But the industry has seen "important reforms" in recent years driven by both proposed class action litigation brought privately by merchants and antitrust enforcement brought by the Justice Department, the merchants claimed.

Visa and Mastercard have dropped rules barring merchants from steering customers to use cheaper card products and charging checkout fees, and states have struck down laws against credit card surcharging, the merchant plaintiffs said.

"Now, in the wake of these reforms, 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 plaintiffs claimed.

The plaintiffs noted that because of AmEx's binding arbitration requirements, before now "merchants have been unable to use antitrust litigation to reform Amex's rules."

But the merchants cited claims brought by merchants against AmEx before the American Arbitration

Association that were administratively closed after AmEx refused to pay its invoice. They contend that under federal laws governing arbitration, a party can't compel arbitration of a claim if that party is in default in proceeding with such arbitration.

"Here, Amex is in default in proceeding with the arbitration of the [proposed class member's] claims," the merchants said. "Separately, by its actions, Amex has waived the right to compel arbitration of those claims under ordinary common law waiver principles."

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

The plaintiffs are represented by Anthony Leone of Leone Law LLC, Deepak Gupta, Eric F. Citron and Thomas Scott-Railton of Gupta Wessler PLLC, Scott C. Harris, Dan K. Bryson and Peggy J. Wedgworth of Milberg Coleman Phillips Bryson Grossman PLLC, Tracey Kitzman of Song PC and Robert W. Cohen of the Law Offices Of Robert W. Cohen PC.

Counsel information for American Express wasn't immediately available Monday.

The case is 5-Star General Store et al. v. American Express Company et al., case number 1:24-cv-00106, in the U.S. District Court for the District of Rhode Island.

--Editing by Michael Watanabe.

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3 Class Claims Follow US Antitrust Suit Against Apple

By **Jared Foretek**

Law360 (March 25, 2024, 10:40 PM EDT) -- Days after the U.S. Department of Justice filed a sweeping antitrust suit against Apple in New Jersey federal court, a group of iPhone buyers are filing suit, launching three separate proposed class actions between Friday and Saturday accusing the tech giant of suppressing innovation in the digital apps, wearables and payments industries through anticompetitive agreements.

The three suits were filed in federal courts in New Jersey and California by plaintiffs in four different states who purchased iPhones in the last several years. Though the plaintiffs are represented by different law firms, the complaints themselves share some common language focusing on five "technologies that Apple has suppressed to maintain a smartphone monopoly," one of the complaints reads.

The three complaints all allege that contractual agreements used by Apple have suppressed innovation and competition in five areas: super apps, which can "host an array of programs and device features" like messaging and payments; cloud streaming games; messaging; smartwatches and digital wallets.

"By suppressing these innovative technologies, Apple has degraded the functionality of its devices. It has made them less valuable to users. But enhancing the quality of its devices was never the objective of Apple's lock-in strategy," one of the complaints, filed in the Northern District of California, reads. "The objective — Apple's overarching strategic objective — is to make it difficult and costly for consumers to switch to competing devices. And measured against that manifestly anticompetitive goal, Apple's strategy has been a resounding success."

All three suits point out that current iPhone models retail for as much as \$1,599, a price they say the company couldn't charge without having locked in consumers years ago. They also reference the **DOJ suit** brought March 21, which accuses the company of using "shapeshifting rules and restrictions" on app developers to "throttle competitive alternatives" and allow for Apple's high commissions. Through a slew of anticompetitive agreements, the DOJ alleges, Apple has not only stifled competition in the phone market, but has left a mark on the financial services, gaming and social media industries.

Now, the private plaintiffs say, the company should have to face consumers who they claim have been ripped off by Apple.

"The U.S. Department of Justice ... and 16 states and territories have rightly brought suit to vindicate their sovereign law-enforcement interests and stop Apple's wrongful conduct," Philadelphia resident Shoshi Goldfus' complaint says. "Plaintiff now seeks in this suit to vindicate the interests of the millions of consumers who have overpaid for iPhones they purchased from Apple, missed out on the innovation and improved user experiences that competition would have made possible, and face ongoing harm unless this court enjoins Apple's monopolistic conduct in the performance smartphone and smartphone markets."

In particular, the suits take aim at Apple's app sales commissions — which they and the DOJ say run as high as 30% — and the way it makes its technologies largely inoperable with other platforms, locking users into Apple products.

The company built the United States' most dominant smartphone platform on the backs of a community of third-party app developers, the suits claim, only to then turn around years later and leverage its massive success to impose anticompetitive rules and industry-leading commissions on

developers and their products.

"Today, Apple charges as much as \$1,599 for an iPhone and earns high margins on each one, more than double the margins earned by others in the industry. When developers create a new product or service for iPhone consumers, Apple demands up to 30 percent of the price of an app whose content, product, or service it did not create," New York resident Jared Schermer's suit reads. "Then, when a consumer wants to buy additional services within that app, Apple extracts up to another 30 percent, again for a service Apple does not create or develop. When customers purchase a meal or pay for groceries, Apple charges a fee for every 'tap-to-pay' transaction, imposing its own form of an interchange fee on banks and a significant new cost for using credit cards."

All the while, the iPhone buyers claim, the company erects barriers to switching between iPhones and often-cheaper Android alternatives. Its wearable products like Apple Watches aren't compatible with other operating systems, and the company has long used older technology to **degrade the quality** of texts, photos and videos sent between iPhones and Androids.

In 2022, Apple CEO Tim Cook even responded to a complaint that photos between the questioner and their mom were degraded by telling the person to buy their mother an iPhone. And the suits allege that the company long ago decided that improving messaging quality between the two operating system's would "reinforce 'obstacle[s]' to iPhone families giving their kids Android phones."

This kind of conduct, the phone-buyers claim, is reflective of the many different ways Apple has used its market power to limit competition.

"Having locked in consumers and insulated itself from effective competition, Apple has maintained a monopoly in the smartphone market and, in that position, Apple is able to charge supracompetitive prices for its smartphones, with recent models commanding as much as \$1,599," one of the two Northern California complaints reads. "In a competitive market, smartphone prices would be lower for Apple and overall. Beyond that, competition in a market freed from Apple's practices would spark innovation — from both Apple and its competitors — that would enhance the functionality, security, and quality of the smartphone as we know it."

Apple did not immediately respond to Law360's request for comment Monday.

Shoshi Goldfus is represented by James E. Cecchi of Carella Byrne Cecchi Brody & Agnello PC and Michael D. Hausfeld, Melinda R. Coolidge, Sarah R. LaFreniere, Nick Murphy, Theodore DiSalvo, Katie R. Beran, Scott D. Martin, Daniel P. Weick, Michael P. Lehmann and Megan E. Jones of Hausfeld LLP.

Deborah Collins, Hunter Collins and Henry Morales are represented by Ben M. Harrington and Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Eamon P. Kelly, Joseph M. Vanek and Phillip F. Cramer of Sperling & Slater LLC.

Jared Schermer is represented by Israel David and Blake Hunter Yagman of Israel David LLC and Mario A. Moya and Rebecca M. Hoberg of Moya Law Firm.

Counsel information for Apple was not yet available Monday.

The cases are Shoshi Goldfus v. Apple Inc., case number 2:24-cv-04108, in the U.S. District Court for the District of New Jersey; Deborah Collins et al. v. Apple Inc., case number 3:24-cv-01796, in the U.S. District Court for the Northern District of California and Jared Schermer v. Apple Inc., case number 3:24-cv-01815, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig and Stewart Bishop. Editing by Dave Trumbore.



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Chiquita MDL Parties Urge Fla. Judge To Ax Trial Testimony

By **David Minsky**

Law360, West Palm Beach (March 25, 2024, 6:49 PM EDT) -- Parties in the multidistrict litigation against Chiquita Brands urged a Florida federal judge Monday to exclude each other's witnesses ahead of the upcoming bellwether trials, saying they were not timely disclosed and have no direct knowledge of the claims in the case.

During a hearing in West Palm Beach federal court, U.S. District Judge Kenneth A. Marra heard competing motions to exclude witnesses, including from Chiquita attorneys who urged him to exclude more than 100 people included on a last-minute witness list for an April trial proposed by victims who alleged brutalization by the Autodefensas Unidas de Colombia, a right-wing paramilitary group allegedly in cahoots with the banana grower.

The victims' claims that Chiquita violated the Torture Victim Protection Act will be heard in two upcoming trials that are scheduled to start on April 22 and July 15.

"Their list is a mess and completely prejudicial to us," said Melissa F. Murphy of Blank Rome LLP, representing Chiquita, adding her team hasn't had an opportunity to depose them.

Additionally, Murphy said the plaintiffs filed thousands of pages of last-minute exhibit lists that include documents in untranslated Spanish, some that are duplicative and others that are just marked with a placeholder. "It is really egregious what they did with this exhibit list," Murphy said.

In the mid-1990s, the plaintiffs said Chiquita made a deal with the AUC to pacify banana plantations during a period of increasing activity by left-wing guerrilla groups, paying the paramilitary group more than \$1.7 million in regular monthly payments, court records show. The plaintiffs allege their relatives were killed or disappeared by the AUC during armed conflict in Colombia in the 1990s and early 2000s.

Marissa Vahlsing of EarthRights International, representing the plaintiffs, said that people added to the list are damages witnesses whose names came up during depositions. Victoria Mesa-Estrada of Searcy Denney Scarola Barnhart & Shipley, representing the plaintiffs, said some of those witnesses included children.

"We added them to the trial list because they are damages witnesses," Mesa-Estrada said. "Some clients have 12 children."

Jonathan C. Reiter of the Jonathan C. Reiter Law Firm PLLC, who represents a group of plaintiffs, told Judge Marra that he promptly and voluntarily disclosed one witness who came forward last year. Reiter described the witness as a former Chiquita security guard-turned-AUC member who was willing to testify about his role in kidnapping people who were leaking information about weapons shipments that came in through ports.

"If I have something, I disclose it immediately, whether it has been asked for or not asked for," Reiter said. "That's been my practice throughout my entire career. Chiquita has had a fair opportunity to depose him."

Responding to opposing counsel arguments, Murphy said that some of the late-disclosed names who were listed by the plaintiffs aren't damages witnesses, including a researcher and a Colombian

congressional representative, and have no "first-hand knowledge" of the claims.

"These are not damages witnesses, whatever that may mean," Murphy said.

Judge Marra heard a motion to strike witnesses and exhibits filed by the plaintiffs, including a category of eight former Chiquita employees that the company allegedly refused to produce for deposition during the discovery period.

Plaintiff attorney John Scarola of Searcy Denney told the judge that Chiquita had the ability to subpoena them for testimony.

"We're not sure whether they were employees at the time they were making these requests, but what we do know is Chiquita has subsequently listed these individuals as either may call or will call, obviously reflecting the fact they have the ability to bring these witnesses to Palm Beach County for purposes of trial," Scarola said.

Murphy said the witnesses aren't under Chiquita's control.

"They claim that simply because they were formerly employees, that we had some obligation to get them to voluntarily appear for a deposition," Murphy said. "That's not the case."

Among the motions heard by Judge Marra on Monday included a Chiquita omnibus motion to exclude plaintiff exhibits, such as information from a previous case involving the company.

Representing Chiquita, Michael L. Cioffi of Blank Rome argued the court should exclude a sentencing memorandum in a 2007 criminal case brought by the U.S. government against the company in D.C. federal court. Cioffi also wanted the court to exclude the plaintiffs' characterization of the guilty plea in that case.

Cioffi argued that the court shouldn't allow the plaintiffs to say that Chiquita admitted to knowingly providing material support to the AUC, which he said isn't part of the proffer.

Richard Herz of EarthRights International, plaintiffs' counsel, said his team should be able to describe the facts "they've admitted to."

The plaintiffs are represented by John Scarola and Victoria Mesa-Estrada of Searcy Denney Scarola Barnhart & Shipley PA, Marco Simons, Richard Herz and Marissa Vahlsing of EarthRights International, Paul D. Wolf of the Law Offices of Paul David Wolf, James K. Green of James K. Green PA and Gabriela Paola Valentin Diaz.

Chiquita is represented by Michael L. Cioffi, Melissa F. Murphy and Frank A. Dante of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc., Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Carolina Bolado and Lauren Berg. Editing by Alex Hubbard.



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Geico Beats COVID-19 Auto Rebate Class Action On 2nd Try

By **Henrik Nilsson**

Law360 (March 25, 2024, 7:41 PM EDT) -- A California federal judge has granted Geico's bid for victory in a certified class action alleging the insurance company owed additional refunds to drivers who overpaid their auto insurance premiums during COVID-19 shutdowns, saying the company's rebate program was adequate and did not violate the state's insurance code.

U.S. District Judge Beth Labson Freeman granted Geico's motion for summary judgment on March 18, but a redacted written order did not appear on the docket until Thursday. The judge found that the plaintiff's remaining claim under California's Unfair Competition Law is negated by the state's Department of Insurance determination that Geico's rebate program was adequate.

"This evidence establishes that the GEICO Giveback was consistent with the legislatively declared policy captured in Proposition 103 on which plaintiff's UCL unfair claim relies," Judge Freeman wrote. "Plaintiff has failed to point the court to material evidence that creates a genuine dispute for trial."

Day **sued** in March 2021, accusing Geico of "unfairly profiting" off premiums during the pandemic, particularly during its early months when fewer drivers were on the roads. Though Geico did offer a 15% rebate to policyholders, the insurer implemented the program without considering individual circumstances, like driving habits or policy coverage.

Day claimed this program was an example of Geico engaging in unfair business practices and that it violated the UCL.

The court tossed Day's breach of contract claim in June 2022, leaving only her UCL claim. Judge Freeman **granted class certification** a few months later. The class includes all California residents who purchased personal automobile, motorcycle or RV insurance with policy coverage from March 19, 2020, through July 11, 2021.

Geico filed an initial motion for summary judgment in September 2023, saying it received an email from the deputy commissioner of the CDI's rate regulation branch to a Geico representative claiming the company was "not required" to return any more premium to policyholders. This correspondence, Geico said, backed its position that it did not owe more after granting partial repayments during the shutdown and that the company complied with CDI's guidance established in a series of bulletins issued in April 2020.

Judge Freeman **denied the motion** in January, finding the CDI's determination did not preclude Day's suit. However, she added that the "determination appears to be powerful evidence that may play a significant role at trial," according to her January order.

The judge said on Thursday that "this order is not inconsistent with any of [the court's] prior orders."

"Although the court considered CDI's determination in the context of abstention and collateral estoppel, the court has never had the opportunity to consider, as it does now, CDI's determination under the proper standard for a UCL unfair claim and in the context of the facts of this case," according to the order.

The CDI determination shows that Geico is entitled to summary judgment as a matter of law, according to the order.

"The fact is that CDI has approved the amount that Geico has refunded as consistent with the directive of the bulletins and, by extension, the policy and spirit of the insurance code," the judge wrote.

Additionally, Day failed to present evidence to suggest there are genuine issues of material fact concerning whether Geico's conduct violated its policy or California's insurance code, according to the order.

The judge rejected, among other evidence, an expert opinion claiming that the relief should have totaled \$733 million and that the class should recover \$238 million in restitution.

"Viewed in the light most favorable to plaintiff, her expert's finding that the Geico Giveback was inadequate to reasonably compensate the class for reductions in claims during the COVID-19 pandemic is merely colorable and not sufficiently probative of the ultimate issue — whether Geico's conduct violated the policy or spirit of the insurance code," according to the order.

Counsel for Geico declined to comment. Counsel for Day did not immediately return a request for comment.

Day is represented by Matthew Morgan of Nichols Kaster PLLP.

Geico is represented by Damon N. Vocke, Ronald M. Lepinkas and Daniel B. Heidtke of Duane Morris LLP.

The case is Day v. Geico Casualty Co. et al., case number 5:21-cv-02103, in the U.S. District Court for the Northern District of California.

--Additional reporting by Candace Pedraza and Hailey Konnath. Editing by Kristen Becker.

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Ripple's Legal Chief Says SEC Wants \$2B In Remedies

By Aislinn Keely

Law360 (March 25, 2024, 6:41 PM EDT) -- The CEO and legal head of blockchain firm Ripple Labs said Monday that the U.S. Securities and Exchange Commission plans to seek \$2 billion in fines and penalties over the firm's failure to register institutional sales of its XRP token, but the firm plans to strike back at the high dollar amount.

The SEC's remedies-related brief is slated to become public on Tuesday, but Ripple Chief Legal Officer Stuart Alderoty offered up a preview on the social media site X, formerly known as Twitter, where he said that the regulator will ask for \$2 billion in fines and penalties. He said that the request represents an attempt to punish and intimidate Ripple and other cryptocurrency firms rather than "faithfully apply the law."

"Our response will be filed next month, but as we all have seen time and again, this is a regulator that trades in statements that are false, mischaracterized and designed to mislead," said Alderoty. "They stayed true to form here."

The SEC did not immediately respond to a request for comment on Monday.

The remedies phase is the final stage of a years-long **legal battle** between the regulator and Ripple over its XRP token, which the SEC claims should have been registered as a security. A summary judgment ruling in July found that the token was **sold as a security** to institutional investors, but not in blind transactions on public exchanges.

The SEC attempted to **immediately appeal** the parts of the decision it lost, but a New York federal judge decided that appellate challenges would have to wait until the **close of the case**. The regulator later **dropped additional claims** ahead of trial that Ripple CEO Brad Garlinghouse and co-founder Christian Larsen aided and abetted the institutional sales.

That left the remedies phase, where the SEC and Ripple would square off over penalties for the sales found to be unregistered securities.

On Monday, Garlinghouse said in his own statement on X that "there is absolutely no precedent" for the \$2 billion figure, particularly given the case didn't involve any claims of fraud or recklessness.

"We will continue to expose the SEC for what they are when we respond to this," he said.

A representative for Ripple declined to comment beyond Garlinghouse's and Alderoty's posts.

Because the brief is not yet public, it's not clear on what grounds the SEC will request the sum. A February ruling from a magistrate judge directed Ripple to **provide its financial statements**, certain contracts related to the institutional sales of XRP, and information about proceeds from the sales. Though Ripple had argued the information was confidential, the order found that the SEC had shown the information could be helpful in setting the remedy amount.

The SEC is represented in-house by Jorge Tenreiro, Ladan Stewart, Ben Hanauer, Marc Jones and Peter Moores.

Ripple is represented by Andrew J. Ceresney, Christopher S. Ford, Douglas Zolkind and Mary Jo White of Debevoise & Plimpton LLP, and Michael K. Kellogg, Andrew E. Goldsmith, Bradley E. Oppenheimer, Collin R. White, Eliana M. Pfeffer, Gregory G. Rapawy, Lillian V. Smith and Reid M. Figel of Kellogg

Hansen Todd Figel & Frederick PLLC.

The case is SEC v. Ripple Labs Inc. et al., case number 1:20-cv-10832, in the U.S. District Court for the Southern District of New York.

--Editing by Adam LoBelia.

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Varsity Brands Says It Will Pay To Settle Cheer Antitrust Case

By **Elaine Briseño**

Law360 (March 25, 2024, 7:53 PM EDT) -- A Tennessee federal judge Monday rejected Varsity Brands' request for a one-week pause on an antitrust lawsuit brought by the parents of cheerleader athletes while the two sides hash out details of a settlement, arguing there are no impending deadlines making a stay necessary.

Varsity Brands filed its motion for a stay on Monday, saying it had accepted monetary terms to settle the case, but finalizing the details of the agreement was "challenging" amidst looming deadlines for the trial. It had asked for the proceedings to be stayed until April 1.

Despite not granting the request, U.S. District Judge Sheryl Lipman said in her short order she understands the parties will devote themselves entirely to settlement discussions over the next week.

The trial is scheduled to start in three months, but Varsity Brands said in its Monday motion that working through a mediator, it had accepted the plaintiff's monetary offer to settle the case. The parties are currently trading drafts on "certain non-monetary terms" of the agreement, according to Monday's motion to stay proceedings.

"However, trial in this matter is scheduled to begin in three months, and finalizing the remaining details of a settlement is challenging in an environment where there are multiple pretrial exchange deadlines looming, material motions pending before the court, and additional motions and filings that are being considered by the parties," the motion said.

Financial details of the settlement were not included in the filing.

The pause, Varsity Brands said, should not require the parties to adjust the trial schedule or other deadlines. Attempts to "confer with plaintiffs" about the proposed stay were unsuccessful, as plaintiffs' counsel did not respond to a request asking their position on the matter, the filings said.

The request comes after earlier this month Judge Lipman **chastised the involved parties** for bickering over procedural matters, telling them to spend more time "litigating the merits of the case," not the opposing counsel's strategic errors.

Legal barbs have characterized the proposed class action since then-named plaintiffs Jessica Jones, Christina Lorenzen and Michelle Velotta filed suit in 2020 accusing Varsity, a cheerleading supply behemoth with private equity backing from Bain Capital, of working with the U.S. All Star Federation to artificially inflate the price required to participate in the sport.

In February, **Judge Lipman implored** the plaintiffs not to resurrect previously dismissed state claims in order to preserve "the court's sanity." Judge Lipman allowed the plaintiffs to file an amended complaint in September so they could add additional defendants but noted any attempt to reintroduce those claims would be denied.

But the plaintiffs pressed ahead, claiming they needed to do so in order to preserve their appellate rights. Judge Lipman, in February, was unpersuaded and ordered them to file another complaint minus those already dismissed claims.

The parties did not immediately respond to a request for comment.

The parents are represented by Joseph R. Saveri, Ronnie Seidel Spiegel, David Seidel, Kevin Rayhill and Elissa A. Buchanan of Joseph Saveri Law Firm LLP, Van Turner of Turner Feild PLLC, Richard M. Paul III and Ashlea Schwarz of Paul LLP, Jason S. Hartley of Hartley LLP, and Daniel E. Gustafson, Daniel C. Hedlund and Daniel J. Nordin of Gustafson Gluek PLLC.

Varsity Brands is represented by George Cary, Heather Nyong'o, Steven Kaiser and Jennifer Kennedy Park of Cleary Gottlieb Steen & Hamilton LLP and Adam S. Baldrige and Matthew Sinon Mulqueen of Baker Donelson Bearman Caldwell & Berkowitz PC.

U.S. All Star Federation is represented by Grady Garrison, Nicole Berkowitz Riccio and James Andrew Roach of Baker Donelson.

Jeff Webb is represented by Paul E. Coggins, Brendan P. Gaffney, Kiprian E. Mendrygal, Jennifer McCoy and Katherine Wright of Locke Lord LLP and Edward L. Stanton III of S. Keenan Carter of Butler Snow LLP.

Bain Capital Private Equity LLC is represented by Michael D. Bonanno, Ryan T. Andrews and Christopher Tayback of Quinn Emanuel Urquhart and Sullivan LLP and Matthew S. Mulqueen and Adam S. Baldrige of Baker Donelson.

Charlesbank Capital Partners is represented by Richard G. Parker, Scott A. Edelman, Fiona A. Schaeffer and Katherine K. Fell of Milbank LLP and Shea S. Wellford of Martin Tate Morrow & Marston PC.

The case is Jones et al. v. Bain Capital Private Equity et al., case number 2:20-cv-02892, in the U.S. District Court for the Western District of Tennessee.

--Additional reporting by Bryan Koenig. Editing by Alex Hubbard.

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