

Conservative appeals court will probe certification of Anadarko investors' class action

 [reuters.com/legal/litigation/column-conservative-appeals-court-will-probe-certification-anadarko-investors-2024-03-28](https://www.reuters.com/legal/litigation/column-conservative-appeals-court-will-probe-certification-anadarko-investors-2024-03-28)

Alison Frankel



The logo for Anadarko Petroleum corp. is displayed on a screen on the floor at the New York Stock Exchange (NYSE) in New York, U.S., April 30, 2019. REUTERS/Brendan McDermid [Purchase Licensing Rights](#) , opens new tab

March 28 (Reuters) - It's never a happy development for plaintiffs when a federal appeals court agrees to review a trial judge's decision to certify an investor class to pursue securities fraud claims.

I'd argue that these mid-case, or interlocutory appeals, are even more perilous for shareholders since the U.S. Supreme Court held , opens new tab in 2021's *Goldman Sachs v. Arkansas Teachers Retirement System* that trial judges should consider "all probative evidence" in weighing whether defendants have managed to rebut the presumption that their alleged fraud impacted the company's share price.

Look, for instance, at what happened when the Goldman Sachs case returned to lower courts after the Supreme Court issued its decision. The trial judge recertified the class for a third time, but Goldman persuaded the 2nd U.S. Circuit Court of Appeals to grant its third interlocutory appeal to review the decision. The third time proved the charm for the bank: The appeals court decertified the class, holding, as I've reported, that there was too wide a gap between Goldman's general statements about conflict management and subsequent revelations about conflicts in specific collateralized debt deals to support shareholders' theory that the bank's alleged misrepresentations propped up its share price.

Now defense lawyers for Anadarko Petroleum are hoping that the Supreme Court's Goldman ruling prompts the 5th Circuit to undo the certification of a class of shareholders alleging that the company covered up disappointing drilling results in a much-ballyhooed oilfield in the Gulf of Mexico.

The 5th Circuit will hear oral argument next week on Anadarko's contention [\[link\]](#), opens new tab that U.S. District Judge Charles Eskridge of Houston improperly certified the class based on expert evidence first introduced in shareholders' reply brief in support of class certification.

Cravath, Swaine & Moore, which represents Anadarko (now part of Occidental Petroleum (OXY.N) [\[link\]](#), opens new tab) argued in its brief to the right-leaning appellate court that under the Goldman Sachs standard, Eskridge should have allowed the company to submit a sur-reply brief after shareholders disclosed an expert report on the price impact of Anadarko's alleged misrepresentation in their brief responding the company's opposition to class certification.

As is usual in securities fraud class actions, the details of the case are unique and complex. Shareholder lawyers from Robbins, Geller, Rudman & Dowd told the 5th Circuit in their brief [\[link\]](#), opens new tab that the full trial court record proves that Erskine properly denied Anadarko's motion to submit a sur-reply brief, as well as its motions to exclude the expert report on price impact and to reconsider class certification. The judge, according to Robbins Geller, gave Anadarko all of the leeway it was entitled to, so the appeals court cannot conclude that he abused his discretion.

But because Anadarko and Cravath pitched [\[link\]](#), opens new tab the interlocutory appeal as a chance for the 5th Circuit to solve a recurring problem in shareholder fraud class actions — arguing that, in the wake of the Supreme Court's Goldman Sachs decision, the court should use this case to confirm defendants' right to respond to new shareholders' evidence — the securities bar should be paying attention.

Anadarko counsel Kevin Orsini of Cravath did not respond to my query. Shareholder lawyer Joe Daley of Robbins Geller declined to comment.

Shareholders allege that Anadarko's share price fell by about 8% in May 2017 after the company disclosed a \$902 million write-down on its investment in the Shenandoah oilfield in the Gulf of Mexico after a so-called appraisal well came up dry. Plaintiffs' lawyers contend that Anadarko hid warnings from its own engineers and geoscientists, who had been predicting for years that the field would not measure up to Anadarko's hype.

Anadarko, meanwhile, maintains that its share price fell on that day for a reason wholly unrelated to the Shenandoah field.

At around the same time that the company disclosed the \$902 million write-down, Colorado officials announced that Anadarko's gas operations were responsible for the deadly explosion of a home in Firestone, Colorado — and that all oil and gas companies in the state would be required to conduct additional safety checks. The Colorado announcement, according to Anadarko, "led to significant regulatory uncertainty," which, in turn, pushed its share price lower.

Anadarko did not submit an expert event study of its share price to refute shareholders' claims in its brief opposing class certification. It instead cited its expert's analysis of the share prices of its partners in the Shenandoah project and its Colorado oil and gas competitors to argue that the Colorado news, not the Shenandoah write-down, impacted the market for its shares.

In response, Robbins Geller cited an Anadarko-specific event study by its expert, who refuted the conclusions of the company's expert.

Anadarko contested the shareholders' event study in a Daubert motion and also asked for a chance to counter its findings in a sur-reply brief. Erskine denied both requests, concluding that the shareholder study was a legitimate rebuttal to Anadarko's arguments.

Robbins Geller told the 5th Circuit that Anadarko should not get a second chance based on its unsuccessful strategy of submitting event studies of the company's partners and competitors instead of the company itself.

Anadarko said Erskine erred grievously in basing his class certification decision on evidence introduced in a reply brief without giving the company a fair shot to refute it.

The company is asking the appeals court not only to remand the case to the trial court with instructions to reconsider class certification in light of Anadarko's price impact evidence but to go even farther and hold that the class cannot be certified.

The case will be heard next Thursday by Judges Carolyn King, James Ho and Kurt Engelhardt.

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Reporting By Alison Frankel

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Thomson Reuters

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.

Aurora Cannabis to settle shareholder lawsuit over alleged 'sham' pot sales

 ca.finance.yahoo.com/news/aurora-cannabis-to-settle-shareholder-lawsuit-over-alleged-sham-pot-sales-193838867.html

Jeff Lagerquist

Thu, March 28, 2024 at 12:38 p.m. PDT · 4 min read

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Axel Gille, President of Aurora Europe, inspects cannabis plants in a flowering room of the production facility at the Leuna Chemical Park. (Photo by Hendrik Schmidt/picture alliance via Getty Images) (picture alliance via Getty Images)

Lawyers for Aurora Cannabis (ACB.TO)(ACB) and a group of shareholders have agreed to settle a class-action lawsuit where the Canadian pot company is alleged to have booked a “sham” transaction to boost its sales figures.

The suit, filed in a U.S. District Court in New Jersey, alleged former executives falsely inflated Aurora’s 2019 fourth-quarter adjusted earnings before interest, taxes, depreciation, and amortization (EBITDA) by selling \$21.7 million worth of dried cannabis to Radient Technologies in June 2019.

Radient, a small cannabis extraction company based in Edmonton, Alta. was at the time 12 per cent owned by Aurora. An Aurora executive sat on its board of directors. The plaintiffs claimed in the suit that there was no legitimate business reason for Radient to buy the cannabis, which they say was later resold to Aurora.

In 2019, Aurora and its peers in Canada’s cannabis sector were under immense pressure to reassure investors as stocks crashed from dizzying highs. In the suit, plaintiffs allege Aurora misled investors on numerous fronts, including the company’s ability to turn a profit, and consumer demand for legal cannabis.

Aurora Cannabis Inc. (ACB.TO)

[View quote details](#)

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5.93

-0.51(-7.92%)

At close:4:00PM EDT

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“Aurora’s sales of cannabis in Canada were severely constrained by at least two factors that were known, or recklessly disregarded, by defendants: Immense over-production of cannabis by Aurora and other Canadian licensed producers; and woefully limited numbers of retail stores in Ontario and Quebec, where nearly two-thirds of Canadian citizens reside,” the plaintiffs stated in an amended complaint filed in November 2022.

“This did not hinder [the] defendants from boldly making projections of positive adjusted EBITDA because they devised a scheme they thought would ensure that Aurora met their projections—a sham, round-trip wholesale cannabis transaction with a related party.”

None of these claims were proven in court.

Both sides reached a settlement via mediation on March 4, according to a letter from a law firm representing the defendants addressed to District of New Jersey Judge Brian Martinotti.

"The amount is not public yet, but it will be in the near future," Alan Ellman, a partner at Robbins Geller Rudman & Dowd told *Yahoo Finance Canada*. "We're working on filing the preliminary papers."

Ellman's firm is among those representing the lead plaintiffs. He says a judge needs to approve the preliminary settlement reached in mediation. Then, a final approval hearing can be held involving members of the class action.

The class action is limited to investors who purchased Aurora stock on the New York Stock Exchange between Jan. 8, 2019 and Nov. 14, 2019.

Aurora declined to comment on the settlement, citing a company policy not to comment on legal matters.

In addition to Aurora itself, Terry Booth, who co-founded the company in 2006, and former chief operating officer Allan Cleiren, are listed as individual defendants. Cleiren was a member of Radient's board between February 2019 and December 2020.

Cam Battley, former chief operating officer, and the public face of Aurora at its peak, was previously named in the lawsuit, along with former executives Stephen Dobler, Glen Ibbott, Michael Singer, and board member Jason Dyck. They were not listed as defendants in the third amended complaint submitted to the court by the lead plaintiffs on Nov. 7, 2022, as the focus narrowed to Booth and Cleiren.

In October 2019, *Yahoo Finance Canada* reported on ties between Aurora and Radient after Craig Wiggins of the industry research group TheCannalysts published research warning of a "roundtrip sale" between the companies.

"Essentially there's potential to double dip on sales," Wiggins told *Yahoo Finance Canada* in an interview at the time. "I think you have to put a big asterisk beside a material chunk of Aurora's sales, gross margin, and EBITDA until we get answers on this."

Aurora is now a shadow of its former self from the high-flying era for Canada's pot industry several years ago. The company has laid off scores of workers and dramatically shrunk its cultivation footprint in a bid to improve financial performance under current CEO Miguel Martin.

Aurora reported positive adjusted EBITDA for the first time in its second quarter 2023 financial results.

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<https://www.law.com/therecorder/2024/03/28/9th-circuit-rejects-securities-allegations-against-biotech-companys-covid-19-cure-claim/>



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NEWS

9th Circuit Rejects Securities Allegations Against Biotech Company's COVID-19 'Cure' Claim

"It seems likely that the bump in the price of Sorrento's stock in the week of May 15 provided it with more revenue from its agreement with Anarki to purchase stock, but Zenoff does not allege any particular improper or inflated sales. Indeed, as defendants note, Zenoff identifies no individual stock sales at all," Judge Consuelo Callahan wrote on behalf of the court.

March 28, 2024 at 04:52 PM

Securities Litigation



Riley Brennan



The U.S. Court of Appeals for the Ninth Circuit dismissed a securities fraud suit against biopharmaceutical company Sorrento Therapeutics, concluding its claims that it found a "cure" for COVID-19, which led to a spike in stock prices, wasn't materially false or misleading.

The appellate court affirmed a judgment by U.S. District Judge Anthony J. Battaglia of the Southern District of California, which granted the motion to dismiss plaintiff Andrew R. Zenoff's suit against the defendants, Sorrento and the company's CEO and vice president. The Ninth Circuit agreed that statements made in a press release, a Fox News article, and a Biospace.com article weren't materially false or misleading, and determined that the allegations in Zenoff's class action complaint didn't support the necessary strong inference of scienter "in defendants' intent to improperly manipulate the price of Sorrento's shares," according to the [March 25 opinion](#).

Zenoff filed suit on behalf of himself and others who purchased Sorrento common stock between May 15 and May 21, 2020, after the company's stock began to fall following the May 15 increase.

While Zenoff argued Sorrento "told the world multiple whoppers" concerning a cure for COVID-19, the appellate panel concluded the defendants' statements may "have been overblown," but they weren't materially misleading. The press release and articles highlighted that there was no promise of an immediate, full-proof cure, the opinion said.

The price of Sorrento's stock rose sharply for about a week as a result of the defendants' "enthusiastic announcement of the development of STI-1499 as a possible cure for COVID-19," but the appellate court concluded that Zenoff failed to adequately plead that the defendants' statements, viewed in their full context, "were false as opposed to overstated."

"Despite defendants' enthusiasm about STI-1499, in context, all of the articles reveal that its development was at the stage of an in vitro virus infection experiment, i.e., it had only been tested in a laboratory," Judge Consuelo Callahan wrote on behalf of the court. "Zenoff has not shown that a reasonable person reading the articles would think that defendants were representing that STI-1499, without further testing, was an immediate cure for COVID-19."

The court further concluded that even if the statements were construed as misleading, Zenoff wasn't entitled to relief as he failed to raise "the requisite strong inference of scienter."

Zenoff argued scienter was shown through the combination of the company's CEO Henry Ji and its vice president Mark Brunswick's management roles, the two men's "undisputed access to STI-1499 data," "the blatant falsity of the defendants' statements," "the extremely short time period between defendants' false statements and their admission of falsity," and "Sorrento's dire financial situation," the opinion cited.

"Certainly, Ji and Brunswick had management roles and access to STI-1499 data, but there is no indication or allegation that those roles gave them access to some information about STI-1499 that was not mentioned in the press release or the articles," Callahan said. "Here, defendants were forthright in stating that STI-1499 was at the in vitro experiment stage. Zenoff does not suggest or allude to what other relevant information defendants had about STI-1499 that should have been disclosed."

According to the court, Zenoff's claim of "blatant falsity" doesn't survive scrutiny, noting the defendants only "admitted falsity" if their initial claims are read as advertising a full-proof cure.

Callahan also concluded Zenoff failed to make "the requisite showing of trading history necessary to raise an inference of scienter," finding Zenoff hadn't shown the company's promotion of its development of STI-1499 was intended to manipulate the stock price.

"It seems likely that the bump in the price of Sorrento's stock in the week of May 15 provided it with more revenue from its agreement with Anarki to purchase stock, but Zenoff does not allege any particular improper or inflated sales," Callahan said. "Indeed, as Defendants note, Zenoff identifies no individual stock sales at all."

"Zenoff has not pled any allegations giving rise to the requisite strong inference that defendants intended to improperly manipulate the price of Sorrento's shares. At best, we can infer that defendants' excitement about the development of STI-1499 (and the public's excitement) produced a one-week bump in the price of Sorrento's stock," Callahan said. "This may well have helped Sorrento's efforts to raise capital, but as Zenoff has failed to point to any particular sales or purchases by Sorrento or its officers, there is no inference of intent to manipulate."

Judges Richard C. Tallman and U.S. District Judge Robert S. Lasnik of the Western District of Washington, sitting by designation, concurred.

Zenoff's attorney, Steven F. Hubachek of Robbins Geller Rudman & Dowd, in San Diego, California, and the defendants' attorney, Edward Han of Paul Hastings, in Palo Alto, California, did not immediately respond to requests for comment.

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March 28, 2024, 2:54 PM PDT

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March 28, 2024, 9:14AM PDT
Thoma Bravo, MeridianLink Board Sued for Alleged Buyback Scheme
By [Mike Leonard](#)
Documents

-  [Complaint](#)
-  [Docket](#)
-  [Company: MeridianLink Inc.](#)
-  [Company: Thoma Bravo LLC](#)

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0309](#)

Bloomberg Law News 2024-03-29T12:28:44311253106-04:00
Thoma Bravo, MeridianLink Board Sued for Alleged Buyback Scheme

By [Mike Leonard](#) 2024-03-28T12:14:55000-04:00
COURT: Del. Ch.
TRACK DOCKET: [No. 2024-0309](#)

An investor sued Thoma Bravo LLC and MeridianLink Inc. board members, seeking to block a stock buyback program that’s allegedly aimed at handing corporate control of the software company back to the private equity firm.

The lawsuit, filed in Delaware, says the investment firm is exploiting its influence over MeridianLink—which it acquired in 2018 and took public in 2021—to regain a majority stake without spending a cent of its own. It’s the second time Thoma Bravo and a board it dominates have arranged a similar buyback scheme after its ownership slipped below 50%, according to the complaint.

The allegations echo a recurring theme in Delaware’s Chancery Court, where shareholders have brought a wave of cases over claims that corporate insiders used stock buybacks to grow their stakes through the back door by reducing the total number of outstanding shares. Those maneuvers force public investors to pay for the privilege of surrendering control, the suits say.

MeridianLink’s directors “did nothing to prevent the change in control, to seek compensation for the company’s public stockholders for the change in control, or to prevent Thoma Bravo from abusing MeridianLink’s corporate treasury,” according to the March 26 court filing. “History now threatens to repeat itself.”

MeridianLink and Thoma Bravo didn’t immediately respond to requests for comment.

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According to the complaint, Thoma Bravo maintained a slim majority stake in MeridianLink after the initial public offering, but its ownership ticked down from 50.2% to 49.7% when it was diluted by various restricted stock awards and compensation-related equity issuances that vested in mid-2023.

The board responded by following through on a stock repurchase program it had authorized the previous year, the lawsuit says, buying back roughly 1.8 million shares for nearly \$31 million—by far its costliest-ever tranche of buybacks at the time. The move allegedly bumped Thoma Bravo's stake back up to 50.8%.

Then, in late January, MeridianLink announced an even larger "buyback spree," the suit says. Two weeks later, it revealed the alleged reason: Thoma Bravo had sold about 4.9 million shares as part of a secondary stock offering, reducing its ownership to 46.8%. If the company exhausts its authorized repurchase capacity, the reduction in outstanding shares would raise Thoma Bravo's interest to 49.9%, according to the complaint.

The program "allows Thoma Bravo to do what it did in 2023: restore its majority voting control of the company at the expense of MeridianLink's corporate treasury and its unaffiliated stockholders," the lawsuit says. It seeks money damages and an injunction blocking the buybacks.

The investor leading the case, Louis Eisenberg, is represented by Grant & Eisenhofer PA and Bronstein, Gewirtz & Grossman LLC. Thoma Bravo and the MeridianLink board members haven't yet made court appearances.

The case is Eisenberg v. Cowan , Del. Ch., No. 2024-0309, complaint filed 3/26/24 .

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March 29, 2024, 9:08AM PDT
FuboTV Fraud Suit Over Advertising, Sports Betting Tossed Again
By [Ben Miller](#)
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- Judge ruled plaintiffs didn't show willful misrepresentation
- Ruling provides chance to amend proposed class action again

Bloomberg Law News 2024-03-29T12:50:46145016604-04:00
FuboTV Fraud Suit Over Advertising, Sports Betting Tossed Again

By Ben Miller 2024-03-29T12:08:24000-04:00
Judge ruled plaintiffs didn't show willful misrepresentation
Ruling provides chance to amend proposed class action again

FuboTV Inc., its top executives, and directors beat a proposed class action alleging that they oversold the company's advertising growth potential and ability to compete as a sports book operator to investors, after a judge dismissed the suit for a second time.

Investors alleged that FuboTV had touted its ability to leverage user data and inventory to achieve long-term advertising growth goals, as well as its chances of successfully competing in the sports betting market, despite lacking the capabilities to succeed on both fronts. These misrepresentations artificially inflated the company's share price for nearly eight months, according to the complaint that was dismissed on Thursday in the US District Court for the Southern District of New York.

Judge Andrew L Carter Jr. opted to toss the case again after dismissing the initial complaint a year ago for improper "puzzle pleading," consisting of block quotes with nonspecific reasons that those statements were misleading.

On Thursday, he ruled that investors insufficiently pleaded that certain statements were false or misleading and couldn't show the company or its executives knowingly made false statements about the sports betting business. The complaint relies exclusively on short-seller Kerrisdale Capital's report, which is a non-actionable competing opinion of the company's capabilities and doesn't qualify as a corrective disclosure, Carter said.

The second amended complaint highlighted a series of stock drops that took place in 2020 and 2021, following analyst criticism of the company over its business capabilities and strategy.

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1/2

Plaintiffs sought to recover damages for investors who acquired FuboTV stock between May 20, 2020 and Jan 4., 2021. The shareholders who brought the suit have until April 11 to seek permission to amend the complaint, Carter said.

Lowey Dannenberg PC and Pomerantz LLP represent the plaintiffs and the proposed class. They didn't immediately respond to a request for comment.

Latham & Watkins LLP represents FuboTV, the executives, and directors. A company spokeswoman declined to comment.

The case is Said-Ibrahim v. FuboTV Inc. , S.D.N.Y., No. 1:21-cv-01412, 3/28/24 .

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Goldman, Morgan Stanley Defeat Archegos Suits For Second Time

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- Suits claim insider trading by Goldman, Morgan Stanley
- Investors seek recovery of losses after Archegos collapse

A federal court tossed out seven shareholder lawsuits alleging Goldman Sachs Group Inc. and Morgan Stanley traded on inside information when they sold stock in which Archegos Capital Management, a private equity firm that failed in March 2021, had large positions.

The ruling by Judge Jed S. Rakoff of the US District Court for the Southern District of New York comes a year after Judge Paul A. Crotty of the same court dismissed earlier versions of the suits, finding the plaintiffs failed to show insider trading by the investment banks under any of three securities-law provision.

Rakoff will issue an opinion explaining his decision “in due course,” according to his order dismissing the cases with prejudice.

The suit by investors in Vipshop Holdings Inc. focuses on trading by Goldman Sachs and Morgan Stanley just before Archegos collapsed and dragged down the share price of stocks in which it was heavily invested, leading to large losses for the Vipshop investors.

Among the companies whose stock was affected were ViacomCBS Inc., Vipshop Holdings Ltd., Discovery Inc., Tencent Music Entertainment Group, Baidu Inc., IQIYI Inc., and Gaotu/GSX Inc., Crotty said in his March 2023 ruling.

The investors alleged the two banks sold several large blocks of shares in companies in which Archegos held positions after receiving inside information that it was likely to fail.

The implosion of Archegos also led to the filing of criminal charges against the firm’s founder Bill Hwang and its CFO Patrick Halligan.

Hwang and Halligan were charged in 2022 with fraud over the collapse of the firm, which at one point held market positions valued at \$160 billion. The meltdown cost banks \$10 billion. Hwang has argued the banks “played a pivotal role” in the firm’s implosion.

He and Halligan argued in recent court filings that information they received from unnamed banks, counterparties on the Archegos transactions, refuted the government’s theory about how Archegos and the banks interacted to influence the market price of the stocks it invested

in.

Hwang has argued that the banks “played a pivotal role” in the firm’s implosion.

Johnson Fistel LLP, Stone Law Group PLLC, Hedin Hall LLP, Scott & Scott LLP, and Pomerantz LLP represent the plaintiffs. Cleary Gottlieb Steen & Hamilton LLP represents Goldman Sachs. Davis Polk & Wardwell LLP represents Morgan Stanley.

The cases include Tan v. Goldman Sachs Group Inc. , S.D.N.Y., No. 1:21-cv-08413, 3/28/24 .

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Mall Property Trust Defeats Investors' Fraud Lawsuit Over Yields

By Martina Barash

- Shopping mall redevelopment, pandemic cash crunch at issue
- Investors fail to show executives' comments caused stock drop

Bloomberg Law News 2024-03-29T10:06:37736972962-04:00

Mall Property Trust Defeats Investors' Fraud Lawsuit Over Yields

By Martina Barash 2024-03-28T14:07:38000-04:00

- Shopping mall redevelopment, pandemic cash crunch at issue
- Investors fail to show executives' comments caused stock drop

Investors in real estate investment trust Washington Prime Group Inc. failed to show a link between executives' statements about expected yields from mall redevelopment projects and a stock-price drop, a federal court said in dismissing their proposed class action.

The investors also didn't adequately allege that statements about the company's ability to borrow money during the Covid-19 pandemic caused their losses, Judge James L. Graham said Wednesday for the US District Court for the Southern District of Ohio.

WPG owned shopping malls throughout the US, according to the court. "Being a mall owner in the 2010s was a challenge, as online sales grew and a new generation of consumers had relatively little interest in spending time in traditional malls," Graham said.

The investors alleged that WPG—which is out of the suit due to its June 2021 Chapter 11 filing—and three of its executives overstated the returns it expected from redeveloping properties under a 2016-2017 business plan to address the downturn. They also say the defendants misled them about being able to modify restrictions from lenders—debt covenants—when WPG was under pandemic-related financial pressure.

The investors failed to show loss causation for both sets of allegations, Graham said. Some of the executives' comments were also protected as forward-looking statements accompanied by cautionary language, he said.

The allegations about the bond covenants and other credit-related issues also fell short because some of the statements were non-actionable and some weren't shown to be false, he said.

WPG has also been embroiled in litigation against principal owner Strategic Value Partners LLC over an alleged post-bankruptcy squeeze-out of minority shareholders.

The Rosen Law Firm PA is lead counsel for the investors. Blank Rome LLP represents the WPG executives.

The case is In re Wash. Prime Grp., Inc. Sec. Litig. , 2024 BL 104418, S.D. Ohio, No. 2:21-cv-2757, 3/27/24 .

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March 28, 2024, 1:46 PM PDT

It vacated Judge Edgardo Ramos' ruling dismissing the securities and racketeering claims, remanding it to be transferred to the US District Court for the District of Delaware.

That court will address the merits of DarkPulse's allegations that the FirstFire fund and managing member Eli Freeman wrongfully converted the 2021 promissory note into shares of DarkPulse stock at a fixed price.

The technology company's lawsuit, initially filed in December 2021, describes FirstFire as a "toxic" lender that makes predatory loans to small companies. It alleged that a \$975,000 loan allowed the lender to extract more than \$38 million in company stock, which it immediately sold.

The company seeks to recover tens of millions in damages from FirstFire and Freeman, as well as legal fees, according to the complaint.

The Basile Law Firm PC and Passante & Associates PC represent DarkPulse.

Kirkland & Ellis LLP represent FirstFire and Freeman.

The case is DarkPulse Inc. v. FirstFire Glob. Opportunities Fund LLC , 2d Cir., No. 23-00078, 3/28/24 .

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/03/what-is-the-value-of-the-corporate-form.html

Friday, March 29, 2024

What is the value of the corporate form?

By Ann Lipton

The Tulane Corporate Law Institute this year was unusually contentious, and that's because a lot of corporate practitioners – defense side – were unhappy with a number of recent Delaware decisions.

Tornetta v. Musk made headlines because of the colorful personalities involved, but it actually rested on fairly commonplace, well-established Delaware standards of review. More unsettling, I think, from the corporate bar's perspective, were decisions like *Sjunde AP-Fonden v. Activision Blizzard* (which I blogged about here), *Crispo v. Musk* (which I blogged about here), and *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* (which I blogged about here), because those cases upset settled expectations of practitioners. (VC Laster obliquely referred to some of the complaints in his decision denying interlocutory review in *TripAdvisor*: "Rule 42 does not invite a trial court to consider the level of media attention that a decision has received. That does not mean that the Delaware Supreme Court could not consider it. The justices might conclude that given the media attention and practitioner-driven stormlets over Delaware's place in the corporate universe, Delaware's highest court should weigh in. But that is not a consideration that Rule 42 instructs a trial court to take into account.")

So it was in some sense unsurprising to see the Council of the Corporation Law Section of the Delaware State Bar Association immediately propose some legislative fixes.

Now, with the caveat that these proposals were just released, and I read them quickly, so I reserve the right to be totally wrong in my interpretation/analysis -

For *Crispo*, the proposal would make it possible for merger partners to specify that lost premium damages are available in the event of a broken deal, and further allow the target to create a shareholder's representative who can seek lost premium damages on shareholders' behalf (which, as I blogged, is something companies have sought to arrange through private ordering).

For *Activision*, the proposal allows boards to approve "substantially final" versions of merger agreements, especially if key terms are not included in the agreement but otherwise available to the board, and that disclosure schedules are not considered to be part of the

merger agreement subject to board approval.

I don't find either of these particularly controversial (though I can imagine classroom hypos that have fun with how far a disclosure schedule can go; it doesn't strike me as a particularly precise term). As I previously blogged, in *Activision*, the violation seemed rather technical in nature, and *Crispo* just seemed like there was a divergence between the formal requirements of common law contract doctrine and the purposes a merger contract is meant to serve.

It's the *Moelis* amendment that's a bit more striking. Proposed DGCL §122(18) would allow corporations to:

Make contracts with one or more current or prospective stockholders (or one or more beneficial owners of stock), in its or their capacity as such, in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions). Without limiting the provisions that may be included in such contracts, the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, whether or not the taking of such action would require approval of the board of directors under this title, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation). With respect to all contracts made under this subsection, the corporation shall be subject to the remedies available under the law governing the contract, including for any failure to perform or comply with its agreements under such contract.

In conjunction with this amendment, there's a new change to DGCL §122(5), as underlined:

Appoint such officers and agents as the business of the corporation requires and to pay or otherwise provide for them suitable compensation; provided that any contract or other appointment or delegation of authority that empowers an officer or agent to act on behalf of the corporation shall be subject to § 141(a) of this title, to the extent it is applicable.

According to the Richards, Layton & Finger memo on the proposed changes, *Moelis* only held that contractual restrictions on the board's authority must be contained in preferred shares rather than a separate contract; therefore, these amendments to the DGCL would not

substantively affect the extent to which the board can contract out its authority. Rather, they only have the effect of allowing boards to use ordinary contracts, rather than preferred shares, to make those arrangements.

I am not sure that is an accurate interpretation of *Moelis*. VC Laster seemed to leave open the question how far a preferred share issuance could restrict board authority; in footnote 19, he wrote:

Moelis may not be able to get everything he wanted. Even a charter provision cannot override a mandatory feature of the DGCL....This court has indicated that some restrictions on board action could be invalid even if they appear in the charter....Some transactions, like mergers, require a specific sequence of events in which the board initiates action, then the stockholders vote. It is unclear whether a charter provision could require a stockholder's pre-approval, before the board could act....Regardless, those issues are for another day....

So as I read it, *Moelis* actually touched upon a couple of different issues. The first was, how much can corporate governance be privately ordered in a personal contract/stockholder agreement, rather than in a corporate charter (including preferred share classes)? The second was, what are the fundamentally nondelegable functions of a corporate board, that cannot be restricted at all?

These are both unsettled questions because, usually, if you want that much tailoring, you either form a close corporation or – more likely these days – an LLC.

But proposed Section 122(18) blows past all that – not only does it allow for stockholder agreements to contain the kinds of governance rights previously associated with preferred shares, but it *also* does not seem to place any limits on the kinds of rights that can be given to stockholders directly in the first place.

We could ask why it matters whether a restriction appears in a stockholder agreement rather than a preferred share issuance. The most obvious is, if it's a private company, the stockholder agreement may not be known to the public or even other investors. And even in a public company, stockholder agreements may be more easily amended than preferred share terms (though I imagine at least some of that difference could be mitigated with careful drafting regarding procedures for amendment of the preferreds).

But I think the broader question is the more interesting one: where is the actual line between a corporation and an LLC? Or, more generally, whether Delaware is going to be so firmly committed to private ordering in the corporate context that it functionally eliminates the distinction between the two.

And that just begs the question whether we really do need the two forms, or whether instead we should just have “the firm” which is a set of defaults that can be altered by the parties.

(Yes, yes, I know LLCs are taxed differently than corporations, but that’s an IRS choice. It can decide separately which governance arrangements stray so far into the LLC territory that the firm should be taxed like an LLC. Certainly, I don’t see any reason the label – and not the actual governance arrangements – should drive the taxation determination.)

One major argument in favor of keeping the corporate form “pure” is network benefits. It’s easier for investors when there’s a basic governance arrangement that’s stable across firms, and that way they can focus on analyzing the substantive nature of the business when making investment decisions. Writing in 2013, Michael Klausner pointed out that IPO charters demonstrate very little customization, which he took as evidence of the value of these network effects.

I genuinely wonder if that same result would be found today. Increasingly, companies are going public with shareholder agreements, byzantine multiple-class share structures, forum selection clauses, corporate opportunity waivers – and that doesn’t even count all the private companies with impenetrably complex governance and cash flow rights.

Does that suggest the network effects of the corporate form are overstated? That’s the challenge that the proposed Section 122(18) poses.

And of course it goes further. I have written about (and written about) the unsettled definition of what it means to be a controlling stockholder; allowing shareholders complete freedom to take on these kinds of governance powers demands a determination of when the powers are so overweening that the shareholder becomes a fiduciary. Unless we want to make fiduciary obligations in this context waivable as well – which again brings the corporate form closer to the LLC.

One of the odder things about the proposed legislation is that the amendments to DGCL §122(5) recognize there must be some inherent powers in the board, that cannot be delegated to someone *acting on the company’s behalf* – like an officer. This, presumably, is how you reconcile proposed §122(5) with proposed §122(18) – a stockholder, exercising rights under an agreement, is not acting on the corporation’s behalf, and therefore the §141(a) limits do not apply.

But think about the situation in *Moelis* itself. There, the stockholder was Ken Moelis, who was also CEO, and also Chair of the Board. He certainly, by virtue of the stockholder agreement, was a controlling shareholder. If he exercised his rights under the agreement, would he be acting in his private capacity, or on behalf of the company? And if on behalf of the company, does that mean §122(5) would kick in, preventing the board from delegating away its §141(a) power? I’m very confused.

Also, by the way, there's the bit about remedies. The Richards, Layton & Finger memo on the proposed changes has this curious comment:

While the plain language of the new subsection would appear to give the board the power to bind the corporation to take fundamental action, such as approving a merger, at the direction of a stockholder, the real-world operation of any provision included in a stockholders' agreement will be much more limited. Although an agreement adopted pursuant to new Section 122(18) may require a corporation to cause fundamental action to be taken, nothing in the statute expressly provides that individual directors may be parties to the agreement and expressly bound thereto in their directorial capacities. For example, fashioning a remedy for a corporation's failure to cause a merger to occur as required by a stockholders' agreement due to the failure of stockholders to adopt the merger agreement likely would involve consideration of the principles of preclusion and coercion applicable to termination fees. While new Section 122(18) recognizes that a stockholder may receive damages if the corporation fails to cause a contractually specified event to occur, the amount of any such damages will be constrained, in most cases involving fundamental corporate actions, by equitable principles. For example, fashioning a remedy for a corporation's failure to cause a merger to occur as required by a stockholders' agreement due to the failure of stockholders to adopt the merger agreement likely would involve consideration of the principles of preclusion and coercion applicable to termination fees.

Actually, the amendment says that any remedies may be available under the law governing the contract. Nothing in that language would prohibit equitable remedies where available, like specific performance, and courts enforce specific performance obligations against corporations all the time, including where board action (like completing a merger) is required. I agree that matters requiring a stockholder vote will still require one, but the drafting of 122(18) does not on its face prohibit an order requiring the board perform its own obligations under the agreement.

Instead, the synopsis to proposed 122(18) says:

New § 122(18) does not authorize a corporation to enter into contracts with stockholders or beneficial owners of stock that impose remedies or other consequences against directors if they take, or fail to take, specified actions as required by the contract or that purport to bind the board of directors or individual directors as parties to the contract. Contracts that would impose such remedies or consequences on directors or that would bind directors as parties are subject to existing law. *Abercrombie v. Davies*, 123 A.2d 893 (Del. Ch. 1956); *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205 (Del. Ch. 1979). Instead, new §122(18) authorizes contracts that impose remedies only against the corporation, including as a result of any failure by the corporation, its board of directors, or its current or future directors, stockholders or beneficial owners of stock, to take, or refrain from taking, actions specified in the contract. If an action addressed in a covenant by the corporation requires director or stockholder approval under title 8, that approval must still be obtained in order to effect the action pursuant to title 8. For example, the lack of stockholder approval of an action under title 8 requiring such approval would render specific performance of the covenant unavailable. Moreover, as noted below, even the enforceability of a claim for money damages for breach of the covenant may be subject to equitable review if the making or performance of the contract constitutes a breach of fiduciary duty.

Notice how this says specific performance is not available if *stockholder* approval is required but lacking? It conspicuously does *not* say specific performance is unavailable if only *board* action is required. So I am not at all certain how the remedies section of the proposed law squares with the claim that it would not change existing cases like *Abercrombie*, which holds that stockholder agreements may not significantly limit the ability of directors to exercise their judgment on matters of corporate policy.

I'll go further – I keep beating this drum about choice of law (wrote a whole paper about it). Stockholder agreements are subject to ordinary choice of law principles, and proposed §122(18)'s reference to "the law governing the contract" apparently plans to keep it that way. Which means, we get the possibility of a California law, or Texas law, or whatever other state law, determination of whether specific performance is required. That sounds ... very coherent.

Anyway, the Delaware Supreme Court has increasingly insisted that corporations are just contracts so now we're really reaching put up or shut up time. Is there anything left for the corporate form to do? Or should we all just be teaching the law of the firm?

Bank of America won't face racketeering class action over foreclosures

 [courthousenews.com/bank-of-america-wont-face-racketeering-class-action-over-foreclosures](https://www.courthousenews.com/bank-of-america-wont-face-racketeering-class-action-over-foreclosures)

Edvard Pettersson

A federal judge ruled that the plaintiffs' amended complaint failed to address the deficiencies of their original filing and threw the case out without leave to amend.

A Bank of America ATM booth, in Woburn, Mass. (AP Photo/Elise Amendola, File)

(CN) — Bank of America and the Bank of New York Mellon won dismissal of a class action by homeowners who claimed the banks are engaged in a racketeering scheme that uses fraudulent documents to foreclose on their homes.

U.S. District Judge Jill Otake in Honolulu on Thursday granted the banks' request to dismiss the claims with prejudice, denying the eight names plaintiffs another a chance to amend their lawsuit.

The judge last year had given the plaintiffs, homeowners in Hawaii and Florida, permission to file an amended complaint because their initial attempt to articulate their claims had been too confusing to proceed. However, the judge said, their renewed effort didn't improve on the original and was again a "lengthy, oft-confusing pleading that continues to impose unfair burdens on litigants and judges."

The amended complaint, according to Otake, was replete with irrelevant facts, argumentative statements that didn't constitute factual claims and lengthy recitations that often didn't involve the two defendant banks or even relate to a civil racketeering claim.

That alone would have been grounds to dismiss the lawsuit, the judge said. However, Otake continued, the racketeering claim should also be thrown out because it was based on the banks' foreclosure proceedings in state courts, and litigation activity by itself isn't sufficient to support a claim under the Racketeer Influenced and Corrupt Organizations Act.

"The court previously considered and decided the first round of dispositive motions practice on similar grounds, and admonished plaintiffs about the consequences of failing to allege adequate factual allegations in an amended complaint," the judge said. "Yet the crux of the legal deficiency in the complaint— acts constituting litigation activity—was not addressed or rectified by the first amended complaint."

Attorneys for the plaintiffs didn't immediately respond to a request for comment on the ruling.

The plaintiffs claimed that Bank of America and the Bank of New York Mellon deliberately targeted people of color in Hawaii and Florida for home loans that the bank knew they would never be able to pay back. Three of the five Hawaii plaintiffs are of Native Hawaiian descent and the three Florida plaintiffs are women of color.

They also claimed they had been or were currently being foreclosed on, some for nearly two decades, as part of the bank's scheme to use fraudulent documentation to initiate a false foreclosure.

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11th Hour strategy shift leaves Netflix lawyers on hook for fees

DJ [dailyjournal.com/articles/377858-11th-hour-strategy-shift-leaves-netflix-lawyers-on-hook-for-fees](https://www.dailyjournal.com/articles/377858-11th-hour-strategy-shift-leaves-netflix-lawyers-on-hook-for-fees)

Mar. 29, 2024

The plaintiff's counsel argued that the defense attorneys' actions were deceitful and forced them to waste trial preparation resources. U.S. District Judge R. Gary Klausner agreed.

Judge R. Gary Klausner

Defense lawyers at Willkie Farr and Gallagher LLP who represented Netflix in a patent infringement case have been ordered by a federal judge in Los Angeles to pay attorney fees to opposing counsel because the Netflix attorneys abandoned parts of their defense strategy at the Eleventh Hour and shared misleading information with the jury.

David M. Stein, a partner at Olson Stein LLP, represented GoTV Streaming against Netflix on patent claims over mobile media software, argued that Willkie Farr's actions were an "unreasonable" way to litigate.

The three-day trial that began on Oct. 17, 2023 ended with the jury finding Netflix infringed one of the two patent claims and awarding GoTV \$2.5 million. GoTV Streaming LLC v. Netflix Inc., 2:22-cv-07556 (C.D. Cal., filed Oct. 17, 2022).

David M. Stein

However, in a motion for attorney fees filed months after the case closed, Stein claimed the defense counsel, led by Willkie Farr partner Barrington E. Dyer, "secretly" abandoned its invalidity defense slideshow presentations they had shared with GoTV's counsel a day before the trial began. Stein claimed that because Dyer briefly discussed to a jury the invalidity issue during opening statements but never shared the slides or brought up the issue throughout the rest of trial, his actions were deceitful and forced the plaintiff's counsel to waste a large amount of trial preparation resources.

In an opposition filing, Dyer argued Stein's claims were nothing more than speculation and innuendo and Netflix "availed itself of the rights available to every part in litigation" to strategically not present its planned invalidity defense during opening statements because they felt it was necessary based on evidence and themes that developed through discovery and how the trial was being presented by GoTV.

U.S. District Judge R. Gary Klausner on Wednesday found Dyer's arguments unpersuasive and ordered his team to pay attorney fees in an amount to be specified by the plaintiff's counsel within 14 days. "Given several instances of suspicious conduct, plaintiff's explanation appears to be the simplest and most likely one. Accordingly, the court concludes, by a preponderance of the evidence, that defendant abandoned its invalidity defense but feigned otherwise intending to force plaintiff to needlessly expend trial resources," Klausner wrote.

Stein did not respond to an email or phone call by press deadline Thursday. Dyer was not available for comment.

Stein's motion stated his legal team was entitled to \$500,000 in fees based on the month-long window in which Netflix filed its pretrial memoranda and the last day of trial on Oct. 19, 2023. However, Klausner decided that because GoTV formally withdrew six of its eight patent claims two days before trial, calculating fees from Oct. 15 to Oct. 19 was more appropriate.

"When plaintiff withdrew its claims on that date, defendant presumably spent significant time and resources preparing to defend against those claims. Once those claims were dismissed, all that work was for naught," Klausner wrote. "Whether plaintiff withdrew on that date maliciously or in good faith, it is only fair that both parties shoulder their own fees prior to that date."

In Netflix's opposition filing, Dyer argued Stein couldn't complain about Netflix's decision to withdraw parts of its defense from trial because he, too, waited until the Eleventh Hour to withdraw parts of the claims.

Klausner agreed, in part, but said the plaintiff's conduct was readily distinguishable because "unlike defendant, plaintiff successfully withdrew its claims before trial, and, despite never formally withdrawing its doctrine of equivalents theory, plaintiff never exchanged slides mentioning the theory or discussed the theory during its opening statement."

#377858

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March 28, 2024, 9:18 AM PDT

Bankman-Fried Sentencing a Harbinger of Crypto Trials to Come

By Chris Dolmetsch

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Bankman-Fried Sentencing a Harbinger of Crypto Trials to Come

By Chris Dolmetsch2024-03-28T12:18:23111-04:00

FTX co-founder Sam Bankman-Fried was sentenced to 25 years in prison. It was shorter than the 40 to 50 years that federal prosecutors had recommended, but above the six-and-a-half-year sentence requested by the defense lawyers. The decision sets the tone for others accused of crimes involving digital assets, including former Celsius Network Ltd. Chief Executive Officer Alex Mashinsky, Terraform Labs Pte co-founder Do Kwon and Binance Holdings Ltd. founder Changpeng Zhao.

Here's a look at where some of the most prominent criminal cases involving cryptocurrency fraud stand.

The Defendants

Do Kwon

Terraform Labs Co-Founder



Do Kwon

Photographer: Woohae Cho/Bloomberg

Plea: While he hasn't entered a formal plea in the US case, Kwon has denied wrongdoing and said he has stolen no money

Status: Awaiting extradition

Age: 32

Charges : Kwon is charged with two counts of conspiracy, which carries a maximum penalty of five years in prison, two counts of commodities fraud, which carry a top punishment of 10 years, two counts of securities fraud and two counts of wire fraud – both of which come with a potential 20-year sentence.

Allegations: The Terraform Labs Pte co-founder was released from prison in Montenegro last weekend as the country's highest court weighs competing extradition requests from South Korea and the US, which wants to try Kwon for the \$40 billion collapse of the TerraUSD algorithmic stablecoin in 2022. His extradition fight is playing out as a trial over civil claims by the US Securities and Exchange Commission against Terraform is ongoing in federal court in New York. Kwon was arrested in Montenegro a year ago while trying to board a private jet to Dubai. He was later convicted of attempting to travel using a fake passport and sentenced to four months behind bars. His team is pushing for South Korea, where sentences for white-collar crimes are generally less harsh than in the US. Kwon has denied wrongdoing and said he has stolen no money.

Alex Mashinsky

Celsius Network Founder



Alex Mashinsky

Photographer: Stephanie Keith/Bloomberg

Plea: Not Guilty

Status: Awaiting trial in January

Age: 58

Charges : Two counts of securities fraud, commodities fraud, two counts of wire fraud, conspiracy and market manipulation. He faces as much as 20 years on the securities fraud, wire fraud and market manipulation charges, 10 years for commodities fraud and five years for conspiracy.

Allegations: Mashinsky is scheduled to go on trial in January on charges that he made false and misleading statements about the health of Celsius before it filed for bankruptcy in 2022. The 58-year-old last month said he was comfortable proceeding to trial using the same lawyers as Bankman-Fried after prosecutors raised concerns about a potential conflict of interest.

Changpeng Zhao

Binance Founder



Changpeng Zhao

Photographer: Zed Jameson/Bloomberg

Plea: Guilty

Status: Awaiting sentence

Age: 47

Charges : Failing to maintain an effective anti-money laundering program. He faces 18 months in prison.

Allegations: Binance and its founder pleaded guilty last year to anti-money laundering and sanctions charges to resolve a long-running probe by US prosecutors and regulators. Binance will pay \$4.3 billion as part of the deal and will have its compliance monitored by an independent firm for as long as five years. As part of the plea agreement, he relinquished his CEO post at Binance and agreed to pay a \$50 million fine.

Avraham Eisenberg

Crypto Trader

Plea: Not Guilty

Status: Awaiting April 8 trial

Age: N/A

Charges : Avraham is charged with one count of commodities fraud and one count of commodities manipulation, both of which carry a maximum penalty of 10 years in prison; and one count of wire fraud, which carries a maximum punishment of 20 years.

Allegations: The crypto trader is accused of stealing \$110 million in 20 minutes by scamming the Mango Markets cryptocurrency exchange. Prosecutors claim he manipulated Mango Markets futures contracts in October 2022, driving up the price of swaps by 1,300% and using them to borrow about \$110 million of cryptocurrency from other Mango depositors.

FTX Collaborators

Caroline Ellison

Alameda Research Chief Executive Officer

Age: 29



Caroline Ellison

Photographer: Stephanie Keith/Bloomberg

Nishad Singh

FTX engineering chief

Age: 28



Nishad Singh

Photographer: Stephanie Keith/Bloomberg

Gary Wang

FTX co-founder

Age: 31



Gary Wang

Photographer: Stephanie Keith/Bloomberg

Ryan Salame

Co-CEO FTX Digital Markets

Age: 30



Ryan Salame

Photographer: Stephanie Keith/Bloomberg

Allegations: Ellison, Singh and Wang, among Bankman-Fried's closest friends, pleaded guilty to fraud charges and testified as prosecution witnesses at his fraud trial. They will face their own sentencing in the coming months. The government will prepare what's known as a 5K letter for the judge outlining how helpful they were in the investigation, from any initial reluctance to come forward to the value of the information they provided. The trio described how Bankman-Fried directed them in different ways to give Alameda special, secret privileges on the FTX exchange and drawn down on customer funds to use on corporate expenses, like real estate and investments.

Salame pleaded guilty in September 2023, but didn't testify against Bankman-Fried. He is scheduled to be sentenced May 1 and faces as much as five years for each of the two charges he pleaded guilty to.

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Crypto Auditor Contests US Oversight Board's Enforcement Powers

By Amanda Iacone

- Case is third to challenge board's enforcement powers
- Firm claims board failed to provide clear rules for crypto audits

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Crypto Auditor Contests US Oversight Board's Enforcement Powers

By Amanda Iacone 2024-03-28T19:05:41000-04:00

- Case is third to challenge board's enforcement powers
- Firm claims board failed to provide clear rules for crypto audits

An unnamed public accounting firm is suing to halt a US regulator's demand for documents as part of an ongoing probe of the firm's crypto-related audit work.

The suit is the third to challenge the US audit regulator's investigative powers brought by anonymous plaintiffs each represented by the New Civil Liberties Alliance. The legal group, backed by conservative funders, has challenged government agency power in cases that have landed at the US Supreme Court.

In this latest challenge, the unnamed firm sued the Public Company Accounting Oversight Board Wednesday claiming that the audit regulator's investigative powers are unconstitutional. The suit argues that federal courts played no role in administering the board's repeated demands that the firm "produce tens of thousands of pages of documents," according to the suit filed in federal district court in Houston.

Board staff first launched the regulator's investigation into the unnamed audit firm in October 2021. More than two years later, enforcement staff informed the firm that they planned to recommend disciplinary actions in February. The board sought additional records earlier this month, the suit said.

PCAOB rules don't limit how long an investigation can take or how many times staff can demand records as part of its inquiries. The regulator's process provides no avenue for accountants or firms to challenge those orders or to have them reviewed in federal court, according to the suit.

The unnamed firm also claims that the board never instructed firms on how the regulator expects them to handle audits involving crypto assets or companies involved in the crypto industry.

“Without Board standards or rules providing fair notice, auditors are left only with the option of selecting from a wide range of opinions on the best method of auditing assets of crypto-related issuers,” the lawsuit said.

Congress created the PCAOB in the wake of accounting scandals that toppled Enron Corp. and WorldCom Inc., giving it broad powers to oversee the auditors of public companies. The 2002 Sarbanes-Oxley Act set up the board as a nonprofit and gave it the authority to write audit rules, inspect compliance with those rules, and to enforce violations.

“The PCAOB is laser focused on protecting investors,” the board said in a statement.

Audits involving cryptocurrency have received extra scrutiny during routine PCAOB inspections since at least 2020. Washington regulators have stepped up pressure on firms working in the crypto sector after the 2022 collapse of exchange FTX, whose founder was sentenced to 25 years in prison Thursday on federal fraud charges.

A federal judge in Dallas agreed on March 13 to transfer a related legal challenge to the district court in Washington, D.C., where the PCAOB is headquartered. An accountant, who worked for a Colombian firm, is challenging the board’s in-house hearing process and its authority to investigate and enforce auditor violations.

Earlier this month, an unnamed accountant based in Tennessee separately sued the audit board on similar grounds.

The case is Doe Corp. v. Pub. Co. Accounting Oversight Bd. , S.D. Tex., 4:24 cv-1103, 3/27/24 .

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PwC Firms Settle US Probes Into Business Deal, Tax Leak (1)

By Amanda Iacone

- PwC Australia settles tax leak reporting probe with US regulator
- Audit board cites gaps in independence policies at PwC US

Bloomberg Law News 2024-03-29T09:46:13111674204-04:00

PwC Firms Settle US Probes Into Business Deal, Tax Leak (1)

By Amanda Iacone 2024-03-28T15:20:26000-04:00

- PwC Australia settles tax leak reporting probe with US regulator
- Audit board cites gaps in independence policies at PwC US

PwC affiliates in the US and Australia agreed to pay \$3.35 million in combined penalties for separate audit violations related to business negotiations with a client and an investigation into the leak of government tax plans.

PwC's US arm agreed to a \$2.75 million penalty to settle charges that a potential business deal with an audit client exposed gaps in the Big Four firm's guardrails meant to prevent conflicts of interest, the Public Company Accounting Oversight Board said Thursday.

The US audit regulator also sanctioned PricewaterhouseCoopers, the firm's affiliate based in Sydney, for not reporting to the board an investigation into the leak of Australian government tax plans. The firm agreed to pay \$600,000 to settle those charges.

The penalties involving PwC LLP—the firm's US affiliate—stemmed from 2018 discussions over a possible business alliance with a software provider and potentially dropping that company as an audit client, according to the order.

Top audit leaders were involved in those conversations, including the engagement partner assigned to the company's audit. But those leaders didn't discuss with firm staff tasked with monitoring conflicts of interest whether exploring the business deal could threaten the firm's objectivity and independence, according to the PCAOB settlement order.

PwC's internal policies at the time didn't require such a consultation "prior to a formal proposal" and fell short of ensuring the firm could remain objective and independent from corporate managers, according to the board.

"While there is no allegation that our independence was impaired, PwC recognizes that maintaining our independence is key to our important role in the capital markets," the US affiliate said in a statement.

The board's order didn't name the software company. The joint venture with the fast-growing company could have been worth tens of millions of dollars—more than the revenue PwC earned as the client's auditor, according to internal firm emails and communications described in the order.

PwC told the company that it should find another auditor in January 2019—after the audit board had already begun investigating whether PwC's audit independence had been compromised, according to the order.

The company's audit committee replaced PwC with another firm to complete the software business's 2018 fiscal year audit.

In addition to the monetary penalty, PwC also agreed to bolster its independence policies, to share them with staff, and to train its workforce on US independence rules and the firm's policies.

The firm in September announced a plan to walk away from less than \$100 million worth of consulting services sold to the firm's audit clients—part of a blueprint to reinforce investor confidence in the firm's audits.

Providing prohibited services to audit clients, a breach of US auditor independence rules, resulted in a \$7.9 million penalty in a Securities and Exchange Commission case PwC settled in 2019. The violations spanned 2013 through 2016.

In response to the hefty penalty, the firm rolled out a series of reforms, including efforts to curb add-on services that could stretch the bounds of a typical financial statement audit.

(Updated with additional reporting throughout.)

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Australian Regulator Wins First Greenwashing Enforcement Action

K [dandodiary.com/2024/03/articles/esg/australian-regulator-wins-first-greenwashing-enforcement-action/](https://www.dandodiary.com/2024/03/articles/esg/australian-regulator-wins-first-greenwashing-enforcement-action/)

March 28, 2024



By Kevin LaCroix on March 28, 2024
Posted in ESG



As ESG-related litigation has developed, one definitive trend has been the emergence of litigation involving allegations of “greenwashing” – that is, claims alleging that companies overstated their ESG credentials in

order to win business, attract customers, or score virtue points. To date, the greenwashing claims have emerged primarily in the U.S. and Europe. Now, Australia is getting into the act, as the Australian Securities and Investments Commission (ASIC) has brought and won its first greenwashing civil penalty action. As discussed below, the action involved claims that Vanguard’s Australian affiliate made misleading statements about its ESG-sorting processes for one of its index funds.

ASIC’s March 28, 2024, press release about the civil action can be found [here](#). The Federal Court of Australia’s March 28, 2024, judgment can be found [here](#). (Hat tip to Persia Navidi of the Hickson Lawyers law firm for her March 28, 2024 *LinkedIn* post about the ASIC action.)

The ASIC action involved Vanguard Investments Australia Ltd., and specifically one of its index funds, the Vanguard Ethically Conscious Global Aggregate Bond Index Fund. As of February 26, 2024, the fund had assets under management of over AUD \$1 billion. The fund is a registered management investment scheme, of which Vanguard is the “Responsibility Entity” and the “Investment Manager,” within the meaning of applicable law and regulation.

Investments in the fund were based on an index called the Bloomberg Barclays MSCI Global Aggregate SRI Exclusions Float Adjusted Index (the “Index”). In its action against Vanguard, ASIC alleged that between August 2018 and February 2021 and in a range of communications (including press releases, disclosure statements, and media reports), and in violation of the Australian Securities and Investment Commission Act 2001, Vanguard made

false and misleading representations about the ESG exclusionary screens that were applied to the fund and that the fund included securities of issuers that violated applicable ESG criteria.

In a March 8, 2024, court hearing, Vanguard admitted that a significant portion of securities in the Index and thus in the fund were from issuers that were not researched or screened against applicable ESG criteria.

In his March 28, 2024, Order, Australian Federal Court Justice Michael O'Bryan held that Vanguard had "engaged in conduct in relation to financial services that was liable to mislead the public as to the nature, the characteristics, and the suitability for their purpose of those financial services," and thereby "contravened" applicable provisions of the ASIC Act.

The penalties to be imposed will be determined at a hearing scheduled to take place on August 1, 2024.

Discussion

ASIC's press release about the court's determination states that the outcome represents the agency's "first greenwashing civil penalty action." The press release quotes an ASIC spokesperson as emphasizing that Vanguard, "by its own admission" had "misled investors" numerous times. The press release also quotes the spokesperson as saying that as the first greenwashing court outcome, the case "shows our commitment to taking on misleading marketing and greenwashing claims" and "sends a strong message to companies making sustainable investment claims that they need to reflect the true position."

Reading between the lines a little bit about Vanguard's admissions, I wonder if what is happening here is that Vanguard and its fund are taking the fall for the limitations of the Bloomberg Barclays Index on which the fund's investments were based; that is, was it Vanguard itself, or was it the Index on which the Vanguard fund was based, that had failed to sort the investments against the ESG exclusionary screens. ASIC would of course say that in either case, it is Vanguard's responsibility to ensure that its own statements accurately reflected the actual way that the investments in the fund were sorted, regardless of whether or not the failure to screen was the fault of the underlying index.

What is of interest to me about this that this civil action was filed and pursued by the Australian securities regulator, in Australian courts, under Australian law. Though the action is thoroughly Australian, it replicates the kinds of claims that regulators and investor plaintiffs have pursued in the U.S. and Europe. It is also another example of the fact that by and large the ESG-related claims that have emerged have not involved companies that were ESG laggards, but rather have been brought against companies that have tried to present themselves as proactive on ESG.

The emergence and evolution of these kinds of “greenwashing” claims should be of interest to anyone concerned about what kinds of AI-related claims we may see. Just as the ESG-related claims have to a significant extent involved these kinds of greenwashing claims, the AI-related claims that have emerged so far have involved a very close corollary to greenwashing – that is, what SEC Chair Gary Gensler called “AI washing,” which is the alleged effort by some firms to portray themselves or their products or services as AI-enabled, in order to burnish their AI credentials at a time when AI is of keen interest to investors. The comparison between the company actions involved certainly seems to hold at a certain level. The likelihood is that, just as we have seen greenwashing claims develop and spread, we will see AI washing claims develop and spread as well.

Speaking of ESG-Related Governmental Actions: Readers may be interested to know that the Mississippi Secretary of State Michael Watson has taken action against Blackrock for its non-ESG funds, issuing a cease and desist order because, he alleges, while the investment firm marketed the funds as non-ESG, the firm had separately committed to use all of its assets under management to “advance the environmental agenda of reducing carbon emissions to ‘net zero.’” A copy of the March 26, 2024 Cease and Desist Order against Blackrock issued by the Office of the Secretary of State can be found [here](#).

According to a March 27, 2024, *Law360* article about the Order ([here](#)), Watson said in a statement that “Investment Companies will not push their political agenda on Mississippians, especially through fraudulent and deceptive means.”

The *Law360* article quotes Blackrock as saying that many policymakers and government officials “have ideas about how we should invest our clients’ money,” but that “We are always bound to invest consistent with our clients’ choices, their best financial interest, and applicable law. Our only agenda is maximizing risk-adjusted returns for the funds our clients choose to invest in.”

The contrast between the Mississippi action and the action of the Australian regulator is interesting. Not only did the Australian regulator go through the courts and pursue its case upon the factual record (including admissions by the defendant) but the Australian action also was directly based on the defendant’s statements *about the funds*. The Mississippi action is not based on anything that Blackrock said about the non-ESG funds that are the basis of the state’s action, but rather it is based on the Secretary of State’s version of general statements about Blackrock’s ESG-related views.

Blackrock is now the favorite punching bag for a certain type of U.S. politician. The *Law360* article refers to actions taken by a number of other state politicians along the same line as Mississippi’s. Certain politicians apparently believe that they can gain political points by attacking an investment firm for positions with which the politicians disagree.

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NEWS

Feds Jump Into Algorithmic Pricing Suit, Say Collusion Can Occur Without Humans Uttering a Word

The Department of Justice and Federal Trade Commission are worried that the growing use of algorithms is making price fixing increasingly difficult to detect—and that the use of AI to create ever-more-sophisticated algorithms will exacerbate that challenge.

March 29, 2024 at 06:23 AM

Antitrust



Maria Dinzeo



The original version of this story was published on [Corporate Counsel](#)

What You Need to Know

- A class-action lawsuit filed last year alleged that Atlantic City hotels engaged in price fixing by knowingly adopting the same algorithmic pricing platform.
- The defendants want the suit dismissed, saying plaintiffs failed to meet their burden of showing when or how conspirators arranged their scheme.
- The DOJ and FTC say the defendants have no such burden and can prevail without showing the hotels even communicated.

Federal antitrust enforcers say competing casino hotels illegally colluded to set room rates by knowingly adopting the same algorithmic pricing platform, a tacit agreement that amounts to an antitrust violation, even if the hotels never communicated directly.

The Federal Trade Commission and Department of Justice filed a [statement of interest](#) late Thursday in *Cornish-Adebiyi v. Caesars Entertainment*, where a class of New Jersey hotel guests claim they paid “supracompetitive” prices for rooms at Caesars Atlantic City Hotel & Casino and the Hard Rock Hotel & Casino Atlantic City. The suit, filed in May 2023, says the prices were [driven by an algorithmic pricing platform](#) called Rainmaker that analyzes real-time data about market supply and demand to generate “optimal” room rates.

The defendant hotels, which include Harrah’s, Borgata and the Tropicana, all installed Rainmaker’s software on their computers, knowing full well that their competitors were doing the same, according to the lawsuit. It’s the crux of the federal enforcers’ stance on the case, that competitors do not need to have communicated directly to have an implied agreement to fix prices.

The hotels argue two main points in their [motion to dismiss](#): that the customers cannot show collusion without identifying “when or how the supposed agreement was formed, which hotel employees reached it, or how it was supposedly enforced,” and that Rainmaker’s nonbinding recommendations on pricing is not per se illegal price-fixing.

Not so, the agencies say, writing, “Although direct communications among competitors can establish an agreement among them, there is no rule requiring proof of such communications.” They say Section 1 of the Sherman Act, which prohibits restraint of trade, discusses tacit as well as express agreements, and “prohibits competitors from delegating key aspects of pricing decisionmaking to a common entity, even if the competitors never communicate with each other directly.”

They also note that an agreement among competitors to fix starting or sticker prices “is per se unlawful, no matter what prices the competitors ultimately charge.”

It remains to be seen how enforcers’ views on algorithmic pricing will be received by the courts. UC Law San Francisco professor Joshua Davis told Law.com that the cases are tricky because “algorithmic pricing doesn’t fit mechanically into the traditional boxes” of antitrust law.

“There’s a credible argument that it’s a per se violation,” Davis said, noting that algorithmic pricing can have the same effect as a horizontal price agreement, where competitors for the same goods or services agree to fix, raise, or stabilize prices. “It certainly has practical consequences, which can be as harmful as horizontal price fixing,” Davis said. “But depending on what analogy one draws, there are ways to argue there is no agreement at all.”

Davis said courts could take a formalist approach, focusing on the plain text and original meaning of the statutes rather than economic impact of the situation on consumers. Others could take a more practical stance by weighing the the economic consequences. “There’s a decision to be made, and courts are just going to have to exercise judgment,” Davis said.

However it shakes out, the enforcers are concerned about the outcome. “Judicial treatment of the use of algorithms in price fixing has tremendous practical importance,” they wrote.

Their joint statement comes amid [growing concern over AI price-setting tools](#) that allow companies to maximize profits by colluding without human involvement. Both agencies have [also weighed in](#) on a [similar price-fixing](#) case that apartment tenants brought against a group of landlords and the rental-pricing platform RealPage.

Congress is also wading into the fight. In January, Sen. Amy Klobuchar (D-Minnesota), chair of the Competition Policy, Antitrust and Consumer Rights subcommittee, introduced a [bill](#) that she says would close a loophole requiring proof of an explicit agreement to fix prices.

This month, the White House announced a new [“Strike Force on Unfair and Illegal Pricing”](#) led by the FTC and DOJ as part of a broader strategy to target practices that keep prices high for consumers. “This Strike Force will strengthen interagency efforts root out and stop illegal corporate behavior that hikes prices on American families through anti-competitive, unfair, deceptive, or fraudulent business practices,” said a White House statement on the initiative.

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NEWS

Treasury Warns of AI's Threat to Financial Sector, Says Cyberattackers 'Outpacing' Defenses

"As access to advanced AI tools becomes more widespread, it is likely that, at least initially, cyberthreat actors utilizing emerging AI tools will have the advantage," the department reported.

March 28, 2024 at 07:30 PM

Banking and Finance Laws



Maydeen Merino



The U.S. Treasury Department warned the financial services sector this week that artificial intelligence will become a powerful weapon for fraudsters and cyberattackers—who will, for a time, outgun defensive efforts.

“Like other critical infrastructure sectors, the financial services sector is increasingly subject to costly cybersecurity threats and cyber-enabled fraud,” the department stated in a report released Wednesday. “As access to advanced AI tools becomes more widespread, it is likely that, at least initially, cyberthreat actors utilizing emerging AI tools will have the advantage by outpacing and outnumbering their targets.”

The department’s report was based on interviews with representatives from 42 financial services and technology companies on the current state of AI fraud and cybersecurity risks and safeguards.

The department stated it will work with the federal Financial and Banking Information Infrastructure Committee and the industry’s Financial Services Sector Coordinating Council “to map major existing and anticipated regulatory regimes relevant to financial sector firms and their vendors in the cybersecurity and fraud space.”

Treasury stated it will pay heed to banks’ concerns regarding the potential for “regulatory fragmentation,” which would compel financial institutions to comply with disparate federal, state and even international regulations regarding AI cybersecurity and fraud defense.

Treasury, the FBIIC and FSSCC “will explore potentially enhancing coordination across regulators with the goal of fostering responsible AI advancements, while addressing risk, and understanding applicable regulatory regimes,” the report stated. “The coordination actions could include the recommendation to establish AI-specific coordinating groups, as allowable, to assess enhancing shared standards and regulatory coordination options.”

David Adams, a securities regulatory attorney at Mintz, said the Treasury report takes a “holistic view” of the risks the financial services sector faces from AI.

Regulatory fragmentation is “a real issue for many of our clients,” Adams said. “What you hope for is that you have alignment across jurisdictions, across states, across federal governmental agencies, but you very rarely get that.”

In a statment accompanying its report, the department said it also will “work with the private sector, other federal agencies, federal and state financial sector regulators, and international partners on key initiatives to address the challenges” that AI presents.

“While this report focuses on operational risk, cybersecurity, and fraud issues, Treasury will continue to examine a range of AI-related matters, including the impact of AI on consumers and marginalized communities,” the department added.

In its report, Treasury cited interviewees who suggested the National Institute of Standards and Technology AI Risk Management Framework could be expanded to include more substantive information related to AI governance with regard to the financial sector.

The report stated that many financial institutions are using artificial intelligence but that smaller banks lack the resources to develop their own in-house AI systems.

Those interviewed for the report also noted a lack of consistency across the financial sector on the definition of “artificial intelligence,” which Adams called concerning.

“Many people mean different things when they say AI,” he said.

“The more we can move toward a world where people have an established set of definitions, the better,” Adams added. “Clear definitions will also help avoid some regulatory fragmentation ... because, if everyone’s working off the same definitions, it becomes much easier to regulate things in a common way.”

The department released its report amid the the Biden administration’s announcement this week of new mandatory safeguards for all federal agencies to help ensure their responsible use of AI.



Opinion **Lex**

UFC must show it is ready for prime time

The fight group was wise to settle a class-action lawsuit over wages



UFC last year was spun out of Endeavor and then combined with WWE, the pro wrestling league, at a \$21bn valuation © AP

7 HOURS AGO



It was not a fair fight. Competitors in mixed martial arts years ago sued the UFC and its corporate predecessors, accusing them of running an illegal “monopsony”. The MMA fighters alleged that UFC prevented competition in the sport’s labour market, which left them almost contractually bound to only enter fights put on by the UFC organisation. As such, they were deprived of fair, market-driven wages, which they said had cost them \$1.6bn in aggregate. The litigation was supposed to be a landmark in worker’s rights.

Rather than go to the mat, UFC earlier this month settled the pending cases for \$335mn, before a scheduled April trial. Ultimate damages could have been in the several billion dollars region so the settlement, while not cheap, was worth resolving early.

The once-fringe sport has minted billionaires among its early backers and lured investors over the years such as KKR and Endeavor. But the headlines of late have not been pretty. UFC last year was spun out of Endeavor and then combined with WWE, the pro wrestling league, at a \$21bn valuation. Its shares have tumbled almost 15 per cent since the deal closed.

Wrestling mogul and WWE founder Vince McMahon earlier this year left the board of the combined company, called TKO Group, after he was sued for sexual assault. He has denied the charges.

TKO still has an enterprise value of \$18bn. WWE recently signed a blockbuster media rights deal with Netflix for \$5bn over a decade. But the question now is if it can grow beyond its scrappy roots to be a professionally managed organisation that belongs in the big leagues.

TKO shares have traded down since the 2023 WWE/ UFC merger

Share price, \$



Source: S&P Global Market Intelligence

© FT

Pro sports, particularly in individual-based games like tennis, golf and fighting, benefit when the top talent is in a single league. But a dearth of competitive options can, at the same time, depress the wages of these athletes. According to preliminary fact finding from the court, UFC had utilised “ruthless coercive techniques” to keep fighters in line.

TKO trades at a healthy 15 times its forecast 2024 ebitda. The \$335mn settlement with the class action group is to be paid in instalments and is supposed to be tax deductible, further mitigating the company's burden.

As a provider of unique content around the world TKO should be able to withstand the ongoing seismic shifts in media and entertainment. Its rough characters have not so far dented its popularity with fans over the years. But as a standalone, large, public company, this is an important round. TKO had better be ready for its moment.

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<https://www.wsj.com/business/autos/teslas-terrible-quarter-catches-some-analysts-asleep-at-the-wheel-a76cb902>

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Tesla's Terrible Quarter Catches Some Analysts Asleep at the Wheel

Whatever delivery number the EV maker reports for January through March, it will be well below the 'consensus' on your terminal screen

By [Stephen Wilmot](#) [Follow](#)

March 29, 2024 6:00 am ET



Some analysts recently have downgraded their estimates for Tesla's deliveries. PHOTO: JÖRG CARSTENSEN/DPA/ZUMA PRESS

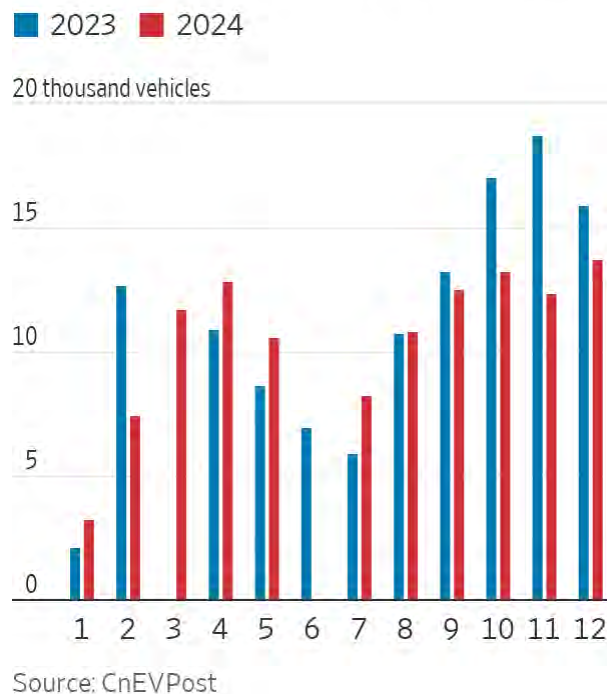
Tesla **TSLA -2.25% ▼** is having a shocker of a first quarter. The sell-side consensus is behind the curve, investors much less so.

The electric-vehicle pioneer might not even match the 422,875 deliveries it made in January through March last year when it reports quarterly volumes early next week. That would make for the first year-over-year decline in sales since the pandemic lockdowns of spring 2020—not to mention some tough headlines.

We don't know precisely what numbers the company will report, not least because it still has a weekend of the quarter left. But we have a fair idea based on a patchwork of data from third-party trackers.

In the U.S., Tesla delivered roughly 108,000 vehicles in the first two months of the year, according to estimates by Motor Intelligence, down from 114,000 a year ago. Insurance data tracked by EV website CnEVPost point to a similar 5% year-over-year decline in China for the first 12 weeks of the quarter. These are Tesla's two largest markets.

Tesla sales in China in the first quarter by week, based on insurance data



Can the rest of the world save the day? In Europe, sales for January and February were roughly 46,000, according to the European Automobile Manufacturers' Association—up 41% year over year, but a step down from the sales rate at the end of last year.

This isn't just about weak demand for Tesla, though that does appear to be a problem despite the brand's aggressive price cuts last year and an enhanced U.S. subsidy regime this year. Production has also flagged, because of an update to the Model 3

production line in Fremont, Calif. and an arson attack in Berlin.

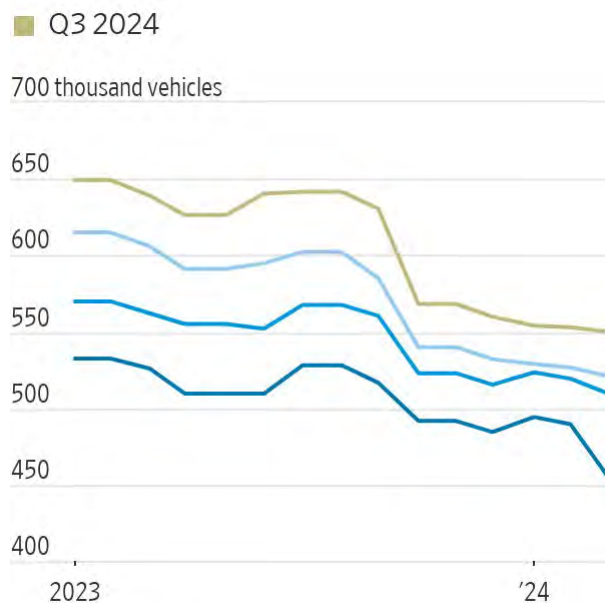
Whatever the reasons, attentive analysts on both sides of the bull-bear debate have been downgrading their estimates. On Thursday, Deutsche Bank's Emmanuel Rosner, who rates the stock a "buy," trimmed his delivery forecast to 414,000. At the other end of the spectrum, longtime bear Gordon Johnson cut his estimate to 406,500 on Tuesday, when the latest Chinese insurance data came in.

The analyst consensus given by FactSet has fallen a lot in recent weeks, but at 457,000 it remains much higher than the latest estimates. That is likely because the average takes into account many stale estimates from analysts who aren't looking at the most-recent data.

Consensus forecasts for Tesla's quarterly deliveries

■ Q1 2024 ■ Q2 2024 ■ Q3 2024

One hint of where the actual consensus among investors sits—the number that might determine



Source: FactSet

whether the stock falls or rises on the report—comes from Kalshi, which runs a so-called prediction market that allows bettors to wager directly on Tesla's delivery numbers and other trading events. As of Thursday, the consensus indicated by bets on the platform was for sales a bit below 420,000.

Delivery numbers aren't the only thing Tesla investors focus on, of course. Right now, the company's automated-driving software is

causing a lot of excitement, though progress is hard to pin down. Still, sales remain the bedrock of the company's growth prospects, including for software: The more vehicles Tesla sells, the more potential customers for digital subscriptions later. That helps explain why the stock is down almost 30% this year.

The big gap between the analyst consensus and what investors actually expect also implies that official earnings estimates are too high. Currently, the consensus earnings per share for 2024 is \$2.87, which compares with a share price of \$180 to give a forward earnings multiple of 63. But the real multiple of what investors expect is probably a lot higher. Tesla's stock is even more expensive than it looks.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Musk questioned in defamation lawsuit over X post about street brawl

 [reuters.com/legal/government/musk-questioned-defamation-lawsuit-over-x-post-about-street-brawl-2024-03-28](https://www.reuters.com/legal/government/musk-questioned-defamation-lawsuit-over-x-post-about-street-brawl-2024-03-28)

Mike Scarcella

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

March 28 (Reuters) - Billionaire entrepreneur Elon Musk was questioned on Wednesday as part of a defamation lawsuit accusing him of falsely suggesting on his social media platform X that a California man participated in a right-wing extremist street brawl last year, a court filing shows.

Musk's attorneys asked an Austin, Texas judge to block any public disclosure of the testimony, which they said required him to sit for up to two hours of questioning.

"This is a high-profile suit involving a public figure, where the discovery produced is quintessentially personal," the lawyers wrote.

They said a court order was necessary to "prevent the disclosure of sensitive information that may subject the parties to harassment, annoyance, and an invasion of personal rights."

Musk has denied any wrongdoing and has moved to dismiss the lawsuit. A hearing is scheduled for April.

Musk's lawyers on Thursday did not immediately respond to a request for comment, and neither did an attorney representing 22-year-old Benjamin Brody, who sued Musk in Texas state court last October.

The lawsuit said Musk falsely suggested in a post on X that Brody took part in a violent Oregon street brawl involving a neo-Nazi group in June.

The lawsuit, seeking more than \$1 million in damages, accused Musk of "astonishingly reckless conduct."

The video player is currently playing an ad.

Brody claimed users on X misidentified him as a participant, and that Musk amplified that misinformation in a post that said "Looks like one is a college student (who wants to join the govt)." Brody asserts that reference was about him.

Musk contends his X post was not "of and concerning" Brody and that it was "not a verifiable statement of fact but rather one of nonactionable opinion."

After losing a bid to block Wednesday's deposition, Musk was allowed to be questioned by Brody's lawyers about his internet history, online searches and state of mind, court records show.

"Musk is the only source of direct evidence as to his state of mind when making the statement, and Musk will be able to testify about issues involving his level of care," Brody argued.

The case is Benjamin Brody v. Elon Musk, District Court of Travis County, No. D-1-GN-23-006883.

For plaintiff: Mark Bankston of Farrar & Ball

For defendant: Alex Spiro and John Bash of Quinn Emanuel Urquhart & Sullivan

Read more:

Elon Musk asks Texas court to bar deposition in defamation lawsuit

Elon Musk defeats bid to be questioned in Tesla fatal crash lawsuit

Grilling Musk: use CEO's tweets, thin skin against him, trial experts say

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Reporting by Mike Scarcella



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Rite Aid Says It Has Creditor Deal, Gets OK For Plan Vote

By **Rick Archer**

Law360 (March 28, 2024, 6:01 PM EDT) -- A New Jersey bankruptcy judge Thursday gave Rite Aid the go-ahead to send its Chapter 11 plan out for a creditor vote after hearing it has reached a \$47.5 million deal with unsecured creditors and is close to a settlement on state and federal claims over drug sales.

U.S. Bankruptcy Judge Michael B. Kaplan gave conditional approval to Rite Aid's plan disclosure statement — after two months of wrangling between the drugstore chain and its creditors over the terms of the restructuring plan — and set the case on course for an April 22 confirmation hearing, saying the company can't afford to linger in Chapter 11.

"We just don't have the luxury of kicking this can down the road any further," he said.

Pennsylvania-headquartered Rite Aid filed for **Chapter 11 protection** in October with \$3.8 billion in secured debt and plans to sell assets and close 150 retail locations. It had operated about 2,100 stores in 17 states at the time of the filing.

The company filed a disclosure statement in January for a plan that would repay \$2.6 billion in term and asset-based loans in cash and exchange \$1.2 billion in senior notes for equity, but hearings on the statement were repeatedly adjourned, most recently on Tuesday, as Rite Aid and its creditors negotiated plan terms **in mediation**.

The last sticking point, which led to **Tuesday's adjournment**, were the details of the plan's "toggle" option, which would switch the plan from a reorganization to a sale if a high enough offer is received before confirmation, Andrew Rosenberg, counsel for an ad hoc noteholder committee, said Thursday. He said their issues with the process had been resolved.

Rite Aid counsel Aparna Yenamandra said the company is in the process of formalizing deals with supplier McKesson Corp., which has asserted a \$700 million claim in the case, and the U.S. Department of Justice, which has accused the company of knowingly filling hundreds of thousands of **illegal prescriptions**. A settlement granting injunctive relief to state governments suing the company over opioid sales is also in the works, she said.

Unsecured creditors committee counsel Rachael Ringer said her committee and the tort claimants committee have struck a deal under which they will receive \$20 million when the plan goes into effect, up to another \$27.5 million over the next four years and 10% of the shares in the reorganized company. The committees and the second-lien noteholders will also share in any proceeds of post-confirmation lawsuits by the bankruptcy estate, she said.

The disclosure statement still faced an objection by the state of Maryland, which argued that unsecured creditors were wrongly deprived of a vote on the plan and that it does not provide a way for the company to get consent for the plan's claims releases.

Rite Aid counsel Ross Fiedler argued unsecured creditors were not entitled to a vote, as Rite Aid believes there would be no money for their recoveries without the settlement, and that the question of consent to releases is being left to a later date.

Maryland Assistant Attorney General Brian Edmunds said prior versions of the plan had not provided

for "adequate compensation" for the company's actions in Maryland, but that his office had not had time to fully read the latest version of the plan filed Thursday morning.

Counsel for a number of landlords also argued the proposed April 15 voting deadline and April 22 confirmation hearing was too soon.

Judge Kaplan overrode Maryland's objections and approved the voting and confirmation timeline, saying the case has already run five months longer than expected and that additional delays would be "nonsensical."

"Every day engenders additional costs and risks," he said.

Rite Aid is represented by Edward O. Sassower, Joshua A. Sussberg, Aparna Yenamandra, Ross J. Fiedler and Zachary R. Manning of Kirkland & Ellis LLP and Michael D. Sirota, Warren A. Usatine, Felice R. Yudkin and Seth Van Aalten of Cole Schotz PC.

The noteholder group is represented by Andrew N. Rosenberg, Brian S. Hermann, Christopher J. Hopkins and Douglas R. Keeton of Paul Weiss Rifkind Wharton & Garrison LLP and Joseph J. DiPasquale, Howard A. Cohen, Mark E. Hall and Michael R. Herz of Fox Rothschild LLP.

The unsecured creditors committee is represented by James S. Carr, Robert L. LeHane and Maeghan J. McLoughlin of Kelley Drye & Warren LLP and Kenneth H. Eckstein, Adam C. Rogoff, Rachael Ringer, Natan M. Hamerman and Megan Wasson of Kramer Levin Naftalis & Frankel LLP.

The tort claimants committee is represented by Arthur J. Abramowitz and Ross J. Switkes of Sherman Silverstein Kohl Rose & Podolsky PA and Arik Preis, Mitchell P. Hurley, Theodore James Salwen and Brooks Barker of Akin Gump Strauss Hauer & Feld LLP.

The state of Maryland is represented by Brian T. Edmunds, Sarah A. Zadrozny and James McHale of the Office of the Attorney General of Maryland.

The landlords are represented by Leslie C. Heilman, Laurel D. Roglen, Nicholas J. Brannick and Margaret A. Vesper of Ballard Spahr LLP and Ivan M. Gold of Allen Matkins Leck Gamble Mallory & Natsis LLP.

The case is In re: Rite Aid Corp. et al., case number 3:23-bk-18993, in the U.S. Bankruptcy Court for the District of New Jersey.

--Editing by Michael Watanabe.



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Chancery Dismisses Carvana Shareholders' Stock Offer Suit

By **Leslie A. Pappas**

Law360 (March 28, 2024, 2:02 PM EDT) -- Delaware's Court of Chancery has dismissed a derivative suit from stockholders of online used car retailer Carvana who sued the company's founders over a \$600 million direct stock offering, finding that a two-person special litigation committee that the company created to investigate the matter had done its job properly.

In a **42-page opinion** late Wednesday, Chancellor Kathaleen St. J. McCormick rejected all the shareholders' challenges to the SLC's probe, concluding that none were strong enough to "move the needle."

"Through its investigation and report, the SLC met its burden and established that its conclusions were the product of a reasonable, good faith investigation," she wrote. "None of plaintiffs' arguments raise a genuine question of material fact as to the thoroughness of the investigation, the reasonableness of the scope of the SLC's investigation, or the presence of reasonable bases for the SLC's conclusions."

Carvana, headquartered in Tempe, Arizona, buys and sells used cars online through its subsidiary, Carvana Group LLC.

The shareholder action, consolidated from claims filed in May, July and December of 2020, brought direct and derivative claims against Carvana founder Ernest Garcia II and his son Ernest Garcia III, the company's chair, president and CEO.

The complaint alleged that at the height of the COVID-19 pandemic, the Garcias executed a direct offering of stock to themselves and hand-picked investors at a price below fair market value, while excluding public stockholders from participating in the offering.

After Chancellor McCormick **in June 2022 denied** the Garcias' motion to have the litigation dismissed, the board formed a special litigation committee in August 2022 to investigate the shareholders' claims.

The special litigation committee asked the court to stay the litigation while it carried out an investigation, which lasted seven months, the opinion filed Wednesday says.

In a 170-page report issued at the end of the probe, the special committee concluded that the shareholders' claims against the Garcias for breaches of fiduciary duty lacked merit, and neither a settlement nor litigation would result in a material benefit to the company, the opinion says.

The special litigation committee **moved to dismiss** the case in May 2023.

In arguments on the motion to dismiss in December, **stockholders argued** that the special committee should have done more to "ferret out the truth."

In her opinion Wednesday, Chancellor McCormick found that the special litigation committee had engaged in a reasonable investigation.

"The SLC investigation lasted seven months and included 100,000 pages of documents, 16 witness interviews, and nine SLC meetings," she wrote. "These efforts compare favorably with SLC

investigations upheld by this court."

The Garcias formed Carvana in 2012 as a wholly owned subsidiary of DriveTime Automotive Group Inc., which Garcia II bought in the 1990s when it was still called Ugly Duckling Rent-a-Car System. DriveTime spun off Carvana in 2017.

Counsel for the special litigation committee, the shareholders, and the Garcias declined to comment on the ruling.

Attorneys who represented the company did not immediately respond Thursday to Law360's request for comment.

The stockholders are represented by Christine M. Mackintosh and Rebecca A. Musarra of Grant & Eisenhofer PA, Kimberly A. Evans, Robert Erikson, Irene R. Lax and Jason M. Leviton of Block & Leviton LLP, and Domenico Minerva, John Vielandi, Mark Richardson, Ned Weinberger and Jiahui (Rose) Wang of Labaton Sucharow LLP.

Carvana Co. is represented by David E. Ross, Adam D. Gold, R. Garrett Rice of Ross Aronstam & Moritz LLP, and Brian M. Lutz, Colin B. Davis and Katie Beaudin of Gibson Dunn & Crutcher LLP.

Defendants Ernest Garcia III and Ernest Garcia II are represented by John L. Reed, Ronald N. Brown III, Peter H. Kyle and Kelly L. Freund of DLA Piper.

The Carvana board's special litigation committee is represented by Joseph R. Slights III, Brad D. Sorrels, Shannon E. German and Leah E. León of Wilson Sonsini Goodrich & Rosati PC.

The case is In re: Carvana Co. Stockholders Litigation, Consolidated, case number 2020-0415, in the Court of Chancery of the State of Delaware.

--Editing by Patrick Reagan.



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Chancery Tosses Mixmax Derivative Suit

By **Leslie A. Pappas**

Law360 (March 28, 2024, 8:08 PM EDT) -- A stockholder who filed a derivative suit against two Mixmax Inc. directors without first notifying the company's board has failed to prove that a majority of the board was too compromised to respond to the shareholder's concerns, so the lawsuit must be dismissed, a Delaware Chancery Court judge ruled.

In a **38-page opinion** late Wednesday, Vice Chancellor Paul A. Fioravanti said the Mixmax investor had failed to show that at least three of the company's five board members had conflicts of interest, and as a result had failed to prove that it would have been "futile" to bring the allegations of wrongdoing to the board.

Mixmax, which works on the Google platform but is not affiliated with Google, develops email-tracking software and marketing tools that allow users of Gmail and Google Inbox to track email clicks and downloads, plan events, personalize bulk emails, embed polls and surveys, and share content more easily with other services.

Harrison Metal Capital III LP, a venture capital fund and an investor in Mixmax, **sued** the San Francisco-based email tracking company in March 2022, alleging that Mixmax CEO and board chairman Olof Mathé and director and chief technology officer Bradford Vogel had given themselves salary increases without getting the required approval from major company investors.

The first salary increase — awarded to Mathé, Vogel and co-founder Chanpory Rith in April 2020 — violated company bylaws because it took place without any formal action by the board, the complaint alleged. Mathé allegedly gave himself another salary increase two quarters later, in early 2021, again without a board vote, according to the complaint.

The lawsuit came less than a year after Harrison Metal's founder Michael Dearing, who was a director on Mixmax's board from October 2014 to September 2019, rejoined the board and then **sued in October 2021** to compel inspection of the company's books and records. Many of the records produced in that lawsuit were used to formulate the March 2022 complaint, the opinion Wednesday says.

Harrison Metal amended its complaint in December 2022, broadening claims against Mathé and Vogel to assert breaches of fiduciary duty.

The Mixmax defendants filed a motion to dismiss in January 2023, **arguing in November** that the suit failed to state a claim and also failed under Rule 23.1, which governs shareholder derivative complaints, because Harrison Metal had not made a demand to the board before filing the lawsuit.

In his opinion Wednesday, Vice Chancellor Fioravanti said that since the complaint could be dismissed under Rule 23.1, he did not consider the argument about failure to state a claim.

The demand futility claim turned on whether at least three members of Mixmax's board would be capable of considering the shareholder's claims against Mathé and Vogel, the vice chancellor wrote.

The court assumed that Mathé and Vogel would not be capable of considering a demand, while Dearing, as the principal of Harrison Metal, was clearly independent.

Thus, the question turned on whether the other two directors, Raanan Bar-Cohen and Carl Fritjofsson, were independent of Mathé, the opinion said.

The court concluded that Harrison Metal's amended complaint "does not create reason to doubt Bar-Cohen's ability to consider a demand," the decision said. Allegations that seek to undermine Fritjofsson's independence from Mathé "are even weaker than those asserted against Bar-Cohen."

None of the parties immediately responded Thursday to requests for comment.

Harrison Metal Capital III LP is represented by A. Thompson Bayliss and Eric A. Veres of Abrams & Bayliss LLP.

Olof Mathé and Bradford Vogel are represented by Catherine A. Gaul and Samuel M. Gross of Ashby & Geddes and Bruce L. Silverstein of Bruce Silverstein Law.

The case is Harrison Metal Capital III LP v. Mixmax Inc., case number 2022-0261, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Kelly Duncan.

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Morgan Stanley, Goldman Get Archegos Suits Tossed

By **Lauren Berg**

Law360 (March 28, 2024, 11:35 PM EDT) -- A New York federal judge on Thursday dismissed a group of lawsuits by investors accusing Morgan Stanley and Goldman Sachs of illegally avoiding billions of dollars in trading losses by acting on nonpublic information about now-defunct Archegos Capital Management.

U.S. District Judge Jed S. Rakoff, in a brief **order**, granted with prejudice the **motion to dismiss** brought by Morgan Stanley and Goldman Sachs, noting that "an opinion explaining the reasoning for this decision will follow in due course."

The two Wall Street giants argued in their motion that the group of investors serving as lead plaintiffs in seven related suits had not amended their "fundamentally flawed allegations," which had already been **dismissed last April**.

Morgan Stanley and Goldman Sachs argued that the now-defunct family trader Archegos was not an insider and did not owe share issuers any fiduciary or other special duty of trust and confidence. The plaintiffs "do not plead a claim for insider trading under any theory," the defendants said.

"Archegos had no alleged contact with the issuers, much less influence over their corporate affairs," their motion states. "Nor does Archegos's alleged manipulation of stock prices, in itself, provide any basis for deeming Archegos an insider."

According to the investors, after ViacomCBS announced plans for a secondary public offering in March 2021, Archegos told its bankers it did not have the money they asked for as additional collateral to secure the family office's various investment positions.

The plaintiffs in the suits claim that in response, Morgan Stanley and Goldman Sachs unloaded "billions of dollars of their proprietary hedged holdings via block trades and other transactions across the very same underlying issuers jeopardized by the imminent collapse of Archegos' massive market manipulation house scheme."

The investors say the brokers did not sell off their proprietary shares, "even though that subjected them to huge losses."

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

The lead plaintiffs in the seven cases are represented by Scott + Scott Attorneys at Law LLP, Hedin Hall LLP, Pomerantz LLP, Johnson Fistel LLP, Berger Montague, Grant & Eisenhofer PA, and The Schall Law Firm, and the firms make up an executive committee co-chaired and coordinated by Thomas L. Laughlin IV of Scott + Scott Attorneys at Law LLP and David W. Hall of Hedin Hall LLP.

Morgan Stanley is represented by Charles S. Duggan and Daniel J. Schwartz of Davis Polk & Wardwell LLP.

Goldman Sachs is represented by Carmine D. Boccuzzi Jr., Mijin Kang and Olivia Everton of Cleary Gottlieb Steen & Hamilton LLP.

The cases are Tan v. Goldman Sachs Group Inc. et al., case number 1:21-cv-08413, Lee v. Goldman Sachs Group Inc. et al., case number 1:22-cv-00169, Scully v. Goldman Sachs Group Inc. et al., case number 1:21-cv-10791, Ulanich v. Goldman Sachs Group Inc. et al., case number 1:21-cv-08897,

Florio v. Goldman Sachs Group Inc. et al., case number 1:21-cv-08618, Merson v. Goldman Sachs Group Inc. et al., 1:21-cv-08752, and Felix v. Goldman Sachs Group Inc. et al., case number 1:21-cv-10286, all in the U.S. District Court for the Southern District of New York.

--Additional reporting by Hailey Konnath and Sydney Price. Editing by Michael Watanabe.

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Investors' Compliance Class Action Falls Short, Discover Says

By **Corey Rothauser**

Law360 (March 28, 2024, 10:33 PM EDT) -- Allegedly misleading statements on compliance and risk management protocols from Discover Financial Services' top brass were "aspirational" remarks about general practices, the company argued Thursday in seeking to end a proposed securities class action in Illinois federal court.

Discover's motion to dismiss argued that compliance objective disclosures at the heart of the shareholders' suit were "devoid of any substantive information" that could have credibly misled investors before the stock fell, which came after Discover froze a share repurchase program and other events leading to the departure of CEO and President Roger C. Hochschild.

None of the statements challenged in the complaint guaranteed Discover would not face problems, and none were false, Discover said.

"Nor would any reasonable investor have believed that Discover — a heavily regulated banking and payment services company — was free from regulatory or compliance risk," it said. "That Discover has fallen short of its goals does not mean that its risk management and compliance framework was not designed to be comprehensive or that Discover was not making 'investments' in that framework."

The suit, Discover argued, fails to meet the requirements of the Private Securities Litigation Reform Act for pleading specific facts as to why statements are misleading. "It is not enough merely to pair statements generally describing Discover's risk management and compliance framework with a subsequent compliance or regulatory failure," it said.

Discover further argued the suit's omission-based claims fall short. Those say the company had a duty to disclose adverse regulatory actions, including a 2020 Consumer Financial Protection Bureau consent order requiring it to pay \$35 million in fines for not complying with a previous order over student loan servicing practices.

There's clear precedent for dismissing fraud claims against similar statements touting a company's comprehensive risk management framework in the face of a securities lawsuit, Discover contended.

Likewise with case law on omission-based claims, Discover said, citing the U.S. Supreme Court's Fifth Third decision, which rejected a suit from a comparable class of investors claiming Fifth Third Bancorp needed to disclose a decadelong CFPB investigation into sales practices.

Discover also worked to distance officers named in the complaint from comments made by former employees about a "toxic compliance culture," arguing that neither Chief Financial Officer and Executive Vice President John T. Greenen or former CFO R. Mark Graf had control over consumer compliance.

The former employees also claim in the complaint that then-CEO Hochschild "actively participat[ed] in Compliance Committee meetings," but Discover argued that this doesn't matter since none of the meetings produced information that disproves what Hochschild stated elsewhere about compliance systems.

"If anything, all these allegations highlight the accuracy of what Discover actually said in its disclosures — that Discover had policies and procedures in place to support the risk management and

compliance systems, with senior management engaged in governance and oversight of those systems," Discover said.

The suit, led by KBC Asset Management NV and several New York City retirement systems, alleges that Discover conveyed to investors, via financial filings, that it had "robust, multi-faceted management and compliance protocols in place," but then came the July 2022 announcement it was suspending its share repurchase program in light of an internal investigation into its student loan servicing practices, and a July 2023 disclosure it had misclassified certain credit card products for 15 years, among other problems.

On an August conference call with analysts, three days after it was announced Hochschild would step down, Discover executives said the company was "paying the price" for having had "historically underinvested" in compliance, according to the complaint.

Counsel for the parties didn't immediately respond to requests for comment Thursday.

The plaintiffs are represented by Jeremy A. Lieberman, J. Alexander Hood II, Patrick V. Dahlstrom and Louis C. Ludwig of Pomerantz LLP and Lesley F. Portnoy of the Portnoy Law Firm.

Discover is represented by Christopher M. Viapiano, David N. Whalen and Leonid Traps of Sullivan & Cromwell LLP.

R. Mark Graf is represented by Hille Sheppard and Christopher Lee of Sidley Austin LLP.

John T. Greene is represented by John Barker and Deborah Birnbach of Goodwin Proctor LLP.

Roger C. Hochschild is represented by Seth Farber, Thania Charmani and Joseph Motto of Winston & Strawn LLP.

The case is KBV Asset Management NV et al. v. Discover Financial Services et al., case number 1:23-cv-06788, in the U.S. District Court for the Northern District of Illinois.

--Editing by Brian Baresch.



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8th Circ. Won't Revive Fannie, Freddie Investors' FHFA Suit

By **Katryna Perera**

Law360 (March 28, 2024, 10:54 PM EDT) -- The Eighth Circuit on Thursday refused to revive Fannie Mae and Freddie Mac investors' suit alleging the Federal Housing Finance Agency's leadership and financial deals violated the U.S. Constitution, saying the investors failed to show how they were harmed by the now-upended restrictions on removing the agency's director.

The investors' case centered on an arrangement approved by the FHFA in 2012 under which it entered into a preferred stock purchase agreement with the U.S. Department of the Treasury that provided the government with shares of senior preferred stock in exchange for \$187 billion in funding to Freddie Mac and Fannie Mae. Amendments to the agreement ultimately suspended quarterly dividends for Fannie and Freddie shareholders and increased the liquidation preference for the U.S. Treasury.

Investor lawsuits followed, such as [Collins v. Yellen](#) , which came before the U.S. Supreme Court. In June 2021, the high court upheld ruling that a restriction on the director of the FHFA from being removed from office for any reason other than just cause was unconstitutional. However, the justices did not rule out the possibility of a claim of compensable damages from FHFA financing agreements made during the housing crisis of 2008.

The Fannie and Freddie investors then claimed in an amended complaint that if the removal restriction had not been in place, then-President Donald Trump would have replaced former FHFA Director Melvin Watt after Trump took office, which would have led to deals more favorable to investors and a discontinuation of the liquidation preference.

Part of their claims pointed to a letter written by Trump in November 2021, in which he said he would have replaced Watt had he been allowed to do so.

On Thursday, the three-judge panel focused much of its analysis on Trump's letter, saying the remarks in it don't align with what the Supreme Court envisioned in [Collins](#).

"Collins envisions a situation where the statement is made during the presidency, not after. The hypothetical calls for a statement that the president 'would' remove the director, not a post-hoc statement that he 'would have' removed the director," the **opinion** states. "[Plaintiff Atif Bhatti] does not allege that, during his presidency, Trump publicly criticized Watt."

The panel further stated that it is "doubtful" that Trump's letter was "public" in the way the Supreme Court envisioned.

"The letter itself, a direct correspondence with a senator, later appeared on a website. While the Supreme Court did not define what qualifies as a 'public' expression, it is questionable, at best, whether the anonymous posting of a private letter on a third-party website is what the Supreme Court had in mind," the opinion states.

The panel also agreed with the district court's conclusion that the investors failed to plead that the removal restriction harmed them or that there was a connection between the restriction and the alleged lost profits they suffered.

U.S. Circuit Judge David R. Stras concurred in part with the opinion, saying he agrees with the court's

conclusion that the shareholders did not connect the dots between the removal restriction and the continuation of the liquidation preference, but he would "start and end the analysis there."

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

U.S. Circuit Judges Duane Benton, Laverski R. Smith and David R. Stras sat on the panel for the Eighth Circuit.

The investors are represented by David H. Thompson, Peter A. Patterson, Brian W. Barnes, John D. Ramer and Athanasia O. Livas of Cooper & Kirk PLLC.

The FHFA is represented by Dirk C. Phillips, Kolya D. Glick, Asim Varma and Robert J. Katerberg of Arnold & Porter.

The case is Bhatti et al. v. Federal Housing Finance Agency et al., case number 23-1051, in the U.S. Court of Appeals for the Eighth Circuit.

--Editing by Adam LoBelia.

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Investors Strike \$42.5M Deal In Brookfield-GGP Merger Suit

By **Rose Krebs**

Law360 (March 28, 2024, 4:19 PM EDT) -- Brookfield Property Partners LP has reached a tentative \$42.5 million deal to bring an end to a yearslong battle with stockholders who alleged they were given misleading information about the global real estate company's 2018 acquisition of U.S. mall operator GGP Inc.

Investor plaintiffs have reached a proposed settlement with Brookfield, members of a special GGP board committee that reviewed the 2018 merger, and others to end the litigation, according to settlement papers filed Wednesday with Vice Chancellor Nathan A. Cook.

A notice filed with the stipulation of settlement said Stull Stull & Brody and Long Law LLC, class counsel for the investor plaintiffs, will seek a fee award of up to 28.5%, or roughly \$12 million, of the settlement fund. Class counsel would determine how to allocate any fee award to other counsel for the shareholders, the stipulation said.

Class counsel will also seek reimbursement for expenses, the stipulation said. The amount of expenses wasn't specified. Any fees and expenses awarded would be paid out of the settlement fund, along with other costs and taxes, the stipulation said.

Whatever amount remains in the settlement fund would be distributed to a class of GGP stockholders "who purchased, acquired or held such securities at any time during the period between November 11, 2017, and August 28, 2018," the notice said.

"BPY and/or GGP shall pay or cause" insurance carriers to pay the \$42.5 million settlement, the stipulation said.

The court will consider whether to approve the settlement and fee and expense request at a future hearing.

If the court signs off on the deal, it would bring an end to litigation **filed in 2018** over Brookfield's \$9.25 billion acquisition of GGP.

The consolidated litigation was filed by a proposed class of former GGP shareholders claiming the company's board breached its duty to shareholders by carrying out an unfair bidding process and undervaluing shares.

In July 2022, a split Delaware Supreme Court **partially revived** the stockholder action, which also accused Brookfield and GGP of misleading shareholders about their appraisal rights.

In an opinion written by Justice Gary F. Traynor, the court's majority revived two claims against Brookfield and GGP's directors, finding it reasonably conceivable they intentionally misled stockholders about their appraisal rights in a "dense" 344-page proxy statement before they voted on **the 2018 merger agreement**.

The majority found that the proxy statement confusingly described the structure of the merger, which included a large pre-closing stock dividend that made up the lion's share of the merger, followed by a "tiny" merger payment that amounted to 31 cents per share.

Although both payments were subject to appraisal rights, the proxy statement erroneously stated that only the pre-closing dividend payment was relevant and suggested the 31-cent share payment was subject to a de minimis provision, the majority wrote.

Weeks after the ruling, a reargument bid by the GGP board special committee **was rejected** by the Supreme Court.

In the stipulation of settlement, Brookfield and the other defendants make no admission of wrongdoing or fault.

"The settlement follows years of extremely hard-fought litigation," one of the shareholders' attorneys, Adam J. Blander of Wolf Popper LLP, told Law360 in an email Thursday. "We're very pleased with the result for GGP's former stockholders."

Counsel for the other parties didn't immediately respond Thursday to requests for comment.

The shareholders are represented by J. Clayton Athey, Samuel L. Closic and Jason W. Rigby of Prickett Jones & Elliott PA, Carl L. Stine, Antoinette Adesanya and Adam J. Blander of Wolf Popper LLP, Frank P. DiPrima of The Law Office of Frank DiPrima PA, Aaron Brody of Stull Stull & Brody and Brian D. Long of Long Law LLC.

Brookfield is represented by Kevin G. Abrams and John M. Seaman of Abrams & Bayliss LLP and John A. Neuwirth, Evert J. Christensen Jr. and Matthew S. Connors of Weil Gotshal & Manges LLP.

GGP's special committee members are represented by Peter J. Walsh Jr., Berton W. Ashman Jr. and Jaclyn C. Levy of Potter Anderson & Corroon LLP and Peter E. Kazanoff, Michael J. Garvey and Sara A. Ricciardi of Simpson Thacher & Bartlett LLP.

GGP directors are represented by Raymond J. DiCamillo and Susan Hannigan Cohen of Richards Layton & Finger PA, Brian T. Frawley, Matthew L. Strand and William S.L. Weinberg of Sullivan & Cromwell LLP and David J. Teklits and Thomas P. Will of Morris Nichols Arsht & Tunnell LLP.

The case is In re: GGP Inc. Stockholder Litigation, case number 2018-0267, in the Court of Chancery of the State of Delaware.

--Additional reporting by Dorothy Atkins, Lauren Berg and Jeff Montgomery. Editing by Janice Carter Brown.



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Faruqi & Faruqi Beats 5 Firms To Lead NewAge Investor Suit

By **Sydney Price**

Law360 (March 28, 2024, 7:17 PM EDT) -- A Colorado district judge has selected two clients of Faruqi & Faruqi LLP to lead an investor class action accusing the executives and directors of wellness company NewAge Inc. of securities fraud, saying the plaintiff with an even bigger financial interest is unfit for appointment because he hid his "troubling" background.

On Tuesday, U.S. District Judge Daniel D. Domenico adopted U.S. Magistrate Judge James P. O'Hara's recommendation issued earlier this month to appoint Faruqi & Faruqi clients Damian and Cigdem Betebenner as lead plaintiffs. The pair, which the court determined lost a total of approximately \$500,000, defeated five other lead plaintiff bids.

In his order, Judge Domenico also adopted Judge O'Hara's recommendation to consolidate the suit with Taylor v. Willis et al., a related suit with similar allegations, according to the order.

Although Levi & Korsinsky client Igor Chernyak lost roughly \$3 million — about six times as much as the Betebenners — in connection with his purchase of NewAge securities, Judge O'Hara recommended against appointing him lead plaintiff because he "displayed a lack of candor" with the court regarding his past criminal proceedings.

In 1996, Chernyak was convicted for extortion and sentenced to 57 months in prison. The Betebenners submitted evidence of Chernyak's conviction to the court, but Chernyak did not, according to Judge O'Hara's recommendation.

Judge O'Hara said the conviction alone does not disqualify Chernyak to lead the securities suit, but his lack of effort to disclose the charges gave the court "serious doubt about his trustworthiness."

"If not for the Betebenners' investigation, the court may have never learned of Mr. Chernyak's past legal issues," Judge O'Hara said in his recommendation. "Indeed, it's unclear to the court whether Mr. Chernyak's counsel was aware of his history when the motion was filed. The court finds this troubling."

A representative for Levi & Korsinsky did not immediately respond to an inquiry from Law360 about the firm's knowledge of the conviction Thursday.

The court used the Lax test derived from the 1997 decision in [Lax v. First Merchants Acceptance Corp.](#) to determine whether Pomerantz LLP client Joseph Wodiuk or the Betebenners should be appointed to lead the case. Although Wodiuk acknowledged the Betebenners had a larger financial interest, he asked the court to consider the factors of the test "holistically" since his loss was only about \$50,000 less.

Judge Domenico said Judge O'Hara correctly weighed the factors in deciding the Betebenners are most suitable to lead the case.

"The Betebenners are qualified to serve as lead plaintiffs, and Judge O'Hara made no legal or factual error in determining that they had the greatest financial interest under a nonbinding, multifactor test that all parties agree was at least a proper legal framework to apply," Judge Domenico said.

The securities suit was launched in December 2022 by plaintiff Dennis Clifton, who alleges that

NewAge lied to investors when it said it had entered into a major "distribution agreement" for its products to sell in U.S. military commissaries; when it touted expanded distribution in Canada and South Korea; when it made a range of claims about a CBD beverage product portfolio the company claimed it developed and when it failed to disclose material details about an internal probe and subsequent federal reporting about a company it acquired.

Clifton also alleged that the company failed to properly apprise investors about its probe of a company it bought in December 2020 called Ariix, which describes itself as a company that sells branded products through independent representatives.

According to Clifton, NewAge "quickly developed concerns that Ariix had violated the Foreign Corrupt Practices Act" and in August 2021, the company made a voluntary self-disclosure about the suspected FCPA issues to the U.S. Securities and Exchange Commission and the U.S. Department of Justice.

A year later, Clifton said, when the company filed for Chapter 11 protection, it said in its filings that it had conducted "an expensive internal investigation" into the FCPA issues at Ariix and cited the cost of the probe as a factor in its bankruptcy filing.

Days later, the company, which traded on the Nasdaq, disclosed that it was being delisted from the exchange, and in October, the SEC announced it was suing the company's former CEO Brent Willis and the company settled separate allegations from the regulator.

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

Damian and Cigdem Betebenner are represented by James M. Wilson Jr. and Robert W. Killorin of Faruqi & Faruqi LLP.

Willis is represented by Lari Ann Dierks, Michael J. Diver and Michael James Lohnes of Katten Muchin Rosenman LLP.

Counsel information for the other defendants was not immediately available Thursday.

The case is Clifton v. Willis et al., case number 1:22-cv-03161, in the U.S. District Court for the District of Colorado.

--Editing by Stephen Berg.



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Disney Shareholder Demands To See Books Amid Board Row

By **Hailey Konnath**

Law360 (March 28, 2024, 11:48 PM EDT) -- An affiliate of Walt Disney Co. shareholder Blackwells Capital on Thursday asked Delaware's Court of the Chancery to force Disney to open its books and records as the investor looks into potential wrongdoing and mismanagement stemming from the entertainment giant's dealings with ValueAct Capital.

Blackwells Onshore I LLC said in its suit that it's trying to determine if wrongdoing or breaches of fiduciary duty have taken place as Disney consults with ValueAct Capital Management LP ahead of a board of directors election at the upcoming annual meeting. In early January, ValueAct announced that it **would support** the Disney board of directors' recommended slate of nominees.

But Blackwells, which plans to endorse its own slate of candidates, said it suspects that ValueAct managed Disney pension funds from at least 2013 to 2023, been responsible for managing hundreds of millions of dollars in Disney pension fund assets in 2022 and been paid up to \$95 million in fees for its money management services.

That long-standing relationship between Disney and ValueAct was never disclosed by the entertainment company, Blackwells said. And it "supports a credible basis to suspect that Disney may have used its relationship with ValueAct to wrongfully influence ValueAct's decision to endorse the [Disney] board's preferred slate of directors, or to hide features of the ValueAct/Disney relationship that are not in the stockholders' best interests," according to Blackwells.

In the suit, Blackwells pointed to a Jan. 3 announcement from Disney that it had entered into a confidentiality agreement that allows the company to share information with ValueAct and consult with it on "strategic matters," including through meetings with Disney's board and top brass. In its statement that day, Disney said ValueAct "has confirmed it will support the Disney Board of Directors' recommended slate of nominees for election to the board at the 2024 annual meeting," Blackwells said.

Since then, Blackwells has repeatedly asked Disney to share additional details regarding the agreement with ValueAct, but Disney has refused, according to the complaint. That refusal "raises a credible basis to suspect that these details reflect wrongful conduct that Disney and/or its board wish to shield from disclosure," Blackwells said.

"For example, had ValueAct's endorsement been based merely on ValueAct's own impartial assessment of the respective candidates' merits, why would ValueAct have deferred its endorsement until execution of the information sharing agreement?" Blackwells said.

Blackwells said it suspects ValueAct's endorsement may be the product of "a corporate quid pro quo, some improper benefit to ValueAct, or other wrongdoing."

Another reason to suspect potential wrongdoing: Blackwells told Disney's board that it intended to nominate director candidates in the upcoming meeting the night before Disney unveiled its ValueAct agreement, according to Blackwells.

"In an effort to front run Blackwells' announcement, the board rushed ahead with Disney's press release, which included ValueAct's endorsement, issuing the press release the next morning before Blackwells' press release," it said.

A Disney spokesperson said in a statement Thursday that Blackwells' claims are "baseless" and the suit is "merely their desperate attempt to gain attention for their slate of director candidates."

"No Disney pension plan funds are currently invested with ValueAct nor were they managing any Disney pension plan funds at the time of their entering into an information-sharing agreement with the company," the spokesperson said. "Prior to Blackwells filing this litigation, Disney offered to meet with them and provide documentation confirming those facts, but Blackwells declined the meeting."

Counsel for Blackwells didn't immediately respond to a request for comment late Thursday.

Blackwells is represented by Elena C. Norman, James M. Yoch Jr., Alberto E. Chávez and Michael A. Carbonara Jr. of Young Conaway Stargatt & Taylor LLP and Michael L. Charlson, Robert P. Ritchie and K. Virginia Burke DeBeer of Vinson & Elkins LLP.

Counsel information for Disney wasn't available Thursday.

The case is Blackwells Onshore I LLC v. The Walt Disney Co., case number 2024-0321, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jade Martinez-Pogue. Editing by Jay Jackson Jr.

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FTX Investors To Settle With Ex-Execs, Crypto Promoters

By **Aislinn Keely**

Law360 (March 28, 2024, 10:45 PM EDT) -- Investors who launched a multidistrict litigation over cryptocurrency exchange FTX's collapse have reached a set of settlements with the former inner circle of founder Sam Bankman-Fried as well as seven promoters who, together, have agreed to pay over \$1.3 million to resolve claims that they boosted a massive fraud scheme at the company.

Caroline Ellison, who led FTX affiliate Alameda Research, ex-FTX Chief Technology Officer Zixiao "Gary" Wang and former FTX engineering head Nishad Singh agreed to voluntarily provide information and testimony in the investors' lawsuit, the parties said Wednesday in a **motion** seeking preliminary approval of the settlements in Miami federal court. The trio will also cooperate in good faith to resolve the claims against them, the filing noted.

Ellison, Wang and Singh have "knowledge and other information that class representatives and class counsel believe will be valuable to class representatives' cases against other defendants in the FTX MDL, particularly relating to the underlying fraudulent scheme and its connection to Miami ... where FTX's U.S. headquarters were based, as well as each MDL defendants' knowledge of and assistance with the scheme and connections to other states in which jurisdiction over those defendants is asserted," the parties wrote in the **proposed settlements**.

If the terms of the settlements are met, the class will attest to the executives' cooperation and submit a letter to the court ahead of each of their sentencing hearings. Ellison, Wang and Singh each pled guilty in connection with the fraud that led to FTX's downfall and **cooperated with the government** in the criminal case against Bankman-Fried, who was **sentenced to 25 years** on Thursday for defrauding customers out of billions.

The three ex-executives agreed to full restitution and forfeiture, according to their latest filing. However, U.S. District Judge Lewis Kaplan, who is presiding over the criminal proceedings, will determine how the funds will be recovered and provided to the victims. The trio also agreed to not oppose any request from investors that the funds be distributed through MDL, as opposed to FTX's Chapter 11 or other processes.

They'll also assign to the investors any funds they may receive or claims they may have against FTX entities, third parties or insurers, they told the court.

As part of the investor settlements, Ellison, Wang and Singh will hand over to the investors all non-privileged documents and information they gave to federal prosecutors, as well as records that are part of the ongoing FTX bankruptcy proceedings. They also agreed to make themselves available for at least five proffer sessions and any depositions or trials in the investor litigation.

The former executives are expected to provide declarations or information where they can, regarding the other defendants in the investors' case. The MDL includes a lengthy list of defendants who the investors accused of inducing them to invest in FTX and helping the firm perpetrate its fraud prior to its collapse, from celebrity promoters like Tom Brady, to law firms like Fenwick & West LLP and investment firms like SoftBank Group, among others.

Wang's counsel declined to comment Thursday, while counsel for Ellison and Singh did not immediately respond to requests for comment.

The investors also settled their claims against Daniel Friedberg, Bankman-Fried's onetime outside counsel who later became chief compliance officer of FTX US and general counsel for Alameda Research. Friedberg's settlement highlighted his assertions that he did not have knowledge of the FTX fraud, and that he promptly left his post and contacted authorities upon learning about it.

It further pointed out that Friedberg voluntarily worked to assist FTX victims and cooperated with the class's investigations "by providing invaluable information to class counsel and various law enforcement agencies."

Friedberg "has agreed to do so on an ongoing basis," and he "was the first person with inside information to cooperate with plaintiffs and has provided to plaintiffs helpful assistance dating back to 2022," his settlement document read.

Unlike the other insiders, Friedberg is not named in any criminal proceeding. There's also no monetary component to his agreement with the investors.

Friedberg declined to comment Thursday.

Dollar amounts do come to bear in the seven proposed settlements with the crypto promoters, who together will pay nearly \$1.36 million in monetary relief. They did not, however, admit to any of the investors' allegations as part of the settlement, case filings showed.

The details about a settlement with NFL quarterback William Trevor Lawrence was unavailable Thursday, but it appears he may pay the lion's share of the sum under the agreements submitted to the court Wednesday. The total relief from the six other promoters is around \$360,000, which indicates Lawrence's settlement amount is likely \$1 million. Counsel for Lawrence did not immediately provide confirmation or comment regarding his agreement.

Finance influencer Kevin Paffrath will pay \$122,000, according to the filings. Counsel for Paffrath said in a statement to Law360 he is pleased to be moving forward with court approval of the settlements.

"He looks forward to putting this case behind him as he moves forward with his business," the attorney said.

Fellow YouTube finance personality Tom Nash will pay about \$37,500. His counsel did not immediately respond to a request for comment.

In September 2023, counsel for the investors **notified the court** they had reached proposed settlements with Lawrence, Paffrath and Nash. That report noted the class expected other settlements to follow, so it planned to hold the proposals until other mediation proceedings wrapped up to present a more efficient package to the court.

Other YouTube **influencers were a part** of the settlements unveiled Wednesday, including Brian Jung, who agreed to pay \$180,000. Part of Jung's deal includes a provision that he can recover 25 cents for each dollar found as part of further cooperation with the class. His counsel did not immediately respond to a request for comment Thursday.

Influencers Graham Stephan, Andrei Jikh and Jeremy LeFebvre are on the hook for \$10,000, \$5,000 and \$5,000 respectively. They'll additionally assign any claims they have against third parties to the investors and cooperate with them on those claims. Attorneys representing those influencers did not immediately respond to requests for comment.

The motion for preliminary approval said the ex-FTX executives and promoters have already begun providing information to assist class members in bolstering their claims against the remaining defendants, leading to additional claims against non-settling defendants like Deltec Bank and Jean Chalopin.

As a result of the agreements, the 11 settling defendants are released "from all claims related to any of the alleged conduct giving rise to this litigation," according to the filing.

The investors are represented by Adam M. Moskowitz and Joseph M. Kaye of the Moskowitz Law Firm

PLLC, and David Boies, Alexander Boies and Brook A. Alexander of Boies Schiller Flexner LLP.

Ellison is represented by Peter G. Neiman and Nicholas Werle of WilmerHale.

Wang is represented by Ilan Graff and Alex Miller of Fried Frank Harris Shriver & Jacobson LLP.

Singh is represented by Andrew Goldstein and Russell Capone of Cooley LLP.

Friedberg represented himself.

Paffrath is represented by Joseph A. DeMaria and Adam Jason Lamb of Fox Rothschild LLP.

Nash is represented by Brian W. Toth of Toth Funes PA.

Jung is represented by Jose Guillermo Sepulveda of Stearns Weaver Miller Weissler Alhadeff & Sitterson PA and Derek Adams of Potomac Law Group PLLC.

Jikh, Lefebvre and Stephan are represented by Josef M Mysorewala of Law Office of Josef M. Mysorewala PLLC and Kimberly P. Stein of Flangas Law Group Inc.

Lawrence is represented by David Alan Rothstein, Eshaba Jahir-Sharuz and Alexander Manuel Peraza of Dimond Kaplan & Rothstein PA, and Eric A. Fitzgerald and Hillary N. Ladov of McAngus Goudelock & Courie LLC.

The case is In re: FTX Cryptocurrency Exchange Collapse Litigation, case number 1:23-md-03076, in the U.S. District Court for the Southern District of Florida.

--Editing by Covey Son.

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Whataburger Accused Of Keeping Shoddy Funds In 401(k)

By **Emmy Freedman**

Law360 (March 28, 2024, 3:37 PM EDT) -- Whataburger breached federal benefits law by stocking its employees' \$215 million retirement plan with poorly performing funds and failing to replace them with better options, according to a proposed class action filed in Texas federal court.

Former Whataburger employee Manuel Esquivel **sued** the fast-food chain, its board of directors and its 401(k) savings plan administrative committee Wednesday, accusing them of running afoul of the Employee Retirement Income Security Act.

"Defendants failed to appropriately monitor the plan's investments, resulting in the retention of unsuitable investments in the plan instead of prudent alternative investments that were readily available at all times defendants selected and retained the funds at issue and throughout the class period," Esquivel said.

Esquivel said Whatburger breached its duties of loyalty and prudence under federal benefits law by retaining two funds — the MainStay Winslow Large Cap Growth Fund and the Janus Henderson Triton Fund — despite their significant underperformance.

Whataburger kept the MainStay fund in its 401(k) even though its three- and five-year returns had trailed benchmarks for nine consecutive quarters, according to the suit.

"Underperformance over several consecutive three- or five-year trailing periods is a cause for both alarm and action," Esquivel said.

If Whataburger's administrative committee had conducted a proper review of the MainStay fund, the complaint said, it would have seen this "troubling pattern" of performance shortcomings. However, the committee either ignored those issues or was unaware that they existed, according to the suit.

In addition, investors were largely aware of the MainStay fund's persistent issues because of its \$9 billion drop in assets under management from 2014 to 2022, Esquivel said.

"Simply put, other investors monitoring the performance of the MainStay fund were able to recognize the red flags associated with the fund and overwhelmingly withdrew their assets," Esquivel said.

Whataburger also should have replaced the Janus fund given that it performed worse than more than 85% of all funds in its market segment for each quarter in 2021, according to the suit.

Again, Whataburger's administrative committee failed to meet to appropriately review this fund's performance, Esquivel said, and as a result, it stayed in the plan's investment lineup.

Like the MainStay fund, the Janus fund saw a big dip in assets under management, dropping \$5 billion between 2019 and 2022, according to the complaint.

"When an investment option's track record is so poor, as is apparent here, defendants should necessarily investigate and replace the fund in the plan with an alternative that has demonstrated the ability to consistently outperform the benchmark, or, at the very least, in such an efficient segment of the market, retain an alternative that tracks the benchmark," Esquivel said.

Esquivel seeks to represent a class of all participants and beneficiaries who invested in the Whataburger 401(k) plan any time between March 27, 2018, and the date of judgment. At the end of 2022, he said, there were about 9,800 participants in the savings plan.

His suit seeks equitable, legal and remedial relief to return all losses to the plan; prejudgment and postjudgment interest; and attorney fees.

"Whataburger disagrees with the allegations in the complaint," a spokesperson for the company told Law360. "The company takes seriously its duties and obligations to the plan participants and will vigorously defend itself in this litigation."

A representative for Esquivel did not immediately respond to a request for comment.

Esquivel is represented by John S. Edwards Jr., Eric Chenoweth and Thomas R. Ajamie of Ajamie LLP, by James E. Miller, Laurie Rubinow, James C. Shah and Alec J. Berin of Miller Shah LLP and by Don Bivens of Don Bivens PLLC.

Counsel information for Whataburger was not available.

The case is Esquivel v. Whataburger Restaurants LLC et al., case number 5:24-cv-00310, in the U.S. District Court for the Western District of Texas.

--Editing by Abbie Sarfo.

Update: This story has been updated with a comment from Whataburger.



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And Now A Word From The Panel: Benefits Of MDL Transfers

By **Alan Rothman** (March 27, 2024, 5:41 PM EDT)

*This article is part of a **bimonthly column** that "rides the circuit" with the Judicial Panel on Multidistrict Litigation as it meets every other month at venues around the country. In this installment, I discuss one of the key functions performed by the panel: transferring individual cases into existing MDLs.*



Alan Rothman

With spring in the air, the panel heads back east for what is becoming a new panel tradition of a baseball opening day hearing session — or at least opening day in North America.

The March opening day session will be held in Charleston, South Carolina, once again this year in a city without a Major League Baseball team.[1] The panel enters the Palmetto State with a jam-packed schedule: It will consider nine new petitions, after a 10th new petition was recently rendered moot.[2]

This docket builds on the six new petitions considered by the panel in California during its rare West Coast January hearing session. This marks one of the busiest starts for the panel in years.

At the January session, the panel granted five of the six petitions before it, beginning the year with a sizzling .833 battling average. Of the five new MDL proceedings, one is venued in Florida, one in New York, two in Ohio and one in Pennsylvania. For those keeping score, the panel returned to creating MDLs exclusively east of the Mississippi River — and for this round, exclusively within the Eastern time zone.

With the jump in new MDLs, the overall number of pending MDL proceedings has ticked up slightly to 169, from 167 proceedings at the beginning of the year.[3] Since January, the panel has closed out three MDL proceedings.[4]

Product liability MDLs continue to dominate the MDL landscape, now representing more than 39% of the total number of MDL proceedings — 66 out of 169 MDLs.[5] The 169 MDL proceedings encompass a total of 458,469 actions, a notch above the calendar year-end record of 456,698 actions just a few months ago.[6]

There are currently 21 proceedings that each include more than 1,000 pending actions — an astounding dozen of which include more than 5,000 pending actions, all from among the product liability MDLs.[7] As we have reminded our readers, these tallies are just civil actions, not the total number of plaintiffs, and the figures do not include unfiled claimants.

The MDL Highway: Getting to an MDL

Although this column generally addresses considerations associated with the creation of MDL proceedings, we turn our attention today to a critical part of the MDL process and the panel's work: moving cases along the MDL highway into an existing MDL. Specifically, we consider some arguments commonly advanced by parties in an attempt to avoid MDL transfer into an already established MDL.

As a reminder, once an MDL is created, additional "tag-along" actions are generally considered for MDL transfer via the conditional transfer order, or CTO, process.

Under panel rules, when the clerk of the panel "determines that a potential tag-along action is not appropriate for inclusion in an MDL proceeding," parties can seek transfer via a motion to transfer.[8]

If a party moves to vacate a CTO, or opposes a motion to transfer, the transfer issue is addressed at the panel's bimonthly hearing session, albeit on the papers without oral argument.

A good illustration of the types of arguments against transfer that the panel typically sees is a January panel order in *In re: Philips Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products Liability* Litigation, denying a pro se plaintiff's motion to vacate a CTO.[9]

Specifically, the panel considered and rejected the following arguments.

Inconvenience/Delay

Although MDL transfer necessarily causes some attendant delays and sends a case to a different jurisdiction, that is the nature of MDL proceedings. The panel found that the benefits to the overall litigation of coordinating discovery and utilizing lead counsel outweigh any inconvenience.

Moreover, to the extent travel is a concern, the panel observed that because MDL proceedings are "for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise." [10]

Jurisdictional Objections

As the panel has made clear time and again over the decades, jurisdictional objections — including objections to a federal court's subject matter jurisdiction — are not a basis to deny MDL transfer.[11] Moreover, until MDL transfer is effective — i.e., when a copy of the transfer order is filed with the clerk of the transferee district court — the case remains with the transferor court.[12]

Ultimately, in deciding whether a tag-along action will advance to first base or remain at home plate, the panel must consider the mandate of the MDL statute.

According to the statutory language, the panel decides whether the action under consideration shares "one of more common questions of fact" with the other actions, and whether transferring the action "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." [13]

Will new MDLs continue to be on the rise? Will the total number of MDL proceedings hit 170 again? Will the number of actions in pending MDLs exceed half a million? Will the panel keep its red-hot batting average? Where will any new MDLs be located?

Stay tuned for our next edition of And Now a Word From The Panel, when the panel heads to Salt

PANEL TRIVIA CORNER

January Trivia Question

When was the last time the panel scheduled an in-person January hearing session outside of the state of Florida, and what unusual event happened in that selected venue?

Answer to January Trivia Question

The panel had planned a January 2014 hearing session in New Orleans, Louisiana, which was hit with an unexpected ice and snow storm. See "And Now a Word from the Panel: Snow Day!," Law360, March 25, 2014.

March Trivia Question

When was the last time the panel ruled on more than 50 new MDL petitions in a calendar year?

Like to venture a guess as to this month's trivia question? Have tidbits of panel trivia that you would like to be featured in an upcoming column? Please do not hesitate to drop me a note at arothman@sidley.com.

Lake City for its May hearing session. In the meantime, enjoy the early days of spring, a new season for our national pastime, and watching the outcome of yet another panel session!

Alan E. Rothman is a partner at Sidley Austin LLP. He counsels clients on issues relating to practice and procedure before the Judicial Panel on Multidistrict Litigation, and has appeared before the panel on oral argument.

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

[1] See "And Now a Word from the Panel: Baseball and MDLs," Law360 (March 29, 2023), <https://www.law360.com/articles/1591048/and-now-a-word-from-the-panel-baseball-and-mdls>.

[2] <https://www.jpml.uscourts.gov/hearing-information>.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-1-2024.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January-1-2024-March-1-2024.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Docket_Type-March-1-2024.pdf.

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-1-2024.pdf.

[7] *Id.*

[8] Panel Rule 7.1(b)(i).

[9] *In re: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prods. Liab. Litig.*, MDL No. 3014 (J.P.M.L. Jan. 31, 2024).

[10] *Id.* at 1 (citations omitted).

[11] *Id.* at 2.

[12] Panel Rule 7.1(h); 28 U.S.C. § 1407(c).

[13] 28 U.S.C. § 1407(a).



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Judge Rejects Amazon's Bid To 'Backpedal' In BIPA Suit

By **Rachel Riley**

Law360 (March 28, 2024, 8:59 PM EDT) -- A Delaware federal judge will allow more plaintiffs to join a proposed class action accusing Amazon of violating Illinois' Biometric Information Privacy Act by collecting their voice data during calls to a financial services provider without consent, overriding the tech giant's apparent attempt to backtrack on standing concerns by instead seeking summary judgment.

U.S. Circuit Judge Stephanos Bibas, sitting by designation in the federal district court in Delaware, granted the proposed class' bid for leave to amend the suit to address Amazon Web Services Inc.'s concerns that newly surfaced evidence showed the current three plaintiffs were never subject to the voice analysis technology at issue.

Judge Bibas ruled Wednesday that establishing calls made by clients of financial services provider John Hancock were authenticated with the software is a key jurisdictional issue to be resolved before the suit moves forward — and not, as Amazon has more recently contended, an issue to be reserved for summary judgment.

"Defendant raised issues with plaintiffs' standing but now tries to backpedal," Judge Bibas said. "It claims that standing is inexorably linked with the merits and so should be resolved on summary judgment. I disagree."

In the latest version of the suit, filed in 2022, Christine McGoveran and two other plaintiffs alleged John Hancock used the cloud-based call center service Amazon Connect to process customer calls, resulting in the audio and related data being routed through Amazon servers to voice authentication provider Pindrop Security. They claim Seattle-based AWS illegally collected and stored their biometric voice data without consent during the process.

Though Pindrop was originally named as a defendant, Judge Bibas allowed the software developer to exit the suit **in March 2023**, ruling it is exempt from BIPA because it serves banks and thus fits the legal definition of a financial institution covered by the Gramm-Leach-Bliley Act. But the judge rejected a dismissal bid from Amazon attempting to shift the blame to John Hancock, ruling the suit properly targeted Amazon Connect for allegedly extracting caller voiceprints from customer calls.

Earlier this month in a March 11 order, Judge Bibas noted Amazon "has raised a potential standing issue" and asked the parties to submit letters explaining their position on the adequacy of the three named plaintiffs so the judge could ensure he had subject-matter jurisdiction to hear the case.

The plaintiffs then moved to amend the suit, saying Amazon intended to challenge the standing of the existing proposed class representatives because of evidence that surfaced during a Feb. 9 deposition of a John Hancock representative. Though recent filings in the case are redacted, Amazon has said the deposition testimony, as well as other evidence, shows none of the three plaintiffs' calls had been screened by Pindrop.

The proposed class noted in **the motion** that it disputes the significance of the evidence and maintains the three existing class representatives have adequately alleged injury-in-fact sufficient to support standing. But the group still requested the judge's permission to "safeguard the interests of the putative class by adding class representatives who are not subject to the purported adequacy concerns that defendant has newly raised."

In a **letter dated Monday**, Amazon said no further discovery in the case is needed and urged the judge to rule on the merits of the plaintiffs' claim as part of a summary judgment decision.

"Evidence showing that plaintiffs were not subject to Pindrop's voice authentication goes to the merits of this case — i.e., whether plaintiffs' voiceprints were in fact collected — and should be adjudicated on a motion for summary judgment or at trial, not in the jurisdictional context," the tech giant wrote.

But Judge Bibas rejected Amazon's argument, saying on Wednesday the court "must assure itself of its jurisdiction before it proceeds," while granting the plaintiffs leave to amend their complaint.

"Whether the named plaintiffs ever came in contact with the authentication technology at all is the injury-in-fact required for standing and a distinguishable issue from whether the technology violated the plaintiffs' rights under the Illinois statute," Judge Bibas said. "The standing of the three named plaintiffs is thus a separate question and leaves the court in doubt of its jurisdiction."

The judge also ordered the parties to conduct limited discovery by May 17 to confirm that all 12 plaintiffs had placed a call while in Illinois that was authenticated with Pindrop's technology.

A spokesperson for Amazon Web Services declined to comment on Thursday. Counsel for the plaintiffs did not immediately respond to a request for comment.

The plaintiffs are represented by David Crumplar of Jacobs & Crumplar PA and Andrew D. Schlichter, Nathan Stump, Joel Rohlf, Alexander L. Braitberg and Pete Cosgrove of Schlichter Bogard LLP.

Amazon is represented by Jody Barillare, Beth Herrington, Ari Selman and Jordan McCrary of Morgan Lewis & Bockius LLP.

The case is Christine McGoveran et al. v. Amazon Web Services Inc. et al., case number 1:20-cv-01399, in the U.S. District Court for the District of Delaware.

--Editing by Philip Shea.

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United Airlines Beats Class Cert. Bid In COVID Refund Suit

By **Lauraann Wood**

Law360 (March 28, 2024, 8:57 PM EDT) -- Passengers who say United Airlines used the COVID-19 pandemic as cover for refusing to reimburse them for cost-cutting cancellations cannot pursue their case as a class because their claims turn on too many individual questions, an Illinois federal judge determined Wednesday.

U.S. District Judge Thomas Durkin said he wouldn't give class treatment to the plaintiffs' consolidated case against United Airlines Holdings Inc. because his inquiries into the circumstances of each passenger's canceled flight and their related damages would be too varied to satisfy federal certification requirements.

For instance, the passengers are seeking individualized awards reflecting their total ticket price — excluding portions of their itineraries that involved travel to or from countries whose borders were closed to U.S. citizens, according to Judge Durkin's order. Seventh Circuit precedent says individual monetary damages means "awards based on evidence specific to particular class members," so certification is inappropriate, the judge said.

Lead plaintiff Jacob Rudolph **kicked off the suit** in April 2020, and additional named plaintiffs Mark Hansen and Jason Buffer joined in the consolidated case. They all bought tickets for flights that had been scheduled for March or April of that year but say United breached its contract of carriage by refusing to issue COVID-19-related refunds to passengers whose flights were canceled.

United says the passengers' flights were canceled due to a force majeure event, which frees the airline from having to provide refunds under its contract of carriage.

The airline has asserted force majeure, or "act of God," events are unique occurrences that prohibit it from operating flights, including emergency governmental orders, worker strikes, damaged aircraft, or events that expose passengers to a substantial risk of bodily harm including "riots, terrorist activities, civil commotions, embargoes, wars, hostilities, disturbances or unsettled international conditions."

Such events can present an "emergency situation requiring immediate care or protection for a person or property," it said.

The passengers have called United's assertion "**nonsense**" and say the airline canceled their flights to stem financial losses from decreased demand. They say their flight cancellations amounted to schedule changes or irregular operations that required the airline to honor their refund requests.

Each passenger will have to prove a force majeure event didn't cause their flight cancellation, and that analysis "requires a particularized inquiry into the circumstances of each class member's itinerary," Judge Durkin said. That could amount to more than 200,000 such inquiries in the case, which steps over commonality and predominance requirements for certification, the judge added.

The passengers may be able to point to a press release and internal communications to show United canceled many flights to save on operating costs, but "it is impossible to generalize across all flights," the judge said.

Four of the five questions the passengers say relate to their claims also require an answer to the

force majeure question, Judge Durkin said. That's another reason the particularized inquiry defeats their certification bid, he said.

A United representative declined to comment on Thursday, and counsel for the passengers didn't immediately respond to a request for comment.

In a February 2021 ruling denying United's initial motion to dismiss the suit, Judge Durkin declined to embrace United's broad interpretation of a force majeure event, saying it could mean any change that was unforeseen or beyond United's control would disqualify affected passengers from receiving refunds.

The parties have been engaging in discovery ever since the 2021 ruling and litigating over summary judgment issues **targeting passengers' individual claims** before Judge Durkin issued his Wednesday ruling. He told the parties to submit a joint status report by April 17 indicating how they intend to proceed, including whether they want him to consider United's pending summary judgment bid.

The plaintiffs are represented by Steve Berman, Whitney Siehl and Daniel Kurowski of Hagens Berman Sobol Shapiro LLP and Joseph Kenney of Sauder Schelkopf LLC.

United is represented by Patricia Brown Holmes, Sondra Hemeryck and Brendan Gerdes of Riley Safer Holmes & Cancila LLP.

The case is Rudolph et al. v. United Airlines Holdings Inc. et al., case number 1:20-cv-02142, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Linda Chiem and Lauren Berg. Editing by Philip Shea.

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Claims Trimmed In Trader Joe's Chocolate Heavy Metals Suit

By **Mike Curley**

Law360 (March 28, 2024, 8:01 PM EDT) -- A California judge has dismissed five out of nine claims in a consolidated complaint alleging that Trader Joe's Co. misled consumers by failing to disclose that its dark chocolate bars contain heavy metals, finding that the complaint doesn't do enough to allege that the amounts are actually dangerous.

In an **order** filed Wednesday, U.S. District Judge Ruth Bermudez Montenegro dismissed with leave to amend the proposed class's claims for violations of California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act, as well as common law claims for breach of implied warranty and unjust enrichment.

The judge however allowed claims for violations of Washington's Unfair Business Practices and Consumer Protection Act, the Illinois Consumer Fraud and Deceptive Business Practices Act and two claims under New York General Business Law to go forward.

The dispute started in January when customers **hit Trader Joe's** with 10 class action complaints alleging the company failed to disclose lead and cadmium in dark chocolate products, based in part on findings by Consumer Reports showing that lead and cadmium levels exceeded California's regulatory standards.

The complaint alleged that Trader Joe's 72% Cacao Dark Chocolate Bar contains 192% of the allowable level for lead, and the Dark Chocolate Lover's Chocolate Bar contains 127% of that level for lead and 229% of that level for cadmium.

The retailer moved to **dismiss in June**, arguing that it had no duty to disclose the metals as they fall well within the regulatory threshold for safe consumption.

While Judge Montenegro on Wednesday found that the actual levels and whether they are safe for consumption is a factual issue, she further found that the complaint does not plausibly allege a safety hazard, saying there is a "disconnect" between the allegations of the general harms posed by heavy metals and whether the levels contained in the products are unreasonably hazardous.

"Plaintiffs cannot just say heavy metals can be unhealthy and these products contain some level of heavy metals," the judge wrote. "They have to connect the health risks alleged to the levels of heavy metals in these products and they have to be significant enough to be unfit for human consumption or an unreasonable safety hazard."

As such, the judge wrote, the California law claims must be dismissed, with leave to amend. However, while Trader Joe's argued that the other state-law consumer protection claims should be dismissed for the same reason, Judge Montenegro said they do so in "only a single footnote" and did not otherwise address those claims, and so she declined to dismiss them.

The judge also rejected the company's argument that the New York and Washington claims fail because a 2015 lawsuit and 2018 consent judgment over heavy metals would have put the plaintiffs on notice, saying that she is not convinced an ordinary customer would have been aware of either.

On the breach of implied warranty and unjust enrichment claims, Judge Montenegro agreed with Trader Joe's that the complaint was unclear as to what state law would govern the claims.

"The law under which a claim is brought is important for any claim, but it is particularly important in a case where plaintiffs bring claims on behalf of a nationwide class and state subclasses and also bring claims under other states' laws," the judge wrote. "Neither the defendant nor the court should have to speculate as to the legal basis for a claim particularly when assessing whether claims on behalf of a nationwide class should be dismissed."

The judge also rejected Trader Joe's argument that the whole case should be stayed or dismissed because the U.S. Food and Drug Administration has primary jurisdiction, saying that while the issue of heavy metals in chocolates might be new to the courts, false advertising suits about failure to disclose alleged hazards are not, and the FDA's expertise is not needed to adjudicate the claims, while a stay would significantly delay the claims.

Judge Montenegro chose not to address Trader Joe's argument that the plaintiffs don't have standing to bring claims on behalf of a nationwide class given the lack of clarity on the choice of law in the common law claims.

Finally, the judge found that the plaintiffs do have standing to sue for injunctive relief because they have alleged they would be willing to purchase the products if they could be certain they don't contain heavy metals, and they have standing to sue over one of the chocolate bars they did not purchase because it is similar enough to the products they do purchase.

"The core of plaintiffs' claims was sustained, including claims under New York, Illinois and Washington state law," Lori G. Feldman of George Feldman McDonald PLLC, representing the plaintiffs, said Thursday. "We will continue to vigorously prosecute the action on behalf of our clients."

Representatives for Trader Joe's could not immediately be reached for comment Thursday.

The plaintiffs are represented by Lockridge Grindal Nauen PLLP, George Feldman McDonald PLLC, Bursor & Fisher PA, Freed Kanner London & Millen LLC, Gustafson Gluek PLLC, Wexler Boley & Elgersma LLP, Barrack Rodos & Bacine, Milberg Coleman Bryson Phillips Grossman PLLC, Levi & Korsinsky LLP, The Sultz Law Group PC, Laukaitis Law LLC, Fitzgerald Joseph LLP, Levin Sedran & Berman LLP, Lippsmith LLP, Almeida Law Group LLC, Kaplan Fox & Kilsheimer LLP and Kuzyk Law LLP.

Trader Joe's is represented by Dawn Sestito, Danielle R. Feuer and Raymond C. Kilgore of O'Melveny & Myers LLP.

The case is In Re Trader Joe's Co. Dark Chocolate Litigation, case number 3:23-cv-00061, in the U.S. District Court for the Southern District of California.

--Additional reporting by Gianna Ferrarin and Henrik Nilsson. Editing by Rich Mills.



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Judge Powers Down Lenovo Computer Crashing Claims

By **Carolyn Muyskens**

Law360 (March 28, 2024, 8:24 PM EDT) -- A Michigan federal judge on Wednesday scrapped a proposed class action claiming Lenovo marketed a computer as reliable when it allegedly suffered from performance issues, saying the company never promised the computer wouldn't freeze or crash.

Plaintiff Josh Dinwiddie pointed to an advertisement that claimed the Lenovo T5 desktop computer offered "solid performance," along with other marketing phrases, as evidence that Lenovo misled customers into thinking the computer would be high performing and wouldn't crash, but U.S. District Judge Paul L. Maloney **said** the phrase "solid performance" was "general and vague" ad copy and not enough to support a claim that customers were deceived.

The judge said Dinwiddie "strung together some marketing language" to try to argue the company promised a smooth-running computer that wouldn't crash, but ultimately failed to show that Lenovo made that specific guarantee.

Dinwiddie's claims for breach of warranty and breach of contract fell flat, the judge said, because Dinwiddie purchased the computer from a Best Buy store, so he never entered into a contract with Lenovo.

"Plaintiff and defendant lack privity because plaintiff purchased the product from a third-party retailer. Also, none of defendant's marketing expressly promised that the product would not freeze or crash and run smoothly during operation," Judge Maloney said.

Additionally, Dinwiddie didn't notify Lenovo of the alleged issues with his device before filing the lawsuit to give the manufacturer an opportunity to fix the problems, as required by Michigan law.

"Plaintiff provided defendant no notice that he believed defendants was in breach prior to filing suit. Accordingly, plaintiff is 'barred from any remedy' under his implied warranty theory," the judge said.

Dinwiddie sued Lenovo in 2022 on behalf of a proposed class of customers who purchased the Legion T5, arguing that the tech company misled potential buyers about the reliability of the model, which it claimed was high performing and suitable for gaming and watching videos.

The plaintiff said he discovered the computer suffered from hardware and software defects that caused it to frequently crash or freeze, and he ended up selling the computer for parts.

Another putative class action lawsuit claiming the Legion desktop computer suffered from freezing and crashing problems filed by the same consumer law firm that represented Dinwiddie, Sheehan & Associates PC, was dismissed by a judge in the Central District of California in January.

The judge in that case found Lenovo never promised a crash-free computer, nor was the statement that the computer would provide "solid performance" enough to support a consumer fraud claim.

Also on Wednesday, Lenovo defeated most claims in a separate consumer fraud lawsuit filed by Sheehan & Associates in the Middle District of Florida.

In that case, a customer claimed, on behalf of a putative class of customers, that Lenovo's 14w convertible laptop had a defective hinge that was not as durable as promised in Lenovo's advertising.

The judge dismissed all claims but allowed the plaintiff, Alex Volinsky, to refile certain warranty claims by April 10.

A lawyer for Lenovo declined to comment. A lawyer for Dinwiddie did not immediately respond to requests for comment Thursday.

Dinwiddie is represented by Spencer Sheehan of Sheehan & Associates PC.

Lenovo is represented by Jeffrey S. Jacobson and Stephanie L. Gutwein of Faegre Drinker Biddle & Reath LLP.

The case is Dinwiddie v. Lenovo (United States) Inc., case number 2:22-cv-218, in the U.S. District Court for the Western District of Michigan.

--Editing by Kelly Duncan.

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Accused 'Shadow Trader' Can't Recall Why He Bought Stock

By **Bonnie Eslinger**

Law360 (March 28, 2024, 10:24 PM EDT) -- A California federal jury considering regulators' claims that an ex-Medivation executive engaged in "shadow trading" of a rival's stock heard video-recorded testimony Thursday from the executive, who said he couldn't recall why he purchased the securities just minutes after learning Pfizer was close to acquiring his own company.

The U.S. Securities and Exchange Commission's civil case against 47-year-old Matthew Panuwat centers on stock options the former Medivation Inc. executive purchased in competitor Incyte Corp. after Medivation's CEO sent out a confidential email to him and other top management saying Pfizer's chief was keen to hammer out the acquisition deal's final details.

On Thursday, the fourth day of trial, the SEC showed jurors parts of video-recorded testimony Panuwat provided during two depositions — one conducted more than a year before the federal agency charged the former Medivation executive with insider trading in August 2021, and a second one conducted afterward, in 2023.

Panuwat said in the first deposition that because of his role as head of business development at Medivation, he kept a watch on mergers and acquisitions in the biotech market, specifically in oncology.

"I do follow that extremely closely," Panuwat said.

He also said he understood how other oncology companies were perceived by the market.

"I would follow stock movement for companies in the oncology space," Panuwat told the SEC lawyer conducting the interview. "What is really supporting their valuation? Why are companies moving up and down? Following what the company is doing."

That research included reading analyst reports on the other oncology companies.

"I also looked at what other investors are buying," Panuwat said.

When asked by the SEC lawyer, Panuwat confirmed that he had been familiar with Incyte, which he called "very successful," before he purchased the oncology company's securities in August 2016.

"That is a company I've actively followed for as long as I can remember," Panuwat said.

The SEC lawyer asked why he decided to trade in Incyte securities in August 2016. Panuwat said he couldn't remember.

"I don't recall there being a specific event around that time," Panuwat said.

The unidentified SEC lawyer asked if he discussed his trades at Incyte with anyone.

"Nothing in particular stands out whether I did and didn't," Panuwat replied. "I don't remember discussing Incyte with anyone around that time."

The SEC lawyer noted that Panuwat had bought a specific type of call option that only has value when

a share price increases. She asked why he anticipated the stock price to go up.

"So your testimony, as you sit here today, is that you have no recollection of why you traded," pressed the SEC lawyer.

Panuwat said he obviously thought that that stock might rise over the coming month or so.

Another SEC lawyer asked Panuwat if he was aware of any information that he understood to be confidential regarding Pfizer's interest in Medivation and its submission of a bid to acquire the company in the August 2016 time frame. Panuwat said yes.

"As of the date you placed your Incyte call option trades on Aug. 18, 2016, were you aware of confidential information that Pfizer had offered to buy Medivation?" the SEC lawyer asked.

Panuwat said he didn't have a memory of that.

The SEC lawyer asked Panuwat how much of his time at work in August 2016 was spent in discussion about the potential acquisition of Medivation. Panuwat said an increasing amount.

"So would it be fair to say that as of Aug. 18, you knew that merger negotiations with Pfizer and other interested parties were at their ending stages?" the lawyer asked.

Panuwat said at that point, information about the multiple bidders was public knowledge.

Pointing Panuwat to Medivation's written insider trading prohibitions, the first lawyer asked if he knew that he was supposed to use confidential knowledge about Medivation for the benefit of the company only. He agreed.

"Not for your own personal benefit, right?" the SEC lawyer pressed.

"I believe so," Panuwat replied.

Afterward, jurors were shown parts of the second deposition, done two years later in March 2023.

During that interview, Panuwat said other members of Medivation's management team invested in biotechnology companies.

Asked to name names, Panuwat pointed to Chief Financial Officer Rick Bierly, CEO David Hung and Vice President of Finance Dominic Piscitelli.

"Did you ever discuss the policy, what the insider trading policy actually allowed or prohibited with any of those three individuals?" an attorney for the SEC asked. Panuwat said he could not recall.

Shadow trading, a novel theory, is said to occur when a corporate insider uses material, nonpublic information about their own company to trade in the stock of a similarly situated company. In this case, the SEC claims that Panuwat purchased stock options in Incyte because he believed that the public announcement of Medivation's acquisition would also cause Incyte's stock price to rise. The news would also make Incyte a more attractive target for acquisition, according to **the SEC's complaint**.

According to the SEC, Panuwat bought stock options in Incyte on Aug. 18, 2016, seven minutes after receiving Hung's email saying top bidder Pfizer was ready to sign a deal that weekend. During **opening statements** on Monday, an SEC lawyer told jurors that after Medivation and Pfizer announced their deal on Aug. 22, 2016, Incyte's stock went up, and two days after that, Panuwat started selling his shares and walked away with \$240,000 from his original \$117,000 purchase, SEC lawyer Matthew Meyerhofer said.

Jack DiCanio of Skadden Arps Slate Meagher & Flom LLP, representing Panuwat, told jurors that when Panuwat made his trades in Incyte, he did not believe the trades violated company policy or securities laws.

The SEC's first witness, an Evercore investment banker who worked on Medivation's 2016 sale to Pfizer, said Panuwat was involved in the confidential process, which was given the code name "**Project Masterpiece**" and the bidding companies were named after famous painters.

Then on Wednesday, the third day of trial, the SEC called Chyhe Becker, the agency's deputy chief economist and deputy director of its division of economic and risk analysis. She told jurors that market observers would expect Incyte's stock price to increase when Medivation's merger was announced.

During her cross-examination, a lawyer for Panuwat, James Spertus of Spertus Landes & Josephs LLP, questioned the SEC economist's neutrality, pointing out that she supervises a 200-person team that, according to her resume, supports "the SEC policy, rulemaking, enforcement and examination activities."

The SEC is represented by its own Monique C. Winkler, Susan F. LaMarca, Bernard B. Smyth, Jason M. Bussey and Matthew G. Meyerhofer.

Panuwat is represented by Jack P. DiCanio, Caroline Van Ness, Joshua S. Brown and Andrew Woo of Skadden Arps Slate Meagher & Flom LLP and James Spertus, Anthony Pacheco, Kirsi Elizabeth Luther, Payton Lyon and Maura Riley of Spertus Landes & Josephs LLP.

The case is Securities and Exchange Commission v. Panuwat, case number 3:21-cv-06322, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jessica Corso. Editing by Michael Watanabe.

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Judge Doubts NBA NFT Licensors Belong In Meta Privacy Suit

By **Emilie Ruscoe**

Law360 (March 28, 2024, 11:26 PM EDT) -- The developer of non-fungible token marketplace NBA Top Shot must face a proposed class action claiming it violated state and federal laws aimed at protecting video consumers, with the National Basketball Players Association and NBA Properties Inc., which handles the NBA's merchandising and licensing, escaping the suit for now.

In a Tuesday order in San Francisco federal court, U.S. District Judge Susan Illston partially granted a dismissal bid by developer Dapper Labs Inc., saying its motion raises "factual questions that should be decided on a full factual record."

However, Judge Illston sided with Dapper Labs and the NBA entities in finding plaintiff Thomas Fan made "conclusory" allegations about the defendants' bona fide joint venture in NBA Top Shot, pointing out that Fan premised the joint venture claim on a press release that stated Dapper would "partner with" the NBA entities on Top Shot.

Since Fan did not lay out specific claims that defendants actually had a joint venture as defined under applicable law, Judge Illston tossed the claims against the NBA companies.

Judge Illston added that if Fan wants to, he can amend his suit to "amplify" the joint venture claims but said he would have to show more than the defendants' license agreements since those agreements "expressly disclaim" that they have a joint venture.

Fan's other arguments warranted further scrutiny, Judge Illston said, finding Fan plausibly pled a claim under the federal Video Privacy Protection Act and a similar California state law.

Notably, Judge Illston found that under those laws, NBA Top Shot qualifies as a "videotape service provider" and "provides video recording sales" as defined by the California law, rejecting the defendants' argument that Top Shot's "NFT digital platform," which sells "moments," described as "21st Century [digital] trading cards," shouldn't be considered a videotape service provider.

The judge also highlighted some factual questions she deemed inappropriate to resolve on a motion to dismiss, including the defendants' claim that the alleged disclosure of certain consumer personal information was made by the consumer's browser and not the Top Shot website.

The latest version of Fan's suit, filed in October, accuses the defendants of collecting and sharing "highly sensitive and specific information about basketball fans' video consumption habits without their informed written consent."

While the site "generates random and anonymous usernames for basketball fans" to buy and sell video clips, Fan claims code on its website discloses the consumers' transaction history to Facebook parent company Meta Platforms Inc., which then uses Top Shot's records to deliver targeted advertisements to consumers.

The defendants sought to shed the suit in January, **arguing**, among other things, that the relevant practices had been disclosed to Fan.

"The privacy policy — to which plaintiff consented when he created his account and each time he logged in (and which he incorporated by reference into his complaint) — discloses that his usage data

may be tracked and that such data may be used for purposes including advertising and provides information on how to disable the technology," the January motion states.

"Importantly, the court did not rule on the merits of the case, and it did not conclude the plaintiff is right," representatives for Dapper Labs told Law360 in an email on Thursday. "Rather, this is a procedural order that only denies Dapper Labs' request to dismiss the complaint at the pleading stage."

"The privacy of our customers' data is a critical component of Dapper Labs' business, and we embed data privacy protections throughout our product development life cycle. We will continue to defend ourselves vigorously against the plaintiff's claims," Dapper Labs said.

Representatives for Fan and the NBA didn't immediately respond to requests for comment Thursday.

Thomas Fan is represented by L. Timothy Fisher, Stefan Bogdanovich and Christopher R. Reilly of Bursor & Fisher PA.

NBA Properties Inc., National Basketball Players Association and Dapper Labs Inc. are represented by Kenneth P. Herzinger and Aaron Charfoos of Paul Hastings LLP.

The case is Thomas Fan v. NBA Properties Inc. et al., case number 3:23-cv-05069, in the U.S. District Court for the Northern District of California.

--Additional reporting by Aislinn Keely. Editing by Drashti Mehta.

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PwC Fined \$3M Over Auditor Controls, Australia Probe

By **Jessica Corso**

Law360 (March 28, 2024, 9:10 PM EDT) -- The Public Company Accounting Oversight Board leveled a pair of fines totaling more than \$3 million against PwC on Thursday, accusing the Big Four accounting firm of failing to maintain policies to ensure auditor independence and of waiting years to inform the U.S. regulator that it was being investigated in Australia.

The larger fine handed down by the PCAOB related to the firm's alleged auditor independence issues was a \$2.75 million penalty over what the regulator claims was a quality control failure on the part of the firm.

PwC's internal policies did not always require employees to consult with PwC's in-house experts on auditor independence prior to discussing a potential business partnership with an audit client, according to the PCAOB order that settles its action against the firm.

The PCAOB says that's exactly what happened in 2018 when two PwC partners met with an unnamed publicly traded company the firm was responsible for auditing to discuss the possibility of a joint business relationship.

The publicly traded company showed interest in the partnership, and PwC and the company began discussing a transfer to another auditor. In the meantime, however, PwC planned to continue auditing the client's 2018 financial statement, the PCAOB said.

The accounting firm didn't discuss the potentially changing business relationship with its internal independence office until it was alerted that the PCAOB had begun its investigation, according to the settlement order. Following that consultation, PwC urged the client to find another auditor right away, which it did, according to the PCAOB.

"Auditor independence is essential to maintaining trust in our capital market system," PCAOB Chair Erica Williams said in a statement Thursday. "Firms must have effective guardrails in place to enforce independence and uphold the integrity of their audits."

PwC neither admitted nor denied the board's findings in either the quality control matter or a separate action Thursday for which it was fined \$600,000 over allegations it was involved in an **Australian tax leak scandal**.

The PCAOB said that some PwC employees were aware that the Australian Tax Practitioners Board was investigating PwC's Australian unit as early as March 2021. But the firm did not report the foreign investigation to the U.S. regulator until last summer, and only after those within the company responsible for filing compliance reports were made aware of the investigation via media reports, according to the PCAOB.

"While there is no allegation that our independence was impaired, PwC recognizes that maintaining our independence is key to our important role in the capital markets," a PwC spokesperson said in a statement to Law360 on Thursday addressing the quality control matter that led to the larger fine.

The firm is pleased to have resolved the matter, and is "committed to a process of continuous improvement, as reflected in our profession-leading audit quality results," the statement said.

In addition to paying a fine, PwC was also required to update its quality control policies around auditor independence to settle the board's investigation.

In a separate statement sent to Law360 on Thursday, a PwC Australia spokesperson acknowledged the delayed compliance report and apologized "for our initial failure to report this incident."

"The firm has cooperated with the PCAOB during this process and has taken a number of steps to improve our policies and procedures related to the reporting requirements," the spokesperson said.

--Editing by Michael Watanabe.

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Oracle Exec Admitted Tech 'Scaring The Lawyers,' Judge Told

By **Dorothy Atkins**

Law360 (March 28, 2024, 10:35 PM EDT) -- Consumers urged a California federal judge Thursday to keep alive Federal Wiretap Act and Florida common law claims in a proposed class action alleging Oracle illegally sold internet users' "electronic profiles," arguing that executive Larry Ellison admitted to the alleged misconduct by stating Oracle's new technology was "scaring the lawyers."

The attorneys' comments came during a hearing in San Francisco before U.S. District Judge Richard Seeborg on Oracle's motion to dismiss two specific claims in litigation accusing Oracle of amassing a vast number of detailed profiles, or digital "dossiers," on millions of people worldwide.

The consumers allege Oracle has made \$42.4 billion in annual revenue selling personal information — including addresses, race, political views, location and retail purchases — of anyone who uses the internet for everyday activities. The company allegedly collects this information with its Oracle ID Graph and related marketing products.

Although there are other claims in the most recent rendition of the complaint, Oracle's latest dismissal bid specifically targets the consumers' intrusion upon seclusion claim brought under Florida common law and a claim under the Federal Wiretap Act, also known as the Electronic Communications Privacy Act.

During the hearing Thursday, Oracle's counsel, Tiffany Cheung of Morrison Foerster LLP, argued that Judge Seeborg has repeatedly dismissed the two claims from prior renditions of the complaint and that the latest amendments don't cure the deficiencies.

However, the consumers' counsel, David T. Rudolph of Lieff Cabraser Heimann & Bernstein LLP, argued that they added eight paragraphs and more details about statements made publicly by Ellison, Oracle's chief technology officer.

The complaint states that in a September 2016 Openworld keynote speech, Ellison specifically described Oracle's ID Graph's amassing of profiles, and he "flippantly acknowledged that Oracle's profile-building conduct was privacy invasive, potentially illegal, and was 'scaring the lawyers.'"

Ellison said "[Oracle's conduct] is a combination of real-time looking at all of their social activity, real-time looking at where they are, including, micro-locations — this is scaring the lawyers who are shaking their heads and putting their hands over their eyes — knowing how much time you spend in a specific aisle of a specific store and what is in that aisle of a store," according to the complaint.

Rudolph also argued that the new complaint added allegations that Oracle has publicly criticized Google's alleged "shadow profiles," which are purportedly the same profile-creating practices it's accused of, and Oracle has told legislators Google's conduct violates privacy rights. Additionally, Rudolph said, the new complaint specifically alleges that an anonymous former Oracle employee posted online that Oracle intentionally didn't update its data opt-out tool, which is "purposefully never updated and knowingly inaccurate."

But in response to the argument, Judge Seeborg observed that in amending complaints, "quantity is not enough — it's quality that we want to focus on," and although he said he agrees that executives can make public statements that are binding on a company, Judge Seeborg doubted whether Ellison's "general statements" about Oracle's technology described in the latest rendition of the complaint

sufficiently addressed his prior concerns.

"I don't see it," Judge Seeborg added.

Judge Seeborg also acknowledged that adding the "context" of an executive's statements to a complaint "is fine," but the consumers need to link the executive's statements to actual alleged misconduct.

"Where does [the executive's statements] get put into practice?" he asked.

But Rudolph argued that Ellison's statement "is basically an open acknowledgment that this conduct is invasive — that it's ... problematic, but that Oracle's going to do it anyway."

Again, Judge Seeborg appeared skeptical.

"Isn't there a lot of leaps between that statement and what the conduct shows?" he asked.

The judge also doubted that the consumers could rely on statements by an unnamed former Oracle employee.

"How do we know that it was a real employee?" he asked.

Rudolph argued that the consumers would need to be allowed to take discovery on the issue to be sure, but there also doesn't appear to be a clear reason why a person would falsely claim to be a former Oracle employee.

Judge Seeborg didn't rule from the bench, but he repeatedly doubted whether the new allegations in the amended complaint state viable ECPA and intrusion upon seclusion claims. The judge noted that he's found twice before that the allegations on the two claims were insufficient, and the new allegations should show tortious intent, but, "I don't see it."

"I've said it was insufficient, and I've said that more than once," he said.

Oracle's partial dismissal bid is the tech giant's latest effort to beat the proposed **class action initially launched** by Johnny Ryan, Jennifer Golbeck and Michael Katz-Lacabe in August 2022, claiming Oracle collects personal data using several tools, including software code stored on web browsers that collect users' data, allegedly without consumers' knowledge or consent.

Those tools purportedly include a proprietary code "bk-coretag.js" that copies and sends to Oracle what information users are requesting from a website server, such as a URL and keywords.

The suit focuses on two key features of the company's data management platform: the Oracle Data Marketplace, allegedly one of the world's largest commercial data exchanges, and the Oracle ID Graph, which is used to personalize and target advertising.

The company also allegedly allows third-party data brokers to "traffic in" personal data on its Data Marketplace without web users' knowledge or permission, the suit states, adding that Oracle also partners with more than 65 such major data brokers.

Judge Seeborg **cut earlier renditions** of the complaint in October, but the judge has given the consumers **multiple shots** at amending it. In filing its latest dismissal motion, Oracle asked the judge only to throw out two claims for good and said it would respond to the other allegations once the judge rules on its motion.

At the end of the hearing, the judge took the arguments under consideration and said he would issue an order.

A deadline for the consumers to file a motion for class certification is set for Oct. 1, and a hearing on any class certification motion is set for Jan. 16, 2025, in San Francisco, according to the docket.

The consumers are represented by Michael W. Sobol and David T. Rudolph of Lieff Cabraser Heimann

& Bernstein LLP.

Oracle is represented by Tiffany Cheung of Morrison Foerster LLP.

The case is Michael Katz-Lacabe et al. v. Oracle America Inc., case number 3:22-cv-04792, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bonnie Eslinger, Craig Clough and Gina Kim. Editing by Dave Trumbore.

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