

HP Investor Suit Over Sales Practices Survives Dismissal Bid

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March 28, 2024, 9:09 AM PDT

Matthew Bultman

Bloomberg Industry Group

- HP accused of scheme centered on printing supplies business
- Suit followed printer maker's \$6 million SEC settlement

By Matthew Bultman

(Bloomberg Law) --

HP Inc. lost an attempt to escape an investor lawsuit accusing the company of hiding an effort to boost sales of printing supplies.

Maryland Electrical Industry Pension Fund alleges HP knew the printing supplies business was struggling and created a scheme to help reach revenue and earnings targets, artificially inflating its stock price.

Judge Jeffrey White in the US District Court for the Northern District of California allowed a securities fraud claim based on the alleged scheme to go forward against HP. Maryland Electrical also adequately alleged certain statements from HP and its executives were misleading, White said.

"By omitting the scheme, Defendants 'hid the ball' and misrepresented HP's true health," White wrote in a Wednesday opinion.

The lawsuit was filed in November 2020, shortly after HP paid \$6 million to settle related Securities and Exchange Commission charges.

The SEC alleged that, in 2015 and 2016, regional sales managers at HP used various incentives to accelerate printing supply sales that the company projected to materialize in later quarters. HP didn't tell investors about uncertainties related to those sales practices, the agency said.

White did dismiss some claims from Maryland Electrical's lawsuit. Among other issues, the pension fund didn't adequately support its allegation that HP executives knew it was false when they said the company was "on track" to stabilize printing supplies revenue by the end of 2017, the judge said.

The pension fund has a chance to amend its complaint.

Robbins Geller Rudman & Dowd LLP represents Maryland Electrical. Gibson, Dunn & Crutcher LLP represents HP.

The case is *York Cnty. v. HP Inc.*, N.D. Cal., No. 20-cv-07835, 3/27/24.

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March 27, 2024, 11:48 AM PDT

Wirecard Investors End Appeal Against German Ernst & Young Unit

By Martina Barash

Bloomberg Law News 2024-03-28T10:11:16832143486-04:00

Wirecard Investors End Appeal Against German Ernst & Young Unit

By Martina Barash 2024-03-27T14:48:03000-04:00

Ernst & Young Global Ltd.'s accounting affiliate in Germany no longer faces the prospect of revived claims by Wirecard AG investors over an alleged €1.9 billion fraud, after the Third Circuit closed the appeal Wednesday.

The parties agreed to a voluntary dismissal. Neither they nor the appeals court indicated whether a settlement was involved. Attorneys for the affiliate and for the US investors didn't immediately respond to emailed requests for information.

- Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, which provided auditing services to Wirecard before its collapse, won dismissal of the claims in December 2023 on jurisdictional grounds in a ruling by Judge Anita Brody of the US District Court for the Eastern District of Pennsylvania
- Lead plaintiffs Thanh Sam and Lawrence Gallagher, who sued the auditor on behalf of a proposed class, accused it of not catching the financial services provider's creation of fictional escrow accounts. They filed the appeal to the US Court of Appeals for the Third Circuit on March 1

Robbins Geller Rudman & Dowd LLP; Hagens Berman Sobol Shapiro LLP; Seeger Weiss LLP; Saxton & Stump; and Bronstein, Gewirtz & Grossman LLC are lead counsel for the investors. Williams & Connolly LLP represents EY Germany.

The case is *In re Wirecard AG Sec. Litig.*, 3d Cir., No. 24-01393, 3/27/24.

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Documents

 Settlement

See also: Visa-Mastercard Deal Rattles Consumers' Credit Card Rewards Math

'Very Small and Very Temporary'

The proposed settlement is weak for merchants, given that it's expected to save them \$30 billion over five years, while US businesses paid more than \$170 billion in swipe fees last year alone, said Doug Kantor, member of the executive committee of the Merchants Payments Coalition. The coalition is a Washington, D.C.,-based group of retailers advocating for competition in the payments market.

Visa and Mastercard will continue to set prices for swipe fees charged to merchants each time a customer makes a purchase, and there's nothing standing in the way of the companies raising them again after five years, Kantor said.

"It's very small and very temporary relief and then back to business as usual," Kantor said. "The plaintiffs want a market that actually works and puts normal competitive pressure on fees."

Kantor's sentiments were echoed by several merchants, including Tom Charley, a co-owner of three Shop 'n Save stores in western Pennsylvania.

"What happens after five years? They have 100 percent control of the market, and they can do whatever they want," Charley said about Visa and Mastercard. "Their rates have gone up significantly over the last five years, and that's going to continue. And with inflation, it's even worse."

Steve Shadowen of Hilliard Shadowen LLP, one of the lead attorneys for the class of merchant plaintiffs covered by the proposed settlement, disagreed. He said five years was plenty for market forces to take over.

If the settlement is approved, it would cover all US merchants who accepted Visa or Mastercard debit or credit cards in the US at any time during the period between Dec. 18, 2020, and when the court enters the final judgment. Retailers pursuing a trial for monetary damages against the card companies would also be covered by the settlement, and wouldn't be able to opt out of the deal.

"We will have a much more competitive marketplace at the end of five years, and it will not be possible for these networks and banks to go backwards," Shadowen said. "And if they were to try to, then they can be sued again."

Proposed Settlement

The proposed settlement for injunctive relief comes a year after a federal appeals court upheld a landmark antitrust deal in which Visa and Mastercard agreed to pay \$5.6 billion to millions of merchants but didn't address concerns about business practices.

This week's proposed settlement doesn't change any of the problems with Visa and Mastercard's business practices, including the so-called "honor all cards" rules, said Stephanie Martz, chief administrative officer and general counsel for the National Retail Federation. Those rules mean that if a merchant accepts one of the brands' cards, it must accept all of the brands' cards. The NRF represents retailers including Walmart, Target, Macy's and Levi Strauss & Co. as well as small businesses.

Ideally, merchants would have more autonomy with respect to which cards they choose to honor, something the card companies would never agree to, Martz said.

"It's too lucrative," she said. "If they have to compete, they are going to start losing."

Merchants also fretted about how much incentive they would have to steer customers to preferred cards with less costly fees—especially if bigger retailers continued to accept all cards, including those charging higher interchange fees like Chase Sapphire Reserve or Visa Infinite. The proposed settlement puts the onus on merchants to encourage customers to use other payment methods.

"If Walmart isn't going to do it, do you think I'm going to do it?" said Charley, who said his stores' main competitors are Walmart and Target. "I'm competing with big, big guys out there."

Jones, of the National Grocers Association, agreed that grocers want to accommodate customers regardless of what card they have.

"Grocery is a volume business so our goal is largely to get customers in and out of the grocery store as quickly as possible," he said.

The case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, E.D.N.Y., No. 1:05-md-01720, 3/26/24 .

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C3.ai Leaders Sued By Investors Over Baker Hughes Claims (1)

By Matthew Bultman

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [3:24-cv-01869](#)

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C3.ai Leaders Sued By Investors Over Baker Hughes Claims (1)

By Matthew Bultman 2024-03-27T12:19:09000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [3:24-cv-01869](#)

Current and former leaders of C3.ai Inc. face a new shareholder lawsuit for allegedly misleading investors about the artificial intelligence company's relationship with oil field contractor Baker Hughes Co.

The derivative lawsuit, filed Tuesday in the US District for the Northern District of California, alleges investors weren't told that C3's partnership with Baker Hughes "was falling apart." The suit also claims C3's growth projections were unrealistic.

Various insiders made over \$751 million combined from improper stock sales while knowing C3's share price was inflated following its 2020 initial public offering, the suit said. The lawsuit seeks damages for the company and corporate governance changes, including a court-ordered shareholder vote on a proposal to strengthen the board's supervision of operations.

"Due to the Individual Defendants' breaches of fiduciary duties, the Company has and will be forced to expend millions of dollars," the suit said.

C3 was the subject of a February 2022 report by short-seller Spruce Point Capital Management, which questioned the company's joint venture with Baker Hughes. The joint venture accounted for about 30% of C3's revenue, the suit said.

Spruce Capital's report also suggested C3 misrepresented the significance of partnerships with companies like Microsoft Corp. and Alphabet Inc.'s Google, according to the suit. C3 separately has done work for the US Department of Defense, Raytheon Co., and the New York Power Authority, among others.

C3, as a company, and certain executives were sued in a putative securities class action in federal court in California. Other derivative lawsuits have also been consolidated in Northern California.

Derron Blakely, general counsel for C3, said the most recent lawsuit is "based on the same baseless allegations about our relationship with Baker Hughes" made in the potential class action. A judge dismissed most of the claims against C3 last month, but gave the plaintiffs a chance to amend the complaint.

"We are confident that this case will be dismissed quickly, and will serve to confirm that the Company, and its directors and officers, has operated at all times in the best interests of its shareholders," Blakely said.

The Brown Law Firm PC and Bronstein Gewirtz & Grossman LLC represent the shareholder.

The case is Lanfair v. Siebel , N.D. Cal., No. 24-cv-01869, complaint filed 3/26/24 .

(Updates with comment from C3 starting in eighth paragraph.)

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Novel Corporate Rulings Fuel Charged Debate on Delaware's Role

By Mike Leonard

Deep Dive

- Ruling on shareholder pacts offered few 'grand pronouncements'
- Delaware judge calls 'sword of Damocles' claims exaggerated

Bloomberg Law News 2024-03-28T10:04:21170690221-04:00

Novel Corporate Rulings Fuel Charged Debate on Delaware's Role

By Mike Leonard 2024-03-28T05:00:59000-04:00

- Ruling on shareholder pacts offered few 'grand pronouncements'
- Delaware judge calls 'sword of Damocles' claims exaggerated

A landmark court ruling that upended a popular corporate governance strategy without offering companies a clear path forward is amplifying concerns—spurred by Elon Musk—about Delaware's place as America's corporate capital.

It's rare for judges on the state's elite business court to strike down the status quo without signing off on a replacement. But "the seemingly irresistible force of market practice" must yield to "the traditionally immovable object of statutory law," Vice Chancellor J. Travis Laster said in the ruling last month.

Laster, writing for Delaware's Chancery Court, stopped short of drawing the types of bright lines the state's corporations have come to expect. The agreement between Moelis & Co. and its billionaire founder clearly went too far, which is all a judge needed to decide, he said.

Read More: Moelis Ruling Sharpens Focus on Private Equity Veto Agreements

The Feb. 23 ruling is one of several recent decisions—including one in January striking down Musk's \$55 billion pay package at Tesla Inc.—that have arguably offered more questions than answers about the court's approach to emerging issues with broad ramifications.

"They're basically saying, 'We don't know what you can do, but you can't do that,'" said Carliss Chatman, a Southern Methodist University law professor. "They're just deciding the issues that are in front of them, without making grand pronouncements, and we're left to piece together the patterns."

The decisions have gotten an anxious greeting from court watchers "spoiled" by judges who go out of their way to stay ahead of major corporate trends, according to Chatman. Delaware's forceful oversight liability doctrine, for instance, came from a decision on settlement fees, she said.

If the state's judges are going to keep issuing rulings that resolve cases as narrowly as possible, "then the question becomes: 'Why Delaware?'" Chatman said.

Three new lawsuits challenging shareholder pacts followed the Moelis decision. They involve L3Harris Technologies Inc., which reached a cooperation agreement with billionaire activist David Shaw; Crown Castle Inc., which has a similar agreement with Elliott Investment Management LP; and Apollo Global Management Inc., which struck a deal pledging support for board nominees proposed by its founders. That's in addition to a wave of similar litigation already pending.

Uncertain Uncertainty

Laster, has sought to downplay the doomsaying. Many of the critics "want to hold the sword of Damocles of asserted uncertainty over the heads of Delaware decision makers, and ideally Delaware judges, so that they can potentially be motivated to do whatever the fearmongers want," he said at a March 13 hearing in the L3Harris case.

A range of disputes unrelated to shareholder agreements—including the Musk compensation case—have also injected uncertainty. They include litigation involving Match Group Inc. that could overhaul court review of insider deal conflicts and a shareholder challenge to the \$69 billion merger between Microsoft Corp. and Activision Blizzard Inc.

The Activision deal decision—by the Chancery Court's chief judge, Chancellor Kathaleen St. J. McCormick—quoted Laster's language about unstoppable forces and immovable objects. The sentiment fits with public remarks by several Delaware judges who spoke at a corporate law conference in early March, according to Jacob Kirkham, a partner at Kobre & Kim LLP.

"Look, Delaware is going to follow the law," Kirkham said. "It doesn't matter how much political, social, media, or other pressure is coming in."

Laster also ruled in a case involving TripAdvisor Inc. that the travel company can move to Nevada, though its leaders may face damages claims. The decision was widely seen as a road map for Musk, who has been threatening to relocate the world's most valuable automaker. Laster said in a subsequent ruling that the legal framework "does not invite a trial court to consider the level of media attention" a case has received.

"A lot of it is media hype," according to Renee Zaytsev, a partner at Boies Schiller Flexner LLP. Concerns about the demise of Delaware's primacy are part of a lengthy hand-wringing tradition, and the reports have always proven premature, she said. Though it's unusual for the state's judges to hand down so much confusion at once, that reflects a coincidence rather than a "concerted effort" to change the way corporate law is practiced, according to Zaytsev.

"There's no doubt the Delaware Supreme Court is aware of the criticisms," she said. "I think the talk is going to die down pretty soon."

'Superstar' Ire

Much of the controversy has been driven by Musk, who has publicly assailed the compensation ruling.

The decision—stressing his outsize influence over the company—put "superstar CEOs" on notice. But McCormick didn't lay down a concrete legal test for identifying who fits that description.

"People are constantly tempted to overestimate how settled corporate law is," according to Gabriel Rauterberg, a University of Michigan law professor. "There can't always be a crisp rule" for novel situations raising "genuinely difficult" questions, Rauterberg said. "Sometimes you just have to have vague standards and trust the people applying them."

SMU's Chatman struck a similar note. "Maybe the reason the judges are going case by case, or what feels like case by case, is they're saying, 'You're not a special case,'" she said. "Maybe we're panicking more than they are."

Members of Delaware's judiciary try to offer "as much guidance as they can," but trial-level judges are limited to ruling on the controversies that land in front of them, according to Kirkham. The state supreme court, however, can wait for all the related issues to percolate before handing down a broader ruling that delivers more certainty, he said.

Open Questions

At least nine other parallel cases have hit the court's docket, including those involving Petco Health & Wellness Co., N-able Inc., and HireRight Holdings Corp.

Most of the issues raised in those disputes were left open by the Moelis ruling. Perhaps the most immediate question follows from sections of the decision suggesting many of the pact's provisions would likely be less problematic in a corporate charter, rather than a stockholder side deal. The case didn't call for Laster to make a firm decision on that approach.

But it's the focus of a letter he sent recently in the N-able case. Laster asked if the company could legally cross-reference a shareholder agreement in its charter, then effectively amend the charter just by changing the shareholder agreement.

That's a key issue, according to Tulane University law professor Ann Lipton. "He's asking what it means to be in the charter," she said. "I can't think of a single reason why you couldn't just say, 'We wrote the charter on multiple pieces of paper.' The question in *N-able* is: Did they?"

The Crown Castle and L3Harris disputes have surfaced a different wrinkle: whether it's enough for boards to tinker with shareholder agreements by adding a "fiduciary out" that gives them leeway to waive their provisions in the company's best interest.

"I'm not in a position today to make a fully informed determination," Laster said at the L3Harris hearing. But he agreed to fast-track the case, saying it's urgent "to try to get some type of clarity."

The judge also expressed concerns about letting companies facing proxy fights exploit litigation-related delays long enough to enforce illegal contract terms at the next shareholder meeting. That could amount to "a free pass," he said.

Other businesses will likely take the hint about amending their charters, a move that would force judges to squarely decide how much authority a corporate board can validly surrender by any means.

The issue is "foundational," Chatman said. "Are directors actually in control? That's the whole point of a corporation."

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March 28, 2024, 6:02AM PDT
Advanced Diagnostic Stock Plan Suit Settles for \$19 Million
By [Jacklyn Wille](#)
Documents

-  [Docket](#)
-  [Motion](#)

- Agreement covers about 185 employee stock plan participants
- Lawsuit alleged that workers missed out on company value

Bloomberg Law News 2024-03-28T11:55:30059346685-04:00
Advanced Diagnostic Stock Plan Suit Settles for \$19 Million

By [Jacklyn Wille](#) 2024-03-28T09:02:15000-04:00
Agreement covers about 185 employee stock plan participants
Lawsuit alleged that workers missed out on company value

A participant in Advanced Diagnostic Group’s employee stock plan announced a \$19 million class settlement in a lawsuit saying company executives, GreatBanc Trust Co., and partners at a private finance firm drained the plan’s value for personal benefit.

The deal, announced Wednesday in the US District Court for the Middle District of Florida, is expected to provide gross payments of more than \$100,000 to 185 people who received distributions from the Advanced Diagnostic stock plan. The settlement amount represents between 22% and 28% of the plan participants’ maximum estimated damages.

The lawsuit challenged the 2015 formation of the Advanced Diagnostic employee stock ownership plan and the plan’s eventual termination after the company’s acquisition by Akumin Inc. in 2019.

Former Advanced Diagnostic employee Johana Colon said the company’s chief executive officer and Palm Beach Capital—a private finance firm that previously held a stake in the company—used the stock plan to “structure a lopsided deal that extracted the current value of the company for themselves” while also allowing them to claim the company’s future value through interest payments and stock warrants.

Colon said certain defendants transferred 100% of the company’s value to the stock plan and then worked against the plan’s interests by diverting the company’s business opportunities to themselves through separate entities.

The case is assigned to Judge Thomas P. Barber.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X6T6FBKK000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...> 1/2

Colon is represented by Engstrom Lee LLC and Wenzel Fenton Cabassa PA, which stand to receive more than \$6.3 million in attorneys' fees if the deal is approved.

The defendants are variously represented by Bryan Cave Leighton Paisner LLP, Kilpatrick Townsend & Stockton LLP, Hodkin Stage Ward PLLC, and Jackson Lewis PC.

The case is Colon v. Johnson , M.D. Fla., No. 8:22-cv-00888, settlement motion 3/27/24 .

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Documents

-  Docket
-  Opinion
-  Motion
-  2023 Opinion

- Reconsideration request was based on non-binding case law
- Workers sought partial revival of lawsuit after dismissal

Denso International Workers Denied Redo in 401(k) Fee Challenge

Workers sought partial revival of lawsuit after dismissal

Denso International America Inc. employees challenging their retirement plan fees failed to convince a federal judge to rethink part of his recent decision dismissing their case against the automotive component manufacturer.

The employees' bid for reconsideration is based on arguments already considered by the court and "non-controlling case law from another circuit," Judge Mark A. Goldsmith of the US District Court for the Eastern District of Michigan said in a Wednesday opinion denying their request.

The employees had asked Goldsmith to greenlight their challenge to the Denso plan's annual recordkeeping fees, which they say were excessive at about \$71 per person. Goldsmith rejected the claims last year because the workers hadn't shown that the fees were excessive relative to the services received, as required by the Sixth Circuit's 2022 decision in *Smith v. CommonSpirit Health*.

The workers said this analysis conflicted with more recent case law that Goldsmith didn't discuss, including the Seventh Circuit's 2023 decision in *Hughes v. Northwestern University* , which created a more plaintiff-friendly pleading standard for fiduciary breach claims under the Employee Retirement Income Security Act.

Goldsmith declined to rethink his prior opinion, saying that a court's "failure to discuss an opinion does not mean it was not considered." He added that the Seventh Circuit's opinion in *Hughes* isn't binding on his Michigan courtroom, which is under the authority of the Sixth Circuit.

The proposed class action says Denso's plan, which covered nearly 14,000 people in 2020, lost more than \$4 million from a handful of overly expensive investment options that should have been swapped for cheaper alternatives. The plan also offered an underperforming stable value fund and paid annual recordkeeping fees of about \$71 per person, when a reasonable annual fee would have been closer to \$32 per person, according to the lawsuit.

Goldsmith dismissed all claims in 2023. The workers' motion sought reconsideration only with respect to their recordkeeping fee claim.

Walcheske & Luzi LLC represents the workers. Jackson Lewis PC represents Denso.

The case is *England v. Denso Int'l Am.*, E.D. Mich., No. 2:22-cv-11129, 3/27/24.

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March 28, 2024, 6:56 AM PDT
Whataburger Sued by Former Worker Over 401(k) Plan Investments
By [Jacklyn Wille](#)
Documents

-  [Docket](#)
-  [Complaint](#)
-  [Company Info: Whataburger Restaurants LLC](#)

- COURT:** W.D. Tex.
- TRACK DOCKET:** [No. 5:24-cv-00310](#)

Bloomberg Law News 2024-03-28T11:57:32451073474-04:00
Whataburger Sued by Former Worker Over 401(k) Plan Investments

By Jacklyn Wille 2024-03-28T09:56:34000-04:00
COURT: W.D. Tex.
TRACK DOCKET: No. 5:24-cv-00310

Whataburger Restaurants LLC was hit with a proposed class action saying the fast food chain mismanages its employees' \$215 million 401(k) plan by failing to weed out poorly performing actively managed funds.

The lawsuit by former Whataburger employee Manuel Esquivel centers on two actively managed funds offered by the company's retirement plan: the MainStay Winslow Large Cap Growth Fund Class R1 and the Janus Henderson Triton Fund Class T. Esquivel says these funds consistently underperformed their benchmarks and lost other investors who recognized the "red flags" associated with the investments and withdrew their assets.

Esquivel's lawsuit, filed Wednesday in the US District Court for the Western District of Texas, seeks to represent a class of thousands of participants in the Whataburger retirement plan since 2018. The plan covered nearly 10,000 people as of 2022, according to the complaint.

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

Esquivel is represented by Ajamie LLP, Miller Shah LLP, and Don Bivens PLLC.

The case is Esquivel v. Whataburger Restaurants LLC , W.D. Tex., No. 5:24-cv-00310, complaint 3/27/24 .

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Documents

-  Docket
-  Plaintiffs' Brief
-  Home Depot's Brief
-  District Court Decision

- Burden for proving losses following fiduciary breach at issue
- Eleventh Circuit has opportunity to weigh in on circuit split

Home Depot 401(k) Investors Get Chilly Reception in 11th Cir.

Eleventh Circuit has opportunity to weigh in on circuit split

A lawyer for Home Depot Inc. employees challenging the company's 401(k) plan faced tough questions Thursday from a panel of Eleventh Circuit judges who appeared unwilling to shift responsibility for a critical element of proof to the retailer.

The court appeared skeptical of the idea that the burden of showing losses stemming from retirement plan mismanagement should fall to the fiduciaries running the plan instead of the participants bringing suit. Judge Ed Carnes repeatedly pressed the employees' attorney on that point, saying it "screws up the whole system" if that duty flips from one party to the other during the course of litigation.

"What does the word burden mean?" Carnes asked. "Burden means if you don't carry it, you lose."

Judge Britt C. Grant suggested this issue was likely to be resolved in favor of Home Depot, telling attorney David Tracey of Sanford Heisler Sharp LLP that he was facing “tough sledding” convincing the court otherwise.

Circuit Split

The case gives the US Court of Appeals for the Eleventh Circuit the opportunity to weigh in on a circuit split under the Employee Retirement Income Security Act. The First, Fourth, Fifth and Eighth circuits have held that once an ERISA plaintiff has proven a breach of fiduciary duty and a related loss to the plan, the burden shifts to the fiduciary to prove that the loss wasn't caused by the breach. The Labor Department supports this standard.

The Tenth Circuit has rejected this burden-shifting rule, and the briefing shows disagreement about how decisions from other circuits—including the Eleventh Circuit—should be characterized.

The underlying lawsuit accuses Home Depot of mismanaging its 401(k) plan by offering poorly performing investment options and allowing online investment advisers—known as robo-advisers—to charge excessive fees.

A federal judge in Georgia awarded summary judgment to the retailer in 2022. He said that while it was “inconclusive” whether Home Depot fulfilled its fiduciary duties in monitoring the plan's fees and investment options, it was clear the plan didn't suffer losses stemming from any potential mismanagement.

The workers appealed, arguing that the burden should have been on Home Depot to prove that its alleged missteps caused no loss.

What's Prudent?

The judges also had tough questions for Roman Martinez, the Latham & Watkins LLP attorney who argued on behalf of the retailer. Grant appeared skeptical of the idea that Home Depot could demonstrate its prudent management of the retirement plan by showing that other large plans made similar choices, saying this likely isn't enough to satisfy ERISA.

Carnes appeared interested in where to draw the line between investment underperformance that requires fiduciary action and underperformance that doesn't rise to the level of fiduciary breach. He also questioned why retirement plans continue offering actively managed funds when research shows passively managed funds tend to do better.

Grant focused some of her questioning on the parties' expert reports, which painted different pictures of what a prudent retirement plan fiduciary should do in Home Depot's position. Grant asked Tracey whether conflicting expert reports meant a case should necessarily go to trial and questioned how difficult it was for parties to find experts reaching their preferred conclusions.

The panel also included Judge Elizabeth L. Branch.

King & Spalding LLP also represents Home Depot. Stillman Welch LLC also represents the workers.

The case is *Pizarro v. Home Depot, Inc.*, 11th Cir., No. 22-13643, argued 3/28/24.

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Class Action

March 28, 2024, 2:26 AM PDT

Mercedes Is Liable for Emissions Cheating Device, Court Rules

By Karin Matussek

- Drivers can seek damages for diesel defeat device, judges rule
- Claimants can now collect payouts individually in German court

Bloomberg Law News 2024-03-28T11:54:43114916137-04:00

Mercedes Is Liable for Emissions Cheating Device, Court Rules

By Karin Matussek2024-03-28T05:26:48815-04:00

Drivers can seek damages for diesel defeat device, judges rule

Claimants can now collect payouts individually in German court

Mercedes-Benz Group AG is liable to owners of some of its diesel cars that were equipped with a diesel defeat emissions device, a German court ruled in a consumer class action case.

The ruling by the Stuttgart Appeals Court published Thursday covers Mercedes GLC and GLK models in a [suit](#) brought by consumer group VZBV three years ago joined by 2,500 claimants. The consumer group alleges the car manufacturer manipulated diesel engines to cheat on emission rules.

The drivers don't get payouts directly but must now sue individually to collect money from the manufacturer. Mercedes said it will appeal the judgment. The company and its employees acted properly at the time, it said.

The European Union has issued emission standards to which cars must comply. The older standard, called Euro 5, and was introduced in 2009. The newer Euro 6 standard applies to cars made since in 2014.

The judges granted the suit for models that carried the Euro 6 emission standards but dismissed the case covering the vehicles under the Euro 5 standard.

The suit copies VZBV's case against Volkswagen AGover the diesel emission scandal which ended with an €830 million euro (\$895 million) settlement in 2020.

The case is: OLG Stuttgart: 24 MK 1/21.

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Litigation

March 28, 2024, 8:46 AM PDT

J&J to Pay \$75 Million to Settle \$6 Billion Baby Powder Suit (2)

By Jef Feeley

- Settlement resolves cancer lawsuit filed by Mississippi
- Pact comes as company seeks to manage growing litigation

Bloomberg Law News 2024-03-28T12:03:15146289612-04:00
J&J to Pay \$75 Million to Settle \$6 Billion Baby Powder Suit (2)

By Jef Feeley2024-03-28T11:46:32137-04:00
Settlement resolves cancer lawsuit filed by Mississippi
Pact comes as company seeks to manage growing litigation

Johnson & Johnson will pay \$75 million to settle a consumer protection lawsuit filed by Mississippi over the company’s talc-based baby powder, according to people familiar with the matter, resolving litigation in which the state had sought as much as \$6 billion.

The pact comes as lawyers for the state and J&J were gearing up for a non-jury trial next month in Jackson, Mississippi, said the people, who asked not to be named because the accord isn’t yet public. Mississippi was one of only two states to file suit over J&J’s marketing of its baby powder.

The state sued over J&J’s failure to warn consumers about the powder’s alleged cancer risks over nearly a 50-year period. The settlement comes as the world’s largest maker of health care products seeks to [manage](#) a growing number of suits by consumers accusing it of concealing the product’s risks, after two unsuccessful attempts to use the bankruptcy courts to impose a settlement on former users.

The decade-long litigation, along with the prospect of future cancer suits, has put a damper on J&J’s stock price, analysts such as JPMorgan Chase & Co’s Chris Schott have noted in the past. The shares were up 0.3% in New York trading.

“Consistent with the plan we outlined last year, the company continues to pursue several paths to achieve a comprehensive and final resolution of the talc litigation,” Eric Haas, J&J’s worldwide vice president of litigation, said in an emailed statement. “We will continue to address the claims of those who do not want to participate in our contemplated consensual bankruptcy resolution through litigation or settlement.”

Debbie Hancock, a spokeswoman for Mississippi Attorney General **Lynn Fitch**, didn’t immediately return calls Thursday seeking comment on the settlement.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X8DCKME0000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93...> 1/3

Fines Sought

As part of its case, Mississippi asked a judge to order J&J to put a warning on baby powder sold in the state and force the company to pay as much as \$10,000 per violation of the state's consumer-protection laws tied to years of sales. Mississippi sought at least \$6 billion in fines, the people said.

The pact follows J&J's agreement in January to pay [\\$700 million](#) to resolve a probe by 42 US states into claims J&J wrongfully marketed its talc-based baby powder by not warning about possible cancer risks. Mississippi's settlement wasn't covered by that deal, the people said. Only Mississippi and New Mexico have actually filed suits targeting the company's marketing of its baby powder.

J&J argues in court filings its talc-based products don't cause cancer and it has marketed its baby powder appropriately for more than a century. It also notes federal regulators haven't demanded it to post a cancer warning on the bottle. The company no longer makes or sells its talc-based baby powder, replacing it worldwide with a cornstarch version

The New Brunswick, New Jersey-based company offered to [settle](#) all current and future baby powder claims for \$9 billion in the bankruptcy filing of one of its units. Lawyers for former talc users have rejected that offer. J&J has vowed to have a unit file a third bankruptcy case in hopes of facilitating further settlement talks.

At one point, J&J sought to use Mississippi's case to get appellate courts to create a broad shield for the company from suits targeting its baby powder. But the Mississippi Supreme Court refused to find talc plaintiffs were precluded from suing the company since the US Food and Drug Administration refused to require it to include a cancer warning on the product after anti-cancer advocates requested them. The US Supreme Court later [refused](#) to hear J&J's appeal of the state appellate court's finding.

J&J said in securities filings last month it now faces nearly 60,000 suits from ex-talc users who blame their cancers on the powder. The company has settled a recent spate of trial-ready cases, but still faces some state-court juries later this year. A large number of talc cases are consolidated before US District Judge Michael Shipp in Trenton, New Jersey for pre-trial information exchanges.

On Wednesday, Shipp ordered a fresh review of the evidence plaintiffs are relying on to make their cases that J&J's talc-based baby powder causes ovarian cancer. Shipp took over the case last year after ex-Chief District Judge Freda Wolfson retired. Wolfson had signed off on the ovarian-cancer evidence.

The case is Mississippi v. Johnson & Johnson, Civil Action No. 25CH1:14-cv-001207, Chancery Court for the First Judicial District of Hinds County, Mississippi (Jackson).

(Updates with details on fines sought.)

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J&J can contest evidence linking its talc to cancer, US judge rules

 [reuters.com/legal/jj-gets-new-opportunity-contest-evidence-linking-talc-cancer-2024-03-27](https://www.reuters.com/legal/jj-gets-new-opportunity-contest-evidence-linking-talc-cancer-2024-03-27)

Dietrich Knauth

A bottle of Johnson and Johnson Baby Powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Mike Segar/Illustration/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, March 27 (Reuters) - Johnson & Johnson (JNJ.N) , opens new tab will get a new chance to contest the scientific evidence linking talc to ovarian cancer, a federal judge ruled on Wednesday, potentially disrupting more than 53,000 lawsuits the company is now facing over its talc products.

In a brief written order, U.S. District Judge Michael Shipp in Trenton, New Jersey, who is overseeing the lawsuits that have been consolidated in his court, said recent changes in the law and new scientific evidence require a fresh review of the evidence that linked J&J products to ovarian cancer.

Shipp took over the case in February 2023, after the retirement of former Chief District Judge Freda Wolfson, who had overseen the litigation since 2016.

J&J Worldwide Vice President of Litigation Erik Haas said the company was very pleased by the ruling, and that it intended to "shine a light on some of the made-for-court junk science" used in recent trials.

"The passage of time has only solidified the decades of medicine and science that support Johnson & Johnson's position in these cases," Haas said in a statement.

J&J has repeatedly denied claims that its baby powder and other talc products cause cancer or contain asbestos, a known cause of mesothelioma.

Leigh O'Dell and Michelle Parfitt, lead lawyers for plaintiffs in the federal litigation, said the scientific evidence that J&J products caused cancer is "stronger than ever."

"The truth of J&J's deceptive conduct to hide the presence of carcinogens in talcum powder and mislead the medical and scientific communities has only become clearer over time," O'Dell and Parfitt said in a statement.

The talc lawsuits had been on hold from 2021 to 2023, while J&J pursued failed efforts to resolve the litigation through the bankruptcy of a subsidiary company, LTL Management.

Trials have since resumed, and the latest case ended in a hung jury on March 5.

J&J will have until July 23 to make renewed arguments about the scientific evidence in the case, according to Shipp's order.

Trials in the talc cases have had a mixed record, with major plaintiff wins including a \$2.1 billion judgment in 2021 awarded to 22 women with ovarian cancer. A New Jersey appeals court in October threw out a \$223.7 million verdict against the company, finding the testimony of the plaintiffs' expert witnesses unsound.

Product liability lawsuits, like the ones J&J is facing over its talc products, rely on experts to establish that the product is capable of causing the alleged harm. Federal judges decide what expert testimony is allowed at trial, based on whether it meets scientific standards first laid out by the U.S. Supreme Court in its 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals*.

So-called "Daubert" decisions on expert testimony can sometimes be major turning points in litigation. For example, drugmakers GSK, Pfizer, Sanofi and Boehringer Ingelheim succeeded in ending 50,000 lawsuits alleging the heartburn drug Zantac caused cancer, after a federal judge in Florida ruled in 2022 that the claims were not backed by sound science.

When Wolfson ruled on the scientific evidence in the J&J cases in 2020, she allowed plaintiffs to present expert testimony that J&J's talc products can cause cancer based on epidemiological studies, as well as testimony that the link could be caused by talc's contamination with asbestos and heavy metals. J&J had sought to bar all of the plaintiffs' experts from testifying, which would have effectively wiped out all the cases in the consolidated litigation.

Shipp's Wednesday order pointed to a December change to the federal rule of evidence governing expert testimony, which emphasized courts' role in vetting experts' conclusions and methodology before allowing them to present evidence to a jury.

J&J said that the rule change would help keep out flawed evidence, while attorneys for talc plaintiffs said that their evidence was strong enough to meet the revised standard.

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Reporting by Dietrich Knauth; Editing by Bill Berkrot, Alexia Garamfalvi and Lisa Shumaker

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NEWS

Federal Judge Orders 'Full Refiling' of Daubert Motions in J&J Talc Litigation

U.S. District Judge Michael Shipp, overseeing more than 50,000 talc lawsuits in multidistrict litigation, cited recent changes to Federal Rule of Evidence 702 and new science since the first Daubert hearing in 2020.

March 27, 2024 at 06:15 PM

Discovery



Amanda Bronstad
staff reporter



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

What You Need to Know

- Johnson & Johnson said the decision would 'shine a light on some of the made-for-court junk science' in talc trials
- Plaintiffs' lawyers insisted that the science linking talc to ovarian cancer 'has only become clearer over time'
- In 2020, U.S. District Judge Freda Wolfson, now retired, allowed five of plaintiffs' general causation experts to testify, but the COVID-19 pandemic and Johnson & Johnson's two talc bankruptcies delayed trials for three years

A federal judge in New Jersey has ordered a new round of briefing on expert evidence in the Johnson & Johnson talcum powder multidistrict litigation, citing amendments to the federal rule and the passage of time.

U.S. District Judge Michael Shipp took over the talc docket last year after the retirement of U.S. District Judge Freda Wolfson. Wolfson, in 2020, gave plaintiffs' lawyers a big victory by allowing five of their general causation experts to testify in upcoming bellwether trials alleging Johnson & Johnson's baby powder caused ovarian cancer.

But more than three years later, Johnson & Johnson's lawyers argued that Shipp should hold a new *Daubert* hearing, named for the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.

"Upon review of the parties' contentions, the court is persuaded that the recent changes to Federal Rule of Evidence 702, the emergence of new relevant science, and the language of Chief Judge Wolfson's previous *Daubert* opinion make a full refiling of *Daubert* motions appropriate," Shipp, who is overseeing more than 50,000 talc lawsuits, ruled in a text order on Wednesday. He scheduled *Daubert* motions for July 30, with oppositions due Aug. 22.

Johnson & Johnson's Worldwide Vice President of Litigation Erik Haas immediately praised the decision in a statement.

"We are very pleased that the court recognizes the need to reexamine these critical issues," he wrote. "The passage of time has only solidified the decades of medicine and science that support Johnson & Johnson's position in these cases. It is also critical to shine a light on some of the made-for-court junk science that the company has unfortunately uncovered in recent trials. We look forward to this opportunity to examine this crucial evidence."

Co-lead plaintiffs' attorneys Leigh O'Dell, of Beasley Allen in Montgomery, Alabama, and Michelle Parfitt, of Washington, D.C.,'s Ashcraft & Gerel, downplayed the order's impact in an emailed statement. They noted that "limited *Daubert* motions" for experts in specific cases were already planned for upcoming bellwether trials. They also said the changes to the 702 rule would not impact Wolfson's opinion.

"The science supporting the dangers of asbestos-laden Johnson's baby powder is stronger than ever," they wrote. "The truth of J&J's deceptive conduct to hide the presence of carcinogens in talcum powder and mislead the medical and scientific communities has only become clearer over time."

The litigation is one of many cases impacted by 702's [Dec. 1 amendment](#), which the defense bar heralded for ensuring that parties putting forth the expert evidence bear the burden of showing by a preponderance of the evidence that it's reliable and applicable. Plaintiffs' lawyers have considered the rule unnecessary.

'Time Has Marched On'

No bellwether trial has occurred in the talc multidistrict litigation, even though juries have rendered numerous verdicts in state courts, primarily in Missouri and California. The COVID-19 pandemic, followed by two Chapter 11 cases filed by Johnson & Johnson's subsidiary, LTL Management, put trials on hold for over three years.

Shipp first discussed the 702 amendment at a Sept. 6 initial status conference in the talc multidistrict litigation after lawyers on both sides submitted letters disagreeing about its impact.

Johnson & Johnson attorney Susan Sharko, a partner in Florham Park, New Jersey, at Faegre Drinker Biddle & Reath, insisted in an August letter to Shipp that the science had changed. She also cited the 702 amendment.

Plaintiffs' lawyers disagreed.

"After delaying this MDL litigation for nearly two years via multiple failed bankruptcy efforts, defendants seek to further delay bellwether trials by redoing that which has already been done in this case," O'Dell and Parfitt wrote in their own August letter to the court. "Judge Wolfson painstakingly analyzed the experts' processes and techniques, ultimately ruling that plaintiffs' experts' methodologies were sound."

Shipp ordered both sides to disclose their experts and reports, which could be amended. But, in November, Johnson & Johnson attorney Sharko flagged 17 plaintiffs’ experts, 11 of whom she later moved to strike, including three new epidemiologists and a marketing expert. U.S. Magistrate Judge Rukhsanah Singh denied that motion on Feb. 9.

In response, O'Dell and Parfitt noted that since 2021, there have been new depositions, documents produced, and scientific literature, many of which have been part of state court trials involving plaintiffs with ovarian cancer and mesothelioma. They accused Johnson & Johnson of once again delaying the litigation, as it had with the LTL bankruptcies.

“Time has marched on, and plaintiffs should have every opportunity to marshal our current understanding of the facts and science in presenting plaintiffs’ case,” O’Dell and Parfitt wrote in a November letter to the court. “This updated scientific literature further affirms and strengthens the opinions of the experts that genital exposure of talcum powder can cause ovarian cancer.”

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Ocean Spray Hit With Class-Action Complaint Over Craisins' Sugar Content

This suit was surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be first to know about new suits in your region, practice area or client sector.

March 27, 2024 at 05:56 PM

Consumer Products



Marianna Wharry



What You Need to Know

- Ocean Spray is facing a class-action complaint for misleading advertising of its Craisin and Greek yogurt cranberry bites.
- The plaintiffs claim the products are advertised as a healthy snack.
- The plaintiffs claim they would have never purchased the snacks if they had known about the added sugar.

In a not-so-sweet filing this week, two California residents [filed](#) a class-action complaint against Ocean Spray alleging false advertising claims related to misleading sugar content for its Craisins, the company's trademarked dried cranberries, and its Greek yogurt-covered cranberry “bites.”

This [suit was surfaced by Law.com Radar](#), ALM's source for immediate alerting on just-filed cases in state and federal courts. Law.com Radar now offers state court coverage nationwide. [Sign up today](#) and be first to know about new suits in your region, practice area or client sector.

Attorneys with Fitzgerald Monroe Flynn in San Diego filed the suit in the U.S. District Court for the Southern District of California, which is asking the court to order Ocean Spray conduct a corrective advertising campaign for its Craisin and cranberry bites due to misleading information about the added sugar in the products.

The plaintiffs, Ann Elders and Rebeca Crampton, claim they would not have purchased either item if they had known about the items’ added sugar.

Crampton claims she relied on Ocean Spray’s health and wellness representations on the bites’ packaging, which included information that the bites are “a wholesome snack you can feel good about!” to “satisfy your sweet tooth.” Additionally, Craisins’ packaging includes the U.S. Department of Agriculture’s “MyPlate” dietary recommendation and states that one serving of Craisins meets 25% of an individual’s daily recommended fruit needs, according to the complaint.

The complaint notes the evidence linking high sugar consumption with an increased risk of cardiovascular disease, Type 2 diabetes and metabolic disorders.

Ocean Spray’s yogurt bites contain 16 to 18 grams of added sugar per serving, which amounts to about 50% of the calories per serving. Craisins contain more than 20 grams of added sugar, which contributes up to 80% of their calories. The Craisins “50% Less Sugar” variety still gets 32% of its calories from added sugar which the complaint says is nearly six times the amount the FDA recognizes as a “healthy” food, the complaint said,

The plaintiffs also are asking the court to compel Ocean Spray to destroy all deceptive advertising materials and to disgorge all profits obtain by the wrongful advertising. They are also asking for damages and a jury trial.

Attorneys Jack Fitzgerald, Melanie R. Monroe, Trevor Flynn and Carolina S. Emhardt of Fitzgerald Monroe Flynn in San Diego are representing the plaintiffs. Counsel did not return a request for comment.

Counsel for Ocean Spray have not yet made an appearance. A request for comment from the company went unanswered.

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Reynolds Wrap aluminum foil isn't 'Made in USA,' lawsuit claims

 [reuters.com/legal/government/reynolds-wrap-aluminum-foil-isnt-made-usa-lawsuit-claims-2024-03-28](https://www.reuters.com/legal/government/reynolds-wrap-aluminum-foil-isnt-made-usa-lawsuit-claims-2024-03-28)

Jonathan Stempel

NEW YORK, March 28 (Reuters) - The maker of Reynolds Wrap aluminum foil is being sued in a proposed class action claiming it misleads consumers by saying the foil is "Made in USA" though much of the raw material and manufacturing comes from elsewhere.

According to a complaint on Wednesday night, substantially all bauxite that Reynolds Consumer Products (REYN.O) , opens new tab uses in its foil comes from outside the United States, which accounts for only a small percentage of global production of the ore.

The complaint filed in Manhattan federal court also says a substantial amount of the bauxite is transformed into alumina and then into aluminum outside the United States.

This makes Reynolds' "Foil Made in USA" claim on its packaging false and misleading to reasonable consumers, because they "value buying products which are made in America" and therefore would pay more, the complaint said.

Reynolds, based in Lake Forest, Illinois, declined to comment, saying it does not discuss pending litigation.

The lawsuit is led by Anaya Washington of Bronx, New York, and seeks at least \$5 million of damages for New Yorkers who bought Reynolds Wrap foil in the last three years.

Washington said she bought her foil at a Target because she trusted the Reynolds Wrap brand, calling it as familiar as Kleenex and Vaseline, and likes to "buy American." She said she wouldn't have done so had she known where her foil came from.

The lawsuit is one of hundreds accusing companies of using insufficiently precise labeling that induces shoppers to pay more, including through appeals to their patriotism.

In 2021, the U.S. Federal Trade Commission adopted a "Made in USA Labeling Rule" , opens new tab, which the complaint cites, to protect businesses and consumers from being misled over product origins.

The case is Washington v Reynolds Consumer Products LLC, U.S. District Court, Southern District of New York, No. 24-02327.

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Reporting by Jonathan Stempel in New York; Editing by Chizu Nomiya

Pennsylvania bitcoin mining lawsuit tests rare 'green amendment'

 [courthousenews.com/pennsylvania-bitcoin-mining-lawsuit-tests-rare-green-amendment](https://www.courthousenews.com/pennsylvania-bitcoin-mining-lawsuit-tests-rare-green-amendment)

Jackson Healy

Waste coal piles in Russellton, PA, a site where Stronghold Digital Mining acquires coals to use at their Panther Creek power plant. Credit: Stronghold Digital Mining

PHILADELPHIA (CN) — A Pennsylvania environmental group is aiming to break new legal ground by using the nation's first-adopted — but rarely used — "green amendment" against the state and a power plant that supplies energy for bitcoin mining.

Mining cryptocurrencies like bitcoin requires massive amounts of electricity. Already, the nascent industry represents 0.6% to 2.3% of the country's entire energy consumption, according to the Energy Information Administration.

Most U.S. crypto miners get their power from the nation's electrical grid, but Stronghold's Carbon County mining facility is unique in that its energy is derived from the Panther Creek power plant in Nesquehoning, which Stronghold privately owns and operates primarily by burning waste coal.

Save Carbon County wants to limit pollution from the coal plant, stop state tax credits from going toward the facility's operations and force the state to regulate the crypto-mining industry. The group filed a 27-page lawsuit in state court on Tuesday to that effect.

"We don't think we're getting anywhere with the Department of Environmental Protection," said Linda Christman, Save Carbon County's president, during an interview on Wednesday. "We're certainly not able to convince Panther Creek to clean up their act. And we believe that this type of use is dumped on the coal regions of Pennsylvania over and over again, and we'd like that to stop."

Waste coal, the material burned at Stronghold, is the low-energy discarded material, left over from the Keystone State's long history of coal mining. Hundreds of millions of tons of these coals litter the state, leaching pollutants like iron and aluminum into nearby waterways.

Stronghold says its Panther Creek power plant is able to make good use of waste coal by removing the piles and allowing recreational sites to take their place.

"Our record of cleaning up land and water in the Commonwealth speaks for itself," a Stronghold spokesperson told Courthouse News in a statement. "Without purpose-built, emission-controlled, reclamation and power facilities like Panther Creek, waste coal would sit dormant and continue to cause environmental harm. ... We are proud to clean up substantial piles of waste coal that have long devastated Pennsylvania."

But Christman and Save Carbon County say Stronghold's cleanup is just creating new problems that Carbon County's residents have to deal with.

"What they are really doing is they're taking one source of environmental pollution, which is coal piles — I will give them that — and turning it into two other kinds of environmental pollution: water pollution and air pollution," Christman said.

People living near the plant have had masses of soot accumulate on their windowsills, plants and yards, as well as in the air they breathe, Christman said. And the coal ash created by burning waste coal is dumped into a nearby abandoned strip mine, where it is at risk of polluting the county's aquifer, she said.

Save Carbon County's lawsuit isn't only aimed at Stronghold Digital Mining — the suit targets the Commonwealth of Pennsylvania, too, arguing it has failed to uphold its residents' constitutional right to a clean environment.

Adopted by Pennsylvania in 1971, the Environmental Rights Amendment was the nation's first "green amendment." It declares that the state's responsibility to conserve and maintain public natural resources.

The amendment held little judicial weight for decades after its codification, though, as state courts used a separate set of criteria to determine whether a defendant violated the law. That changed in 2017, when a Supreme Court of Pennsylvania decision set new legal precedent, doing away with the separate criteria entirely and allowing the amendment's language to speak for itself.

Now in a new era of the Environmental Rights Amendment, Save Carbon County is testing the amendment's re-designated limits.

"Our attorneys, Freiwald Law, say that this is a new type of case," Christman said, "specifically because we're using the Environmental Rights Amendment."

"What we're saying in our lawsuit is they're not doing a good job of being a trustee of our environment," she added. "That language, that beautiful language in our constitution, means nothing if it's not enforced."

A Stronghold spokesperson said the company is still analyzing the lawsuit but adamantly denies any wrongdoing.

Categories / Business, Courts, Energy, Environment, Government, Law

America First Legal Accuses Disney of Unlawful Discrimination and Misleading Shareholders

 legalnewsline.com/stories/657329327-america-first-legal-accuses-disney-of-unlawful-discrimination-and-misleading-shareholders

March 27, 2024

Stephen Miller - President, America First Legal | <https://aflegal.org>

America First Legal (AFL) has sent a stern letter to The Walt Disney Company, accusing the entertainment giant of engaging in unlawful discrimination and misleading its shareholders. The letter, addressed to Disney's CEO Bob Iger and the Board of Directors, highlights alleged breaches of fiduciary duty and violations of federal securities laws that have resulted in a significant drop in Disney's share value.

According to AFL, Disney has been involved in civil rights violations in employment and contracting, as well as damage to its brand and commercial reputation due to a perceived disconnect between its political and social agenda and the preferences of its customers. The letter specifically mentions Disney's implementation of race and sex quotas, which AFL claims are illegal and a result of the Board's failure to prevent civil rights violations.

Gene Hamilton, Executive Director of America First Legal, expressed concerns about Disney's shift away from its traditional family-focused content towards a more politically charged and divisive direction. Hamilton stated, "Disney's leadership is gambling with shareholder money and appears to be violating federal law in the process."

The letter from AFL also criticizes Disney for pushing what it describes as extreme and divisive political and socio-sexual agendas through its parks and creative content, contrary to the values of many American families. The allegations include the promotion of radical gender ideologies, anti-White and anti-police content, and the inclusion of controversial themes in children's programming on Disney+.

As a result of these actions, AFL claims that Disney's market capitalization has plummeted by nearly forty percent since February 2021, leading to significant financial losses for shareholders. The organization has called on Disney's Board of Directors and management team to address the issues raised in their letter and fulfill their duties to shareholders.

In response to these allegations, Disney has yet to issue a public statement regarding the accusations made by America First Legal.

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March 27, 2024, 8:00 AM PDT

Stephen Miller's Legal Group Targets Disney Board on Diversity

By Clara Hudson

- Conservative group alleges board mismanagement of diversity
- AFL has targeted dozens of other companies over DEI practices

Bloomberg Law News 2024-03-28T10:16:49394399666-04:00**Stephen Miller's Legal Group Targets Disney Board on Diversity****By Clara Hudson 2024-03-27T11:00:51000-04:00**

- Conservative group alleges board mismanagement of diversity
- AFL has targeted dozens of other companies over DEI practices

Conservative activist group America First Legal sent a letter to Walt Disney Co.'s board taking issue with its oversight of the entertainment giant's hiring policies that promote diversity, equity, and inclusion.

The group, led by former Trump adviser Stephen Miller, alleged Wednesday that the company's DEI programs amount to "discriminatory quotas to ensure members of underrepresented groups fill a certain percentage of Disney jobs," such as acting and directing roles. The letter accuses Disney's board of breaching its fiduciary duty, wasting company assets, and violating civil rights laws.

AFL has filed bias litigation and sent more than 30 requests to the US Equal Employment Opportunity Commission to investigate DEI policies at companies including Southwest Airlines Co. and Macy's Inc.

The conservative group previously filed a complaint over Disney's diversity practices with the EEOC in February. Disney didn't immediately respond to a request for comment.

The DEI backlash from conservative groups gathered new momentum after the US Supreme Court's June decision curtailing affirmative action in college admissions. Companies including JetBlue Airways Corp. and Molson Coors Beverage Co. are listing DEI as a "risk factor" in their securities filings, citing a potential business impact from taking too much or too little action on diversity.

But companies also continue to assert in securities filings that DEI is pivotal to the success of their business.

The AFL letter says that “Disney’s Board and management team are sacrificing the Company’s reputation and goodwill to serve a highly idiosyncratic and controversial political agenda that is offensive to the vast majority of the Company’s core customers.”

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BlackRock Gets Legal Warning Over ESG Funds From Mississippi (1)

By Saijel Kishan and Silla Brush

- State accuses firm of 'fraudulent' climate-related statements
- BlackRock says its only agenda is maximizing investor returns

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BlackRock Gets Legal Warning Over ESG Funds From Mississippi (1)

By Saijel Kishan and Silla Brush2024-03-27T11:49:36581-04:00

- State accuses firm of 'fraudulent' climate-related statements
- BlackRock says its only agenda is maximizing investor returns

BlackRock Inc. faces the prospect of being barred from offering securities in Mississippi after state officials accused the investment firm of making "fraudulent" statements regarding its climate strategy.

This marks at least the second time BlackRock has faced legal action from a Republican-led state over environmental, social and governance factors, joining Tennessee.

Mississippi Secretary of State Michael Watson issued an administrative "cease and desist" order released on Wednesday to the world's largest money manager. In a 33-page document, Watson alleges that BlackRock is misleading investors in its funds about the firm's climate-related efforts.

"Many of BlackRock's acts, practices and courses of business operate or would operate as a fraud or deceit upon investors and potential investors in Mississippi," Watson said in the order.

In response, BlackRock said it operates "in one of the most highly regulated industries in the country and is committed to following the law in every respect." The company added that "our only agenda is maximizing risk-adjusted returns for the funds our clients choose to invest in."

BlackRock manages about \$10 trillion of stocks, bonds and other assets around the world. For the past three years, the New York-based firm has found itself in the middle of a political and reputational conundrum, with some Republican politicians in the US deciding to pull money from the company.

BlackRock has 30 days to respond to the Mississippi complaint. It's possible the firm could be banned from doing business in Mississippi where it's registered as an investment adviser and broker-dealer, according to the secretary of state's order.

Specifically, Watson said BlackRock has claimed that ESG factors provide a financial benefit, when there's no proof that ESG-related metrics result in improved investment returns.

The order comes three months after Tennessee filed a lawsuit against BlackRock, claiming the firm breached consumer protection laws by making "misleading" statements about its ESG strategy. Chief Executive Officer Larry Fink has said he no longer uses the ESG label because it's become too politicized. He does still refer to the transition to clean energy, a key tenet of ESG investing.

Just last week, the Texas State Board of Education announced plans to pull about \$8.5 billion from BlackRock, the largest amount withdrawn from the money manager tied to the political backlash. The firm said the decision "ignores our \$120 billion investment in Texas public energy companies and defies expert advice."

Watson's complaint focuses on BlackRock investments, including exchange-traded funds. He alleges that the firm's statement that it doesn't follow a "sustainable, impact or ESG investment strategy" for such products is "untrue or misleading" because BlackRock does press companies to decarbonize through its engagement policies, shareholder voting and lobbying efforts.

On its website, BlackRock says climate risk is an investment risk. The firm adds that while it helps clients navigate these risks, it doesn't "engineer a specific decarbonization outcome."

Watson also cited BlackRock's participation in groups such as the Net Zero Asset Managers initiative, which aim to push companies to reduce their corporate emissions.

According to NZAM, asset managers committing to the international initiative ultimately invest in line with their clients' desires and mandates and are subject to government regulation.

(NZAM is part of the Glasgow Financial Alliance for Net Zero, which is co-chaired by Mark Carney, who is chair of Bloomberg Inc. and a former Bank of England governor, and Michael Bloomberg, the founder of Bloomberg News parent Bloomberg LP.)

(Adds BlackRock response to Texas in 10th paragraph and comment from the firm's website in 12th.)

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BlackRock issued warning over 'misleading statements' tied to ESG funds

 [reuters.com/sustainability/boards-policy-regulation/blackrock-issued-warning-over-misleading-statements-tied-esg-funds-2024-03-27](https://www.reuters.com/sustainability/boards-policy-regulation/blackrock-issued-warning-over-misleading-statements-tied-esg-funds-2024-03-27)

Reuters

The BlackRock logo is pictured outside their headquarters in the Manhattan borough of New York City, New York, U.S., May 25, 2021. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights , opens new tab

March 27 (Reuters) - BlackRock (BLK.N) , opens new tab was issued a legal warning by the U.S. state of Mississippi over "false and misleading statements to Mississippi investors" tied to its environmental, social and governance (ESG) investment strategies, according to a 33-page document , opens new tab released on Wednesday.

The Mississippi secretary of state Michael Watson and the state's Securities Division issued a 'summary cease and desist order' and served a warning to impose a multimillion-dollar administrative penalty on the New York-based money manager.

Mississippi's legal warning comes after Florida, Louisiana and Missouri have previously said they plan to pull investment mandates from the company, citing concerns that include impact on investor returns due to BlackRock's ESG efforts.

The world's largest asset manager has been at the forefront of scrutiny in some Republican-run states over its ESG policies. CEO Larry Fink said last year it lost around \$4 billion in assets under management as a result of the political backlash.

"We operate in one of the most highly regulated industries in the country and are committed to following the law in every respect," BlackRock said in a statement to Reuters.

"Our only agenda is maximizing risk-adjusted returns for the funds our clients choose to invest in," it added.

Last year, the U.S. state of Tennessee said it sued the asset manager, alleging it breached consumer protection laws and downplayed the extent to which ESG considerations drive the firm's investment strategies.

BlackRock managed \$10 trillion in assets as of Dec 31, 2023 and served clients in over 100 countries across the globe.

Reporting by Mehnaz Yasmin in Bengaluru; Editing by Krishna Chandra Eluri

Chemours Faces DOJ, SEC Accounting Probe Amid Shakeup at Top (1)

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Chemours Company headquarters is seen at the Hotel DuPont Oct. 11, 2021, in Wilmington, Del.

The US Securities and Exchange Commission and the Department of Justice are probing Chemours Co. after the chemical company put three of its top executives on leave amid an investigation into its accounting practices.

“Chemours is cooperating with requests for information by the SEC and the United States Attorney’s Office for the Southern District of New York concerning the results of the Audit Committee Internal Review and the Company’s SEC filings in respect of that review,” the company said in its 10-K published after market close on Wednesday.

The Delaware-based company stunned the market in late February when it suspended its CEO, chief financial officer, and controller and announced an internal investigation into its accounting practices, including how it managed working capital and the impact on the company’s incentive plans. It also was investigating certain accounting measures that do not comply with US generally accepted accounting principles, or GAAP.

In early March, the company revealed more details, saying the investigation found the company’s top executives in the fourth quarter of 2023 delayed payments to vendors and sped up the collection of receivables to manipulate the company’s free cash flow targets. The accounting move juiced the metrics to determine their cash and stock bonus pay, the company said.

The review started from an anonymous report made to the company’s ethics hotline, the company said. Chemours suspended CEO Mark Newman, Chief Financial Officer Jonathan Lock, and Vice President, Controller and Principal Accounting Officer Camela Wisel in February.

(Revised with additional context.)

To contact the reporter on this story: Nicola M. White in Washington at nwhite@bloombergtax.com

Digging into the latest indictment of former Ohio House Speaker Larry Householder

ohiocapitaljournal.com/2024/03/28/digging-into-the-latest-indictment-of-former-ohio-house-speaker-larry-householder

By Marty Schladen

March 28, 2024



Former Ohio House speaker Larry Householder arrives for day two of his racketeering trial. (Photo by Morgan Trau, WEWS.)

Former House Speaker Larry Householder has again been indicted on charges related to his actions in a massive bribery and money laundering scandal.

The Glenford Republican is already serving a 20-year sentence in federal prison after being convicted last March of racketeering in a scheme in which Akron-based FirstEnergy paid more than \$60 million to purchase a \$1.3 billion, ratepayer-financed bailout.

The state charges concern some conduct Householder engaged in after he was arrested in July 2020. They also concern debts and other items that Householder admitted during his federal trial that he didn't report to the Joint Legislative Ethics Commission as required.

The former speaker faces maximum sentences of from three to eight years on each of the 10 state charges from the Cuyahoga grand jury. And importantly, if he's convicted of one of the counts — theft in office — he's permanently disqualified from holding public office.

In a video accompanying the announcement of the indictment, Ohio Attorney General Dave Yost noted that Householder has served two different stints as speaker, and that if he's successful in appealing his federal conviction, "he might well try for a third bite at the apple."

Five of the 10 state counts Householder faces stem from his use of campaign funds to pay lawyers after his July 2020 arrest. In the video in which Yost appeared, Deputy Attorney General Carol O'Brien said Householder knew that was illegal when he did it.

Several other counts relate to Householder "not reporting significant credit card debts going back to at least 2016, as well as gifts from lobbyists and significant loans from individuals."

Among gifts Householder received from FirstEnergy were flights to and from the 2017 inaugural of Donald Trump.

Householder is due in Cuyahoga Common Pleas Court to be arraigned on April 12.

The new state charges follow the announcement last month of state charges against former FirstEnergy CEO Chuck Jones and Vice President Michael Dowling. The executives are accused of financing the \$60 million scheme to bail out two unprofitable nuclear plants owned by the utility so they could spin them off.

Also indicted was Sam Randazzo, Gov. Mike DeWine's pick to be Ohio's top utility regulator. Jones and Dowling paid Randazzo \$4.3 million mere weeks before DeWine nominated him to the commission in February 2019.

DeWine's chief of staff knew, Laurel Dawson, of the payment, but an administration spokesman said she didn't tell the governor until after the FBI searched Randazzo's Columbus condo in 2020. The governor stands behind Dawson because it wasn't until 2021 that the payment was alleged to be a bribe, the spokesman said.

Randazzo was charged by federal authorities in relation to his role in the scandal in December.

Despite all the prosecutions and allegations of wrongdoing, the bailout law, House Bill 6, is still on the books. As a result, ratepayers have ponied up nearly a quarter-billion dollars to prop up two aging coal plants.

Despite the fact that Ohio ratepayers are shouldering that burden, one of the plants isn't even in Ohio, but in Indiana instead.

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Ex-FirstEnergy execs allowed to travel while awaiting criminal trial

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POLITICS

Former FirstEnergy execs allowed to travel while awaiting criminal trial



Jessie Balmert

Akron Beacon Journal



Facing criminal charges for a sweeping bribery scandal, two former FirstEnergy executives were given permission to travel.

On Monday, Summit County Common Pleas Court Judge Susan Baker Ross granted former FirstEnergy CEO Chuck Jones's to visit his property in Naples, Florida. And ex-Senior Vice President of External Affairs Michael Dowling was approved to take an Easter trip to Mt. Pleasant, South Carolina, Cleveland.com first reported.

Both are accused of participating in a scheme to bribe former Public Utilities Commission of Ohio Chairman Sam Randazzo to work on behalf of FirstEnergy. Randazzo is also accused of skimming money from his large industrial energy user clients. All three men have pleaded not guilty.

Jones asked Ross for the ability to travel around Ohio and Florida while awaiting trial, according to court records. In the request, Jones listed his 6,000-square-foot luxury condominium with views of the Gulf of Mexico, a second three-bedroom home in Naples and his five-bedroom Akron house.

In exchange, Jones and his wife would automatically forfeit their interest in their Ohio and Florida properties if he failed to appear at trial or any hearing "absent extraordinary circumstances." Jones would also use the location-sharing function on his cellphone to keep

his pre-trial services officer apprised of his location, according to the court filing.

"Mr. Jones and his counsel assure the Court that his presence in Florida will not in any way delay or impede preparation for the trial of this matter," Jones' attorney Carole S. Rendon wrote. Because of these stipulations, the Ohio Attorney General's Office did not oppose Jones' request, according to the court filing.

But the Ohio Attorney General's Office did oppose Dowling's request to visit his second home in South Carolina over Easter.

"Dowling faces serious charges that, if convicted, could send him to an Ohio penitentiary for the rest of his life. Nevertheless, he demands the privilege to take a vacation outside of the State of Ohio and far beyond the Court's jurisdiction," Principal Assistant Attorney General Matthew Meyer wrote. They also pointed out that FirstEnergy was paying Dowling's legal bills – a privilege many criminal defendants don't enjoy.

Judge Ross initially denied Dowling's vacation. But Dowling, through his attorney, made a second plea for a nine-day trip instead of the rejected 13-day one. Dowling pledged to share a detailed itinerary with pre-trial services, and Ross approved the trip.

Meanwhile, court filings indicate Randazzo wants to be excused from wearing a GPS monitor.

Randazzo's attorney did not disclose the medical reason behind the request. But the Ohio Attorney General's Office wrote that "a mental health professional has opined that the GPS monitor that Randazzo is required to wear as a condition of his bond has negative health consequences for Randazzo."

The flurry of filings is typical in all criminal cases, but the prominence of the defendants has led to less typical requests. This is one of two criminal cases filed against Randazzo, who was also charged in federal court. The former FirstEnergy executives have not been charged federally.

Jessie Balmert is a reporter for the USA TODAY Network Ohio Bureau, which serves the Columbus Dispatch, Cincinnati Enquirer, Akron Beacon Journal and 18 other affiliated news organizations across Ohio.

Judge in Coinbase case endorses SEC's crypto regulation-by-enforcement strategy

 [reuters.com/legal/transactional/column-judge-coinbase-case-endorses-secs-crypto-regulation-by-enforcement-2024-03-27](https://www.reuters.com/legal/transactional/column-judge-coinbase-case-endorses-secs-crypto-regulation-by-enforcement-2024-03-27)

Alison Frankel

U.S. Securities and Exchange Commission logo and representations of cryptocurrency are seen in this illustration taken June 6, 2023. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

March 27 (Reuters) - In a ruling , opens new tab on Tuesday that allows the U.S. Securities and Exchange Commission to proceed with its case against crypto exchange Coinbase, a Manhattan federal judge threw a bucket of ice-cold water on the crypto industry's criticism of the SEC's strategy of setting policy through enforcement actions. U.S. District Judge Katherine Polk Failla of Manhattan held that because at least some crypto trades on the Coinbase platform met the longstanding definition of an investment contract, the SEC can move ahead with claims that Coinbase improperly operated as a securities exchange, broker and clearing agency. She also said the SEC adequately alleged that Coinbase sold unregistered securities through its "staking program," in which customers received rewards for allowing Coinbase to pool their assets.

The judge did dismiss SEC claims related to Coinbase's crypto wallet application, but, as my Reuters colleagues Hannah Lang and Jody Godoy reported on Tuesday morning, her holding that securities laws can apply to crypto trades on secondary exchanges "largely blesses the SEC's approach to cryptocurrency." And that's not the only good news for the SEC from Failla's ruling.

I've told you many times that Coinbase and its allies have condemned the SEC's entire crypto enforcement campaign as an abuse of the commission's authority and a violation of their due process rights.

In essence, crypto defendants and their supporters contend that instead of bringing enforcement actions against selected targets, the SEC should either have waited for Congress to enact laws regulating the burgeoning industry or engaged in formal rulemaking to guide crypto issuers and exchanges.

By opting to set policy via lawsuits, Coinbase and its backers have argued repeatedly, the SEC has violated defendants' constitutional due process rights by failing to provide fair notice that they'd be subject to enforcement.

Even more sweepingly, crypto defendants and their amici have asserted that the SEC's suite of enforcement actions runs afoul of the U.S. Supreme Court's major questions doctrine, which, broadly speaking, bars federal agencies from expanding their power without express Congressional authorization in matters of great economic and political significance.

Failla shut down those arguments in Tuesday's Coinbase opinion, ruling that the SEC has authority to sue crypto defendants under its existing power — and is entitled to use enforcement actions to advance the commission's crypto policies.

"The very concept of enforcement actions evidences the commission's ability to develop the law by accretion," Failla wrote. "The SEC has a long history of proceeding through such actions to regulate emerging technologies and associated financial instruments within the ambit of its authority."

I should pause here to say that in response to my query on Failla's analysis of Coinbase's due process and major questions doctrine arguments, a Coinbase spokesperson directed me to posts on X from the exchange's chief legal officer, Paul Grewal. Grewal's posts did not specifically address either of the questions I raised, but said, among other things, that Coinbase may appeal.



"We remain confident in our legal arguments, we look forward to proving we're right [and] we are eager for the opportunity to take discovery from the SEC for the first time," Grewal said on X.

The SEC sent me an email statement: "We're pleased that yet another court has confirmed that, while the term 'crypto' may be relatively new, the framework that courts have used to identify securities for nearly 80 years still applies."

In Failla's analysis of the major questions doctrine issue, the judge followed the lead of her Manhattan federal court colleague Jed Rakoff, who bluntly rejected the industry's theory in a 2023 decision denying Terraform Labs' bid to dismiss an SEC enforcement action. As I told you at the time, Rakoff said the doctrine doesn't apply to crypto enforcement actions because the crypto industry is simply not of "vast economic and political significance" in the U.S.

Failla agreed, noting that crypto "cannot compare with those other industries the Supreme Court has found to trigger the major questions doctrine."

She also said, like Rakoff, that the SEC's crypto enforcement actions are not the sort of regulatory power grab that the doctrine is intended to address. Congress gave the agency broad power to enforce securities laws, Failla said. For decades, she said, the SEC has deployed that authority to oversee an array of emerging financial instruments that satisfied the Supreme Court's test for securities.

"Using enforcement actions to address crypto-assets is simply the latest chapter in a long history of giving meaning to the securities laws through iterative application to new situations," the judge said.

Failla did not specifically address an SEC argument I highlighted last year: that no individual enforcement action is significant enough to be barred by the major questions doctrine. But she did say that the SEC's years-long crypto enforcement campaign is one of the reasons why Coinbase was on notice that it, too, could be sued for breaching securities laws. And though Failla said it may be true that formal rulemaking could be a better and fairer method than enforcement actions to promulgate new regulatory policies, the judge said the SEC's suit against Coinbase does not advance a new policy.

The SEC, she said, "is simply engaging in a fact-intensive application of an existing standard."

In short, Failla considered all of the crypto industry's silver-bullet arguments to halt the SEC's enforcement march — and concluded that none of them withstand scrutiny.

That's got to be a setback for the industry, especially because crypto lawyers, including Coinbase counsel from Wachtell, Lipton, Rosen & Katz and Sullivan & Cromwell, threw their all into this case. Failla praised the lawyers on both sides, as well as amicus counsel, for putting forth "the strongest and most cogent arguments for their respective positions" and using "intellectual rigor" in their briefs and oral arguments.

An appellate court might eventually reach a different conclusion about the SEC's fundamental authority to sue crypto defendants. But if I were an SEC crypto enforcement lawyer, I'd be feeling pretty good about my future.

Read more:

Coinbase must face US securities regulator's lawsuit

SEC in Coinbase case defends crypto rulemaking, enforcement

Terra Labs ruling casts doubt on crypto reprieve from recent Supreme Court doctrine

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Reporting By Alison Frankel

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Alison Frankel

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Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

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March 28, 2024, 7:51AM PDT
FTX Insiders, Promoters Pitch \$1.4 Million Deal, First in MDL
By Ben Miller
Documents

- Settlement
- Docket

- FTX promoters to pay \$1.35 million to end part of class action
- Insiders set to pay restitution, forfeiture in criminal case

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FTX Insiders, Promoters Pitch \$1.4 Million Deal, First in MDL

By Ben Miller 2024-03-28T10:51:39000-04:00
FTX promoters to pay \$1.35 million to end part of class action
Insiders set to pay restitution, forfeiture in criminal case

FTX Trading Ltd. promoters will pay \$1.35 million to settle part of a multi-district litigation over the cryptocurrency trading platform’s collapse in 2022, according to a preliminary motion for approval of the deal.

The settling parties are the first defendants to seek approval for an accord in the US District Court for the Southern District of Florida case. If approved, the monetary relief would benefit class members who held any cryptocurrency or otherwise invested through the FTX platform.

The deal comes amid Sam Bankman-Fried’s sentencing, which is set for Thursday. Prosecutors seek a sentence of 40 to 50 years, while Bankman-Fried’s legal team proposed a sentence of no more than 6 1/2 years.

Read more: SBF Prison Time Hangs on Persuading Judge He Is No Madoff (1)

Another group of company insiders are seeking to route restitution and forfeiture payments from a separate criminal case through the MDL, according to the parties’ filing. The insiders who pleaded guilty to fraud and other charges in the criminal case and now seek to settle claims against them in the MDL are Caroline Ellison, former CEO of Alameda Research, as well as ex-FTX executives Gary Wang and Nishad Singh, all of whom were key witnesses in Bankman-Fried’s trial.

The settling promoter defendants include YouTubers and an athlete, while company insiders who have pled guilty in separate criminal proceedings seek approval from a judge in the Southern District of New York to distribute their payments via the MDL to better benefit FTX victims, according to the motion filed Wednesday.

FTX's former in-house counsel Daniel Friedberg, who is also one of the settling parties, is cooperating with the MDL plaintiffs to pursue their claims against the non-settling defendants in the case, including information regarding the company's Miami-based office and business operations, the motion says.

The Moskowitz Law Firm and Boies Schiller Flexner LLP represent the plaintiffs and the class.

The case is In re: FTX Cryptocurrency Exchange Collapse Litig. , S.D. Fla., No. 1:23-md-03076, 3/27/24 .

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March 27, 2024, 2:00 PM PDT

Bankman-Fried's Original Sin at FTX Is Trouble for All of Crypto

By Zeke Faux and Max Chafkin

Bloomberg Law News 2024-03-28T09:33:20589438856-04:00

Bankman-Fried's Original Sin at FTX Is Trouble for All of Crypto

By Zeke Faux and Max Chafkin2024-03-27T17:00:20456-04:00

Sometime between FTX's collapse and Sam Bankman-Fried's fraud conviction a year later, a consensus formed about the onetime boy genius of cryptocurrency: His wild, curly hair and beanbag chair naps at the office were largely for show, but his company FTX, which had been used by millions of people to buy and sell digital currencies, was the real deal. The crypto faithful see FTX as an almost-success story—if only its owner hadn't taken customer money to cover side gambles. As the author Michael Lewis put it on *60 Minutes*, "They actually had a great, real business."

That idea has been bolstered by a twist in the FTX bankruptcy: When the company collapsed, \$8 billion in customer funds had vanished, but the lawyers running it now say they expect to recover enough money to pay back everyone in full. Bankman-Fried's allies have used this to suggest that the customer funds weren't so much stolen as they were redirected into at least a few surprisingly good investments.

"Whatever else might be said about Bankman-Fried, he was a brilliant businessman," the law professors Ian Ayres and John Donohue wrote in a recent essay arguing he was wrong to even declare bankruptcy. His lawyers have used this argument to call for a light sentence; on March 28 a federal judge will decide whether to go easy on him or send him to prison for 40 years or more, as prosecutors are seeking.



Sam Bankman-Fried, co-founder and former chief executive officer of cryptocurrency exchange FTX, at his arraignment hearing in Manhattan federal court in New York on Dec. 22, 2022, in this courtroom sketch. Photographer: Jane Rosenberg/Reuters

Meanwhile, the crypto industry is acting as if nothing went wrong. The price of Bitcoin is near a record high; also booming are so-called memecoins, a neologism referring to tokens that don't even pretend to have a real business behind them beyond vibes. The bulk of trading still occurs on exchanges located in countries with extra-light regulation. Crypto boosters have even spun Bankman-Fried's conviction—along with a guilty plea from the former head of the world's largest exchange, Binance's Changpeng Zhao, to criminal charges including laundering money for terrorists—as a positive. "We now have an opportunity to start a new chapter," Brian Armstrong, the chief executive officer of Coinbase Global Inc., wrote on the social network X. In other words: Don't worry, it's safe to buy crypto again.



Listen to the podcast: The Sentencing of Sam Bankman-Fried

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But Bankman-Fried's case revealed a version of the former billionaire that's more disturbing—and especially troubling for an industry bent on sweeping the whole episode under the beanbag. According to an examination of trial testimony, thousands of pages of exhibits and interviews with insiders, Bankman-Fried's rise appeared to rely on tricking customers, investors and banks almost from the very beginning. His genius, if one can call it that, was recognizing that the mania around crypto would enable him to get away with totally disregarding the rules.



Courtroom sketch: On Oct. 10, 2023, Bankman-Fried sits near a screen showing him shaking hands with Binance CEO Changpeng Zhao.

Photographer: Jane Rosenberg/Reuters

Imagine crypto trading as a video game. Bankman-Fried certainly did. His gaming addiction was a running theme throughout Lewis' bestselling book *Going Infinite: The Rise and Fall of a New Tycoon* and was well known even to his own investors, who caught him playing *League of Legends* during a pitch meeting. Helping himself to FTX customer money was like turning on invincible mode. It let him gamble like he'd never lose and spend like he'd never go broke. His race to billionaire status was so fast that one tech blogger compared it to a speedrun of *The Legend of Zelda*.

Bankman-Fried's trading wasn't as profitable before he found his cheat code. Back in 2017, when he started a hedge fund called Alameda Research, he relied on personal connections for funding and even then had to agree to pay punishing interest rates. Bankman-Fried, then 25, had worked at the Wall Street firm Jane Street Capital, but his capital came mostly from people he knew from the effective altruism movement, whose adherents believe getting rich quickly and giving money thoughtfully could help solve the world's ills.

Alameda's first big investor was an early Skype engineer named Jaan Tallinn, who charged the hedge fund an annual interest rate of 43%. He and a handful of other wealthy effective altruists lent Alameda more than \$100 million. But within a few months, Bankman-Fried had suffered a series of big losses, and many of his investors demanded to be paid back. He somehow still cultivated an image of perpetual success and immense wealth, often with a philanthropic bent. This image had the effect of obscuring an essential truth about his empire: For a business that purported to be wildly profitable, it was weirdly low on cash.

"This was something he talked about a lot," Caroline Ellison, the former CEO of Alameda, said in her court testimony. "He said that we should be trying really hard to find new sources of money." Ellison pleaded guilty for the role she played in defrauding customers.

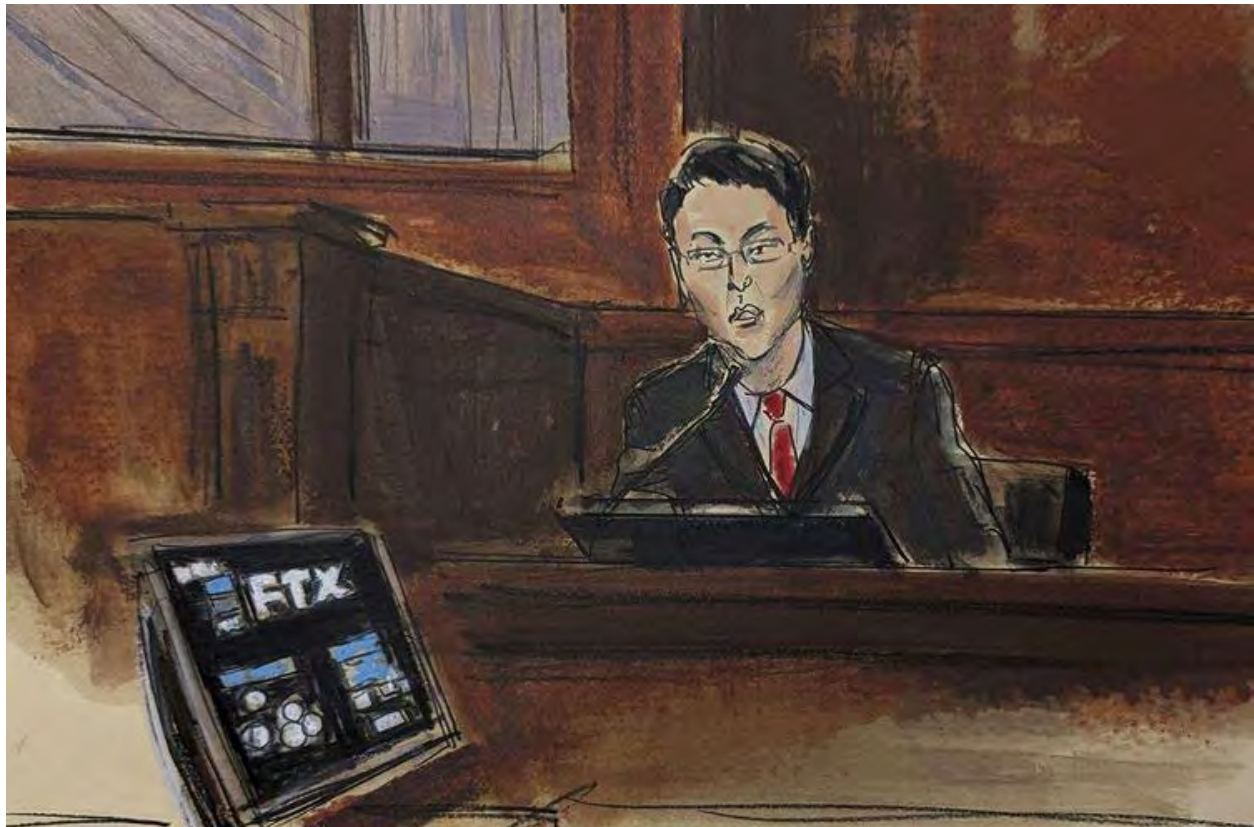


Courtroom sketch: Caroline Ellison weeps as she testifies during Bankman-Fried's trial on Oct. 11, 2023. Photographer: Elizabeth Williams/AP Photo

Until Ellison took the stand, Bankman-Fried's official story about the founding of FTX had basically stood unchallenged: He started the company in 2019, he often said, because Alameda had been doing a lot of crypto trading, and he thought he could build a better exchange. He pitched FTX to customers as a safe place to buy, sell and store their digital currencies. Ellison offered an alternative explanation: "He said that FTX would be a good source of capital," she said in court. The implication was that Bankman-Fried started FTX as a means to fund high-risk investments for Alameda. This, to be clear, is the opposite of what he told customers.

Testimony from Bankman-Fried's former employees, as well as code from FTX's website introduced as evidence in the trial, showed his pitch to be hollow. For example, the total balance for an "insurance fund" listed on FTX's website to reassure customers was actually made up using a random number generator. And just months after the exchange opened, FTX created a backdoor for Alameda, a mechanism within FTX's code known internally as "allow negative." It overrode FTX's internal controls, making it possible for Alameda to borrow almost unlimited sums from FTX customers. It also helped that, to deposit money at FTX, customers had to send it to Alameda. They were led to believe the funds would be passed along and held on their behalf. Instead, Alameda in many cases just spent the money.

Bankman-Fried acknowledged most of this at the trial but said none of it was malicious. His former employees on the witness stand, however, suggested he knew the company was short on cash and tried to hide it. FTX co-founder Gary Wang testified that, in late 2019, he overheard his boss telling an Alameda trader it was OK that the fund was borrowing money from FTX customers because the exchange had earned more than enough in trading fees to cover the investments. A few months later, Wang said, he discovered Alameda had already blown through that already questionable guideline.



Courtroom sketch: Gary Wang testifies during Bankman-Fried's trial on Oct. 6, 2023.

Photographer: Elizabeth Williams/AP Photo

The truth was obvious to him: "Alameda was taking customers' money," Wang testified.

All the evidence makes clear that FTX wasn't a good company run by a bad guy. It was a business that was crooked almost from Day 1. That's a problem for the entire crypto market. Its supporters pitch the products as an alternative to a mainstream financial system they say is rigged against ordinary people. But the conditions that let Bankman-Fried rig markets at FTX remain unchanged. If anything, they may get worse: In a contentious political environment, crypto boosters are spending lavishly to influence lawmakers and try to soften regulations while marketing digital tokens as a sensible choice for novice investors. Which is pretty much what Bankman-Fried did to maximize his fraud.

It wasn't hard for Bankman-Fried, armed with the cheat code of unlimited customer cash, to make FTX look more successful than it actually was. The company famously spent hundreds of millions of dollars on luxury real estate in the Bahamas and made eye-popping investments in crypto companies—including \$50 million for a startup that sells digital copies of cartoon monkeys, \$45 million for the investment firm run by former Trump White House spokesman Anthony Scaramucci and \$400 million for an attempted bailout of a failing crypto lender. Bankman-Fried also spent lavishly on donations to politicians and celebrity endorsements.



An Instagram post showing Bankman-Fried with singer Katy Perry.

Source: SDNY US Attorney's Office

More important, perhaps, the cheat code allowed FTX to paper over losses that would've sunk a normal business. According to Wang, FTX lost about \$1 billion in a 2021 incident when a trader exploited a bug in its software using a thinly traded token called MobileCoin. The loss would've wiped out all the revenue the exchange had generated since it started, according to internal figures filed as evidence in court, and might've sent a version of FTX that wasn't cheating straight into bankruptcy. Instead, Bankman-Fried instructed employees to count the loss as Alameda's.

At the trial, Wang recalled Bankman-Fried's explanation: "He said that FTX's balance sheets are more public than Alameda's." In an interview with Bloomberg Opinion columnist Matt Levine several months after the MobileCoin incident, Bankman-Fried bragged that the company's risk management was so good that "we've never had a day, I think, that there was more money that we lost in blowouts to revenue than trading fees." This was a lie.



A court image shows Bankman-Fried at his desk at FTX.

Source: SDNY US Attorney's Office

Around the same time, Bankman-Fried was negotiating with venture capitalists to raise money for FTX. He sent them reports that omitted the giant loss. "Congrats on the amazing exchange performance," Zack Rosen of Ribbit Capital wrote in response to Bankman-Fried's pitch. In July 2021, FTX raised \$900 million. A former employee involved with the investment, who asked not to be identified because of the company's ongoing litigation, says the deal would never have closed if Bankman-Fried hadn't covered up the loss.

Even with the influx of venture capital, Alameda borrowed more and more from FTX. One of the big costs was buying out an investment that Binance had made in FTX so Bankman-Fried could disentangle his company from a rival. "We don't really have the money for this," Ellison testified that she told Bankman-Fried.

"That's OK," Bankman-Fried replied, according to Ellison. "We have to get it done." Ellison testified that they used an additional \$1 billion of FTX customer deposits to close the deal with Binance.



Courtroom sketch: Ellison points out Bankman-Fried during his fraud trial on Oct. 10, 2023.

Photographer: Jane Rosenberg/Reuters

Later that year, as crypto markets boomed, Alameda borrowed even more to make big bets on newly minted digital currencies known within the industry as "shitcoins." As Ellison once put it in a post on Twitter, "figure out when the market is going to go up and get balls long before that." Alameda was also investing in so-called yield farming, which in practice often amounted to lending money to Ponzi schemes and hoping to get out before they collapsed. There also was a \$150 million expense Ellison listed as "the thing" on a report she prepared. The thing, prosecutors alleged, was "one of the largest foreign bribes ever paid by a US person," in this case to Chinese government officials.

In mid-2021, before Bankman-Fried's spending spree really got going, Ellison warned him that Alameda's debts were looking risky. Bankman-Fried asked her to invest an additional \$3 billion in venture capital, even though Alameda had already helped itself to at least \$2 billion from FTX customers and borrowed \$9 billion from other lending firms. The hedge fund's biggest asset was a giant pile of cryptocurrencies that Bankman-Fried had either created himself or was closely associated with. Ellison calculated that without these so-called Sam coins, FTX owed almost \$3 billion more than it had. She testified telling Bankman-Fried that if they made the investments, and the market crashed and lending firms asked for their money back, Alameda would go broke and FTX would fail.

What happened next is, well, they made the investments, the market crashed, Alameda went broke and FTX failed. Before long, Bahamian police were knocking on the door of Bankman-Fried's \$30 million penthouse.

After FTX filed for bankruptcy, Bankman-Fried didn't know what to do. He wrote a list of potential strategies, including: "File the doc with problems about the Chapter 11 process" (Option 1); "go on Tucker Carlsen [*sic*]" and "come out against the woke agenda" (Option 3); "Have Michael Lewis interview me" (Option 11); "radical honesty" (Option 15). Ultimately he settled on a version of Option 1, blaming the bankruptcy attorneys, and Option 11, finding a sympathetic journalist. He didn't try Option 15.

Bankman-Fried first said he lost the money through a series of sloppy mistakes. He claimed he wasn't heeding warning signs because it felt like he had "infinity dollars." "I f---ed up," he wrote on Twitter and in testimony he planned to deliver to Congress. Then, in interviews and social media posts, he complained he'd been victimized by "strong-arming" lawyers who'd manipulated him into filing for bankruptcy, which he called "maybe my single biggest f---up." In a series of unpublished essays titled "Inception," after the Christopher Nolan movie, he even argued that Sullivan & Cromwell, the law firm in charge of the FTX bankruptcy, had manufactured the narrative that he stole customer funds. (He gave the essays to a crypto influencer, Tiffany Fong, who passed them on to the *New York Times*.) "They've played it incredibly well," Bankman-Fried wrote of the law firm, which has defended its conduct as proper. "Were it not destructive to just about everything I care about in life, I would tip my cap to them."

This argument found a willing audience among some FTX victims eager to blame anyone for what happened, helped spur a class-action lawsuit and was presented in Lewis' book as a plausible explanation for what went wrong at FTX. Sullivan & Cromwell will get paid hundreds of millions of dollars for its work on the bankruptcy, a figure that critics have suggested is excessive. On the other hand, those fees are starting to look like money well spent, since FTX's bankruptcy attorneys said in January that they expect to recoup enough money to pay customers back in full.

Bankman-Fried's attorneys seized on this announcement to offer an audacious counterfactual narrative they hoped would get him a more lenient sentence. "The truth is, there were never losses," Marc Mukasey, the lawyer representing Bankman-Fried at his sentencing, wrote in a March 19 letter to the judge. "The money has always been available. Assets remain. Each victim quoted in the government's opposition will receive 100 cents on the dollar—plus interest. This would be impossible if the estate's assets had disappeared into Sam's personal pockets."



Courtroom sketch: Bankman-Fried sits with his lawyers Torrey Young and Marc Mukasey on Feb. 21, 2024, as he appears in court for the first time since his November fraud conviction.

Photographer: Jane Rosenberg/Reuters

The claims weren't quite as novel as they might've seemed. Fraudsters often insist, as Bankman-Fried has, that they would've made all the money back if only they'd been allowed to keep going. And bankruptcy lawyers are often successful in eventually cleaning up the messes they find, even in cases of massive fraud. For instance, the administrators overseeing the Bernie Madoff bankruptcy have returned about 90% of clients' initial investments.

In the case of FTX, recovering assets rests largely on long-shot bets Bankman-Fried made using customer money that wasn't his to gamble with, such as a \$500 million investment in the artificial intelligence startup Anthropic PBC that's likely now worth more than \$1 billion. The biggest factor is crypto prices. FTX's debts to its customers were fixed in dollar terms on the day the company filed for bankruptcy, when prices were at a low point.

The estate quickly found about \$1 billion worth of Solana tokens and \$600 million of Bitcoin and related products, as well as hundreds of millions of dollars of other coins. It hired a manager for the assets: Galaxy Digital, run by Mike Novogratz, a Wall Streeter-turned-crypto enthusiast so committed to the cause that he once got the logo for a token tattooed on his shoulder. (That particular token was later found to be a Ponzi scheme.) Predictably, Novogratz's firm didn't try to unload FTX's crypto right away.

Lucky for everyone involved, prices started going back up. The excitement was driven in part by anticipation that US regulators would approve Bitcoin exchange-traded funds, opening that cryptocurrency to a novel group of potential buyers. Bitcoin started rising, along with the prices of other widely traded tokens including Dogecoin, the original memecoin, which has roughly doubled in value since early 2023. New joke coins that trade on the Solana blockchain emerged, seemingly competing to be as stupid or offensive as possible: dogwifhat (the Dogecoin dog but with a hat), Pepe (the symbol beloved by White nationalists) and for those who found that last one too subtle, a token named simply NAZI. Some of them soared to market caps exceeding \$1 billion. The price of Solana itself has climbed more than tenfold since FTX's failure.

The runup means that, on paper, zombie FTX may have gained as much as \$10 billion on its Solana bet, though many of the holdings are locked up and can't be sold for a few years. FTX's stash of Bitcoin and other tokens likely gained an additional \$3 billion at least, based on filings in the bankruptcy case. If the estate is able to sell them all while the market is hot, it'll have a reasonable claim to the title of greatest crypto trader in history.

The bankruptcy administrator, John Ray III, tried to downplay this achievement in a letter to the judge in Bankman-Fried's criminal case. "Even taking into account the potential for achieving anticipated recovery levels, which is by no means assured," he wrote, "customers still will never be in the same position they would have been had they not crossed paths with Mr. Bankman-Fried."



Courtroom sketch: Bankman-Fried leaves a New York federal courtroom in handcuffs on Aug. 11, 2023. A judge revoked his bail after concluding the former CEO had tried to influence witnesses.

Photographer: Elizabeth Williams/AP Photo

Unfortunately, the conditions that allowed people to fall for schemes such as Bankman-Fried's remain: a massive, speculative and largely unregulated industry rife with fraud and manipulation—and a credulous public eager to bet real money in search of a big score.

Bankman-Fried is still doing what he can to spread the hype. Recently, one of the guards at the Brooklyn prison where he's being held asked him for crypto trading advice, according to a person with knowledge of the interaction, who requested anonymity citing legal concerns. Bankman-Fried suggested the guard sell his XRP tokens and buy Solana.

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<https://www.wsj.com/finance/investing/dear-donald-trump-heres-how-to-manage-your-stock-market-fortune-e0a70670>

Dear Donald Trump, Here's How to Manage Your Stock-Market Fortune

It requires recognizing a fundamental truth about Truth Social: The current valuation can't last



By [James Mackintosh](#) [Follow](#)

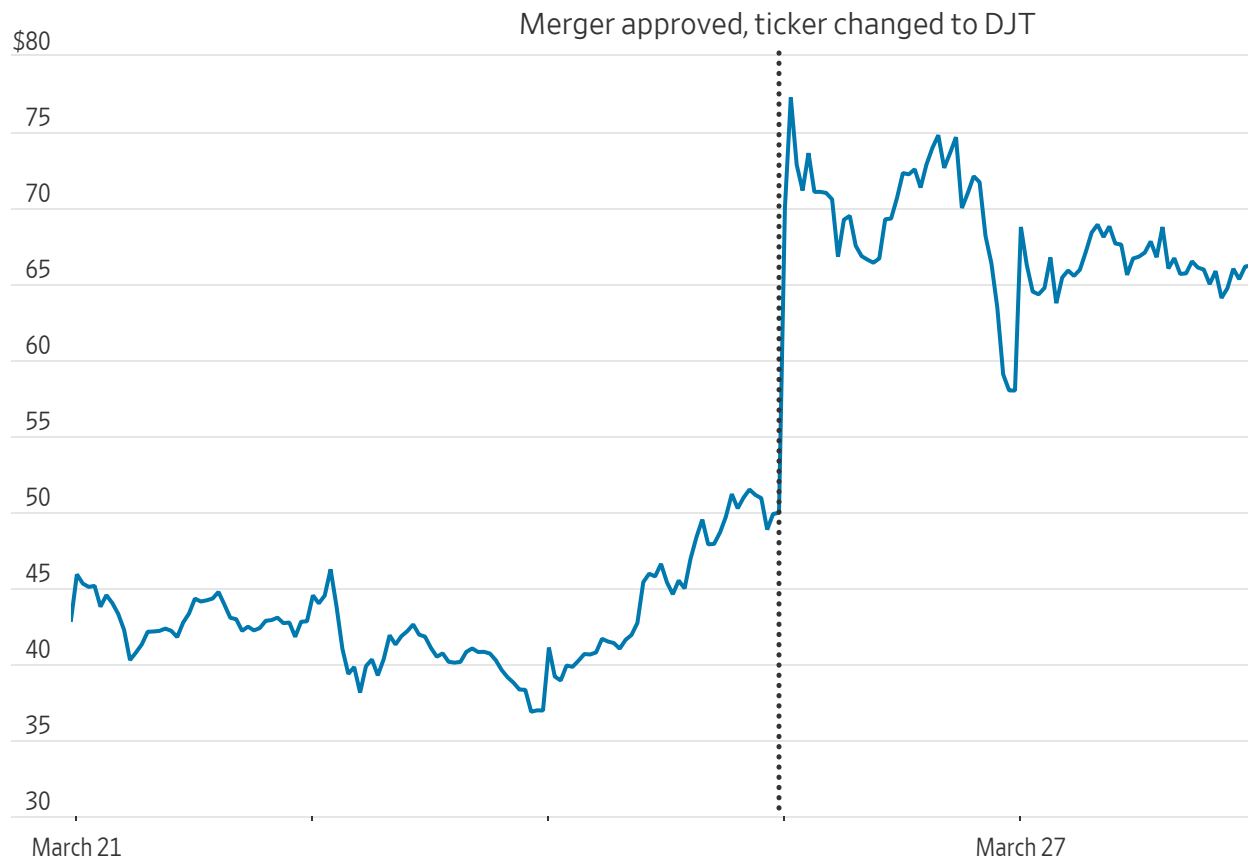
Updated March 28, 2024 12:02 am ET

Dear Mr. Trump,

Congratulations! You have finally managed to make it as a multibillionaire, at least on paper—and thanks to the meme-ification of your Trump Media & Technology Group **DJT -8.55% ▼** under the ticker DJT, you are in the unusual position of being majority owner of a company bigger than some members of the S&P 500.

Now comes the hard part: turning it into cash. You have a few options, but the bad news is that none of them are assured.

Sell stock. Your near-60% stake is worth \$4 billion on paper, but a simple sale would have to be disclosed and is sure to go down badly with other shareholders. When Ryan Cohen, chairman and CEO of GameStop, sold his stake in Bed Bath & Beyond in 2022 the price halved in two days. His meme followers weren't happy (nor was the Securities and Exchange Commission), but at least he wasn't hoping for their votes in the presidential election. You have to get permission from the board to sell too, but directors including your son are hardly likely to object.

Trump Media & Technology Group share price

Note: Before merger was Digital World Acquisition

Source: FactSet

Borrow against the stock. This eases the disclosure rules, and a loan of say \$500 million secured on your DJT holding would be small compared with its current value on the stock market. But as you know, your lenders have been running scared, and they might quibble with taking a chunk of stock in a loss-making business that managed only \$5 million (yes, million) of sales from 2021 to the end of September 2023. Speaking frankly, you could make more selling MAGA hats, and if the bankers look at the financials (purely as a formality) they might worry about the risk of DJT shares.

Related-party transactions. DJT has almost \$300 million in cash from the SPAC merger. And the company might be able to borrow more (perhaps issue junk bonds, as you did so effectively in Atlantic City?). Doing a deal with one of your other businesses is one way to extract the cash. Judge Arthur Engoron ruled that you overvalued your Florida beach club, among other properties, but he'd be forced to eat his words if you sold Mar-a-Lago to DJT for \$500 million. Overvalued? Pah.

“Buying assets from the founder [of a company] is one of the things that’s very hard to guard against,” explains Dan Davies, a financial analyst and author of “Lying For Money,” a history of financial frauds.

“It’s the blue-chip way to extract money. The only guard is having a board that’s not completely supine.” It would be unfair to call a board that has only just been elected “supine,” but it does look a lot like one of your political-action committees. You probably don’t need to worry.

Cash can also be extracted through license fees for the Trump name, just as with your real estate. After all, what would DJT’s Truth Social be without you? You can name your price to renegotiate the existing terms—if you walked away, this business has zero value. And you already have the right, according to your agreement with Truth Social, to take your messages elsewhere so long as you say they are political. These days, what isn’t political? Plus the company could easily employ a few more family members, and perhaps order a few thousand copies of your book.

There is some risk to the strategy. Delaware courts usually defer to the board for business decisions, but if directors seem to be in the pocket of a shareholder or the CEO they are more willing to look at whether the decisions are reasonable—as Elon Musk discovered with his \$56 billion pay package. Maybe you should move DJT from Delaware to Texas to get less-intrusive courts, as Musk says he plans to do with Tesla.



Former President Donald Trump's near-60% stake in Trump Media & Technology Group was recently valued at \$4 billion on paper. PHOTO: ALYSSA POINTER/REUTERS

Raise more cash for the company. It would be unusual to issue new stock so soon after listing, but you have to take advantage of these ludicrous valuations while you can. Remember VinFast Auto? It's a Vietnamese electric-car company, no reason you should remember, except that it was briefly "worth" \$190 billion last summer when the memes were with it, and is now worth \$11 billion.

Cinema chain AMC Entertainment stock also lost its meme status, but at least it cashed in, raising \$272 million by issuing "APE" preferred shares. The MAGA ticker has already been used by the minuscule America First ETF, but TRMP is still available, or just issue more DJT stock. The stock market loves you, but you've got to turn that into real money.

All this requires recognizing a fundamental truth about Truth Social: This valuation can't last.

Sure, if you win the election it could be the outlet for the White House bully pulpit. But even on generous assumptions of a 30% profit margin and a valuation of 25 times earnings, it would need revenue of \$1 billion a year. That's an implausible step up from \$3.3 million in the first nine months of last year. Get as much cash out as quickly as you can, before the memes evaporate.

Outright fraud. Clearly this is not to be recommended. If you win the White House you can (probably) pardon yourself, but if you lose, you don't want to go down as the man who ripped off his own voters.

Anyway, you shouldn't need fraud to get at the money in DJT. As Mr. Davies put it, "if you've got a compliant board and you're not taking cash out of a company you control, I would say you're not trying."

Yours,

James Mackintosh

Write to James Mackintosh at james.mackintosh@wsj.com

Appeared in the March 28, 2024, print edition as 'How Trump Should Manage His Windfall'.

Unhedged **Reddit Inc**

Valuing Reddit, take 2

And the yen



Reddit chief executive Steve Huffman at the New York Stock Exchange © Reuters

Robert Armstrong & Ethan Wu YESTERDAY



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This article is an on-site version of our Unhedged newsletter. Sign up [here](#) to get the newsletter sent straight to your inbox every weekday

Good morning. The S&P 500 hit another all-time high yesterday. More importantly, [Trump Media & Technology Group](#) rose another 14 per cent, right after we wrote that it looked a bit overvalued. Unhedged's record as a contrarian indicator remains spotless. We are off tomorrow for Easter. But you can still email us: robert.armstrong@ft.com and ethan.wu@ft.com.

Also, tickets are nearly sold out for the FT Alphaville pub quiz in New York in two weeks, where both of us will be hosting a session. [More info here](#).

Reddit as just another second-tier social media company

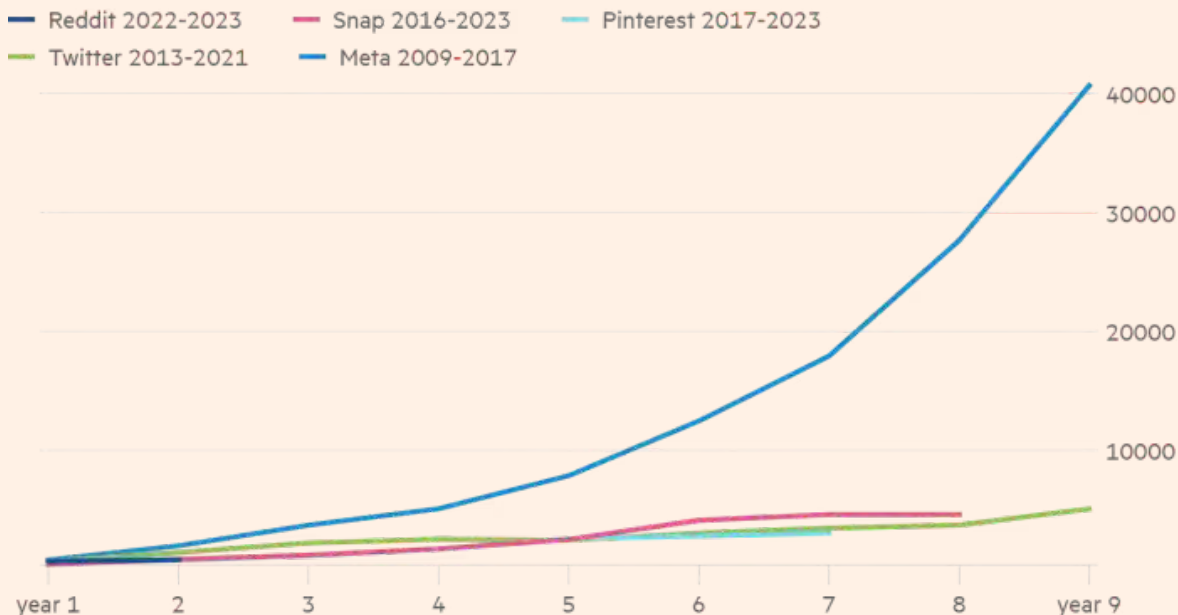
Yesterday I [argued](#), roughly, that trying to value internet platform companies such as [Reddit](#) was a futile attempt to impose order on a chaotic and arbitrary universe. My experience with trying to extrapolate forward from the early days of Google and Facebook taught me that trying to see into the future of industries characterised by massively increasing returns to scale and winner-take-all dynamics is simply beyond the tools of financial analysis.

I was, I can see now, being a bit dramatic. I realised this after talking to Dan Salmon of New Street Research, who made the sensible point to me that the internet has changed a lot in 15 years. Nothing is growing explosively any more, and the land grab of the early days is over. In social media, in particular, a stable industrial ecosystem has developed that operates in somewhat predictable ways. The main feature of the system is Meta's dominance within it: it was the first company to get to massive scale and to nail how to sell advertising against user-generated content, so it has locked the market down. Only TikTok is a serious rival, and only within the short video niche. The second-tier players — Twitter, Snap, Pinterest and Reddit — take the scraps.

To get a sense of Reddit's potential, I looked at the revenue of other social media companies, starting when each of them was roughly the size Reddit is now. Looking at it that way, you can see how Meta has followed a wildly different trajectory from the companies that followed it:

First mover advantage

Revenue, \$mn



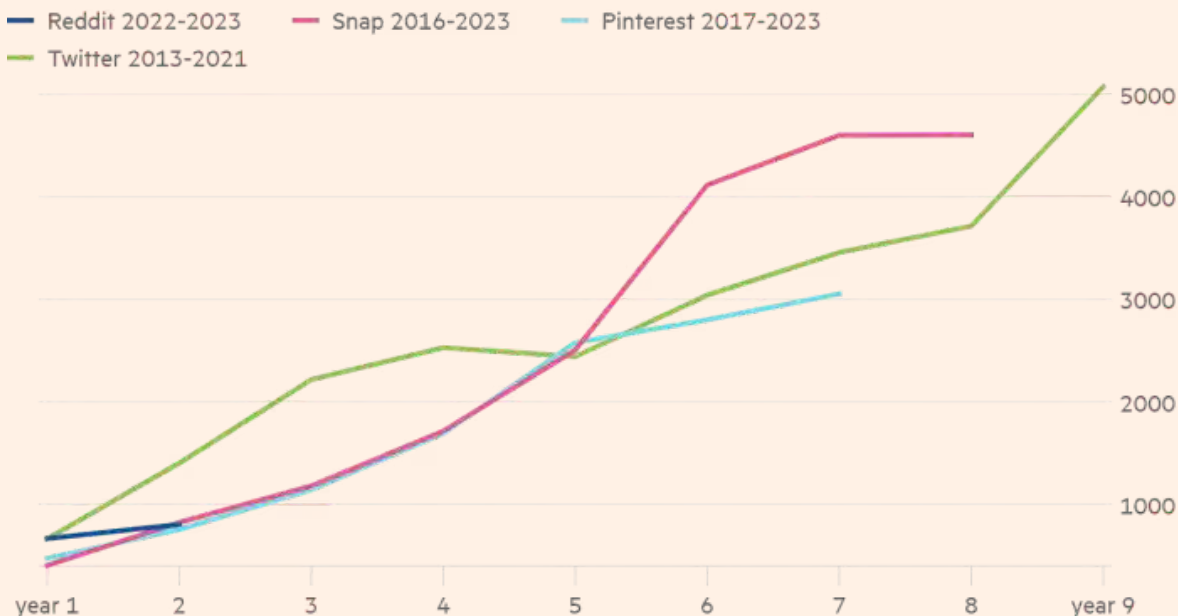
Sources: Company filings, S&P Capital IQ

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Taking Meta out of the picture, though, you can see how Snap, Pinterest and Twitter grew in broadly similar ways:

Similar businesses?

Revenue, \$mn



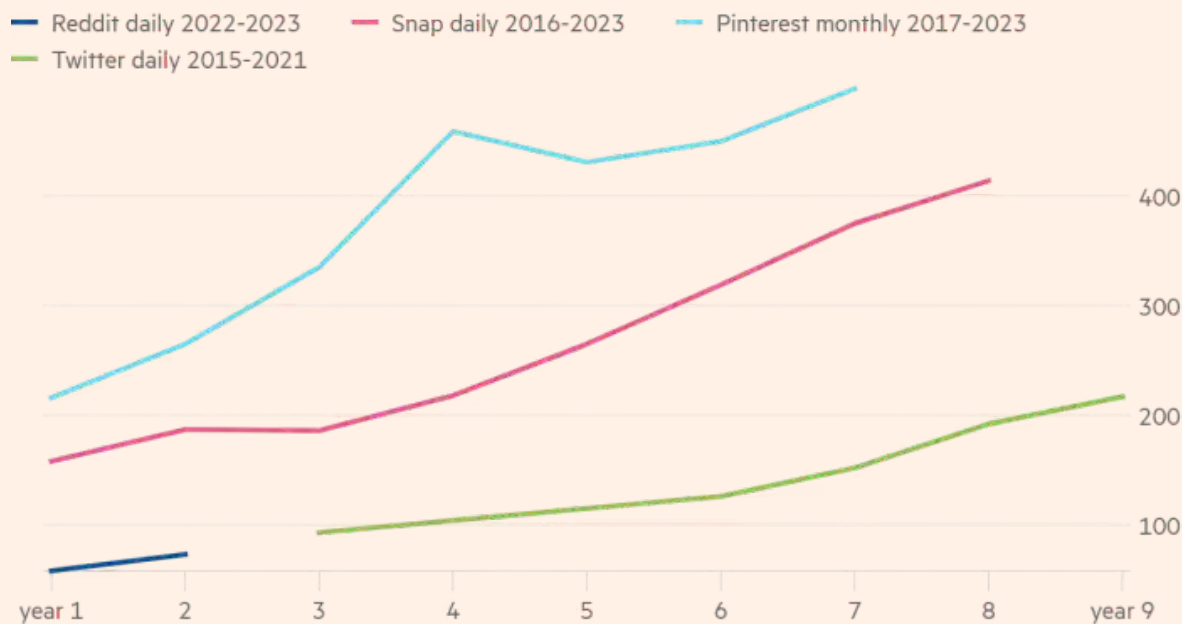
Sources: Company filings, S&P Capital IQ

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Like revenue, active users grew as those three companies grew steadily. As the companies have matured, user growth has settled into the low double digits (note Twitter has some missing data and Pinterest reports monthly rather than daily active users, but the slopes of the lines tell a clear story):

You are the product

Active users, mn



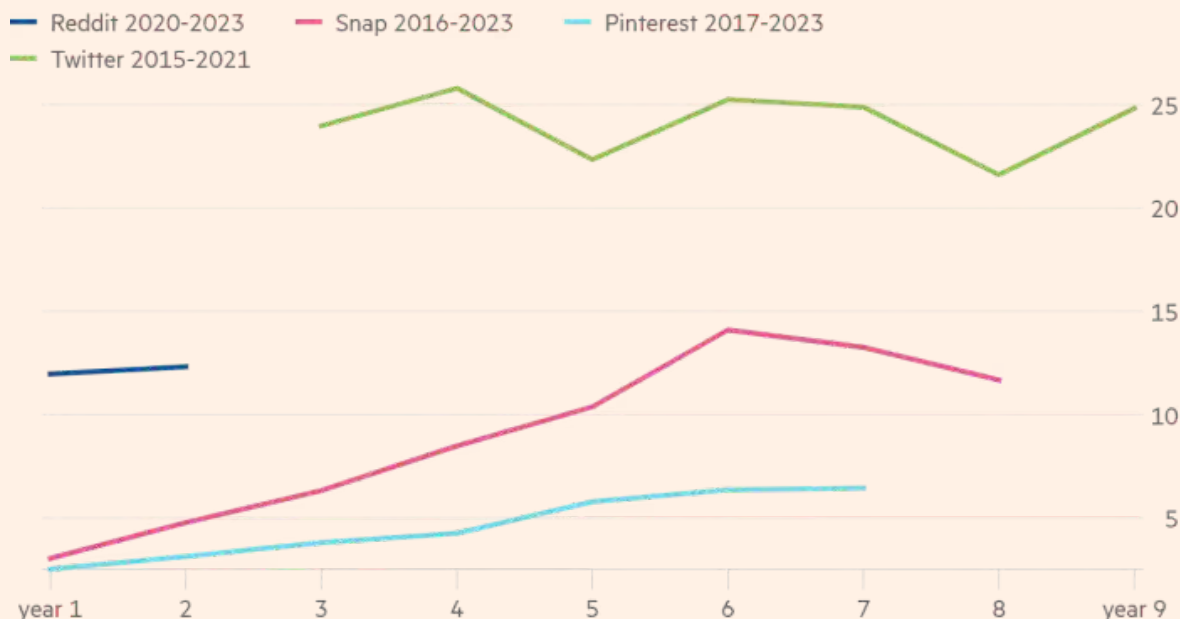
Source: Company filings

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Another pattern that holds across the companies is that annual revenue per active user does not climb ever higher. It seems to find a level and stabilise:

Finding their level

Annual revenue per active user, \$



Source: Company filings

© FT

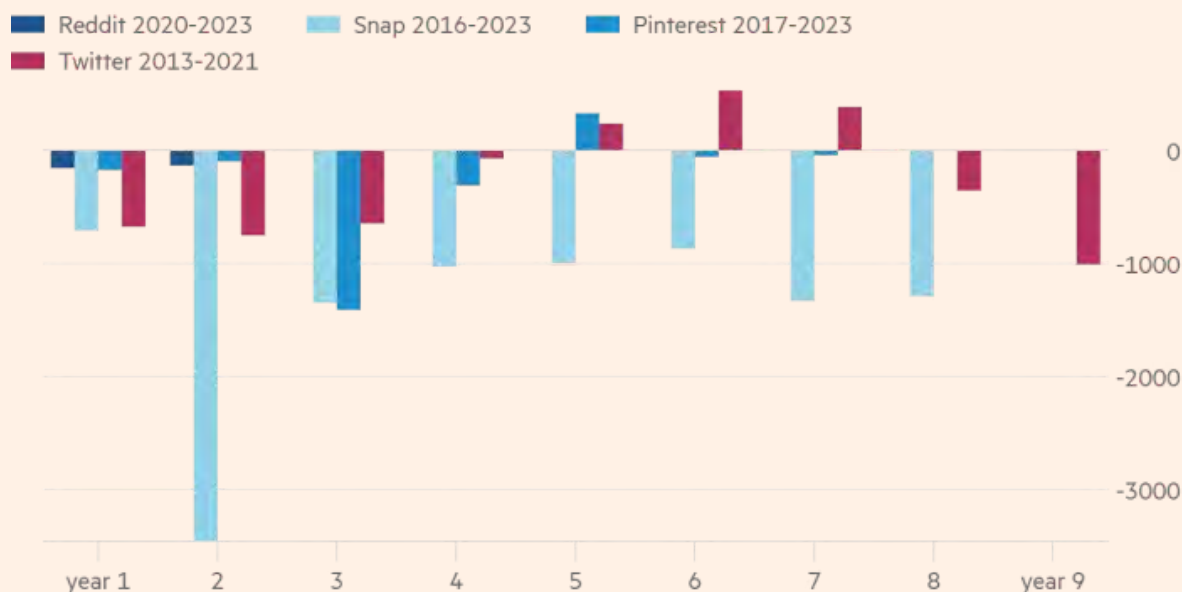
Looking at all this, it seems possible to make some reasonable assumptions about the trajectory of a business such as Reddit, and derive an estimate of value from that. Other companies have done what it is trying to do. Obviously things could happen that could break Reddit out of the mould. Its huge cache of user-generated text could become very valuable to artificial intelligence companies for training their models; further commercialisation could infuriate its core users and volunteer moderators, such that growth stalls or reverses. But the forecasting challenges facing investors in the social media group are not all that much worse than those facing, say, a computer gaming company or a movie studio.

Salmon is the only analyst to have published his forecasts. His model has Reddit with 131mn users and \$2.3bn in revenue in 2027, implying growth of 16 and 30 per cent a year, respectively, over the next four years. That's in the range of what Snap and Pinterest did starting from a similar point in their development (Salmon rates Reddit a hold).

There is one area of concern. I'm not sure if the second-tier social media companies are profitable, even when their revenues rise into the billions. The profit metric I prefer to use for tech companies is what I call "true free cash flow", which is operating cash flow minus capital expenditures and stock-based compensation (stock comp becomes a cash expense when a growing tech company becomes successful, because stock options vest and the company has to spend cash repurchasing shares to prevent shareholder dilution; this is [happening to Uber](#) now, for example). They may yet figure it out, but as of now, none of Twitter, Pinterest or Snap has consistently generated true free cash flow. They are, in other words, only profitable because they pay their employees in IOUs:

It is not totally clear if these businesses are profitable

True free cash flow (operating cash flow less capital expenditures and stock-based compensation), \$mn



Sources: S&P CapitalIQ,

© FT

Salmon thinks Reddit will generate \$344mn of true free cash flow in 2027. I'd bet, without much confidence, that it will be less than that.

Yen: it's all about US

The Bank of Japan has left negative interest rates behind, yet yen weakness continues unabated. The yen touched a [34-year weak point](#) on Wednesday, prompting Japanese officials to threaten forex intervention and hold an emergency meeting.

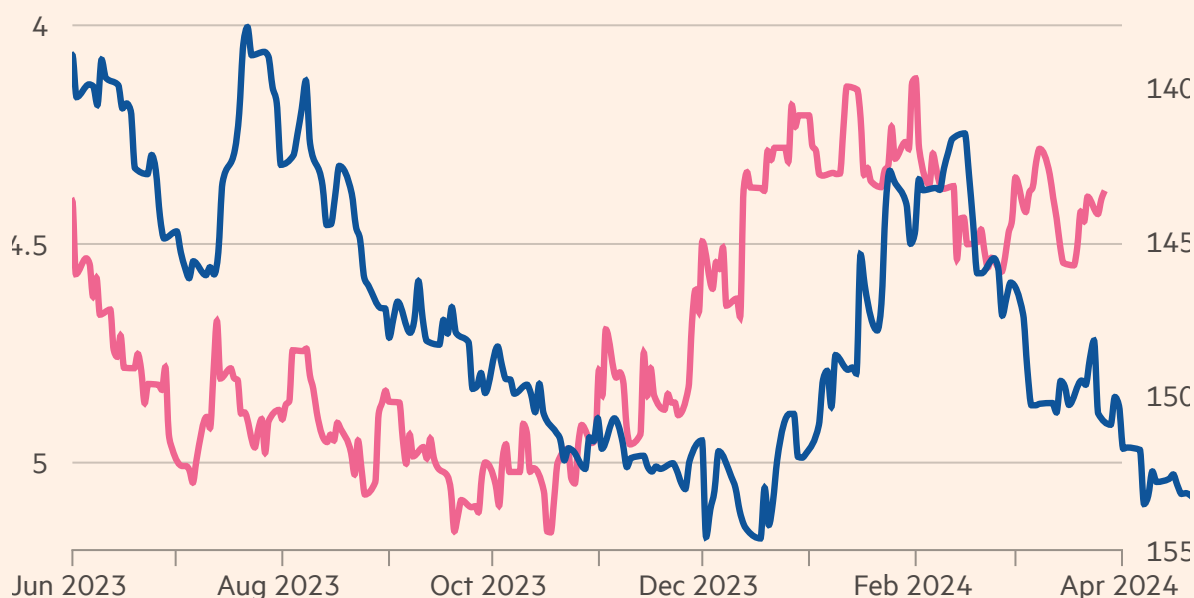
Usually, big currency moves follow rate differentials — that is, the gap between two countries' nominal interest rates. Higher rates should attract capital and push up a country's currency. But rate differentials haven't changed much in the past few months. The chart below shows the gap between Japanese and US two-year yields against the yen. The two tend to travel together but the latest bout of yen weakness has corresponded with US-Japan rate differentials moving mostly sideways. (Using 10-year instead of two-year yields renders the same picture.) At a high level, there isn't a dead-obvious rates story here:

Yen weakness doesn't have a tidy rates story

Both axes inverted such that declines correspond with a weaker yen

Yen per dollar (right, inverted)

Spread between US and Japan 2-year yields, % (left, inverted)



FINANCIAL TIMES

Source: Bloomberg

Various explanations have been mooted. A popular one is that traders expected the BoJ to sound more hawkish last week, were disappointed and started selling yen. Jonas Goltermann of Capital Economics wrote last week:

“

we suspect that [the yen falling] reflects market participants unwinding short-term positions built up in anticipation of a more aggressive tightening move from the BoJ. After all, press reports ahead of the meeting had (again) suggested a more hawkish approach might be in the offing and the yen and JGB yields had risen in response, only for policymakers to deliver another damp squib.

The BoJ's own explanation is not entirely different. As our colleagues Leo Lewis and Kana Inagaki [reported yesterday](#):

“

Japanese finance officials have privately told analysts that they do not believe the yen's recent weakening is justified by the BoJ's historic move and said the declines represent speculative money testing the authorities' resolve...

This week, Japan's top currency official, Masato Kanda, warned speculators against further attempts to sell off the yen and said “all options” were under consideration by the authorities.

You can find more exotic views, too, like the idea that [US trade policy is to blame](#).

We put all these to Karl Schamotta, currency strategist at Corpay, who had yet another explanation. He thinks yen movements largely reflect what's happening to the dollar. World-beating US growth, somewhat stubborn inflation and central bankers emphasising patience have meant rate-cut expectations are being curtailed. The US two-year yield has risen 37 basis points in the past two months, and more are talking about the [possibility of zero Fed cuts this year](#). The result is that we are on the US dominance side of the “dollar smile” — the pattern whereby the dollar appreciates when US growth outpaces everywhere else.

One way to see this is that other currencies have weakened against the dollar in a similar way as the yen. The US dollar index is up 3 per cent this year. Recent renminbi weakness has looked much like the yen's, and has also invited speculation about official intervention. Markets, says Schamotta, see a strong US economy begetting a strong dollar as a lasting feature, and are betting on it.

We find that convincing, and would add that the magnitude of the BoJ's rate increase, moving from -0.1 per cent rates to merely zero, was more symbolic than substantive. That made it easy to be overwhelmed by the strong dollar's momentum. In that sense, saying the yen is weak *despite* the BoJ rate rise isn't quite right. Given the [many constraints on its monetary policy](#), the BoJ just appears to have limited sway over the yen. It will have to do much more to wrest control of its country's currency back from the Fed. (*Ethan Wu*)

One good read

[More on China's pivot to manufacturing.](#)

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Short Seller's Winning Bet Means Permanent Payments to Jefferies

By Greg Farrell

- Hedge fund IsZo Capital bet against struggling retail chain
- Now it has sued, claiming Jefferies won't let it close trade

Bloomberg Law News 2024-03-28T10:05:54288950614-04:00

Short Seller's Winning Bet Means Permanent Payments to Jefferies

By Greg Farrell2024-03-27T15:19:43450-04:00

- Hedge fund IsZo Capital bet against struggling retail chain
- Now it has sued, claiming Jefferies won't let it close trade

A short seller that bet against a struggling retail chain claims it's now paying the price: an endless stream of monthly payments to Jefferies LLC, which lent it the shares for the trade more than a decade ago.

IsZo Capital can't close out its short position in Gordmans, a Nebraska-based retailer that filed for bankruptcy in 2017, because Jefferies won't let it, the hedge fund said in a lawsuit filed late Tuesday in New York state court.

For years Jefferies "has collected fees for an outstanding loan of shares of stock that have been canceled and thereby rendered forever valueless," IsZo said in its complaint. "Even assuming its motives are benign — a questionable assumption — defendant's continued refusal of plaintiff's requests to close the short sale is unjustifiable and inconsistent with the principles of equity."

Read More: Hedge Fund IsZo Says Jefferies 'Hijacked' Its Brokerage Account

It isn't the first skirmish between the two. In 2021 IsZo filed an arbitration complaint against Jefferies claiming that the investment bank had "hijacked" its prime brokerage account when IsZo wanted to move its business to a different brokerage. The hedge fund published an open letter criticizing several Jefferies employees by name and even created a website devoted to the firm's alleged misdeeds.

In February an arbitration panel of the Financial Industry Regulatory Authority ruled in Jefferies' favor and ordered IsZo to pay \$1 million toward the firm's attorneys fees and take down the website.

In the current dispute, IsZo is asking the court to make Jefferies let it close the position.

A spokesperson for Jefferies declined to comment on the suit.

Short sellers identify companies they believe are overvalued and sell borrowed shares, planning to buy the stock back later for return to the lender, when they believe the price will be significantly lower. If the targeted company goes bankrupt, wiping out the stock, it can all backfire. That's what happened to IsZo, which can't buy back the stock because it no longer exists.

In addition to the Sisyphean stream of monthly fees, IsZo alleges it has been forced to keep \$1.6 million at its prime broker, Pershing LLC, because it can't close out its Gordmans position without Jefferies' approval.

As a result, IsZo says, it "will remain stuck in a kind of perpetual purgatory."

The case is IsZo Capital v. Jefferies LLC, New York State Supreme Court, New York County (Manhattan).

--With assistance from Katherine Doherty.

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Colo. Judge Unplugs Vague EV-Maker Investor Suit

By **Daniel Ducassi**

Law360 (March 27, 2024, 7:36 PM EDT) -- A Colorado federal judge has dismissed a shareholder suit against commercial electric vehicle company Lightning eMotors, agreeing with a magistrate judge's conclusion that the shareholders failed to bring specific allegations that the company knowingly misled investors on matters like its production capacity.

The lawsuit, filed in October 2021, accused certain executives and directors of knowing or recklessly disregarding that Lightning couldn't quickly scale up its operations or meet revenue expectations as claimed. U.S. Magistrate Judge Kathryn A. Starnella **wrote in her recommendation** in February that the investors' allegations lacked necessary details to support the conclusion that alleged misstatements were false when they were made, and that their claims should be dismissed without prejudice.

U.S. District Judge Regina M. Rodriguez agreed with Judge Starnella's assessment, writing in her order Tuesday that the investors' objection to the recommendation "merely repeats the same error" as their complaint, failing to get into specifics regarding why statements about the company's supply chain were misleading.

"Plaintiffs simply cite to several other alleged misstatements 'detailed in the complaint' and assert that such statements were materially false or misleading 'because they ignored or misrepresented the critical shortages in battery supply and the inability of Lightning's four existing battery suppliers to provide sufficient batteries for Lightning to scale production as promised.'" Judge Rodriguez wrote. "The court agrees with the recommendation's finding that plaintiffs' supply chain allegations fail because they lack particularized, contemporaneous facts to support their speculation about Lightning's supplier network or procurement costs."

The rest of the investor arguments objecting to the conclusion that their allegations of misstatements were too vague "amount to little more than disagreement with Magistrate Judge Starnella's findings regarding the alleged misstatements and do not identify any error," Judge Rodriguez wrote.

The investors had also asserted claims based on allegations that leadership for special-purpose acquisition company GigCapital3 — which acquired Lightning Systems in 2021 before renaming itself Lightning eMotors — abandoned the company despite previously touting a mentor-investor approach. Judge Starnella, however, found the shareholders' allegations weren't specific enough to support a conclusion that the statements about the mentor-investor relationship were known to be false when the last such statement was made about four months before the GigCapital3 defendants left the Lightning board.

Judge Rodriguez found no fault with that analysis, finding that Judge Starnella didn't overlook key facts, but rather correctly found that the Lightning board's reclassification of two of the GigCapital3 defendants a few days after the purchase of Lightning didn't speak to the intentions of GigCapital3 defendants months before.

And Judge Rodriguez wrote that because Judge Starnella didn't find the investors' allegations could support finding any of the alleged false statements were false when they were made, she was right to also find those statements couldn't be the basis for claims of fraud or deceit.

Lightning investors last year **settled a related derivative lawsuit for \$1.9 million**, and the deal is now awaiting final approval.

Meanwhile, Lightning's financial woes have continued. The company went into receivership last year, with the company's receiver telling a state judge in Larimer County, Colorado, in February that it had sold just about all of Lightning's assets to a subsidiary of bus manufacturer Gillig for \$12.6 million.

Counsel for Lightning declined to comment. Counsel for the shareholders and the GigCapital3 defendants did not immediately respond to requests for comment Wednesday.

The investors are represented by Daniel S. Drosman, Hillary B. Stakem and Heather G. Geiger of Robbins Geller Rudman & Dowd LLP, and Jeffrey Allen Beren, Michael I. Fistel Jr. and Mary Ellen Conner of Johnson Fistel LLP.

Lightning is represented by Boris Feldman and Doru Gavril of Freshfields Bruckhaus Deringer LLP.

The GigCapital3 defendants are represented by Melanie E. Walker and David Freeburg of DLA Piper.

The case is Shafer v. Lightning eMotors Inc. et al., case number 1:21-cv-02774, in the U.S. District Court for the District of Colorado.

--Additional reporting by Sydney Price. Editing by Kelly Duncan.

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3 Firms Vie To Lead Instacart Pre-IPO Action

By **Sydney Price**

Law360 (March 27, 2024, 4:47 PM EDT) -- Levi & Korsinsky LLP, Pomerantz LLP and The Rosen Law Firm PA have each asked a California federal judge to lead a securities lawsuit against grocery delivery company Instacart for allegedly misrepresenting its growth potential in the lead-up to its initial public offering.

All three proposals claim to represent the "largest financial interest" in the **proposed class action** against Instacart, which was filed in January by shareholder Andy Dean Stephens.

According to a motion filed Monday by Levi & Korsinsky, its client James Cheng lost over \$200,000 in connection with his purchases of Instacart securities. Pomerantz client Carlo J. Viscusi alleges he lost approximately \$34,000 in Instacart securities transactions and submitted a separate proposal for lead plaintiff.

The Rosen Law Firm client Tapiwanashe Nhundu claims losses of approximately \$156 in another proposal for class lead.

"[Nhundu] satisfies the above criteria, having the largest financial interest of any movant in this litigation, and is therefore the most adequate plaintiff and should be appointed as lead plaintiff," the motion states.

Stephens' suit alleges Instacart downplayed the amount of competition it faces in the online grocery shopping and delivery market when it filed its registration statement with the U.S. Securities and Exchange Commission before its September IPO.

The offering documents included a letter from Instacart CEO Fidji Simo, in which she told investors that Instacart demonstrated the ability to "help retail partners drive strong growth and stay competitive in a complex and increasingly digital industry," the suit states.

The company went public on Sept. 19, when its shares began trading on the Nasdaq for \$30 each, Stephens' suit noted.

But the truth regarding Instacart's business prospects emerged a few days later, on Sept. 22, when a news article with analyst commentary revealed Instacart faced major competition from DoorDash and Uber in the "slowly expanding" grocery delivery market, the suit said.

Following the article, Instacart's shares fell 65 cents, or about 2%, to close at \$30 per share on Sept. 22, according to the suit.

A couple of weeks later, on Oct. 2, investment research firm Gordon Haskett issued a "hold" rating for Instacart, saying decreased consumer spending and competition threatened the business, the complaint noted.

The suit further claims Instacart and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Securities Act and the Exchange Act.

Counsel for Cheng declined to comment on Wednesday. Counsel for the other parties did not immediately respond to requests for comment.

Cheng is represented by Adam M. Apton of Levi & Korsinsky LLP.

Viscusi is represented by Jennifer Pafiti, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP.

Nhundu is represented by Laurence M. Rosen of The Rosen Law Firm PA.

Instacart is represented by Boris Feldman, Doru Gavril, Olivia Rosen and Eunice Leong of Freshfields Bruckhaus Deringer LLP.

The case is Stephens v. Maplebear Inc. dba Instacart et al., case number 3:24-cv-00465, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.

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Energy Co. Origis Exits Investor Suit Over Devalued Shares

By **Katryna Perera**

Law360 (March 27, 2024, 10:35 PM EDT) -- Renewable energy company Origis USA Inc. has escaped a suit by former shareholders after a New York federal judge concluded that the plaintiffs failed to show that the company was privy to an alleged scheme by its now-former CEO to induce them to sell their stakes for considerably less than the \$1.4 billion they were later sold for.

U.S. District Judge Katherine Polk Failla issued a 69-page opinion and order Monday fully granting Origis' dismissal motion while only partially granting a separate dismissal motion filed by former Origis CEO Guy Vanderhaegen and three entities associated with him.

The suit, filed by former Origis shareholders Pentacon BV and Baltisse NV, alleges that in the lead-up to the September 2020 sale of their 29% stakes in the company, the defendants deliberately withheld critical information and intentionally misrepresented the value of Origis and its pipeline of solar energy projects.

"These actions were part of defendants' scheme to seize plaintiffs' interests in Origis USA at a 'grossly deficient' price and resell them quickly thereafter for a significant profit," Monday's order said.

Pentacon and Baltisse sold their stakes in Origis USA for only \$105 million to the defendants, according to the order. Then, a year later, Vanderhaegen, the Guy Vanderhaegen Revocable Trust, Pelican Invest LLC and Pelican International LLC — together known as the Vanderhaegen defendants — sold their collective interest in Origis for \$1.4 billion.

The defendants moved for dismissal of all twelve counts of the amended complaint in June. In her Monday order, Judge Failla first addressed the suit's counts of fraud and fraudulent inducement of contract.

She said the plaintiffs have adequately stated claims for fraud and fraudulent inducement only against the Vanderhaegen defendants since the complaint alleges that they intentionally withheld material information to induce the plaintiffs to enter into the share redemption agreement "and thereby unlawfully expropriate large amounts of money from plaintiffs in order to enrich themselves."

"Plaintiffs reasonably relied on those statements because of 'the fiduciary duties which Vanderhaegen touted he owed to plaintiffs' and 'the representations and warranties in the [share redemption agreement],'" the order states. "Plaintiffs suffered damages because the statements induced them to sign the SRA and 'relinquish their ownership interests [in Origis USA] at a grossly deficient value.'"

The judge also noted that the "obvious inference" from the suit's allegations is that Vanderhaegen did not believe any of the valuations he presented to plaintiffs ahead of the sale, making all the related statements and alleged misrepresentations he made actionable.

The claims against Origis were also dismissed because the judge found that the alleged misrepresentations are only attributable to Vanderhaegen.

"To the extent information prepared by Origis USA made its way to plaintiffs, Origis USA was not involved. Rather, plaintiffs' allegations establish that any information prepared by Origis USA was transmitted to plaintiffs exclusively via Vanderhaegen and do not support any plausible finding that

Origis USA itself provided any valuation information to plaintiffs," the order states.

Due to the retention of the fraud and fraudulent inducement claims against the Vanderhaegen defendants, Judge Failla also declined to toss claims for constructive fraud and breach of fiduciary duty against them.

Turning to the complaint's breach of contract claims, Judge Failla found that the plaintiffs plausibly alleged such claims against Pelican International, Pelican Invest and the GVR Trust, but not Vanderhaegen himself since the suit does not establish that he was a party to the share redemption agreement in his individual capacity. Therefore, he cannot be held personally liable on any related claims, the judge said.

Judge Failla also dismissed allegations that the Vanderhaegen defendants breached the implied covenant of good faith and fair dealing and the SRA's no-sale clause.

"The amended complaint indicates that, on Sept. 8, 2021, Vanderhaegen 'confirm[ed]' the \$1.4 billion deal for Origis USA. But the [transaction] did not officially occur until October 2021, i.e., more than twelve months after the SRA was executed," the order states. "Applying the 'ordinary meaning' of the term 'sale' ... the 'sale' of Origis USA did not occur within the twelve-month post-SRA period covered by the no sale clause. Accordingly, defendants cannot have breached the no sale clause."

Finally, Judge Failla tossed the suit's claim for aiding and abetting fraud against both Origis and the Vanderhaegen defendants, saying the plaintiffs have not established that any of the defendants assisted another.

"The Vanderhaegen defendants acted together as the 'one entity' in committing the purported fraud, and thus could not have offered assistance to one another," the order states.

She also said the amended complaint lacks any allegations that Origis knew of Vanderhaegen's scheme to defraud the plaintiffs or that it assisted that alleged scheme in any way.

"Absent plausible allegations of this knowledge, plaintiffs cannot implicate Origis USA in Vanderhaegen's fraud merely due to the fact that it provided financial information to Vanderhaegen," the order states.

The judge also tossed civil conspiracy claims against all the defendants and a tortious interference claim against Origis.

In a statement to Law360 on Wednesday, counsel for the plaintiffs, from Dechert LLP, said: "We are gratified that the court rejected the attacks on the heart of the complaint, our fraud and fiduciary duty claims, and has recognized that those claims should go forward to trial."

Counsel for the defendants did not immediately respond to requests for comment on Wednesday.

The plaintiffs are represented by Steven B. Feirson, Matthew L. Mazur and David L. Attanasio of Dechert LLP.

The Vanderhaegen defendants are represented by Thomas J. McCormack, Robert Kirby, Anthony Lauriello and Robin Ball of Norton Rose Fulbright.

Origis USA is represented by Blair Connelly, Blake Denton, Matthew Valenti and Ryan Maamoun of Latham & Watkins LLP.

The case is Pentacon BV et al. v. Vanderhaegen et al., case number 1:23-cv-02172, in the U.S. District Court for the Southern District of New York.

--Editing by Rich Mills.



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AI Software Co. Hid Oil Biz Partnership's Collapse, Suit Says

By **Sydney Price**

Law360 (March 27, 2024, 11:07 PM EDT) -- Executives and directors of artificial intelligence company C3.ai Inc. have been hit with a shareholder derivative suit in California federal court claiming they failed to disclose that the company's partnership with oil company Baker Hughes Co. was falling apart and that its sales team was experiencing high turnover.

According to the **suit** filed by shareholder Justin Lanfair Tuesday, C3 relies on selling its AI software subscriptions to other businesses, and Baker Hughes had exclusive rights to resell C3's software to other oil and gas industry entities under an agreement between the companies. However, the defendants hid from the public that C3 did not have access to Baker Hughes' full sales team, and that Baker Hughes' C3 sales team did not make any sales during the 2020 fiscal year, the complaint alleges.

The complaint also describes how the partnership was fraying despite assurances, such as a former C3 employee calling it "a marriage that is not working" and a report questioning if it would be renewed.

In addition to nominal defendant C3, the individual defendants include its CEO Thomas Siebel, former Chief Financial Officer David Barter, and several current and former executives and directors.

The suit alleges that C3's share prices were artificially inflated because the offering documents for its December 2020 initial public offering contained false and misleading statements about its sales team's size, the nature of its strategic partnerships, and its business model.

On Dec. 1, 2021, however, the truth began to emerge, the suit claims. That day, Siebel revealed that C3 had reorganized its direct sales team earlier in the year and had to reorganize it again during the second quarter of 2021. He also told investors that C3 was not utilizing Baker Hughes' 12,000-person expert sales team as promised, according to the suit.

The price of C3's shares fell \$3.79, or approximately 11%, to close at \$30.04 per share on Dec. 3, 2021, according to the suit.

The truth fully emerged, the suit alleges, on Feb. 16, 2022, when short seller Spruce Point Capital Management said in a research report that, among other things, C3's sales teams suffered from high turnover, and that the company was paying Baker Hughes \$25 million in sales commissions on what Spruce Point determined to be a maximum of \$11 million of eligible revenues for commission payments. The report said C3 agreed to pay commissions despite the Baker Hughes joint venture not being on track to hit the minimum revenue requirement for 2022, according to the suit.

That day, C3's shares fell \$1.01, or nearly 4%, to close at \$24.70 per share on Feb. 16, the suit states.

Additionally, the suit claims that 10 of the individual defendants, including Siebel and Barter, made insider sales of stock, profiting by \$745 million during the relevant period.

The complaint also notes that C3 is facing a securities class action in California federal court and says the company has already been damaged financially due to the defendants' actions.

"The individual defendants' misconduct has caused the company to incur many millions of dollars of legal liability and/or costs to defend unlawful actions and investigations and the securities class action, to engage in internal investigations, and to lose financing from investors and business from future customers who no longer trust the company and its products," the suit states.

Lanfair accuses the defendants of breaching their fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, wasting corporate assets, and violating the Exchange Act.

Counsel for Lanfair and a representative of C3 did not immediately respond to requests for comment on Wednesday.

Lanfair is represented by Robert C. Moest and Timothy Brown of The Brown Law Firm PC, and Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC.

Counsel information for C3 and the individual defendants was not immediately available on Wednesday.

The case is Lanfair v. Siebel et al., case number 3:24-cv-01869, in the U.S. District Court for the Northern District of California.

--Editing by Adam LoBelia.

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Everbridge Investor Seeks To Block \$1.8B Thoma Bravo Deal

By **Julie Manganis**

Law360 (March 27, 2024, 2:28 PM EDT) -- A shareholder in Massachusetts-based emergency management platform Everbridge Inc. is asking a state court to intervene in a pending \$1.8 billion acquisition by private equity firm Thoma Bravo LP, alleging in a Wednesday lawsuit that investors are being misled about the true value of shares and the motives of those promoting the deal.

Cheryl Lacoff, an Everbridge shareholder, says the proposed share price of \$35 does not reflect Everbridge's true value and will harm shareholders while benefiting the board members and the company's recently hired CEO, David Wagner, according to the complaint filed in Middlesex County Superior Court.

Lacoff is asking for a court order to either block the sale or, in the event the sale takes place before a hearing, rescind it.

The complaint names Everbridge, Thoma Bravo, the holding companies set up by Thoma Bravo for the deal, Wagner, and other board members.

Wagner, Lacoff says in the complaint, is a former senior executive of another Thoma Bravo-owned company, something she says is among the relevant information not disclosed in a proxy distributed to investors ahead of next month's scheduled shareholder meeting.

The lawsuit alleges that Wagner, who is also on the board of directors, had been angling to return to the Thoma Bravo fold and, once the acquisition is complete, stands to receive a multimillion-dollar compensation package as CEO of Everbridge.

The board members will also receive payouts of more than \$282,000 each for what are currently unvested equity awards, according to the complaint.

Lacoff says Everbridge's financial adviser in the transaction, Qatalyst Partners LP, which is not named as a defendant in the complaint, also had an incentive to recommend the deal, standing to make \$40 million if the sale closes but just \$6.5 million if it does not.

That, she argues, "provides Qatalyst with an enormous financial incentive to support the sale, regardless of its unfairness to Everbridge investors at large."

In addition, Qatalyst was simultaneously advising Thoma Bravo in a separate \$10.5 billion acquisition, "calling into question whether its true loyalties lie with Thoma Bravo or Everbridge," Lacoff alleges.

Lacoff's complaint alleges negligent misrepresentation and concealment and common law negligence, both under state law.

The complaint also names board chair David Henshall and members David Benjamin, Alison Dean, Rohit Ghai, Kent Mathy, Simon Paris and Sharon Rowlands, who each are expected to receive \$282,380 in accelerated vesting of their equity in Everbridge if the deal goes through.

Everbridge, based in Burlington, Massachusetts, operates a software-as-a-service platform for law enforcement and other government agencies or private entities seeking to provide mass notifications

during emergencies or other crisis situations.

The proposed "take private" deal with Everbridge, which made its initial public offering in 2016, **originally valued** the shares at \$28.60, but the price was **bumped up** earlier this month after another third-party offer came in during a "go shop" period.

Lacoff, in her complaint, points to the company's "double-digit year-over-year revenue increases" of more than 30% per year since its 2016 IPO. It brought in \$450 million last year and is projected to continue to grow, according to the suit, which says the stock in late 2021 hit a share price of over \$100.

That share price dropped, however, amid the fallout following a former CEO's resignation and a subsequent proxy fight, the suit says.

Lacoff alleges the board hasn't given share prices time to rebound.

On Wednesday afternoon, shares in the Nasdaq-traded Everbridge were trading at \$34.81.

Everbridge is scheduled to ask shareholders to approve the deal at a meeting on April 25.

Messages seeking comment from Lacoff's attorneys, from spokespersons for Everbridge and Thoma Bravo, and from attorneys who have been handling the acquisition for the two firms did not immediately receive responses on Wednesday.

Lacoff is represented by Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP and Richard B. Brualdi, John F. Keating Jr., Gaitri Boodhoo and David Titus of The Brualdi Law Firm PC.

Counsel information for Everbridge, its board members and Thoma Bravo was not immediately available.

The case is Lacoff v. Everbridge Inc. et al., case number 2481CV00815, in the Middlesex County Superior Court for the Commonwealth of Massachusetts.

--Additional reporting by Al Barbarino. Editing by Philip Shea.



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Chancery Sides With Cannabis Company On Legal Fees Row

By **Courtney Buble**

Law360 (March 27, 2024, 5:06 PM EDT) -- A Delaware Court of Chancery judge at a Wednesday hearing gave Left Coast Ventures Inc. time to fulfill a court order requiring it to cover legal fees for three former directors of the cannabis company defending a merger-related suit, after a company attorney told the judge the money will be coming.

Ronald J. Kohut of Jackson Tidus, one of the attorneys for the defense, said on a teleconference call on Wednesday that LCV already committed to making a payment of \$1 million, but there will be a "short delay" due to a funding issue.

On Sunday, an attorney for the former directors sent a letter to Vice Chancellor Morgan T. Zurn **seeking a hearing** for what he alleged were "concerning violations" of the court's bench ruling and orders earlier this month. An attorney for Left Coast Ventures contested these claims.

Steven L. Walsh of Benesch Friedlander Coplan & Aronoff LLP, another attorney for the defense, wrote in a March 24 letter that LCV "concedes that it has not yet made a payment" and that it explained to the plaintiffs that it couldn't make the payment until March 28.

Kohut asked the judge on Wednesday to "be comforted" that the money is there.

Vice Chancellor Zurn sided with the defense's argument.

The March 8 ruling granted the directors' summary judgment motion in their lawsuit for advancement of about \$119,000 in unpaid legal fees, issued an order governing ongoing advancement procedures, also known as a "Fitracks order," and awarded them fees-on-fees.

"Fitracks order" is derived from a 2012 case, *Danenberg v. Fitracks*, that spelled out the protocol for payment of advancement claims.

"The plain, unambiguous language of the Fitracks order states that 'if LCV disputes more than 50% of the amount sought in any demand, LCV shall pay 50% of the amount sought,'" Walsh wrote. "Plaintiffs want the court to change 'shall pay 50%' to 'shall pay 100%.' The court should decline plaintiffs' request to modify the clear language of the order that they drafted, and that the court entered at their request."

Cynthia Jordano of Cohen Ziffer Frenchman & McKenna LLP, representing the plaintiffs, said on the teleconference, "We have not received any payments yet in escrow or otherwise" and argued that \$1.27 million already should have gone to the plaintiffs.

"LCV disputed all of plaintiffs' invoices on grounds already rejected by this court and failed to pay any of plaintiffs' expenses, even though Paragraph 3 of the Fitracks order requires LCV to pay a minimum of 50% of the demand and place the disputed remainder into escrow," Matthew D. Stachel of Paul Weiss Rifkind Wharton & Garrison LLP, an attorney for the directors, wrote in a March 24 letter.

In June, the former directors — Daniel Fireman, Christopher Akelman and Octavio Boccalandro — **filed a lawsuit** alleging that LCV, a cultivator, manufacturer and distributor of cannabis products, breached its bylaws and indemnification agreements by not paying their defense in a **stockholder class action**, which accused them of scheming to divert \$40 million from the company before it was

bought by what is now called the Parent Company.

Vice Chancellor Zurn noted she didn't have all the materials pertinent to the case and said this was a "disappointing progression of this case."

Attorneys for both sides declined to comment for the story.

Daniel Fireman, Christopher Akelman and Octavio Boccalandro are represented by Robin L. Cohen, Cynthia M. Jordano and Victoria Salami of Cohen Ziffer Frenchman & McKenna LLP, and Matthew D. Stachel of Paul Weiss Rifkind Wharton & Garrison LLP.

Left Coast Ventures Inc. is represented by Krista M. Enns and Steven L. Walsh of Benesch Friedlander Coplan & Aronoff LLP, and Ronald J. Kohut of Jackson Tidus.

The case is Daniel Fireman et al. v. Left Coast Ventures Inc., case number 2023-0588, and the related lawsuit is Michael Blue et al. v. Fireman Capital Partners LLC, et al., case number 2021-0268, both in the Court of Chancery of the State of Delaware.

--Additional reporting from Leslie A. Pappas. Editing by Robert Rudinger.

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Real Estate Exec Asks To Toss Shareholder's Self-Dealing Suit

By **Isaac Monterose**

Law360 (March 27, 2024, 2:21 PM EDT) -- The president of a real estate management and investment firm asked a California federal court to toss a derivative shareholder suit accusing him of misusing nearly \$35 million of company revenue in various ways, including hiring a business he owned with his mistress.

Tramor Properties Inc. President John H. Morris argued in a **dismissal motion** Monday that minority owner Molly Tracy's amended suit failed to pass a test established for derivative shareholder suits by the Delaware Supreme Court's September 2021 decision in *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*.

According to Morris, the California federal court used the Zuckerberg test to dismiss the initial version of Tracy's suit and determined that she failed to allege demand futility, which entails shareholders having the option to make litigation demands to the board before filing a derivative shareholder suit.

Morris argued that in her new amended suit, Tracy failed to pass the Zuckerberg test because she didn't specifically allege how Morris' fellow Tramor Properties board members, Thomas K. Tracy and Marisa Prasifka, benefited from Morris' alleged misuse of the company's revenue. Thomas Tracy and Prasifka aren't listed as defendants in Molly Tracy's suit, which she **filed** in September 2023.

The lawsuit claimed that Morris misused company revenue to make "questionable loans," "pay exorbitant employee benefits" and hire property management company Tramor Management Services, which is owned by Morris and his alleged mistress, Monique F. Price.

Tramor Properties owns more than 2,600 apartments, mostly in the Austin, Texas, area, the company says on its website.

"Plaintiff fails to allege facts with particularity demonstrating that Ms. Prasifka or Mr. Tracy received any material personal benefit from the alleged conduct that is the subject of the litigation," Morris argued Monday. "On the contrary, the [amended suit] makes clear that Mr. Tracy — like plaintiff — is a minority shareholder to whom the distributions plaintiff complains about have also not been made, and that Ms. Prasifka is not a shareholder at all."

The lawsuit also falters when it comes to alleging how likely it would be for nonparties Prasifka and Tracy to be held liable for the claims, Morris said. The allegations that the two other board members were "complicit" in his alleged misuse of company revenue were "conclusory," he argued.

"Plaintiff alleges no facts to show what Ms. Prasifka or Mr. Tracy supposedly did, when they did it, or why it would give rise to any liability under any legal theory," Morris said.

"At best, plaintiff alleges that Ms. Prasifka is 'complicit' in 'accounting irregularities' like 'mystery loans' and 'cash hoarding,' but that does not state the facts, with particularity or otherwise, to show how she supposedly engaged in conduct that gives rise to a substantial likelihood of personal liability," he continued.

Additionally, Morris argued that the claims regarding the board members' complicity contradicts other claims that Morris has total control over Tramor Properties. He also said the suit included a request for accounting records, but a Texas state court previously ruled in a separate suit that Molly Tracy

wasn't entitled to those records.

"Having lost that case in Texas, plaintiff cannot plausibly allege injury from not receiving relief that a court has ruled she was not entitled to in the first place, let alone allege this gives rise to a 'substantial likelihood of liability,'" Morris argued. "Even if plaintiff's books and records demands had not already been adjudicated in TPI's favor, the [amended suit's] allegations [fail] to state any substantial likelihood of liability on that issue as to Mr. Tracy or Ms. Prasifka."

The lawsuit also failed to allege that the two board members lacked any independence when it came to their business decisions, Morris argued. Its claims about Prasifka's independence were "conclusory," and the claims regarding Tracy's independence lacked substance, he said.

"The [amended suit] also alleges that Morris employs Ms. Prasifka, she reports to him, and Morris 'presumably' establishes her compensation," Morris said. "But those allegations are contradicted by the [amended suit] itself, and in any event insufficient."

The lawsuit had alleged that Thomas Tracy and Morris were friends, but Morris pointed to the Zuckerberg ruling to argue that an alleged friendship wasn't enough to show that the board member lacked independence.

"For example, in Zuckerberg, the plaintiff alleged Peter Thiel is Mark Zuckerberg's 'close friend and mentor' as a basis for why — according to that plaintiff — Thiel is beholden to Zuckerberg," Morris said. "The Delaware Supreme Court rejected that allegation, holding that 'alleging that Thiel is a personal friend of Zuckerberg is insufficient to establish a lack of independence.'"

Morris also argued that the lawsuit failed to allege a direct breach of fiduciary duty claim, which he said violates the Federal Rule of Civil Procedures for derivative shareholder suits.

He pointed to California law and a California appeals court's September 2021 ruling in [Schrage v. Schrage](#) to argue that a successful derivative shareholder suit must only benefit the company and not the shareholders themselves. But the Schrage decision also determined that a direct breach of fiduciary duty claim has to "enforce a right against the corporation which the stockholder possesses as an individual," Morris said.

However, the amended suit uses the same previously dismissed derivative shareholder claims to establish a direct breach of fiduciary duty claim, Morris said, even though the presiding California federal court previously ruled that those claims weren't enough.

According to Morris, the suit fails to allege "any injuries separate and distinct from the supposed injury to TPI and its shareholders."

"Plaintiff alleges that Morris directed TPI 'to hoard excessive amounts of cash,' which results in 'the loss of distributions' and 'harm to the value of the investment' in TPI as shareholder," Morris told the California court. "Plaintiff also alleges that 'Morris has been diverting corporate assets,' thus 'the value of plaintiff's shares in TPI have decreased.'"

"These are the exact same claims the court already ruled are not separate and distinct from the injury to the value of TPI," he continued.

Molly Tracy's attorney Brendan F. Macaulay told Law360 on Wednesday that the dismissal motion is telling the California federal court that she hasn't "jumped through a lot of hoops" to ask Morris and the other company directors to allow the company to sue Morris.

"This is basically just them throwing up every conceivable obstacle to a shareholder trying to investigate and seek redress for self-dealing," Macaulay said. "The fox is in control of the hen house and is arguing that we didn't ask the fox to sue himself."

"We hope and expect that the judge will see through this additional procedural obstacle and allow Ms. Tracy to eventually be able to bring her claims on behalf of all the shareholders," he said.

Counsel for Morris and Tramor Properties didn't respond to requests for comment.

Molly Tracy is represented by Brendan F. Macaulay and Kasia Penn of Nossaman LLP.

Morris is represented by Christopher Tayback, Joseph C. Sarles and John W. Baumann of Quinn Emanuel Urquhart & Sullivan LLP.

Tramor Properties is represented by Steven M. Garber.

The case is Molly Tracy et al. v. John H. Morris et al., case number 2:23-cv-08022, in the U.S. District Court for the Central District of California.

--Editing by Haylee Pearl.

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9th Circ. Rejects Rust-Oleum's Bid To Sink Class Cert.

By **Juan-Carlos Rodriguez**

Law360 (March 27, 2024, 7:01 PM EDT) -- The Ninth Circuit on Tuesday upheld the certification of a class of Rust-Oleum customers who are suing the company for allegedly greenwashing its degreaser products with the terms "non-toxic" and "Earth friendly."

Rust-Oleum argued that within the Ninth Circuit there is an unsettled legal standard regarding the commonality analysis required for class action certification, and had asked the appeals court to grant an interlocutory appeal of the certification in its case on that basis. But the Ninth Circuit **denied the request**, citing its 2005 ruling in *Chamberlan v. Ford Motor Co.*, which set the standards for such petitions. The court did not explain its decision further.

Katherine Bruce, a partner at Clarkson Law Firm PC, praised the Ninth Circuit's decision on Wednesday.

"The Ninth Circuit's order takes us one step closer to trial where we can obtain justice for people who unknowingly put the health of their families, including pets, at risk due to egregiously deceptive marketing tactics," Bruce said. "Our firm and our clients are dedicated to a safe and sustainable future, and that means standing up to greenwashing and fraudulent advertising, particularly where it endangers health, safety, and the environment."

Rust-Oleum did not respond to a request for comment Wednesday.

In its petition for permission to appeal, the company also said that U.S. Magistrate Judge Laurel Beeler's **order granting** the class certification request should be overturned because the judge didn't adhere to U.S. Supreme Court and Ninth Circuit precedent requiring a "rigorous analysis" to determine if a reasonable juror could find that consumers are likely to be misled by the marketing statements.

Judge Beeler in February granted plaintiff Anthony Bush's motion for class certification, finding that the proposed class is sufficiently large, based on the number of California residents who purchased Rust-Oleum's Krud Kutter cleaning products, and despite the company's contentions otherwise, questions of law or fact common to the class exist.

Bush first sued Rust-Oleum in 2020, accusing the company of misleadingly labeling and thereby greenwashing several of its grease, stain remover and concentrated cleaner products with the terms "non-toxic" and "Earth friendly," despite containing ingredients that pose a risk of harm to the environment, humans and animals.

Unpersuaded by the company's argument, Judge Beeler denied Rust-Oleum's summary judgment motion in late January.

The company has filed a motion to reconsider with Judge Beeler, but that is still pending.

Bush is represented by Glenn A. Danas, Ryan Clarkson, Shireen M. Clarkson, Katherine A. Bruce and Kelsey Elling of Clarkson Law Firm PC and Kevin Moon of Moon Law APC.

Rust-Oleum is represented by Anthony J. Monaco, William Patterson and Stephen Fardy of Swanson Martin & Bell LLP and Carlos K. Poza and Karen M. Sullivan of Manning Gross & Massenburg LLP.

The case is *Anthony Bush v. Rust-Oleum Corp.*, number 24-913 in the U.S. Court of Appeals for the

Ninth Circuit.

--Additional reporting by Madeline Lyskawa.

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Judge Trims Porsche EV Charging Speed Fraud Claims

By **Chart Riggall**

Law360 (March 27, 2024, 8:38 PM EDT) -- A Georgia federal judge has narrowed the scope of a proposed class action that alleges Porsche sold defective chargers for its flagship electric car and then throttled their charging speed to make up for the design weakness, finding the plaintiff's fraud and breach of warranty claims fall short.

In a Monday order, U.S. District Judge Eleanor Ross said because Ian Bauser — a New Yorker who bought a Porsche Taycan GTS for more than \$176,000 last year — has not shown Porsche lied about the EV charger defect, the claims for unjust enrichment and other fraud charges can't proceed.

"The complaint is devoid of any factual allegations regarding communications that [Bauser] had with [Porsche] or materials that [Bauser] examined where disclosures might have been made prior to purchasing his charger," Judge Ross said.

Likewise, Bauser fell short on his breach of warranty claims because the warranty only covers manufacturing defects, not design, the judge said. Bauser "alleges no facts to support a plausible claim for a manufacturing defect," Judge Ross said.

However, the judge left intact Bauser and his proposed class members' claims under New York law, where the plaintiffs face a lower pleading standard.

Bauser filed his suit a little over one year ago over his 2022 purchase of the Taycan, which he says operated just fine initially. The company had advertised the accompanying charger could bring the Taycan up to a full charge between 9½ and 10½ hours, and that the charge would hold up for several months.

But over time, Bauser said, he and other buyers noticed the charger, along with another model, would often become "extremely hot to the touch" during charging. For some, the supply cables and plugs became so hot that they melted industrial outlets, the complaint said.

Rather than address the purported issue, Bauser claims Porsche simply blamed consumers' home electrical infrastructure for their charging problems. Then, the company allegedly pushed out a software update that throttled the charging speed by half to offset the overheating.

"After a post-sale software change, the devices can only safely charge at half of their advertised rate. As a result, consumers who purchased the charging devices have paid for functionality that defendants advertise but that their devices cannot safely provide," according to the suit.

However, Porsche contends its 9½ to 10½ hour advertisement was only a best-case scenario, arguing its website made clear that speeds could vary based on conditions.

Despite this, Judge Ross said she didn't necessarily expect the average consumer to discern that the "up to" language used by the company represented a minimum amount of time.

"The court is unpersuaded by defendant's argument that in the context of charging times, a reasonable consumer would understand 'up to' to mean that 9.5 or 10.5 hours is 'the best minimum time to fully charge their vehicle' rather than the maximum amount of time required to do so," the judge said. "Plaintiff plausibly alleges that 'the up to statement' is likely to mislead a reasonable

consumer."

In addition to slashing the fraud and warranty claims, Judge Ross also denied Bauser's bid for injunctive relief, namely, for Porsche to correct its advertising and provide him and other customers with new chargers.

Judge Ross noted that because Bauser himself had not experienced the alleged overheating and melting issues "plaintiff's hypothetical continuing injury is too speculative to confer standing to assert injunctive relief."

Counsel for the parties did not immediately respond to a request for comment Wednesday.

Bauser is represented by E. Adam Webb and G. Franklin Lemond Jr. of Webb Klase & Lemond LLC, William H. Anderson and Simon Wiener of Handley Farah & Anderson PLLC, Matthew D. Schelkopf and Joseph B. Kenney of Sauder Schelkopf LLC and Brian W. Warwick of Varnell & Warwick.

Porsche is represented by Alan Frank Pryor, Andrew G. Phillips, Cari K. Dawson and Kara Frances Kennedy of Alston & Bird LLP.

The case is Bauser v. Porsche Cars North America Inc. et al., case number 1:23-cv-01054, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Collin Krabbe. Editing by Drashti Mehta.

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On Deck In JPML: Baby Food, 23andMe Privacy, NCAA

By **Cara Salvatore**

Law360 (March 27, 2024, 7:15 PM EDT) -- The Judicial Panel on Multidistrict Litigation's packed meeting Thursday in South Carolina will see the panel mulling consolidation of privacy litigation against 23andMe, claims of heavy metals in baby food, and scholarship-fixing claims by student athletes against the NCAA — and that's just for starters.

The panel will hold its second meeting of the year at a federal court complex in Charleston, where it's set to consider one of the densest oral argument dockets in recent memory, with 10 matters on deck.

Here's a look at some of the cases.

More Privacy Breach Fallout for 23andMe

23andMe is looking to transfer to the Northern District of California a large number of actions in that district, plus one in the state's Central District and one in the Northern District of Illinois.

In representative complaints, customers Alexandra Hoffman and Alexandra Klawitter **claimed** the genetic profiling company failed to safeguard its customers' personal data, exposing their Ashkenazi Jewish ancestry. Other customers have made claims that Chinese ancestry profiles were also targeted.

23andMe announced in an Oct. 6 blog post that "threat actors" obtained personally identifiable information and health information. It said the company believed hackers were able to access account information because customers reuse usernames and passwords across multiple websites. The company said it was cooperating with law enforcement, working with forensic experts and notifying affected users.

Hoffman and Farmer said users' personal information was targeted because of its value in exploiting and stealing identities. Farmer said the breach allowed third parties to download and sell targeted private information on the dark web. Their suits also accuse 23andMe of failing to say whether it was able to contain or end the cybersecurity threat, or explain how the breach occurred.

State attorneys general have **also questioned** 23andMe about the breach.

The case is *In re 23andMe Inc. Customer Data Security Breach Litigation*, MDL No. 3098.

Baby Food Makers Face Toxin Claims

A group of baby food manufacturers, including Gerber Products Co., The Hain Celestial Group Inc. and Beech-Nut Nutrition Co., is urging the JPML **not to consolidate** suits claiming the products contain heavy metals, causing autism spectrum disorder and other conditions, saying there's no benefit to grouping them in an MDL.

The defendants say the JPML should follow its own example from three years ago, when it decided the companies' marketing and manufacturing operations were too disparate to warrant consolidation.

The suits stem from a congressional report three years ago that seven manufacturers had allowed high levels of arsenic, lead, cadmium and mercury into their food. The current litigation says instances of autism spectrum disorder, ADHD and other conditions are linked.

Beech-Nut and other makers claim no scientific studies support this claim, pointing to a similar case in which Hain Celestial got a mid-trial win when the judge found that the evidence didn't support the claims.

If the JPML does conclude that consolidation is necessary, Beech-Nut and other producers say the Southern District of New York is most appropriate. Michael Imbroscio of Covington & Burling LLP will represent Gerber and The Hain Celestial Group Inc. at oral argument.

The case is In re Baby Food Marketing, Sales Practices and Products Liability Litigation (No. II), MDL number 3101.

LDS Church Accused of Misusing Donations

A member of the Church of Jesus Christ of Latter-Day Saints has asked the JPML to centralize actions currently filed in Illinois, Utah, Tennessee and Washington over the church's use of tithe money from members.

In the Utah case, member Daniel Chappell **says the church** claims to use donations for "humanitarian relief" but holds "some, if not all" of those funds for different investment purposes.

Chappell says the Salt Lake City-based church — widely known as the Mormon or LDS church — is lying when it tells donors that "one hundred percent of every dollar donated" goes to help those in need. The church actually hides funds in its Ensign Peak Advisors Inc. investment entity, according to Chappell and co-plaintiffs Masen Christensen and John Oaks, who say they have donated hundreds of thousands of dollars.

A whistleblower alleged in December 2019 that the church had "funneled billions of dollars of donations into covert permanent investments through Ensign," according to the complaint, leading the U.S. Securities and Exchange Commission to accuse the church and investment firm of using shell companies to veil a \$32 billion portfolio. The church and Ensign agreed to pay \$5 million in civil penalties to settle the matter, without admitting or denying wrongdoing.

Funds were used to bail out a failing life insurance company and build a Salt Lake City mall, the church members' suit claims. The trio wants to represent a nationwide class of potentially millions of donors since 1998.

Plaintiff Joel Long, represented by James Rosemergy of Carey Danis & Lowe, will argue that the cases should be grouped in the Central District of California. The LDS church will be represented by Mark Mester of Latham & Watkins LLP, who will argue the case should be centralized, but in the District of Utah.

The case is In re The Church Of Jesus Christ Of Latter-Day Saints Tithing Litigation, MDL No. 3102.

Regeneron Looks to Group Suits Over Eye Medicine Patents

Regeneron has accused numerous other biotech and pharma companies of infringing as many as 38 patents connected to a top eye medication, Eylea.

In **one suit** filed in November, Regeneron said South Korea-based Celltrion is seeking approval to manufacture and market a biosimilar called CT-P42.

Eylea was first approved by the U.S. Food and Drug Administration in 2011 and helps prevent vision loss and permanent blindness through a genetically engineered fusion protein called aflibercept.

Celltrion announced in June that it had submitted an abbreviated biologics drug application for its biosimilar eye medication and told Regeneron in September that it intended to begin marketing CT-P42 as soon as the FDA approved the application, Regeneron said.

Regeneron's exclusivity period expires May 18.

If centralized, the MDL would be composed entirely of suits brought by Regeneron. Other suits

proposed for inclusion are against Mylan, Amgen, Formycon AG and others.

Mylan, represented by Deanne Mazzochi of Rakoczy Molino Mazzochi Siwik LLP, will oppose centralization. Amgen, represented by Joseph Hynds of Rothwell Figg Ernst & Manbeck PC, will take the same stance. Amgen has argued that the move to centralize Biologics Price and Competition Act cases "is a matter of first impression" for the panel.

Regeneron, represented by David Berl of Williams & Connolly, will argue for centralization in the Northern District of West Virginia.

The case is *In re Aflibercept Patent Litigation*, MDL No. 3103.

Hotel Chains Face Claims They Ignored Sex Trafficking

Several hotel chains will oppose an initiative to centralize claims that they ignored sex trafficking on their properties. The chains have argued they were not aware such abuses were happening.

In a representative complaint, a trafficking survivor known as S.C. is suing Choice Hotels International Inc., Wyndham Hotels & Resorts Inc., Red Roof Inns Inc., Days Inns Worldwide Inc., Holiday Hospitality Franchising LLC, Six Continents Hotels Inc. and Crowne Plaza LLC under the Trafficking Victims Protection Reauthorization Act, **alleging they allowed crimes against her** to continue. The hotels have replied that they did not knowingly allow her to be trafficked.

Red Roof Inns, for example, has argued that even if S.C. had named the specific Red Roof employees or the owner of the franchise location she was trafficked through, that still would not grant her a claim against the company. Red Roof said that it trains employees on how to prevent trafficking but that there is no evidence any workers ever saw S.C. enter or leave the site she has named.

There are suits in California, Georgia, Minnesota, New Mexico, Texas, Pennsylvania, South Carolina and Washington, plus a large number of suits in Ohio.

By and large, the chains oppose centralization. Choice Hotels will be represented by Sara Turner of Baker Donelson Bearman Caldwell & Berkowitz PC, David Sager of DLA Piper will argue for Wyndham, John Hamrick of Holland & Knight LLP will oppose on behalf of Holiday Hospitality Franchising, Karen Campbell of Lewis Brisbois Bisgaard & Smith LLP will argue on behalf of Best Western International Inc., and Chelsea Mikula of Tucker Ellis LLP will argue for Red Roof Inns.

The case is *In re Hotel Industry Sex Trafficking Litigation (No. II)*, MDL No. 3104.

NCAA Faces Athletes' Claims Over Fixing Scholarship Amounts

The NCAA is facing litigation from student-athletes — again — and wants the JPML to centralize at least five cases.

A representative suit in California federal court against the NCAA and the five major sports conferences says they have "exercised their monopoly power in the labor markets for Division I college sport by fixing the prices of scholarships," raking in billions while the athletes receive little in comparison.

The named plaintiffs are DeWayne Carter, a defensive tackle for Duke University's football team; Nya Harrison, a junior and a defender on Stanford University's women's soccer team; and Sedona Prince, a basketball player for the women's team at Texas Christian University.

"In college sports, only the athletes are treated as amateurs," the Carter plaintiffs said in their suit. "Everyone else involved enjoys the compensation that results from unrestrained competition for the athletes' services."

They're seeking to centralize their suit and another from Colorado in the Northern District of California. The NCAA will support the idea.

Christopher Yates of Latham & Watkins LLP will be presenting oral argument against centralization on

behalf of his client, the Atlantic Coast Conference, as well as on behalf of the NCAA, the Big 12, the Southeastern Conference, the Big Ten and the Pac-12 Conference.

It's part of a much broader landscape of litigation against the NCAA. In September, a California federal judge certified a class of 184,000 athletes seeking **injunctive relief concerning name, image and likeness rights**.

The college sports governing body is also facing litigation from a group of state attorneys general over its **transfer eligibility** rule.

The case is *In re College Athlete Compensation Antitrust Litigation*, MDL No. 3105.

--Additional reporting by Theresa Schliep, Isaac Monterose, Matthew Perlman, Ryan Harroff, Dorothy Atkins, Mike Curley and Lauren Berg. Editing by Haylee Pearl.

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BlockFi Wins Approval Of 'Tremendous' Deal With FTX

By Hilary Russ

Law360 (March 27, 2024, 7:29 PM EDT) -- A New Jersey bankruptcy judge gave his blessing on Wednesday to a global settlement that ends disputes between fallen cryptocurrency giants BlockFi Inc. and FTX, saying the results were "tremendous."

U.S. Bankruptcy Judge Michael B. Kaplan praised the professionals who worked on the deal during a short hearing in BlockFi's Chapter 11 case, noting that the agreement will save BlockFi's estate significant money by avoiding long legal fights and that creditors will receive "much higher percentages than were envisioned when the plan was filed."

"The BlockFi proceeding has been undertaken in a substantially cost effective manner as compared to ongoing proceedings in other jurisdictions," he said.

Earlier in March, the companies **said they settled** their wide-ranging feud, with BlockFi allowed claims for \$874.5 million in FTX's case, and FTX to lay claim to roughly \$600 million worth of liquidated Robinhood shares, formally ending all disputes and litigation between the two companies.

BlockFi's estate, which had asserted over \$1 billion claims against FTX, will receive \$250 million of its claim against FTX affiliate Alameda Research just after FTX's own Chapter 11 plan goes into effect. The remaining \$439.3 million will be allowed as general unsecured claims.

"The FTX settlement is in every respect a huge win for the BlockFi estate," said Kenneth Aulet of Brown Rudnick, counsel for the BlockFi wind-down debtors and plan administrator. "This could not have been achieved without a huge effort from everybody involved ... It's a great result that's achieved at a low cost."

The settlement was reached in part with the help of U.S. Bankruptcy Judge Craig T. Goldblatt, who served as mediator.

However, the victory lap came with a warning to BlockFi's former customers who are awaiting payout on their claims: beware of scammers.

"There's been unfortunately a considerable uptick in scam emails," Aulet said, urging creditors to "be vigilant" and only open emails from blockfi.com or kroll.com.

Aulet said that 100% distributions are not the same as 100% in-kind distributions, meaning that a person owed 1 bitcoin will not actually get 1 bitcoin because BlockFi's estate "will never have the funds to do that."

Aulet was trying to clarify claims made by FTX founder Sam Bankman-Fried ahead of his sentencing on Thursday. His defense attorneys said he should get a light sentence, arguing that FTX customers' losses were not so steep because they will be made whole in the bankruptcy process.

But that wasn't true, Aulet said, noting that BlockFi submitted a victim statement in the criminal trial.

Essentially all of BlockFi's customers should now be able to receive their first interim distributions via more than 315,000 accounts that have been set up, he said.

BlockFi's plan administrator is represented by Daniel M. Stolz and Donald W. Clarke of Genova Burns LLC, Richard S. Kanowitz and Lauren M. Sisson of Haynes and Boone LLP, and Kenneth J. Aulet and

Tristan Axelrod of Brown Rudnick LLP.

The case is In re: BlockFi Inc., case number 3:22-bk-19361, in the U.S. Bankruptcy Court for the District of New Jersey.

--Editing by Alex Hubbard.

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DOJ, SEC Looking At Chemours After Internal Accounting Probe

By **Henrik Nilsson**

Law360 (March 27, 2024, 11:15 PM EDT) -- The Chemours Co. said on Wednesday that the U.S. Securities and Exchange Commission and the U.S. Department of Justice have launched a probe into the chemical company after an internal review revealed that former executives engaged in unethical accounting practices.

In a 10-K filing with the SEC, Chemours said it's "cooperating with requests for information from the SEC and the United States Attorney's Office for the Southern District of New York concerning the results of the audit committee internal review and the company's SEC filings in respect of that review."

The filing noted that investors have already filed two separate proposed class actions in Delaware federal court, and more are likely on the way as private law firms are currently soliciting clients to file additional suits.

Chemours first disclosed at the end of February that it had launched an internal review and provided an update on March 7.

The internal investigation, which was **spurred by an anonymous tip** to the company's ethics Hotline, found that Chief Executive Officer Mark Newman, Chief Financial Officer Jonathan Lock and Controller and Principal Accounting Officer Camela Wisel violated the company's code of ethics. The executives were placed on leave in February, the company said.

In a statement published Wednesday, the company said that the executives delayed payments of up to approximately \$100 million to vendors due in the fourth quarter of 2023 until the first quarter of 2024. They also accelerated the collection of up to approximately \$260 million of receivables into the fourth quarter of 2023 that were not due to be received until the first quarter of 2024, according to Chemours.

Similar actions were taken to a lesser extent in the fourth quarter of 2022, Chemours noted. The company added that it's "in the process of designing and implementing enhancements to its internal control over financial reporting."

Chemours said in Wednesday's 10-K filing that former members of its senior management are seeking compensation under indemnification agreements in connection with the investigation "to provide advances of funds for legal fees and other expenses and [Chemours] expects additional requests in connection with the investigation and any future related litigation."

Litigation is already underway. For instance, an investor **lodged a suit** last week alleging that trading prices for the company's shares fell by more than 31%, or more than \$9 a share, from nearly \$38 to under \$29, at the end of February following the initial announcement.

The investor said the company's public criteria for executive compensation included annual incentive plans, which entitled senior executives to cash compensation for meeting certain free cash flow targets, and long-term incentive plans that entitled the same executives to stock compensation for meeting certain free cash flow conversion targets.

According to the complaint, a week after its administrative leave announcement, the investigating

board committee found that the executives on leave had made moves to delay payouts to some vendors while speeding up collection of certain receivables, so the company would have more money on its books when the third quarter of 2023 ended.

A spokesperson for the U.S. Attorney's Office for the Southern District of New York declined to comment.

Representatives for the SEC and Chemours did not immediately return a request for comment.

-- Additional reporting by Emilie Ruscoe. Editing by Emily Kokoll.

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Backers Of Trump-Tied SPAC Sue To Confirm Manager Purge

By **Tom Zanki**

Law360 (March 27, 2024, 8:17 PM EDT) -- Investors behind the sponsor of the special-purpose acquisition company that took Donald Trump's Truth Social public sued its managing member, seeking a declaration from the Delaware Chancery Court that they have validly removed him from his post and that he has no authority to act on their behalf.

Members of ARC Global Investments II LLC told Delaware's Court of Chancery Tuesday they voted on March 22 to remove Patrick Orlando as the investment firm's managing member with a margin of more than 50.1%, according to the suit. As such, they argue any actions taken by Orlando as an ARC manager since then should be considered "null and void."

"Plaintiffs are entitled to a declaration that Orlando has been removed as Manager of ARC ... and he no longer has authority to act on ARC's behalf," investors told the court.

The complaint comes amid **multiple lawsuits** surrounding Digital World Acquisition Corp., the SPAC that acquired and took public Trump Media Technology Group Corp., which owns the Truth Social platform. Orlando is Digital World's former CEO and has been a key player in Miami-based ARC. The firm is the founding investor of Digital World, known as a sponsor.

The plaintiffs in Tuesday's suit are members of ARC and Class B stockholders of Digital World.

Digital World alleged last week that Orlando — through ARC — was seeking to frustrate the merger's consummation by threatening to withhold votes for his own financial benefit. Digital World sued to **force a shareholder vote** on its proposal to acquire and take Trump Media public, which proceeded as scheduled Friday and was **overwhelmingly approved**.

Trump Media **began trading** as a public company Tuesday on the Nasdaq, effectively replacing Digital World's listing. Its shares have rallied in two days since going public.

In Tuesday's suit, ARC members allege that Orlando has "acted wrongfully" for years while involved with Digital World.

The suing investors alleged Orlando improperly initiated merger discussions with Trump Media before Digital World's September 2021 initial public offering, sparking a U.S. Securities and Exchange Commission settlement that required Digital World to **pay \$18 million** to settle charges.

SPACs, also known as blank-check companies, conduct IPOs in order to acquire a private business and take it public within a given period. SPACs are not permitted to have a particular target in mind when they launch their IPO

Orlando, Digital World's first CEO, was **fired** in March 2023. The SPAC cited "unprecedented headwinds" facing the company as it was trying to finalize its merger with Trump's entity.

The suing investors further allege that Orlando has attempted to "extort DWAC to obtain additional shares for his personal benefit," while diluting the stakes of remaining investors.

ARC members also claim the circumstances under which Orlando became managing member of ARC is unclear, noting that Lee Jacobson was the original managing member of ARC at the investment

firm's formation in December 2020.

Orlando has **separately sued** Digital World in Delaware's chancery, seeking legal fee advancements for costs arising from federal probes, lawsuits in multiple states and potential fiduciary breach claims.

Attempts to reach Orlando and ARC were not immediately successful.

A message to plaintiff's counsel was not immediately returned on Wednesday.

The plaintiffs are represented by Thomas Eubler, Brian Demott, and Adam J. Waskie of McCollom D'Emilio Smith Uebler LLC.

Counsel information for Orlando was not immediately available.

The case is Aaron Leon, et al v. Patrick Orlando and ARC Global Investments II LLC, case number 2024-0311, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Alex Hubbard.

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Coinbase Denied Early Victory Over SEC Enforcement Action

By Aislinn Keely

Law360 (March 27, 2024, 5:53 PM EDT) -- A Manhattan federal judge on Wednesday rejected crypto exchange Coinbase's bid to defeat the U.S. Securities and Exchange Commission's claims that it operated as an unregistered securities exchange, broker and clearing agency.



Coinbase failed to convince the court to toss the SEC's claims that it operated as an unregistered securities intermediary and offered unregistered securities through its staking program. (Michael Nagle/Bloomberg via Getty Images)

Coinbase's motion for judgment on the pleadings had sought to toss the SEC's claims that it operated as an unregistered securities intermediary and offered unregistered securities through its staking program by arguing that the regulator hadn't shown that the Coinbase platform offered investment contracts. U.S. District Judge Katherine Polk Failla found the SEC's allegations held up to existing precedent at this stage.

"As explained herein, the 'crypto' nomenclature may be of recent vintage, but the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years," Judge Failla wrote in her 84-page **opinion and order**.

Coinbase legal head Paul Grewal said in a post on social media site X, formerly Twitter, that the exchange was prepared for the motion's denial and looks forward to "uncovering more about the SEC's internal views and discussions on crypto regulations."

The SEC did not immediately respond to a request for comment on Wednesday. However, it's already submitted the order to the judge in its case against crypto exchange Binance, which it accused of operating as an unregistered exchange the same day it brought its suit against Coinbase.

As Judge Failla's order noted, the central dispute between the regulator and the crypto platform is whether the transactions in 13 tokens at issue are investment contracts. The U.S. Supreme Court precedent known as the **Howey test**  describes an investment contract as an investment of money in a common enterprise made with the reasonable expectation of profits to be realized through another's effort.

Against Howey, Judge Failla said that the SEC has adequately alleged that those who bought certain digital assets through Coinbase "invested in a common enterprise and were led to expect profits solely from the efforts of others."

According to Judge Failla, the SEC has shown that purchasing certain tokens is an investment in a common enterprise since some projects pooled investor assets to share in profits and risks.

"As detailed in the complaint, token issuers, developers, and promoters frequently represented that proceeds from crypto-asset sales would be pooled to further develop the tokens' ecosystems and promised that these improvements would benefit all token holders by increasing the value of the tokens themselves," the judge said.

The SEC has also shown that in certain cases investors would understand that an increase in a token's value would come from the efforts of others, according to the order.

Websites, social media posts, investor materials, town halls and other communications from issuers and promoters "repeatedly encouraged investors to purchase tokens by advertising the ways in which their technical and entrepreneurial efforts would be used to improve the value of the asset, and continued to do so long after the tokens were made available for trading on the secondary market," the judge said.

Judge Failla was also unpersuaded by Coinbase's argument that a transaction's status as a security is affected by whether an asset is purchased from an issuer or on an exchange. Investors are attracted by the promises made by issuers, and those promotions encouraged both direct buyers and secondary market traders to purchase the assets, Judge Failla explained.

"[With] specific regard to the crypto-assets at issue here, there is little logic to the distinction defendants attempt to draw between the reasonable expectations of investors who buy directly from an issuer and those who buy on the secondary market," the judge said.

Judge Failla also rejected Coinbase's attempt to defeat the SEC's claims around the crypto exchange's so-called staking service. This service allows users to receive rewards for allocating assets on the blockchain to secure the network.

The SEC has alleged that these are essentially securities transactions, but Coinbase has argued that the agency's complaint is lacking because it doesn't allege that staking participants reasonably expected to earn profits as a result of the company's "managerial efforts." The exchange said its service is more like a tool or interface to make the process of staking easier, and that users could simply do this on their own.

But Judge Failla said the SEC's complaint does adequately allege "significant post-sale managerial efforts" by Coinbase, including hiring third parties to stake assets, maintaining liquidity pools and preventing hacks and malicious actors.

She also said the exchange's arguments are "downplaying" the barriers to staking on one's own crypto and these "stand in sharp contrast to Coinbase's representations to its customers of the significant efforts it exerts to offer and market those features that differentiate the Coinbase staking program from staking independently."

Judge Failla was also unswayed that the so-called major questions doctrine, which directs the court to question agency expansions of authority on issues of economic significance, bars the SEC's claims. She found the SEC isn't asserting a novel expansion of its authority beyond its congressional mandate, and the crypto industry hasn't grown to the level required to implicate the doctrine.

The SEC also hasn't violated Coinbase's due process rights by failing to provide fair notice that the digital assets at issue would be treated as securities, the order said.

"Here, the SEC is not announcing a new regulatory policy, but rather is simply engaging in a fact-intensive application of an existing standard — an application that Coinbase also conducted — to determine whether certain transactions involving crypto-assets meet the characteristics of an 'investment contract,'" Judge Failla said in the order.

Coinbase has separately **sued the SEC** in the Third Circuit, urging the federal appeals court to compel the regulator to engage in rulemaking around digital assets.

Despite denying the bulk of Coinbase's motion, the court did toss the SEC's claims that Coinbase acted as an unregistered broker through its wallet application. Though the assets may have been sold as investment contracts, the wallet application doesn't negotiate terms for the transaction, provide trading instructions or do other activities that fall under brokerage, the order said.

The SEC **brought its case** against Coinbase in June, and by August, Coinbase **filed its motion** for judgment on the pleadings. Though Coinbase lost its bid for an early dismissal, its legal head Grewal said on X on Wednesday that Coinbase remains confident in its arguments and is "eager for the opportunity to take discovery from the SEC."

"Early motions like ours against a government agency are almost always denied," Grewal said. "But clarity is the ultimate goal and today's decision continues us on that path."

The SEC is represented in-house by Peter Mancuso, Jorge Gerardo Tenreiro, Patrick Costello and Nick Margida.

Coinbase is represented by William Savitt, Kevin S. Schwartz, Sarah K. Eddy, Adam M. Gogolak, David P.T. Webb and Sijin Choi of Wachtell Lipton Rosen & Katz and Steven R. Peikin, Kathleen S. McArthur, James M. McDonald, Julia A. Malkina and Olivia G. Chalos of Sullivan & Cromwell LLP.

The case is Securities and Exchange Commission v. Coinbase Inc. et al., case number 1:23-cv-04738, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Dave Trumbore.



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Video Streamer Escapes Crypto Token Holder's Fraud Suit

By **Katryna Perera**

Law360 (March 27, 2024, 11:05 PM EDT) -- A New York federal judge has permanently tossed a suit accusing video streaming service Open Props Inc. and its executives of misrepresenting to investors that it would become a decentralized blockchain network following the sale of its native cryptocurrency tokens.

U.S. District Judge Ronnie Abrams issued an **order** Tuesday saying plaintiff Romein Rostami has failed to allege any actionable misleading statements, his reliance on them, or any fraudulent intent by the defendants.

According to the order, Open Props announced in 2017 that it was creating a cryptocurrency called Props Tokens, which it planned to sell to raise money to create the Props Network, a decentralized, blockchain-based digital media platform for video applications.

Rostami claims he and other investors were told that the cryptocurrency would power the Props Network and that Open Props would be "merged or integrated with the Props Network creating an instant environment for mass adoption and use."

The complaint states that the defendants raised \$25 million through the sale of Props Tokens, but a decentralized network or any blockchain-based platform was never created.

"According to plaintiff, [the individual defendants] never intended to decentralize or integrate the Props Network. Instead, he asserts that they 'devised a fraudulent scheme' once they 'noticed' that they could 'take advantage of the cryptocurrency trend and [initial coin offering] craze,'" Tuesday's order said.

However, Judge Abrams said Tuesday that many of the challenged statements in the complaint are "representation[s] about defendants' expectations and opinions," or forward-looking, and therefore, aren't actionable.

The statements that "come closest to being actionable" are those that imply the platform was already decentralized, but the judge pointed out that Rostami does not allege that he relied on those statements.

"Instead, plaintiff alleges that he relied on defendants' statements that they 'would develop a decentralized, blockchain based network in which the Props Token would serve as the network's native asset,'" the order said. "Accordingly, despite including statements in the amended complaint that arguably imply existing decentralization and relying on such statements in his opposition, plaintiff's fraud claim does not appear to rest on those statements."

According to the order, before entering into a "simple agreement for future tokens" or SAFT, Rostami "was privy" to documents warning that the implementation of the Props Network was dependent on several factors and faced certain risks.

"Indeed, two pre-SAFT whitepapers specifically advised that '[s]ome elements of the [Props] platform ... will remain centralized until decentralized options become feasible or desirable,'" the order said.

Rostami alleged that these disclosures only concerned "general risks of loss" and did not "specifically

disclaim the material misrepresentations of decentralization and integration." Judge Abrams disagreed with this claim, pointing to the two white papers that warned that the network might not become decentralized.

"Plaintiff was not justified in ignoring the risks that the network would not become decentralized, especially in light of his knowledge about the field of cryptocurrency," the judge said.

Judge Abrams also called Rostamis' claims that the defendants ran a fraudulent scheme and planned for Open Props to "abandon the project utilizing the guise of non-commercial viability," conclusory accusations.

"The court, moreover, has already found insufficient plaintiff's allegation that defendants registered with the [U.S. Securities and Exchange Commission] so that they could later exit the venture under the guise that it was not commercially viable — which continues to underlie plaintiff's theory of fraudulent intent," she added.

Finally, the judge said Rostami's attempts to "situate" the alleged scheme within the context of 80% of initial coin offerings in 2017 and 2018 being identified as scams "does not give rise to a 'strong inference of fraudulent intent.'"

Judge Abrams also tossed the suit's claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing.

In a statement to Law360 on Wednesday, John B. Horgan of Ellenoff Grossman & Schole LLP, counsel for Open Props, said: "We are pleased to have achieved this result for our clients. Twice now the court has recognized that the plaintiff's claims were without merit, and our clients look forward to turning the page on the matter."

Counsel for Rostami did not immediately respond to requests for comment Wednesday.

Rostami is represented by Yamina-Sarah Chekroun of Venture Lawyers LLP and Matthew M. Fischer of Matthew M. Fischer PA.

Open Props and the individual defendants are represented by John B. Horgan, Joanna R. Cohen and Amy M. Scotto of Ellenoff Grossman & Schole LLP.

The case is Rostami v. Open Props Inc. et al., case number 1:22-cv-03326, in the U.S. District Court for the Southern District of New York.

--Editing by Linda Voorhis.