

AT&T hit with derivative suit over WarnerMedia spinoff | Secondary Sources | National

 today.westlaw.com/Document/I93c36e3df5dd11ee8921fbef1a541940/View/FullText.html

(April 08, 2024) - AT&T Inc. and CEO John Stankey are facing a securities fraud lawsuit claiming they drastically overstated WarnerMedia's financial position before spinning off the business in a \$43 billion merger with Discovery Inc.

Scarborough v. AT&T Inc. et al., No. 24-cv-420, *complaint filed*, 2024 WL 1486800 (D. Del. Apr. 3, 2024).

The 2022 transaction saddled the combined company, Warner Bros. Discovery Inc., with \$40 billion in assumed debt and \$350 million in undisclosed costs to launch a news service, according to the complaint, filed April 3 in the U.S. District Court for the District of Delaware.

The plaintiff, WBD shareholder Davant Scarborough, claims that AT&T and Stankey deceived Discovery into "massively overpaying" for WarnerMedia assets. He filed the derivative suit to recover damages on behalf of the company.

WBD recently won dismissal of a proposed class action claiming the offering materials for the merger misled investors about WarnerMedia's content strategies and subscribers to its HBO streaming services. *Ohio Pub. Emps. Ret. Sys. v. Discovery Inc.*, No. 22-cv-8171, 2024 WL 446466 (S.D.N.Y. Feb. 5, 2024).

The lead plaintiff in that suit, Ohio Public Employees' Retirement System, filed a notice of appeal to the 2nd U.S. Circuit Court of Appeals on March 4.

Misleading financial projections?

Scarborough's suit says AT&T sought to spin off WarnerMedia to unload some of the debt it assumed in a "disastrous acquisition" of Time Warner Inc. in 2018.

AT&T and Stankey overstated WarnerMedia's financial projections and concealed \$350 million in startup costs for its CNN+ streaming service during merger negotiations, according to the complaint.

WBD CEO David Zaslav, who previously helmed Discovery, learned after the merger that AT&T used questionable accounting tactics to inflate WarnerMedia's revenue and understate costs, the suit says.

The "cracks began to show" less than two weeks after the merger, when WBD released quarterly results April 21, 2022, that showed WarnerMedia's operating income declined nearly 33% year over year, the complaint says.

The company disclosed a \$2 billion reduction in the company's 2022 projected earnings before income, taxes, depreciation and amortization on Aug. 4, 2022. WBD Chief Financial Officer Gunnar Wiedenfels stated in a conference call that the company was "starting from a less favorable position compared to our expectations," the suit says.

Wiedenfels also disclosed that WarnerMedia had stopped licensing most of its content to other platforms before the merger, even though external content sales comprised 38% of WarnerMedia's revenues in 2021, the suit says.

WBD's announcement Oct. 24, 2022, that it expected to incur up to \$4.3 billion in restructuring costs through 2024 also highlighted the "severe deficiencies" in WarnerMedia's assets, the complaint says.

Conflicted directors

Scarborough asserts that bringing a demand to WBD's board to redress AT&T and Stankey's misconduct would be futile. The 11-member board includes seven AT&T appointees, the suit says.

Furthermore, four directors served on AT&T's board and received stock grants in connection with the merger, the complaint says. None of the individual directors are defendants in the suit.

The complaint says AT&T and Stankey violated the anti-fraud and control-person provisions in Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a). Scarborough requests unspecified damages on behalf of WBD, plus interest, costs and equitable relief.

Peter B. Andrews and Craig J. Springer of Andrews & Springer LLC and Christopher Lyons and Tayler Bolton of Robbins Geller Rudman & Dowd LLP represent Scarborough.

By Nicole Banas

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US Supreme Court case marks debut for Stanford prof's circuit split test

 [reuters.com/legal/government/column-us-supreme-court-case-marks-debut-stanford-profs-circuit-split-test-2024-04-08](https://www.reuters.com/legal/government/column-us-supreme-court-case-marks-debut-stanford-profs-circuit-split-test-2024-04-08)

Alison Frankel

View of the U.S. Supreme Court building in Washington, U.S., January 8, 2024.
REUTERS/Julia Nikhinson/File Photo Purchase Licensing Rights , opens new tab

April 8 (Reuters) - Not all circuit splits are created equal.

Intuitively, everyone who tracks U.S. Supreme Court litigation understands that idea. As you know, one of the most effective ways to attract the justices' attention is to contend that the Supreme Court must step in to resolve differences among federal appellate courts on important issues. That's why experienced Supreme Court lawyers frequently cite circuit splits in their clients' petitions.

But in reality, not every circuit split deserves the court's attention. Sometimes the underlying issue isn't really pressing. Sometimes the purported split is more a matter of semantics than substance. And sometimes, the split itself isn't of much consequence, perhaps because one circuit is a lone outlier or because the issue rarely arises in the circuits with differing views.

If the Supreme Court, after all, granted review to every petition asserting a circuit split, the justices would have a vastly busier docket than their usual 70 or 80 cases.

The justices and their clerks are obviously quite experienced when it comes to qualitatively assessing purported circuit splits. But in a new amicus brief , opens new tab urging the Supreme Court to grant a petition , opens new tab by chipmaker Nvidia (NVDA.O) , opens new tab, Stanford Law School professor Joseph Grundfest told the justices about a new methodology he has devised to quantify the significance of circuit splits, based on what Grundfest calls the "market share" of the appellate courts on opposite sides of the split.

The new Grundfest test, which the professor laid out in more detail in a working paper , opens new tab titled Quantifying the Significance of Circuit Splits in Petitions for Certiorari: The Case of Securities Fraud Litigation, relies on two key metrics. The first, called "aggregate circuit split share," estimates the economic consequences of the split, or, as Grundfest's lawyers at Quinn Emanuel Urquhart & Sullivan explained in the Nvidia brief, "the aggregate share of the overall market implicated by the conflict."

In the Nvidia case, for example, Nvidia's lawyers at Hogan Lovells argue that the 9th U.S. Circuit Court of Appeals split with five other federal appellate courts, including the 2nd Circuit, when it ruled , opens new tab that Nvidia shareholders adequately alleged the

company's fraudulent intent based on internal documents, even though plaintiffs have not seen the documents and cannot say specifically what they contain. (Shareholders allege that the company misrepresented the extent to which sales of a particular chip depended on the volatile crypto mining market.) Nvidia also contends that the 9th Circuit split with the 2nd Circuit in holding that shareholders could rely on an expert report, rather than specific alleged facts, to prove the falsity of the company's purported misstatements. Between them, Grundfest said in his amicus brief, the 2nd and 9th Circuits handle 60% of all shareholder securities fraud cases in federal court. And when you add up the rest of the circuits that have weighed in on one side or the other on the contested questions presented to the Supreme Court, the Grundfest brief said, you see that a robust 86% of the "market" for securities class actions is affected by the circuit split on the first question and 64% on the second.

The second Grundfest factor, dubbed the "split ratio," looks at the market shares of the appellate courts on either side of the split, instead of simply tallying up the number of courts on each side of the divide. Grundfest argues that the Supreme Court should be quicker to grant review when the split ratio is close to 50/50, because that reflects real foment in the lower courts rather than rulings by an outlier circuit or two.

The split ratio is a more complex calculation than the market share determination, but in the Nvidia case, Grundfest's brief argued, the ratios indicate that the division on both questions is not just a matter of a rogue circuit.

Both the quantitative metrics, the Grundfest brief said, "demonstrate that the circuit splits identified by the petition are highly consequential."

Shareholders' counsel of record, Gregory Joseph of Joseph Hage Aaronson, did not respond to my query. The plaintiffs' brief opposing Nvidia's petition is due on May 6. Nvidia declined to comment. Notably, the company received additional amicus support [\[link\]](#), opens new tab for its Supreme Court bid from 10 former high-ranking U.S. Securities and Exchange Commission officials who argued that the 9th Circuit decision will undermine the requirement that shareholders provide specific allegations of defendants' fraudulent intent. Grundfest told me that he's been toying for years with the idea of quantifying the significance of circuit splits but was galvanized into action by the Nvidia case, which offered what he described as an ideal way to illustrate the underlying concepts of market share and split ratio.

Stanford maintains an exhaustive database on securities class actions, which allowed Grundfest to calculate each circuit's share of this kind of litigation. But he said the same principles could apply in other fields, such as administrative law.

His draft article described a correlation within each federal circuit between economic metrics involving shareholder class actions, such as settlement values and the volume of new lawsuits, and “semantic” metrics including the number of citations to securities law provisions in reported opinions from the circuit. If that correlation holds up in other areas of litigation, Grundfest said, it might be possible to use keyword searches across legal databases to calculate aggregate circuit split shares.

Grundfest acknowledged (as does his draft article) that it will take a lot more research to figure out how to calculate circuit shares and split ratios outside the realm of securities class actions. But he told me that the value of his methodology is that the metrics are neutral. The shareholder class action bar, he said, can use his test to argue against Supreme Court review in cases involving circuits with small market shares or lopsided split ratios.

“This is the first step in a particular direction,” Grundfest said. “I’m just trying to help the Supreme Court allocate a scarce resource.”

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Reporting By Alison Frankel

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Thomson Reuters

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'Match' Opinion Stresses Delaware Courts' Focus on Investors, Scrutiny of Controlling Shareholders

"The Delaware courts are going to continue to have a lot of skepticism when it comes to conflicted controller transactions," Fried, Frank, Harris, Shriver & Jacobson senior counsel Gail Weinstein said.

April 08, 2024 at 04:48 PM

Corporate Governance



Ellen Bardash



The original version of this story was published on [Delaware Business Court Insider](#)

Delaware courts are not making it easier to get the business judgment rule applied in corporate transaction cases.

On top of more specific guidance about what exactly makes a director committee independent in the context of *Kahn v. M&F Worldwide Cleansing* cleansing, that's been the corporate bar's big takeaway from the Supreme Court's [ruling](#) on Match Group Inc. shareholder litigation.

"The Delaware courts are going to continue to have a lot of skepticism when it comes to conflicted controller transactions," Fried, Frank, Harris, Shriver & Jacobson senior counsel Gail Weinstein said.

Vice Chancellor Morgan Zurn's opinion was appealed in 2022 and argued before the high court in May 2023.

It garnered further attention when, based on the argument from defendants, the Supreme Court took the rare step of asking for supplemental briefing on an issue that wasn't raised in the Court of Chancery: whether both an informed shareholder vote and independent committee approval were needed for Zurn's decision to stand, or if one or the other was enough.

Since then, Delaware corporate litigators have almost universally said that *Match* has been one of their most closely watched cases because of its potential impact on how transactions with a controller in play need to be handled to stand up to judicial scrutiny.

Following the opinion's release, attorneys said the decision is one that's significant for not making waves and clarifying that a generally accepted application of the *MFW* requirements was correct under Delaware law.

Law professor Charles Elson said the decision points to a trend of the Delaware courts focusing on investors, a focus that he said is key to Delaware maintaining its franchise and is context that could be relevant to prospective appellees yet to argue before the Supreme Court.

"You have to look at the scope, and look at the chancellor's ruling in the *Musk* case," he said. "We're becoming, I think rightly so, much more searching on the independence issue than we had been several years ago."

The decision is part of the broader discussion about Delaware’s dominance as a state of incorporation, said Boies Schiller Flexner partner Renee Zaytsev, and some may have expected the court to take the *Match* case as an opportunity to win favor with skeptics by loosening the requirements for getting business judgment review in controller transactions other than squeeze-outs.

“It’s almost like the Delaware court is hearing the criticisms that are coming out about its law versus other jurisdictions’—and in particular Nevada, which has really marketed itself as being a more fiduciary-friendly state—and just bucked all of that criticism and said, ‘We’re going to do what we think is the right thing, that strikes a fair balance between fiduciary obligations and protections of minority stockholders,’” Zaytsev said. “And that is the Delaware way.”

The phrase “*MFW* creep” was coined in response to the Court of Chancery applying *MFW* in cases over transactions that weren’t squeeze-outs, such as the transaction in the original *MFW* case. Those who felt *MFW* creep had gone too far argued *MFW* was meant only to be applied to that specific type of transaction and that business judgment should otherwise be the default standard of review.

“This is a very clear rejection of that concept and a reinforcement of the idea that the courts really are concerned about the inherent coercion that controllers present,” Weinstein said. “*MFW* is really a gift to controllers from the courts in the sense that it provides a path to business judgment review of transactions that involve a conflicted controller.”

Weinstein said the *Match* decision highlights that controllers are faced with the choice of whether or not to craft a transaction to be compliant with *MFW*, and both options have their own advantages and disadvantages.

“The defense bar has never been too thrilled with having to go through these exercises in a controlled transaction,” Elson said of those who opt to be *MFW*-compliant. “It’s a lot of work to go through.”

“It introduces more cost to the transaction, it introduces more uncertainty to the transaction, especially when it comes to the majority of the minority vote, because you just can’t guarantee what the result of that vote is going to be,” Zaytsev said. “By definition, it’s introducing some closing risk into the transaction.”

Match Group, a tech company that operates a portfolio of dating apps, is a Delaware corporation headquartered in Dallas.

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Perrigo, Investors Settle for \$97 Million Over Failed Mylan Bid

By Peter Hayes

- Class members must submit claim form, show proof of loss
- Settlement calls for attorneys' fees totaling 20% of fund

Bloomberg Law News 2024-04-09T09:51:05087276338-04:00

Perrigo, Investors Settle for \$97 Million Over Failed Mylan Bid

By Peter Hayes 2024-04-08T12:26:06000-04:00

- Class members must submit claim form, show proof of loss
- Settlement calls for attorneys' fees totaling 20% of fund

Perrigo Co. PLC investors asked a federal trial court for preliminary approval of a \$97 million settlement of allegations that the pharmaceutical company overstated its value to fight a takeover attempt by Mylan NV in 2015, leading to a stock drop.

The agreement "provides a favorable result" for class members who purchased Perrigo's stock between April 21, 2015, and May 2, 2017, because it "removes the considerable possibility" that the plaintiffs "could recover nothing, particularly in light of the risks and uncertainties of proving their remaining claims at trial and prevailing in inevitable post-trial appeals," lead plaintiff Perrigo Institutional Investor Group said in an unopposed motion for preliminary approval of settlement filed in the US District Court for the District of New Jersey.

The consolidated class action settlement also calls for lead counsel to be awarded 20% of the common fund in attorneys' fees and litigation expenses not to exceed \$4.5 million, "plus interest earned on these amounts at the same rate as earned by the Settlement Fund," according to the motion for approval.

To recover from the fund, each class member must submit a claim form and supporting documents to establish proof of loss.

The investors originally alleged four sets of misrepresentations, but two were dismissed at an earlier stage of the case. The remaining claims involved statements related to the integration and the resulting performance of its Omega division, and the alleged concealment of anticompetitive practices in its generic drug unit.

Mylan failed in its \$26 billion hostile bid for Perrigo Co. in November 2015.

Perrigo shareholders tendered only about 40% of their shares to Mylan by the deadline, and more than half were required for a deal to move forward. Mylan offered \$75 in cash and 2.3 Mylan shares for each Perrigo share, which Perrigo had called inadequate.

The parties agreed that settlement “shall in no event be construed or deemed to be evidence of, or an admission or concession” of wrongdoing.

Pomerantz LLP and Bernstein Litowitz Berger & Grossmann LLP are co-lead counsel for the class. Greenbaum, Rowe, Smith & Davis LLP and Fried, Frank, Harris, Shriver & Jacobson LLP represent Perrigo. Siegel Teitelbaum & Evans LLP and Gibson, Dunn & Crutcher LLP represent Papa. Sullivan & Cromwell LLP represented former chief financial officer Judy Brown.

The case is *Roofer’s Pension Fund v. Papa*, D.N.J., No. 16-2805, motion 4/5/24 .

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April 9, 2024, 7:17 AM PDT

CVS Caremark Says Court Botched Drug Price Math in Fraud CaseBy [Daniel Seiden](#)**Documents**📄 [Motion](#)📄 [E.D. Pa. docket](#)

- CVS says 'erroneous' math assumptions made in FCA order
- Court improperly focused on drug price mixes, CVS says

Bloomberg Law News 2024-04-09T12:23:2003608327-04:00

CVS Caremark Says Court Botched Drug Price Math in Fraud Case

By Daniel Seiden 2024-04-09T10:17:55000-04:00

CVS says 'erroneous' math assumptions made in FCA order

Court improperly focused on drug price mixes, CVS says

CVS Caremark Corp. asked a federal district court to reconsider its decision that a whistleblower has demonstrated that CVS inaccurately reported prescription drug prices to Medicare Part D, a program under which private insurers share costs with the government.

Whistleblower Sarah Behnke alleges that CVS violated the False Claims Act by causing insurers to misrepresent to the government the amount spent on prescription drugs on behalf of Medicare beneficiaries, which caused Medicare to overpay subsidies. She says CVS, a pharmacy benefit manager, contracted with pharmacies to pay a fixed average price for drugs, but actually reported individual sale prices that were higher.

On March 25, Judge Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania granted partial summary judgment to Behnke on the issue of falsity under the FCA.

But the court's ruling that price reporting was inaccurate is based on "erroneous mathematical assumptions," CVS said in its motion for reconsideration filed Monday.

Correcting for the flawed assumptions shows that the record is unclear as to whether CVS set higher prices for Part D drugs and lower prices for commercial drugs, CVS said. The issue of falsity "at minimum" should be sent to the jury, it said.

CVS said, for example, that the court incorrectly assumed it could disregard how a different drug mix determines average prices for Part D drugs and commercial drugs.

If Part D beneficiaries make two purchases of Drug A and one purchase of Drug B—and commercial beneficiaries make one purchase of Drug A and two purchases of Drug B—the average price for the two drug mixes will be different, but the individual drug prices could be the same, CVS said.

CVS theoretically could have set the exact same prices for Part D drugs and commercial drugs and have a different average price for different drug mixes, the motion said.

CVS also said it respectfully disagreed with with other conclusions in the March 25 order, and reserved the right to challenge those conclusions at an appropriate time.

Behnke sued in 2014. The court ruled in April 2020 that the suit could proceed, stating that she alleged with sufficient detail that CVS's failure to satisfy its obligation to report lower prices negotiated with pharmacies caused Medicare to overpay \$25 million in 2012 and \$50 million in 2013.

Williams & Connolly LLP represents CVS. Berger Montague PC and Miller Shah LLP represent Behnke.

The case is United States ex rel. Behnke v. CVS Caremark Corp. , E.D. Pa., No. 2:14-cv-824, motion for partial reconsideration 4/8/24 .

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Google now accused in state court of illegally tracking Chrome users

DJ [dailyjournal.com/articles/377964-google-now-accused-in-state-court-of-illegally-tracking-chrome-users](https://www.dailyjournal.com/articles/377964-google-now-accused-in-state-court-of-illegally-tracking-chrome-users)

Data Privacy

Apr. 9, 2024

The lawsuits follow a similar class action in federal court that was settled, with Google agreeing to delete and/or remediate billions of data records.

SAN FRANCISCO -- Two law firms that helped settle a federal wiretapping class action against Google LLC last week took their battle to state court on Monday; filing 17 mass tort lawsuits in Santa Clara County Superior Court accusing the tech giant of illegally tracking Google Chrome users while they browsed the internet in "Incognito" mode.

Attorneys from Boies Schiller Flexner LLP and Morgan & Morgan, the firms leading the new wave of litigation in state court, were prominent members of the legal team for a similar class action in federal court that was settled on April 1 after Google agreed to "delete and/or remediate billions of data records that reflect class members' private browsing activities." Kelly et al vs Google LLC, 24CV434668 (Santa Clara Sup. Ct. Filed April 8, 2024).

That lawsuit failed to procure monetary damages for the plaintiffs after U.S. District Judge Yvonne Gonzales-Rogers ordered the plaintiffs to pursue injunctive relief only in a class certification order from December 2022. Brown v. Google 4:20-cv-03664 (N.D.Cal. Filed June 2, 2020).

An email from Google's press office Monday addressed the new accusations and provided a statement on the now-settled federal case, "These copycat complaints are meritless and we will defend ourselves vigorously. We are pleased to settle this lawsuit, which we always believed was meritless. The plaintiffs originally wanted \$5 billion and are receiving zero. We never associate data with users when they use Incognito mode. We are happy to delete old technical data that was never associated with an individual and was never used for any form of personalization."

The plaintiffs' attorneys from Boies Schiller Flexner are: David Boies, Mark C. Mao, Beko Richardson, Joshua M. Stein, and James Lee. The plaintiffs' attorneys from Morgan & Morgan are: John A. Yanchunis, Ryan J. McGee, and Michael F. Ram.

In the new state court complaints, the plaintiffs' attorneys claim that Google misrepresents its Incognito mode's true privacy apparatus and creates a false sense of security for users.

"Google has represented to Google account holders, including plaintiffs, that they are 'in control of what information [they] share with Google,' meaning that they have the power to limit what data Google tracks, collects, and shares with third parties," the attorneys wrote. "Google's representations were and continue to be false. Google unlawfully intercepted plaintiffs' private browsing communications to collect their personal and sensitive information, without disclosure or consent, including when they in Incognito mode visited non-Google websites without being signed into any Google account."

The number of lawsuits pending against Google in Santa Clara from Boies Schiller Flexner and Morgan & Morgan clients now totals 21 as Monday's batch of complaints joins four similar actions filed last week.

On Google's website, the company describes its privacy practices for Incognito mode and warns users, "While Incognito mode provides local privacy on your device, it does not affect how Google collects data when you use other products and services, as described in the Privacy Policy."

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Norfolk Southern agrees to pay \$600 million to settle Ohio derailment lawsuit

 [reuters.com/legal/norfolk-settle-ohio-derailment-class-action-lawsuit-600-mln-2024-04-09](https://www.reuters.com/legal/norfolk-settle-ohio-derailment-class-action-lawsuit-600-mln-2024-04-09)

David Shepardson, Clark Mindock

WASHINGTON, April 9 (Reuters) - U.S. railroad operator Norfolk Southern (NSC.N) , opens new tab has agreed to pay \$600 million to settle a class action lawsuit over a February 2023 East Palestine, Ohio train derailment that spilled toxic chemicals, according to the company and court documents.

The agreement in principle, which is still subject to court approval, would cover claims from residents and businesses in the city and impacted surrounding communities.

It will also provide compensation "for past, present and future personal injuries resulting from exposure to the chemicals involved", the lawyers bringing the action against Norfolk Southern said in a joint statement.

The train caught fire and released more than a million gallons of hazardous materials and pollutants, sparking concerns about U.S. rail safety.

Jayne Conroy, a lead attorney representing the class, said the proposed settlement is "much larger than any derailment settlement in the United States".

The agreement will resolve all class action claims within a 20-mile radius of the derailment and, for those residents who choose to participate, personal injury claims within a 10-mile radius, court documents show.

Item 1 of 5 General view of the site of the derailment of a train carrying hazardous waste, in East Palestine, Ohio, U.S., March 2, 2023. REUTERS/Alan Freed/File Photo

[1/5]General view of the site of the derailment of a train carrying hazardous waste, in East Palestine, Ohio, U.S., March 2, 2023. REUTERS/Alan Freed/File Photo Purchase Licensing Rights , opens new tab

Conroy estimated there are just under 100,000 class members who will be eligible to receive funds from the settlement, including up to 25,000 residents who live within 10 miles and another roughly 72,000 living within 20 miles of the crash site.

Norfolk Southern is not admitting liability or wrongdoing.

Some details still need to be finalized, including setting an allocation formula and how to efficiently process claims and distribute funds. The lawyers suing Norfolk Southern hope to get initial payments distributed by the end of 2024, they said.

Claims will consider factors including location relative to the derailment, household membership, the length of any displacement, and exposure to contaminants, the lawyers said.

Last year, Norfolk Southern agreed to compensate homeowners around East Palestine, Ohio who have had to sell their properties at a reduced value.

In addition to the class action, Norfolk Southern also faces lawsuits filed by shareholders, the state of Ohio and the U.S. Justice Department.

In May 2023, a U.S. Senate committee approved bipartisan rail safety legislation that tightens rules on trains carrying explosive substances like the Norfolk Southern-operated train, but further action has stalled.

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Reporting by David Shepardson and Clark Mindock in Washington and Abhinav Parmar in Bengaluru; Editing by Sriraj Kalluvila and Jan Harvey

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April 9, 2024, 7:39 AM PDT

Norfolk Southern to Pay \$600 Million to Settle Spill Case (2)

By Jef Feeley

Bloomberg Law News 2024-04-09T12:24:20672752089-04:00

Norfolk Southern to Pay \$600 Million to Settle Spill Case (2)

By Jef Feeley2024-04-09T10:39:25451-04:00

Norfolk Southern Corp. said it would pay \$600 million to settle lawsuits over its fiery train derailment in Ohio last year that spilled more than 1 million gallons of toxic chemicals and sickened residents.

The Atlanta-based railroad company said Tuesday its agreed to resolve consolidated legal claims pressed by as many as 500,000 residents, property owners and businesses in the East Palestine area over the disaster. The Feb. 3, 2023, derailment of freight train N32 released dangerous chemicals such as vinyl chloride, considered a carcinogen, and prompted an evacuation of local residents.

The derailment ranks among the most high-profile railroad disasters in years, drawing extensive news coverage, congressional inquiries, calls for new regulation and outrage from the public. More recently, the company has come under scrutiny from activist investor [Ancora Holdings Group](#) , which is seeking to replace Norfolk Southern’s leadership in part over its “tone-deaf response” to the East Palestine accident.

“This resolution comes shortly after the one-year anniversary of the disaster and will provide substantial compensation to all affected residents, property owners, employees and businesses,” lawyers representing victims of the derailment said in an emailed statement.

In a statement Tuesday, Norfolk Southern said the settlement resolves all class action claims in a 20-mile radius of the derailment and personal injury claims in a 10-mile radius of the disaster. It said the pact wasn’t an admission of liability.

Shares of Norfolk Southern were up about 1% in New York trading.

Separately, Norfolk on Tuesday reported preliminary first-quarter adjusted earnings of \$2.49 a share, falling short of the \$2.59 average of analyst estimates compiled by Bloomberg. Chief Executive Officer **Alan Shaw** said in a statement that results were hurt by “macroeconomic challenges” and a heavy reliance on international intermodal traffic. This quarter, the company expects as much as a \$100 million impact on revenue due to port disruptions related to the collapse of Baltimore’s Francis Scott Key Bridge.

Shortly after the Ohio train accident, Norfolk Southern launched a controlled burn of the chemicals to mitigate the explosion risk. East Palestine residents blamed the resulting cloud for headaches, rashes and increased risks of liver cancer and leukemia.

The accord doesn't resolve the [US Department of Justice](#)' suit accusing the rail company of violating the Clean Water Act, including "unlawfully polluting the nation's waterways," with the spill. The [state of Ohio](#) also has sued Norfolk Southern over what the state described as the "entirely avoidable" derailment. That suit is still pending, as well.

US District Judge Benita Pearson in Youngstown, Ohio, is overseeing the consolidated case and must give final approval to the \$600 million deal.

Last month, Pearson rejected Norfolk Southern's bid to have the case thrown out on the grounds the combined suits were preempted by the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, and other federal laws.

Under the Norfolk Southern accord, residents and business owners in a three-state area are eligible for settlement funds over their claims the shipper was negligent in setting up the train and created a public nuisance with the spill.

The case is In Re East Palestine Train Derailment, 23-cv-00242, US District Court, Northern District of Ohio.

(Adds details and context starting in second paragraph.)

--With assistance from **Richard Clough**.

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Peter Jeffrey, Anthony Aarons

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BUSINESS | AIRLINES

Boeing Engineer Says Company Used Shortcuts to Fix 787 Jets

Lawyers for Boeing employee say managers dismissed quality concerns; Boeing says issues were previously raised and addressed

By [Sharon Terlep](#) [Follow](#)

April 9, 2024 1:14 pm ET



A ceremonial presentation of a Qatar Airways Boeing 787 Dreamliner in the Czech Republic this year. Boeing delivered 73 Dreamliners last year, hitting its target to deliver 70 to 80. PHOTO: MICHAELA RIHOVA/ZUMA PRESS

A veteran Boeing engineer has filed a complaint with federal regulators alleging the company dismissed quality and safety concerns during production of its troubled 787 Dreamliner jets.

Lawyers for the engineer, Sam Salehpour, said Tuesday that Salehpour observed Boeing using shortcuts during the 787 assembly process that placed excessive stress on important joints and embedded drilling debris between joints on more than 1,000 planes. The errors, they say, reduce the plane's lifespan and could be difficult to detect.

Boeing, in a statement, said the claims are inaccurate and that the company is confident in the safety of the jets, which it says are subject to rigorous oversight from the Federal Aviation Administration.

“This analysis has validated that these issues do not present any safety concerns and the aircraft will maintain its service life over several decades,” the company said. “We continue to monitor these issues under established regulatory protocols and encourage all employees to speak up when issues arise.”

The FAA declined to comment on the case. “Voluntary reporting without fear of reprisal is a critical component in aviation safety,” an FAA spokesman said. “We thoroughly investigate all reports.”

The claims come as Boeing faces broader scrutiny over its quality control and manufacturing operations in the wake of a midair blowout of a door plug on an Alaska Airlines flight in January. That plane, a smaller 737 MAX, was built at Boeing’s Renton, Wash., factory.

The company has struggled for years with quality of the South Carolina-built 787 Dreamliner, popular among airlines and often used on long-haul international flights.

Deliveries of the plane were largely halted for nearly two years starting in 2020 amid various production and regulatory issues. Deliveries resumed in August 2022 and were halted again the following February for a few weeks over regulatory documentation issues.

The Dreamliner, which made its debut in 2011, has a largely carbon-composite frame that reduces fuel costs, making it more economical. Also setting the plane apart is a production process in which Boeing farmed out much of the work to a global network of suppliers, making it the first of the company’s planes to be designed largely by other companies.

Boeing delivered 73 Dreamliners last year, hitting its target to deliver 70 to 80.

Lawyers for Salehpour said he was involuntarily moved off the 787 program to the 777 program after raising his concerns. He was then threatened with termination after flagging issues on the 777 to his supervisors, they said.

“These problems are the direct result of Boeing’s decision in recent years to prioritize profits over safety, and a regulator in the FAA that has become too deferential to industry,” attorneys Debra Katz and Lisa Banks said in a statement.

Boeing said it prohibits retaliation and encourages employees to flag quality and safety issues.

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April 9, 2024, 10:42AM PDT

Boeing Shares Fall After Report on 787 Whistleblower Claims

- Boeing disputes claims that repair, test work was improper
- Shares are down more than 30% this year, worst on Dow Jones

By Siddharth Philip

(Bloomberg) --

Boeing Co. fell as much as 2.5% to its lowest in five months after the New York Times reported that the Federal Aviation Administration is investigating an engineer’s complaint about safety issues with its 787 Dreamliner aircraft.

The whistleblower, a Boeing employee who worked on the plane, alleged that sections of the 787’s fuselage were improperly fastened together in a way that could weaken the aircraft over time, and that repair work and testing was performed in the wrong fashion, the newspaper reported.

“These claims about the structural integrity of the 787 are inaccurate and do not represent the comprehensive work Boeing has done to ensure the quality and long-term safety of the aircraft,” the US planemaker said in a statement responding to the report. Company engineers are “completing exhaustive analysis to determine any long-term inspection and maintenance required, with oversight from the FAA,” it said.

The report threatens to intensify the scrutiny that Boeing is facing as it grapples with a crisis of confidence after a fuselage panel blew out on an almost-new 737 Max 9 jet on Jan. 5. While nobody on that flight was seriously hurt, the issue has put the spotlight on Boeing’s manufacturing and safety procedures and has led to a wholesale makeover of senior management.

‘Significant Fatigue’

Lawyers for Sam Salehpour, the whistleblower, said that Boeing displayed “major lapses in the company’s quality control process” while it addressed repair work on the 787. These included what the engineer called “shortcuts” during both the engineering and the testing stage of the repairs, according to a letter to FAA Administrator Michael Whitaker dated Jan. 19 by the whistleblower’s law firm, Katz Banks Kumin LLP in Washington.

https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SBOPJKT1UM0W?bc=W1siU2VhcmNoICYgQnJvd3NlliwiaHR0cH...

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Parts for Boeing Dreamliner 787 planes are seen on the production line

Photographer: Travis Dove/Bloomberg

The omission affects more than 1,000 787 aircraft in service, according to the letter, and can result in what was called "significant fatigue" in important airplane components, especially in joint areas where large fuselage barrels are connected, the letter said.

Boeing disputed those claims as inaccurate. The stock has lost 31% this year, the worst performance on the Dow Jones Industrial Average.

The 787 Dreamliner is Boeing's most advanced aircraft in service and uses large composite-material barrels for its fuselage. Assembly mishaps including flaws in how sections of the 787's carbon fiber frame were joined together caused deliveries of the aircraft to be largely shut down for the better part of two years earlier this decade.

Deliveries were allowed to resumed in 2022 after the FAA approved manufacturing changes to ensure the planes were built in accordance with safety standards. Boeing said on Tuesday that based on this analysis and any future inspections, the 787 will maintain its strength, durability and service life with Boeing saying the jet can safely operate for more than 30 years.

"Voluntary reporting without fear of reprisal is a critical component in aviation safety," the FAA said in a statement. "We strongly encourage everyone in the aviation industry to share information. We thoroughly investigate all reports."

(Updates with details of allegations from second paragraph.)

--With assistance from Julie Johnsson and Ryan Beene.

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Financial firms tout energy business after West Virginia restrictions

 [reuters.com/business/finance/west-virginia-treasurer-adds-four-finance-firms-esg-blacklist-2024-04-08](https://www.reuters.com/business/finance/west-virginia-treasurer-adds-four-finance-firms-esg-blacklist-2024-04-08)

Isla Binnie

Item 1 of 3 The logo for Citibank is seen on the trading floor at the New York Stock Exchange (NYSE) in Manhattan, New York City, U.S., August 3, 2021. REUTERS/Andrew Kelly/File Photo

[1/3]The logo for Citibank is seen on the trading floor at the New York Stock Exchange (NYSE) in Manhattan, New York City, U.S., August 3, 2021. REUTERS/Andrew Kelly/File Photo [Purchase Licensing Rights](#) , opens new tab

NEW YORK, April 8 (Reuters) - West Virginia has added Citi , HSBC (HSBA.L) , opens new tab and two other financial firms to a list of institutions that may be barred from some state business due to their energy finance policies, prompting three of them to assert their commitment to that industry.

The move was the latest flare-up in a bubbling dispute between Republican officials and Wall Street firms over use of environmental, social and governance (ESG) factors in banking and business.

West Virginia, a major energy-producing state, created the list in 2002, placing five firms on it at the time.

On Monday, West Virginia Treasurer Riley Moore also added TD Bank (TD.TO) , opens new tab and the Northern Trust Co (NTRS.O) , opens new tab to the list.

Moore's office says the list is for firms that "have publicly stated they will refuse, terminate or limit doing business with coal, oil or natural gas companies without a reasonable business purpose".

Citi said it was disappointed by the designation.

"Citi is not engaged in a boycott of energy companies as evidenced by the fact that we continue to lend to these companies and have substantial credit exposure to the industry," it said in a statement.

A Northern Trust spokesperson said the asset and wealth manager "does not restrict or prohibit investment in fossil fuel-based energy companies." The spokesperson said Northern Trust had around \$52 billion in investment exposure to companies in the traditional energy sector as of February 2024.

HSBC seeks "to work with - not boycott - energy companies," a U.S.-based spokesperson said via email. The bank expects to continue corporate lending and capital markets transaction support to "energy-based customers," the spokesperson continued.

TD Bank did not respond to a request for comment.

Financial firms also face pressure from the other side of the ESG debate, with environmental activists and investors pushing them to stop financing new projects in areas like oil and gas.

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Reporting by Isla Binnie; Editing by Leslie Adler, David Gregorio and Paul Simao

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

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April 8, 2024, 9:00 PM PDT
Archegos-ViacomCBS Suit Is a Dumb Money Reminder: Paul J. Davies
By Paul J. Davies
Opinion

Bloomberg Law News 2024-04-09T10:59:4597256967-04:00
Archegos-ViacomCBS Suit Is a Dumb Money Reminder: Paul J. Davies

By Paul J. Davies 2024-04-09T00:00:09272-04:00

Stock markets in 2020 and 2021 exhibited way more than their fair share of stupid. There was the incredible rally in shares of Hertz Global Holdings Inc. *after* the car-rental company had declared bankruptcy. Also, the memestock craze that drove an ailing games retailer, GameStop Corp., to wild highs, blew up a hedge fund and inspired the fabulous finance comedy *Dumb Money*.

Then there was Archegos, the family office/personal hedge fund of Bill Hwang, whose collapse inflicted more than \$10 billion of losses on the banks that had helped build his trades. The repercussions of this failure haven't finished: On Friday, a New York appeals court gave the go-ahead for investors in ViacomCBS Inc. to sue banks that underwrote nearly \$3 billion of share sales for the media company just days before they dumped billions of dollars' worth of its stock linked to trades by Archegos at the end of March 2021.

To find the culprit for some great wrongdoing you should follow the money. The amazing thing about the ViacomCBS-Archegos story is that pretty much everyone involved lost.

Morgan Stanley, Goldman Sachs Group Inc. and Wells Fargo & Co. are the focus of the lawsuit as they were involved in both the capital raising and the Archegos trades. Investors who bought new Viacom stock at \$85 a share less than a week before some of the banks that sold it to them were dumping the same company's shares for [less than \\$50 each](#) have a right to feel aggrieved. That doesn't mean they have a great chance of winning their case.



The suit is proceeding on the basis that there are glaring conflicts between what two parts of the same banks were doing such that somebody, somewhere could have known what was going on and that investors may have been misled. The banks' main defense is that the two sides of their banks are blocked from knowing what each other is up to: Investment bankers involved in helping a company issue new shares aren't allowed to talk to colleagues involved in trading the same shares in public markets, including those who look after big hedge fund clients.

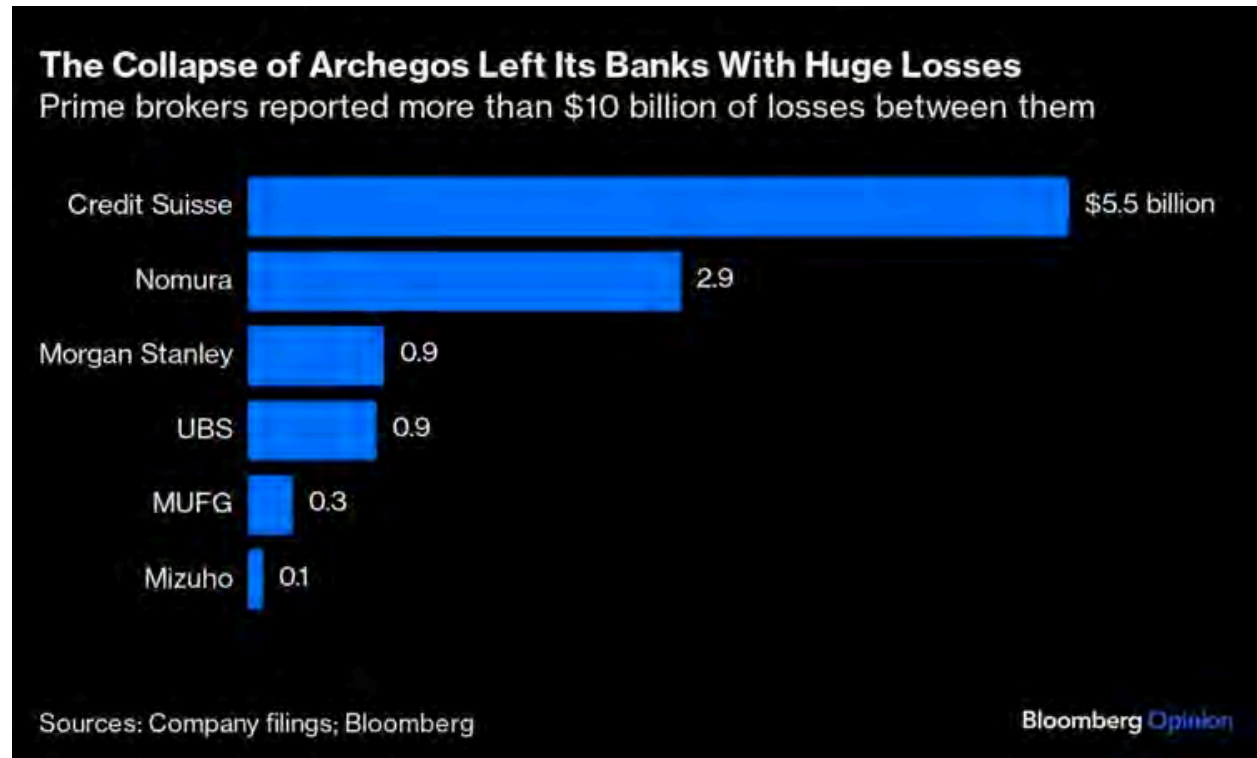
Regulators require these kinds of information walls to stop any potential market manipulation, front-running or insider trading. It's debatable whether they always work as they should; but typically, if some bank is getting in trouble for breaching this quarantine, it's because somebody has been spotted profiting unduly.

The ViacomCBS-Archegos saga has got to be among the dumbest of the Covid-19 era. Sure, people were stuck at home for long periods watching more shows and movies on streaming services, but with ViacomCBS playing catchup to leading subscription services like Netflix Inc. its stock somehow rallied 175% in the first quarter of 2021, leading the S&P 500.

For the company's executives, the opportunity to raise extra funding to invest in broadcast rights and better services was a no brainer. But what no one had figured out, apparently, was that the fabulous rise in ViacomCBS stock had been driven predominantly by one buyer – Archegos. Even better, it was the announcement of the \$3 billion capital raise in March 2021 that caused ViacomCBS's shares to start falling, leading the banks that had engineered Archegos's leveraged bets on the stock to start asking the fund for margin cash that it didn't have, resulting in the collapse of all of its trades. ViacomCBS stock lost almost all of its 2021 gains in just two weeks.

There have been extensive post-mortems covering how Archegos kept its massive positions in ViacomCBS and nine other stocks hidden from the group of banks involved in constructing its trades. But the thing I still don't get is why some of those banks would have doubled up on the same stock risk, and at such scale. Archegos's bets were mostly built through swap trades that meant the banks owned the stock and gave the fund its exposure through derivatives. In underwriting the new share sales, Morgan Stanley and Goldman Sachs then took further big exposures to the same stock by committing to buy it from the company, with Wells Fargo among banks playing a more junior role. Obviously, the aim was offload the shares to investors for a quick profit.

Creating large swap trades for hedge funds and underwriting share sales by companies are different kinds of exposure undertaken by different parts of a bank, but in this case the collateral is exactly the same - ViacomCBS shares - and the share sale directly affects the swap trades. Banks should be aware of the risks they're taking across their books, especially when their exposures interact in ways that increase their own chances of suffering a loss.



If another stock had kicked off the Archegos collapse before banks had sold the ViacomCBS stock they had committed to buy in their underwriting, their losses would have been even greater. Goldman Sachs and Wells Fargo a [voided losses](#) unwinding Archegos trades, but Morgan Stanley lost almost \$1 billion.

Risk departments should be able to tell investment bankers they can't underwrite a certain deal without giving them a detailed explanation. I don't think you have to breach any information walls to control bank-wide exposures. After 2008, somebody somewhere is meant to know at least the risks that the right hand and left hand are taking. Anything else is just dumb.

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Ohio consumer watchdog blasts AEP rate hike

ohiocapitaljournal.com/2024/04/09/ohio-consumer-watchdog-blasts-aep-rate-hike

By Marty Schladen

April 9, 2024



The AEP headquarters in Columbus, Ohio. The utility's disconnection rate was more than twice that of other Ohio utilities over the past year. (Credit: Creative Commons.)

Correction: The electric security plan that the Public Utilities Commission of Ohio approved last week will allow AEP to increase customer rates by up to \$8 a month by 2028. The original version of this story contained incorrect information. It's been updated.

The Public Utilities Commission of Ohio last week approved yet another rate increase to distribute electricity without requiring a big utility to go through a rigorous process to determine whether it's needed.

The Office of Ohio's Consumers' Counsel — the state's official watchdog — said the rate hike is improper. Meanwhile, the PUCO — which has been mired in scandal — said the changes are justified and will actually save some customers money.

The PUCO last Wednesday approved an "electric security plan" that the watchdog said will allow AEP to charge an extra \$8 a month by 2028. It follows an increase the regulator allowed late last month that would add \$10 in monthly distribution charges to the typical customer's bill.

The most recent charge comes as part of a plan that “will serve to improve the service quality and reliability of the grid across AEP Ohio’s service territory and will reduce costs for AEP SSO customers,” PUCO Chair Jenifer French said in a statement. “Incentivizing off-peak electric vehicle charging, smart thermostat programs, and customer and community assistance programs are exciting opportunities for Ohio consumers.”

However, the consumers’ counsel said it’s just another one-sided deal that is allowing a big Ohio utility to profit at consumers’ expense.

“Under AEP’s electric security plan there is much security for AEP and little for residential consumers,” Consumers’ Counsel Maureen Willis said in a statement. “Such plans, like AEP’s billion-dollar security plan, favor utilities over consumers. AEP’s residential consumers are hurting with the highest disconnection rates in the state.”

Among the watchdog’s specific criticisms: The scheme doesn’t “fully demonstrate how its billion-dollar plan will improve reliability,” and it “lacks transparency and accountability.”

In its regulatory filings, the Consumers’ Counsel warned that the extra billion dollars the latest security plan would allow AEP to raise by 2028 would cause “rate shock” for customers. It said that amount should be lowered to \$717 million.

But the PUCO decided that the larger increase was needed to fulfill a 2021 survey’s finding that “AEP Ohio’s customers want power to be restored quickly in the event of an outage and power outages to be kept to a minimum.”

As for the claim that AEP customers will save with the new electric security plan, the Consumers’ Counsel countered that it’s important to look at the details. Those savings would be enjoyed by fewer than half of AEP customers who participate in a competitive-supply program, and there’s no guarantee those savings will last, the watchdog said.

Another bone of contention is one of long-standing — that the utility wasn’t required to go through a “rate case” before the increase was granted. That’s a more rigorous process intended to ensure that monopoly utilities don’t benefit unfairly.

“In a standard rate case, a utility opens its books for an objective and comprehensive look at how much it costs to deliver a safe and reliable supply of energy and yet allows the utility the opportunity to earn a fair profit,” Consumers’ Counsel spokesman JP Blackwood said Friday in an email. “Rate cases also provide some basic consumer protections that are absent from electric security plans. Under electric distribution rate cases, the expenses must be incurred during a defined “test year.” Investment is measured as of a specific date (date certain). Charges are cost based and must be shown to be necessary to provide utility service to consumers.”

Instead of requiring AEP to undergo a rate case prior to allowing the rate hike, the electric security plan approved by the PUCO delayed one for more than two years — to June 1, 2026.

Blackwood said that a 2008 law allowed electric security plans, but now a bill filed by state Sen. Mark Romanchuk, R-Ontario, would prohibit them.

“Electric security plans allow utilities to charge consumers for costly ‘riders,’” the Consumers’ Counsel said January in written testimony in support of Romanchuk’s proposal, Senate Bill 143. “Riders are add-on charges that allow utilities to cherry pick expenses and investments for expedited recovery with limited review. That ratemaking is an exception to Ohio rate case law that otherwise requires utility expenses, revenues, plant, and profits to be considered together in a case. Standard ratemaking does not allow for such riders. Under an electric security plan, there is almost no limitation on the type of riders the electric utilities can ask for.”

The use of riders and the avoidance of rate cases both played roles in the massive FirstEnergy bribery and money laundering scandal. An audit of a “distribution modernization” rider was conducted after House Speaker Larry Householder, R-Glenford, and four others were arrested in July 2020 in a scandal in which \$61 million in bribes were paid to purchase a \$1.3 billion bailout.

FirstEnergy collected \$465 million under the distribution rider before the Ohio Supreme Court ruled that it was illegal. Because of the way it and other riders are structured by the PUCO, there’s no way to refund them to customers if they’re later declared illegal.

Sam Randazzo, then the PUCO chairman, in early 2020 led the commission in stopping an audit of the funds raised by the distribution rider. Randazzo resigned the following November after the FBI searched his German Village condo and FirstEnergy said in a deferred prosecution agreement that it paid Randazzo a \$4.3 million bribe as incoming governor Mike DeWine was nominating him to head up the regulatory agency.

Randazzo now faces indictments in state and federal court over his relationship with FirstEnergy. When the audit he helped stop was finally completed, investigators couldn’t determine what the proceeds of the FirstEnergy rider were spent on — or if they were used to help pay massive bribes in the bailout scandal.

Randazzo is accused of helping draft, pass and protect the bailout in exchange for the millions he was paid by FirstEnergy.

He also is accused of doing another improper favor for FirstEnergy by canceling a 2024 rate case that FirstEnergy executives feared would force them to lower rates, which would dent stock prices and take a bite out of their own portfolios. That rate case has

subsequently been reinstated.

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News from Bloomberg Terminal

April 8, 2024, 11:19 AM PDT

Public Markets Are the New Private Markets

By Matt Levine

(Bloomberg Opinion) --

Destiny

A not uncommon situation is: You are an employee of a hot tech startup, you own stock in your startup, but you can't sell it. One reason that you might not be able to sell it is that the company isn't public yet, so the shares aren't listed on the stock exchange and there is no easy way to sell them. But that problem can be overcome: People want to buy the stocks of hot private startups, there are online marketplaces and brokers looking for shares, and probably with a bit of effort you could find a buyer.

The other reason that you might not be able to sell your stock is that the company doesn't let you. It is pretty common for hot private tech startups to limit the sale of their stock: The company might have transfer restrictions ("you can't sell your stock without our permission"), or a right of first refusal (ROFR, "you can't sell your stock unless you first offer to sell it back to us at the same price"), or both. Of course these transfer restrictions will go away when the company goes public, but you don't know when that will be, and it could be a long wait. 1 And so even if you find a buyer, you can't sell to her without going to the company for permission. And the company might well say no: Those restrictions exist so that the company can control its shareholder base, and it doesn't want just anyone to own its stock. It wants you to own the stock.

But you might prefer money: Perhaps your startup has been private for a long time, its valuation is high, you'd like a new house, and you'd like to cash out a bit now. Often, these days, mature private tech startups recognize this problem and periodically buy back stock from employees. But perhaps your company doesn't do that, or it doesn't do it at the size or price you want, or it's between buybacks and you want money now.

Meanwhile lots of people want your stock: It's a hot startup and there's plenty of demand. You'd think there'd be a trade. The trade is:

A buyer comes to you and says "I really want your stock and I'll give you \$50 per share."

You say "that sounds great, but there are transfer restrictions and I can't sell until we go public."

The buyer says: "Sure, sure, but stock is just a promise of future cash flows anyway; it's not like I need the stock certificate today. I just want to pay today's *price* for the stock, because I think it will go up. Tell you what: I'll give you \$50 today, and when the company *does* go public, *then* you give me the shares." 2

You say "sure," she gives you the \$50, and you write a little contract saying "IOU: startup shares."

Two years later (or whenever), the company goes public, 3 the transfer restrictions lift, you get your shares, and you deliver them to her. If the stock is at \$400, you feel a twinge of regret: You're giving her stock worth \$400 today, and all you got was \$50 two years ago.

This is called a "forward contract." 4 There are some risks:

1. If your company has transfer restrictions, they *probably cover forward contracts*. They won't say "you can't sell your stock"; they will say something more complicated like "you can't sell, pledge, assign, agree to sell, enter a derivative contract to sell, etc., etc." your stock. The point of a forward contract is not that it is *allowed* by your company; the point is that you can sign the contract now, and deliver the stock later, without your company *knowing about it*.
2. But say that the company goes public at \$400 per share, two years after you did the forward contract. You have all this stock worth \$400 per share. The buyer comes to you and says "hey, remember me? We had a contract? I paid you \$50 per share for your stock? I'd like the stock now." You feel a twinge of regret, but might you also feel a twinge of ... amnesia? Litigiousness? "I don't remember any contract," you might tell the buyer. "I'm pretty sure it's invalid anyway," you might add, "because the company's transfer restrictions cover forward contracts. See you in court!"
3. Say that the company goes public at \$400 per share. The *company* now has all this extra cash, and this valuable stock. The *company* gets wind of your forward contract. It calls you and/or the buyer and says "hey, it seems like you agreed to trade this stock at \$50 two years ago. Well, we had a right of first refusal, and we are now exercising it, so you have to sell *us* the stock. Today, for \$50." Your buyer – who paid \$50 two years ago as a bet that the company would be far more valuable when it went public, and was right – now has to give the stock back and get back only her \$50.

One more point about forward contracts. A forward contract is, in essence, a placeholder for stock, an empty box that will one day hold a share of stock of the underlying startup. The buyer paid money for it, because it is desirable. She can *sell* it, too. If she no longer likes the company, or if the company's valuation has gone up and she wants to take profits, there's probably some *other* investor who wants exposure to a hot startup and who will pay her \$60 or whatever for that forward. Maybe that investor will turn around and sell it, too. In two years, when your company goes public, you might get a call from a total stranger saying "hey, you don't know me, but I bought a forward from someone who bought it from someone who bought it from someone who bought it from someone who bought it from you, so please send me the stock." Your twinge of amnesia might be strong.

At the New York Times last Friday, Erin Griffith had a fun article about Destiny Tech100, a publicly traded closed-end fund that invests in private tech startups:

It is offering a publicly traded fund that contains shares of 23 private tech companies including Stripe, SpaceX, OpenAI, Discord and Epic Games. The fund, which began trading on the New York Stock Exchange last week, plans to expand its holdings to include stock in 100 start-ups.

Sohail Prasad, the chief executive of Destiny XYZ, the parent company of the fund, said his goal was to let anyone own part of the tech industry's top private companies. ...

Mr. Prasad and a team of five deal makers have used their relationships to get access to the start-up shares that Destiny has bought so far. Private companies can be picky about whom they let own their shares. But as they stay private for longer, their employees and early investors can become antsy to cash out. The most valuable companies have held regular "tender offers" that allow employees to sell their shares, which is one way Destiny Tech100 buys stock.

It is a fascinating model: It trades publicly on the New York Stock Exchange (under the ticker DXYZ), but its investments are private and illiquid. It computes its net asset value quarterly, and its most recent computation lists its net asset value per share at \$4.84. It went public last month with a reference price of \$4.84, but started trading at \$8.25 and went up from there; it closed on Friday at \$59.20, and it was trading around \$80 at noon today. It has a net asset value – its computation of the fair value of its underlying startup stakes – of about \$54 million, and a market capitalization – the value that the market places on its shares – of about \$875 million.

Somebody is wrong! One way to model this is that there is \$875 million of demand from regular public investors to own shares in hot private startups, and so far only about \$54 million of supply. But if each of this fund's holdings goes up 1,000% by the time they go public, people who bought into the fund today will *lose money*. Weird!

The other weird thing is, as Griffith reports:

The fund has also bought shares in Stripe and Plaid, a financial technology provider, through “forward contracts.” In these agreements, start-up employees can get cash by agreeing to transfer their company shares to an investor when the company goes public or sells.

The contracts are controversial. Stripe has said that it forbids its current and former employees to strike such deals and that any forward contract is void. Mr. Prasad said his fund was confident the deals were legal.

Here is Stripe’s threat:

To be clear, transactions in which a Stripe [employee] receives payment now and promises to transfer shares directly or indirectly in the future are subject to ROFRs and transfer restrictions. This means, among other things, that at the time the transaction is “closed out” Stripe is entitled to step in and repurchase the shares that are subject to the contract at the original price paid by the buyer. We intend to vigorously enforce our ROFR rights with respect to all such contracts.

To be fair, Destiny Tech100 lists its investment in Stripe forward contracts as having a cost of about \$3.5 million and a fair value (as of last June) of about \$1 million: It bought into Stripe forwards at the peak, Stripe’s valuation has fallen, and at this point it would be *great* for the fund if Stripe tried to buy back its shares at the original price it paid. Still the fund’s forward-related risk factors are a fun read:

Should counterparties breach their agreement inadvertently, by operation of law, intentionally, or fraudulently, it could affect our performance. ...

In cases where we purchase a forward contract through a secondary marketplace, we may have no direct relationship with, or right to contact, enforce rights against, or obtain personal information or contact information concerning the counterparty(ies). ...

Should the portfolio company object to the existence of the forward contract, it may take any number of steps to discourage or obstruct the transactions, including claiming that the counterparty transactions violate the portfolio company’s agreements, claiming causes of action against counterparties or us, defensive measures intended to discourage counterparties from selling the portfolio company’s securities to us, refusing to accept or process securities transfers, or claiming rights to rescind our transactions or trigger rights of refusal to purchase the portfolio company’s securities involved in our transactions.

It seems to me that the safest way for a forward contract to work is for the company *not to know about it*: Once it goes public, the seller just delivers the unrestricted stock and never tells the company. But once you put it in a prospectus, the company knows!

SEC v. crypto

A pretty standard story in crypto is:

1. Crypto in general, and Crypto Project X in particular, are *building something*. Each crypto project is working to achieve some vision of the future of finance or communications or media or wireless networking or whatever, and crypto collectively – the aggregate of those projects – is moving toward some loosely shared vision of a future of decentralized ownership, censorship resistance, etc.
2. By buying tokens of Crypto Project X, you are betting on the success of whatever they are building: If the thing succeeds, the tokens will be worth more than you paid for them.
3. *Probably* the people building Crypto Project X are *selling* its tokens to raise money to build the thing, or doing something that rhymes with that. 5

This is not the only story in crypto; there is another common story that goes like “someone created some tokens as a joke and now they are worth billions of dollars.” But the one I laid out above is important. For one thing, it describes a lot of big crypto projects. Also, though, it would be hard to *care* about crypto if it *wasn’t* trying to build something. “Dogecoin is a joke and if you buy it it might go up” is, I think, a very interesting fact about modern finance, but you’d feel silly devoting your life to it. *Read Write Own: Building the Next Era of the Internet* is the name of venture capitalist Chris Dixon’s book about crypto, and if you are a venture capitalist “the next era of the internet” is a better thing to back than “a joke about a dog.”

The problem with this story, though, is that Crypto Project X's tokens sure sound like they are *securities* under US law. A security is "an investment of money in a common enterprise with profits to come solely from the efforts of others," and what I laid out above – Crypto Project X is a group of people building a thing, they raise money by selling tokens, and you buy tokens hoping to make money if their thing succeeds – is that.

US securities law exists mostly to prevent swindling in the sale of securities. This creates several problems for crypto:

1. Some crypto projects are in fact swindles, and securities law is bad for them.
2. The main way that the law prevents swindles is by requiring disclosure by securities issuers, and the disclosure rules are not well adapted to crypto, meaning that even a non-swindle crypto project will have a hard time registering its tokens and complying with US law.
3. The law empowers the US Securities and Exchange Commission to regulate securities, and the SEC *hates* crypto and does not do anything to make registration easy or even possible.
4. Most critically, perhaps, the law also regulates securities *exchanges*, and it is hard for a crypto exchange to register with the SEC as a securities exchange. So the SEC can go after crypto exchanges for illegally listing crypto tokens that are securities.

And the SEC has done that, suing Coinbase Global Inc. and other crypto exchanges for operating illegal securities exchanges.

This really is an existential problem for crypto in the US, and the industry's response has been to argue that these crypto tokens are not securities. The leading form of this argument goes something like this:

A security is an "investment contract," and there is no *contract* between you and Crypto Project X. Sure they say they will build the project, and you expect them to, and that's why you invested. But you never signed a contract; if they just run off with your money you can't sue. Therefore, not a security.

Even if there *is* some sort of contractual arrangement between you and Crypto Project X, the *token* is not a security. The security is something like "the token plus the other arrangements and expectations you have with Crypto Project X." But the token is not the contract; the token is "little more than [an] alphanumeric cryptographic sequence." Maybe Crypto Project X issued a security, but *secondary market* trading in the token – people buying and selling it on an exchange – is not a securities transaction, so crypto exchanges are not securities exchanges.

I have never found these arguments especially persuasive; to me, these tokens are analogous to stock in companies, and secondary trading in Meta Platforms Inc. stock is obviously a securities transaction even though none of the money goes to Meta. (A share of stock is also, trivially, "little more than an alphanumeric cryptographic sequence," an entry in a computer database: It's what the database entry *represents* that makes it a security.)

But last July a federal judge in New York was persuaded, issuing a puzzling ruling in the SEC's case against Ripple Labs Inc. finding that Ripple's XRP token is mostly not a security. I thought that perhaps I had it all wrong, and crypto tokens really are a get-out-of-securities-law-free card: You can raise money for your business by selling quasi-stock and calling it a token, you can do as much fraud as you want, and the SEC can't do anything about it.

Since then, though, the SEC has been on a winning streak against crypto. Shortly after the Ripple decision, another New York federal judge issued a decision in the SEC's case against Terraform Labs and its founder Do Kwon, finding, no, of course Terra's tokens are securities. And last month, a different New York federal judge ruled that the SEC's case against Coinbase can go forward: "The 'crypto' nomenclature may be of recent vintage," she wrote, "but the challenged transactions fall comfortably within the framework that courts have used to identify securities for nearly eighty years."

Here is her opinion, which strikes me as thorough and straightforward, and which surveys several other cases reaching similar results, more or less ignoring the Ripple decision. Coinbase had argued that crypto tokens were like Beanie Babies: speculative investments, but not speculative investments *in a business*. The judge rejected that argument, writing that "unlike in the transaction of commodities or collectibles (including the Beanie Babies discussed during the oral argument), which may be independently consumed or used, a crypto-asset is necessarily intermingled with its digital network – a network without which no token can exist."

And then last week the SEC won its jury trial against Terra. The Wall Street Journal reports:

After a two-week civil trial, a New York jury agreed with the SEC's claims that Kwon and his firm, Terraform Labs, defrauded investors by misleading them about the stability of TerraUSD, a so-called stablecoin designed to maintain a value of \$1. Kwon had claimed that TerraUSD would "self-heal" if its value ever dropped below the peg.

The decision was the latest in a series of federal court wins bolstering regulators' efforts to force the freewheeling industry to comply with the same laws that govern the stock and bond markets.

In some sense, the Terra result was obvious once the judge allowed the case to go forward: If you think that Terra's tokens were *securities*, then *of course* you are going to find that Terra did *securities fraud*. This is in part because there is a lot of evidence that Kwon and Terraform were lying to investors about important facts of the Terra ecosystem, but there is also the more straightforward fact that Terra crashed and incinerated a lot of investor money. If (1) you call a thing a "stablecoin," (2) its value drops to \$0.026 and (3) it is a security, then (4) you're going to get sued for securities fraud and (5) you are going to lose.

Or as SEC Enforcement Director Gurbir Grewal put it in a statement after the verdict:

Through these deceptions, the defendants caused devastating losses for investors and wiped out tens of billions of market value nearly overnight. For all of crypto's promises, the lack of registration and compliance have very real consequences for real people.

Last year, as the SEC accelerated its crypto crackdown, I wrote about its timing. It seemed to me that cracking down on crypto in the wake of a crypto collapse was arguably bad regulation (better to prevent the collapse!) but good realpolitik:

In 2021, if the SEC thought your token was a security and you thought it wasn't, you could go to court to argue about it, and try to convince a judge that the SEC was wrong on the law. You might win, who knows. ... But in 2023, the SEC can go to court and say to a judge "we need to protect investors from unregistered crypto securities offerings, because *look at how many of them are frauds that went bankrupt*," and while that *legal* argument is no better than it was in 2021, it is much more *persuasive* now. At some emotional level the debate is "we need to stop fraudsters" versus "we need to allow for innovation," and the fraud/innovation balance has shifted a lot in recent months.

Well, now crypto is booming again, but the memory of all those frauds is still pretty fresh, and the SEC has notched some important wins.

Shadow trading

Elsewhere in SEC wins, Bloomberg's Rachel Graf reported Friday:

The US Securities and Exchange Commission won a jury verdict in its ground-breaking insider-trading case that seeks to bar employees from using non-public information about their own company to place bets on rival stocks.

The closely watched two-week San Francisco civil trial was the regulator's first enforcement action targeting so-called shadow trading, a widespread phenomenon that researchers say has gone largely unchecked.

Grewal put out a statement about that one too:

"As we've said all along, there was nothing novel about this matter, and the jury agreed: this was insider trading, pure and simple. Defendant [Matthew Panuwat] used highly confidential information about an impending announcement of the acquisition of biopharmaceutical company Medivation, Inc., the company where he worked, by Pfizer Inc. to trade ahead of the news for his own enrichment. Rather than buying the securities of Medivation, however, Panuwat used his employer's confidential information to acquire a large stake in call options of another comparable public company, Incyte Corporation, whose share price increased materially on the important news."

We have talked about the Panuwat case before, because there was *obviously* something novel about it: It's the first shadow trading enforcement case. Every other insider trading case has had the form "person gets inside information about Company X and trades Company X stock (or options)"; this one is "person gets inside information about Company X and trades *Company Y* stock (actually options)." Where Company X and Company Y are closely correlated competitors, it *makes sense* that the SEC thought this was illegal insider trading, and they won. But it was a novel argument.

Incidentally, it's hard to know how important the Panuwat result is. One possible interpretation is "shadow trading is illegal now," but that might go too far. (Not legal advice!) The way US insider trading law works, broadly speaking, is that it is illegal to trade stock using material nonpublic information in breach of some duty to someone. We have talked before about how important it was to this case that Medivation had a broad anti-insider-trading policy that specifically mentioned trading in "the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company." Under that policy, Panuwat had a contractual duty to Medivation not to use his inside information about Medivation to trade the stocks of its competitors. But not every company has a policy like that; some have policies saying, for instance, "don't use inside information to trade our stock," without mentioning competitors. For all I know some companies might *encourage* their executives to trade competitors' stocks. The meaning of Panuwat might be something like "shadow trading is illegal if your company tells you it is."

Trader pay

My model of investment banks is that they are socialist collectives run for the benefit of their employees, but I confess that that is an outdated model. Once upon a time it was more or less literally true – the big investment banks were once private partnerships – and even as public companies investment banks have sometimes had a tendency to run themselves for the enrichment of their employees rather than of shareholders. But the industry is not what it used to be, banks care more about their shareholders now, and these days some of the big investment banks seem positively skeptical of socialism.

For instance, the Financial Times reports:

Wall Street banks have warned that their next wave of hiring in France may be stunted without restrictions on dismissal costs for highly paid traders, a flagship measure that has been left out of a reform package intended to bolster Paris as a financial centre. ...

Redundancy payouts to traders earning more than €1mn a year in Paris can end up being more than five times that of London, although there is less of a difference between France and the rest of Europe. ...

The idea under review would be to put more specific limits on payouts to traders so they don't exceed a threshold of about half a million euros. ...

Alexandre Holroyd, a lawmaker who is leading the reform package, said France's labour rules were meant to be protective, but had never been designed to overcompensate traders.

"A trading floor is somewhere where there is a lot of volatility and variations in headcount," Holroyd said. "It's the flipside of being paid sums of money that are completely disproportionate to more than 99 per cent of people."

If you hire a trader and pay her more than a million euros a year, and she doesn't work out, you'd like to be able to get rid of her without paying her millions more. On the other hand, if you *are* a trader getting paid more than a million euros a year, and your bank decides to get rid of you, *you'd* like to get paid millions more, no? Seems nicer.

Also there are risk-management considerations; Byrne Hobart notes:

High legally-mandated payouts for firing amount to a put option on their compensation. If they get a free put option, their incentive is to take more risk. Part of what banks are worried about is what it costs to fire an underperforming trader, but another thing it's prudent for them to worry about is how much it pays for a trader to underperform.

This is true as a matter of options math, but I wonder how true it is sociologically. Are French traders notably riskier than British or American ones? (There are tantalizing examples.) There is some baseline level of risk that you have to take as a trader to *avoid* getting fired, and perhaps if getting fired is cushy enough your reaction will be laziness rather than risk-taking.

Elsewhere, here is a claim that “the hedge fund industry’s biggest stars are looking beyond money when they plot their career moves, according to IDW Group founder and Chief Executive Officer Ilana Weinstein”:

After a year or two of guaranteed compensation in a new role, “you’re out and you’re on your own, so to speak, and you need to put up the goods,” Weinstein said Friday in a Bloomberg Television interview. “The question becomes: Are you really set up for success, how do you develop, and what are the resources the firm has to get you there?” ...

“Will I be better by virtue of making this move, developmentally – will I be the best version of myself?” she said. “The second question is, ‘Is there more opportunity at this place that I’m going to, relative to where I’m at?’”

I feel like I’d probably be a better version with myself with more money.

Things happen

Bank Valuations at Stake as EU Splits With Wall Street Over ESG. Steelworkers Push Back Against \$14 Billion Deal for U.S. Steel as Vote Looms. Vitrol posts \$13bn profits in second consecutive year of bumper results. How Aston Martin Outran a Billion-Dollar Debt Time Bomb. TSMC Gets \$11.6 Billion in US Grants, Loans for Three Chip Fabs. Jersey Mike’s Considers Sale. Wall Street Is Searching for AI Winners Across Emerging Markets. Chinese State Bank Asks Court to Liquidate Developer Shima. ZIG Debuts in Zimbabwe’s Sixth Effort at a Revamped Currency. Brazil’s Top Justice Opens Criminal Inquiry Against Elon Musk. The Best Summer Camps for Future Tech Moguls. Retiree loses \$1 million in new timeshare fraud by Mexican drug cartel known for cannibalism. I’m verified on Twitter again.

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1. There are some situations where public companies might have transfer restrictions or ROFRs on some of their shares, but generally not permanent restrictions for every employee. Employees might find themselves locked up for a few months after the initial public offering, and any new grant of shares might be restricted for some period, but eventually they’ll have freely tradable stock.
2. Realistically she’d probably pay you less than \$50, to account for the risk and delay and complexity.
3. Or the company is acquired, you get \$20 per share in cash, and the forward contract requires you to pay her the \$20. Or the company fails, the stock is worth \$0, and the forward contract doesn’t matter.
4. Generically, a “forward contract” often means a contract in which (1) I agree to pay you \$50 in a year and (2) you agree to deliver me the stock in a year. The thing in the text is a “prepaid forward contract,” in which I pay you now and you deliver the stock later. But in tech-startup employee liquidity usage, a “forward contract” is normally prepaid, because you want the money now.
5. E.g., they are building the thing on the cheap without raising money, but they *have* a lot of the tokens, and if the thing succeeds those tokens will make them rich.

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April 8, 2024, 1:20 PM PDT

Trump Media Spirals as 36% Dive From Debut Erases Billions (1)

By Bailey Lipschultz

- DJT has struggled to retain the attention of retail traders
- Paper windfall for Donald Trump drops by \$1.6 billion in weeks

Bloomberg Law News 2024-04-09T09:55:18489853861-04:00

Trump Media Spirals as 36% Dive From Debut Erases Billions (1)

By Bailey Lipschultz2024-04-08T16:20:03821-04:00

- DJT has struggled to retain the attention of retail traders
- Paper windfall for Donald Trump drops by \$1.6 billion in weeks

Trump Media & Technology Group Corp. has wiped out some \$2.8 billion in value as some of the retail traders who frantically bid up the stock last month began to sell.

The social media company that's mostly owned by former president Donald Trump has slumped 36% from its close on March 26. The stock fell below the level it was trading at on March 22, when investors approved its tie-up with the blank-check firm, Digital World Acquisition Corp.

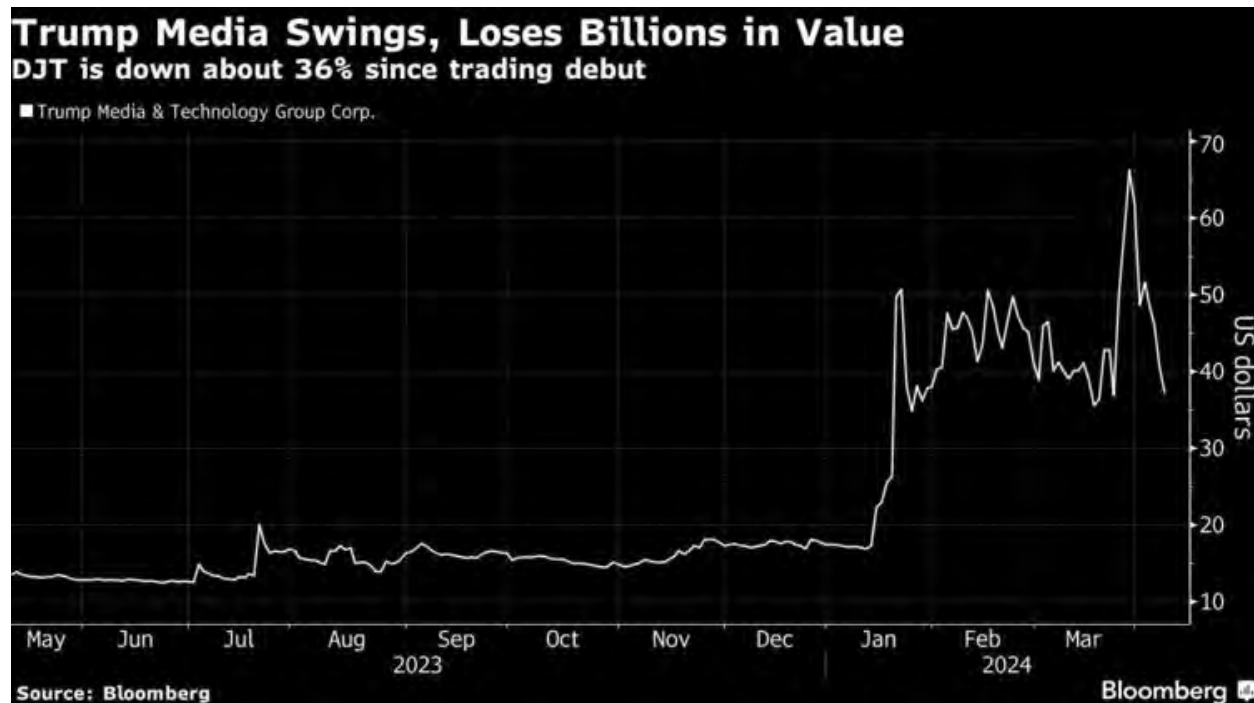


WATCH: Former President Donald Trump's social media startup goes public.

Source: Bloomberg

Trump Media, which owns Truth Social, had soared in its first days as a public company after the private firm merged with DWAC, what the shell company was known as.

But the stock, which trades under Trump's initials DJT, has struggled to retain the attention of individual investors who bought shares as a way to support the former president in his 2024 reelection campaign.



As the stock slides, the paper windfall for Trump himself has dropped some \$1.6 billion to roughly \$2.9 billion. For Trump to benefit from the paper wealth, he'll have to wait six months before he can sell shares under a lock-up agreement.

Trump Media began trading amid a torrent of legal woes facing the former president, including four criminal prosecutions. He's one week away from the start of his first criminal trial in Manhattan, in which he's accused of falsifying business records to conceal a hush money payment to a porn star before the 2016 election. He's also due to be deposed soon in a civil suit against him and Trump Media by two co-founders who claim Trump tried to dilute their shares before the merger.

Read more: [Why Trump's Social Media Firm Is Awash in Legal Cases: QuickTake](#)

Trump Media has a market capitalization of roughly \$5 billion even after the latest drop despite generating just \$4.1 million in revenue last year. That heightened valuation has made it costly and risky to bet against the company, with short sellers facing annual financing costs of more than 450% to borrow the shares, according to brokerages.

Read more: [Trump Media Is Now the Most Expensive US Stock to Bet Against](#)

The fallout has shades of past meme stocks like GameStop Corp. and other so-called de-SPACs, companies that went public through blank-check deals, which saw initial swings in their stock performance before falling.

More than one-fifth of the nearly 500 SPAC deals that have closed since 2019 are trading below \$1 each, representing a greater than 90% plunge. And dozens of them at times saw share prices surge in retail trader-fueled frenzies, meaning losses for some are far greater.

(Updates with share movement throughout, adds legal context in sixth paragraph.)

--With assistance from Erik Larson.

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Securities Law News

April 8, 2024, 10:06 AM PDT

Trump Media's Accounting Firm Has Audit Deficiency History (1)

By Lydia Beyoud, Nicola M. White (BTAX) and Amanda Iacone (BTAX)

- BF Borgers's past work has drawn scrutiny from regulators
- TMTG decided last month to keep the firm after going public

Bloomberg Law News 2024-04-09T09:40:48873038348-04:00

Trump Media's Accounting Firm Has Audit Deficiency History (1)

By Lydia Beyoud, Nicola M. White (BTAX) and Amanda Iacone (BTAX)2024-04-08T13:06:22598-04:00

- BF Borgers's past work has drawn scrutiny from regulators
- TMTG decided last month to keep the firm after going public

Donald Trump's social-media company just became the most valuable publicly traded client of an accounting firm that has more experience auditing companies traded over-the-counter and has had a string of regulatory issues, including a 100% deficiency rate on audits reviewed by a US watchdog.

Trump Media & Technology Group Corp. said in recent regulatory filings that it will keep BF Borgers, a Lakewood, Colorado-based accounting firm, as its auditor after starting to trade publicly late last month. A Canadian regulator said last year that BF Borgers violated its rules for auditors, while the US's Public Company Accounting Oversight Board found multiple deficiencies in every audit it reviewed from the firm over the past two annual checks.

Closely held companies often retain audit firms after going public through mergers with blank-check companies. But most of BF Borgers's clients, such as Lingerie Fighting Championships Inc., a mixed martial arts league, are significantly smaller than Trump's media business. Its deficiency rate from the PCAOB was worse than the industry rate of 40% in 2022, and the December enforcement action from Canada's audit regulator prevents it from accepting new clients in that country until it makes certain improvements.

A representative for BF Borgers didn't respond to multiple requests for comment.

Trump Media said in a statement that articles about BF Borgers's record were partisan and "preemptively attacking our auditors before they've even begun their work for us as a public company."

TMTG has used the firm since 2022 as it sought to go public by merging with Digital World Acquisition Corp., a special purpose acquisition company. PCAOB inspections haven't yet covered BF Borgers's audits of Trump Media.

Read more: Trump Media Is Now the Most Expensive US Stock to Bet Against

Trump owns most of TMTG's stock, and its listing on the Nasdaq netted the former president a multibillion-dollar windfall. After a surge in its share price the company is now valued at roughly \$5 billion. Shares in the company fell 10% to \$36.52 at 1:04 p.m. in New York on Monday.

Audit Report Card

Small or foreign audit firms often have high deficiency rates, and are typically only examined every three years by PCAOB inspectors. However, BF Borgers is a prolific auditor with more frequent examinations. Last year, it ranked No. 8 on a list of audit firms with the most publicly traded clients, with just nine fewer clients than midtier firm BDO USA, according to research firm Ideagen Audit Analytics. Among the 10 busiest auditing firms, Withum Smith+Brown had an 80% deficiency rate and BDO had a 66% rate in 2022, according to the audit regulator.

About 84% of BF Borgers's clients were traded over-the-counter, meaning they don't meet the listing requirements of large exchanges. Less than 30 traded on either the Nasdaq or the New York Stock Exchange, according to Ideagen.

The PCAOB said that BF Borgers more than doubled its clients between 2019 and 2021. But the company didn't add more staff to handle the additional workload, the PCAOB said in an expanded inspection report, noting that just one person was responsible for 147 audits.

Deficiencies Found

Congress created the PCAOB to oversee the work of auditors and restore investor confidence in corporate accounting, tapping the Securities and Exchange Commission to appoint its members. The regulator's inspections look at a small sample of client audits. They measure whether auditors had sufficient evidence to back up their assessments of companies' financial statements, providing a performance gauge for corporate directors and investors.

Negative findings from the regulator indicate flawed processes or technical violations of the board's rules.

The Washington-based audit regulator found problems with the firm's testing procedures for bedrock measures such as revenue and accounts receivable, among other issues.

In 2022, the PCAOB placed a two-year ban on one of BF Borgers' audit directors for failures on the audits of Chineseinvestors.com Inc., United Cannabis Corp. and China Pharma Holdings Inc. China Pharma's shares are down 99% in the past three years.

(Update with TMTG share price in seventh paragraph.)

Trump Media stock plummets as expert warns of possible securities fraud: reports

 rawstory.com/trumps-truth-social-media-2667721367

April 8, 2024



Brooks Kraft/ Getty Images

Former President Donald Trump's Truth Social stock continued to circle the drain Monday as financial experts warned he may have broken the law trying to prop up the price.

Trump Media shares lost 8 percent Monday after losing 12 percent Friday, according to an analysis from Boston's NPR station WBUR.

After the completed merger with "blank check firm" Digital World Acquisition Corp., the stock soared to over \$66 a share then fell when news broke that Truth Social lost \$58 million in 2023.

Trump went online on Thursday to talk up the strength of Truth Social's stock, which could be a legal problem for him, a financial expert told Newsweek.

ALSO READ: The overlooked detail in Trump's Bible sales pitch

"A false statement of 'material' information is securities fraud," Michael Klausner, Professor of Law at Stanford Law School, told Newsweek. The professor warned it could be a case of "pumping."

Klausner warned this could be seen as illegal by the Securities and Exchange Commission if it's not true, and Trump could be investigated for a so-called "pump and dump" scheme, where someone deliberately hypes a stock to manipulate its price and time their own cashout.

According to WBUR, "The former president owns a majority stake in the company and his stake was valued at about \$2.9 billion on Monday, down from a peak of over \$6 billion after its debut on its trading debut. That's still an eyebrow-raising valuation for former president's

stake considering Trump Media lost \$58 million last year and had revenue of just over \$4 million. Under his current agreement, Trump is not allowed to sell his shares until September, but he can seek permission from Trump Media's board to unload some of his stake earlier" — with many on the board being close associates like his son, Donald Trump Jr.

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Donald Trump's Post May Have Just Broken the Law

N [newsweek.com/trump-truth-social-claims-securities-fraud-financial-disclosures-1888184](https://www.newsweek.com/trump-truth-social-claims-securities-fraud-financial-disclosures-1888184)

Alexander Fabino

April 8, 2024

By Alexander Fabino
Reporter, Economy & Finance

Donald Trump's recent comments on Truth Social's financial robustness—he asserts there is over \$200 million in cash and no debt—come as the platform's stock plummets and financial disclosures reveal a number of possible fiscal troubles.

While one expert says that Trump's comments on the finances are "probably correct," they have ignited scrutiny over potential securities fraud, raising the stakes for the former president and his early-stage media business venture.

Against a backdrop of the stock falling nearly 30 percent since it spiked following a merger with blank-check company Digital Acquisition World Corp just two weeks ago, and serious financial losses detailed in SEC filings, some experts say Trump's declarations may have misled investors and potentially violated securities law.

Republican presidential candidate, former President Donald Trump speaks in the library at Mar-a-Lago. Trump may have committed securities fraud with a post on his Truth Social platform last week. Alon Skuy/Getty Images

The former president President Trump championed the financial stability of Truth Social last Thursday in a post on the platform, saying that the company held over "\$200 million in cash and zero debt," and that his follower count is "growing fast," indicating that the company's user base could be growing despite its issues raised by financial disclosures.

That message could be a violation with the U.S. Securities and Exchange Commission (SEC), the governing body of the stock market, according to Michael Klausner, Professor of Law at Stanford Law School.

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Trump's portrayal of the financial windfall as inherent to Truth Social rather than a lifeline from DWAC, coupled with the fact that he said his follower count is growing fast, paints a misleading picture of the company's standalone viability and could influence investor perception under false pretenses, Klausner told *Newsweek* on Monday.

"A false statement of 'material' information is securities fraud," Klausner said while warning it could be a case of "pumping."

"Pumping is a term used to refer to such a statement, but not necessarily by a company insider, as in Trump's case," Klausner added. This could be considered a violation under the Securities Exchange Act of 1934, which governs the statements made by company owners that could affect investor decisions.

The professor of law noted that the term "growing fast" used by Trump could be ambiguous and misleading unless it is supported by genuine growth metrics, which contrasts with the company's documented financial challenges.

"If it is growing slowly and Trump calls it 'fast' there is some room for the SEC or a court to decide," Klausner said. "It would be a judgment call."

The SEC did not respond to *Newsweek's* request for comment sent last week.

Meanwhile, Trump's assertions contrast with the platform's pre-merger fiscal reality, according to Kin Lo, CPA Professorship in Accounting at UBC Sauder School of Business, where prior to the completion of the merger with DWAC, Truth Social was grappling with a burn rate that saw it hemorrhaging \$58 million against a mere \$4.1 million in revenue.

"My opinion is that the [\$200 million in cash and zero debt comments that Trump made] are probably correct," Lo told *Newsweek*. He made clear, however, that before the merger, Truth Social itself had very little money.

"The company had only \$2.5 million in cash, and \$70.1 million in liabilities as [of] December 31, 2023," he said.

Before the merger, Truth Social was a separate entity from DWAC, and its survival appeared to be contingent upon the merger's success, according to words used in its own official filings, Lo noted.

"What this says is that the top management of Truth Social believed that the company will not survive beyond the end of 2024, unless a merger with DWAC is completed," Lo said.

Post-merger, the financial situation of the Trump-owned company appeared rosier with DWAC's cash infusion, ostensibly clearing debts and providing a much-needed lifeline.

Lo said, however, that "DWAC had no real operations (no revenues). All of its funding came from the initial stock issuance and any interest or investment income," suggesting a strategic move to leverage the financial markets for capital rather than following traditional business growth strategies.

"Why would the funders of DWAC willingly merge with a company (TMTG) that is about to collapse, and give TMTG the majority of shares in the merged company," Lo asked. "Is there a bona fide business reason for doing so, or is something else going on?"

Given the volatile nature of its financial standing and the public interest in its high-profile leadership, Klausner told *Newsweek* that he thinks that if Trump's claims aren't an SEC violation, "it is only a matter of time before Trump violates the securities laws by falsely claiming facts about Truth Social."

About the writer

Alexander Fabino

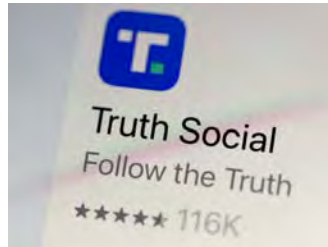
Aj Fabino is a Newsweek reporter based in Chicago. His focus is reporting on Economy & Finance. Aj joined Newsweek ... [Read more](#)

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Trump's Truth Social shares are plunging again, erasing billions of dollars in value

wbur.org/npr/1243498311/truth-social-shares-trump-media-legal-troubles

Home//NPR News



Shares of Trump Media & Technology Group, the company behind social media platform Truth Social, plunged for a second consecutive day on Monday.

(Getty Images)

About two weeks since its meteoric debut, shares of Truth Social are slumping, wiping out billions of dollars in value in former President's Trump's stake.

Shares of Trump Media & Technology Group — the company behind Truth Social — lost 8% on Monday after already losing 12% on Friday.

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It's now trading at its lowest level since the company's trading debut on March 26. Trading has been remarkably volatile since its debut, with some big swings.

The sharp declines over the past two days will take a big bite out of Trump's paper gains.

The former president owns a majority stake in the company and his stake was valued at about \$2.9 billion on Monday, down from a peak of over \$6 billion after its debut on its trading debut.

That's still an eyebrow-raising valuation for former president's stake considering Trump Media lost \$58 million last year and had revenue of just over \$4 million.

Under his current agreement, Trump is not allowed to sell his shares until September, but he can seek permission from Trump Media's board to unload some of his stake earlier.

The board is made up of people Trump knows well, including his son, Donald J. Trump Jr., and former administration officials.

Analysts had cautioned that Trump Media shares were were trading completely divorced from its actual financial health.

But shares are being sustained by thousands of individual investors, many who are believed to be strong Trump supporters.

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/04/trial-court-blesses-shadow-insider-trading.html

Monday, April 8, 2024

Trial Court Blesses Shadow Insider Trading

By joanheminway

A federal jury found Matthew Panuwat liable for insider trading late last week. As you may recall, the U.S. Securities and Exchange Commission (SEC) brought an enforcement action against Mr. Panuwat in the U.S. District Court for the Northern District of California back in August 2021. In that legal action, the SEC alleged that Mr Panuwat violated Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5, seeking a permanent injunction, a civil penalty, and an officer and director bar. The theory of the case, as described by the SEC in a litigation release, was founded on Mr. Panuwat's deception of his employer, Medivation, Inc., by using information obtained through his employment to trade in the securities of another firm in the same industry.

Matthew Panuwat, the then-head of business development at Medivation, a mid-sized, oncology-focused biopharmaceutical company, purchased short-term, out-of-the-money stock options in Incyte Corporation, another mid-cap oncology-focused biopharmaceutical company, just days before the August 22, 2016 announcement that Pfizer would acquire Medivation at a significant premium. Panuwat allegedly purchased the options within minutes of learning highly confidential information concerning the merger. According to the complaint, Panuwat knew that investment bankers had cited Incyte as a comparable company in discussions with Medivation and he anticipated that the acquisition of Medivation would likely lead to an increase in Incyte's stock price. The complaint alleges that Medivation's insider trading policy expressly forbade Panuwat from using confidential information he acquired at Medivation to trade in the securities of any other publicly-traded company. Following the announcement of Medivation's acquisition, Incyte's stock price increased by approximately 8%. The complaint alleges that, by trading ahead of the announcement, Panuwat generated illicit profits of \$107,066.

The SEC's theory of liability, an application of insider trading's misappropriation doctrine as endorsed by the U.S. Supreme Court in *U.S. v. O'Hagan*, has been labeled "shadow trading."

The Director of the SEC's Division of Enforcement, Gurbir S. Grewal, put it plainly in responding to the jury verdict in the *Panuwat* case on Friday:

As we've said all along, there was nothing novel about this matter, and the jury agreed: this was insider trading, pure and simple. Defendant used highly confidential information about an impending announcement of the acquisition of biopharmaceutical company Medivation, Inc., the company where he worked, by Pfizer Inc. to trade ahead of the news for his own enrichment. Rather than buying the securities of Medivation, however, Panuwat used his employer's confidential information to acquire a large stake in call options of another comparable public company, Incyte Corporation, whose share price increased materially on the important news.

Yet, many assert that the SEC's theory in *Panuwat* broadens the potential for SEC insider trading violations and enforcement. See, e.g., [here](#), [here](#), and [here](#). They include:

- a wide class of nonpublic information that may be determined to be material and give rise to an insider trading claim;
- the expansive scope of insider trading's requisite duty of trust and confidence (and the potential importance of language in an insider trading compliance policy or confidentiality agreement in defining that duty); and
- the potentially large number of circumstances in which employees may be exposed to confidential information about their employer that represents a value proposition in another firm's securities.

Three of us on the BLPB have held some fascination regarding the *Panuwat* case over the past three years. Ann put the case on the blog's radar screen; John later offered perspectives based on the language of Medivation's insider trading compliance policy; and I offered comments on John's post (and now offer this post of my own). I am thinking we all may have more to say on shadow trading as additional cases are brought or as this case further develops on appeal (should there be one). But in the interim, we at least know that one jury has agreed with the SEC's shadow trading theory of liability.

Shadow Trading Verdict Is Red Flag for Private, Public Companies

- Orrick attorneys say novel shadow trading verdict is harbinger
- Public, private companies should review insider trading policies

Bloomberg Law News 2024-04-09T09:56:15282122682-04:00

Shadow Trading Verdict Is Red Flag for Private, Public Companies

By Stephen Thau, Paul Rugani, and Nina Ganti2024-04-09T04:30:33000-04:00

- Orrick attorneys say novel shadow trading verdict is harbinger
- Public, private companies should review insider trading policies

An April 5 verdict in a groundbreaking insider trading enforcement action by the Securities and Exchange Commission highlights the potential for expanded risks of stock trading for officers and directors of publicly traded companies. It also potentially expands concerns about insider trading to directors and officers of private companies.

The type of trading targeted in this case, which the SEC calls shadow trading, occurs when a corporate insider uses material, nonpublic information about their own company to trade in securities of another, comparable publicly traded company.

In light of the SEC's enforcement activity in this area, public companies should consider updating their insider trading policies to address shadow trading. Private companies may want to consider adopting policies to address the practice as well.

First SEC Action

On April 5, a federal jury in California found Matthew Panuwat, the former head of business development at Medivation, Inc., liable under the novel theory of "shadow trading" in a civil enforcement action brought by the SEC. The jury made its decision in just several hours after an eight-day trial, which included testimony from Panuwat and several of his former colleagues.

Medivation, Inc. is a California-based mid-cap, oncology-focused biopharma company where Panuwat used to work. During his time at Medivation, Panuwat purchased stock options in another comparable oncology-focused biopharma company, Incyte Corp., allegedly because he believed Pfizer's acquisition of Medivation would have beneficial collateral effects across that segment of the market and thereby increase Incyte's stock price.

On Aug. 18, 2016, Medivation's CEO emailed Panuwat and 12 other employees on a confidential basis to advise them that Pfizer was ready to sign a deal to acquire Medivation "this weekend" and disclosing the price at which Medivation would be acquired. Seven minutes after that email, Panuwat purchased call options in Incyte.

Once Pfizer's acquisition of Medivation became public, Incyte's stock price increased by roughly 8%, with Panuwat netting \$107,066 in profit. In August 2021, the SEC brought charges against Panuwat, alleging he engaged in insider trading by purchasing call options in Incyte.

The verdict in Panuwat's case provides a first glimpse of how juries and courts view the novel issues raised by shadow trading, including that an employee of one company can be found to have violated a legal duty when purchasing or selling securities of another company, and how closely correlated the stock prices of two companies need to be for a violation of law. Given the probability of appeals and potential for more enforcement actions, further legal developments are likely.

Update Policies

Public company insider trading policies often restrict trading in companies with which a company has dealings, and may go so far as to restrict trading in competitors or other key third parties. Medivation's insider trading policy extended beyond Medivation stock to cover the securities of "all significant collaborators, customers, partners, suppliers or competitors." Broad trading prohibitions like these recognize that corporate insiders may access material, non-public information relevant to the market value of other companies, and that could place the insiders at an informational advantage to the market as a whole.

Yet even such expansive language may not be enough, on its own, to create a legal duty for an insider to refrain from trading. In Panuwat's case, the court found at least some disputes of material fact over whether Medivation's policy prohibited trades like Panuwat's purchase of call options in Incyte such that those purchases should be considered insider trading.

In light of the potential for shadow trading claims against officers and directors, and as law in this area evolves, public companies should consider updating insider trading policies to make clear the trading activities that are or aren't permitted, and the companies whose securities may be subject to trading restriction.

Using generic categories in insider trading policies such as “customers” or “competitors” provides breadth, but can lead to open questions about whether a particular company fits those definitions. Greater specificity, including a list of specific key other companies, when known, helps provide clarity to corporate insiders and reduces reliance on interpretation.

Private Companies Too

Most private companies don’t have policies addressing insider trading since purchases and sales of company stock is more cumbersome than trading on the open market (and, in many instances, restricted until a public offering or liquidation event). However, an individual need not be an employee of a public company to engage in shadow trading since the concept applies to trading in another company’s stock.

As Panuwat’s case illustrates, for life science companies there are often reasons to believe that information about one company, public or private, might have implications for another public company’s stock. For instance, if a private company and public company are both developing drugs that target the same biological pathway, and the private company obtains positive clinical data, it might be possible to infer that the public company program will also succeed.

To prevent employees from using non-public information for their own benefit, a private company may find it prudent to assess its current employee confidentiality agreements or other policies to address shadow trading.

The case is Securities and Exchange Commission v. Panuwat , N.D. Cal., No. 21-cv-06322, verdict 4/5/24 .

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April 9, 2024, 3:30 AM PDT

How 'Shareholder Value' Became a US Mantra: Adrian Wooldridge

By Adrian Wooldridge

Bloomberg Law News 2024-04-09T13:04:38391583543-04:00

How 'Shareholder Value' Became a US Mantra: Adrian Wooldridge

By Adrian Wooldridge 2024-04-09T06:30:07180-04:00

Michael Jensen, who died on April 2, did as much as any single thinker to shape modern financial capitalism, particularly as it is practiced in the Anglo-Saxon world. To his critics, he was the high priest of the greed-is-good era who justified exorbitant executive pay and vulture capitalism: Gordon Gekko with a doctorate. To his admirers, he was the surgeon who gave Anglo-Saxon capitalism a new lease of life by slicing off the fat, removing the malignant tumors and prescribing a strict exercise regime.

Nobody can deny his extraordinary influence. His elective at Harvard Business School was the most popular in the institution's history, enrolling more than 600 students, two-thirds of each year's class, many of whom went on to restructure American capitalism during one of its most excited phases. And nobody can deny the rigor of his ideas about the central issues in business theory: the proper boundaries of the firm, the ideal incentive structure, the market for corporate control and the advantages and disadvantages of public versus private companies. His groundbreaking article, co-written with William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," has earned more than 130,000 Google citations, more than any other article in financial economics.

Jensen's central idea was that the people hired to run companies ("agents") will shortchange the people who own the companies ("principals") unless they are motivated by the right mixture of sticks and carrots. This is particularly true of public companies where ownership is dispersed and monitoring mechanisms weak. The giant companies that dominated the US economy are monuments to the so-called "agency problem": a bloated class of managers produced dismal returns for shareholders while living a comfortable life of perks and lifetime tenure, low risk and low return.

The solution was to apply the magic of shareholder value to change incentives: Pay the CEOs and senior managers of public companies like owners with share options – or better still take the companies private through leveraged buyouts. The more you turn "agents" into "principals," the more you will give them an incentive to squeeze the maximum value out of the companies that they were hired to run.

This idea was at the heart of the revolution that transformed corporate life, first in America and then in much of the world, from the late 1970s onward. Hard-driving managers downsized companies in pursuit of shareholder value. Corporate raiders tore apart conglomerates and turned them into collections of leaner companies. Jensen's ideas revolutionized attitudes toward everything from pay scales to corporate debt. CEOs who had once balked at the idea of seeming greedy now competed to earn the most. Analysts who worried about taking on debt now quoted Jensen's advice that debt "creates the crisis atmosphere managers require to slash unsound investment programs, shrink overhead, and dispose of assets that are more valuable outside the company."

The great HBS historian Alfred Chandler had preached that the end of corporate history is reached when the managers take over. His classic *The Visible Hand* (1977) is an encomium to postwar firms such as General Motors and DuPont, with their serried ranks of professional managers who acted as if their shareholders did not exist. Jensen preached the opposite: These giant institutions are nothing more than dinosaurs that need to be replaced by much smaller and more entrepreneurial outfits. If Chandler's HBS students had happily become company men, confident that they were doing history's work, Jensen's students became venture capitalists, financial engineers, corporate raiders, equally confident that they were doing the market's work.

Jensen's work is as unpopular today as it was feted in the Reagan era. The Harvard Business Review failed to include his work in a collection of its most important articles of its first hundred years, despite the fact that "Eclipse of the Public Corporation" is about as good an HBR article as you can write. Nicholas Lemann, a former editor of the New Yorker and former Dean of Columbia University's Graduate School of Journalism, has written a book, *Transaction Man: The Rise of the Deal and the Decline of the American Dream*, excoriating his ideas and influence. The younger professors at HBS have abandoned the idea of shareholder value in favor of fluffier ideas about corporate purpose.

Lemann argues that Jensen bears much of the blame for the dire state of American capitalism. Soaring executive pay ensured that the C-suite absorbed a disproportionate share of the economic surplus at a time when productivity growth was slowing down. Re-engineering and downsizing tore apart corporations that had provided a stable way of life for communities. Jensen-trained managers pursued short-term gains (a boost in share price often through financial engineering) at the expense of long-term investment in productive capacity. Jensen stoked the rage in the heartland against stagnant wages and shuttered factories that produced the angry populism of both left and right.

This is an exaggeration. True, far too many CEOs lined their own pockets for mediocre performance. In the same week that Jensen died, we [learned](#) that Dave Calhoun, who is stepping down as CEO of Boeing Co. during a safety crisis that has sent the company's share price plunging, was paid \$32.8 million in 2023. Jensen nevertheless provided a mechanism for Joseph Schumpeter's "creative destruction" to work its magic, cleaning out corporate capacity and putting it to productive use. As Don Chew, the editor of the Journal of Applied Corporate Finance, points out, the wave of highly leveraged takeovers and LBOs during the 1980s limited the waste of corporate capital on futile attempts to prop up sunset industries and companies and thereby made it available for the next industrial revolution.

The US thus escaped the stagnation that continues to afflict Japan, a country that, when Jensen started writing, looked set to supplant the US as the world's leading economic power. By contrast to Japan's over-layered and over-staffed behemoths, America's companies look astonishingly fit: The old-line industrial companies have refrained from putting on too much weight since the Jensen revolution and the new IT behemoths are still tightly managed (though they may yet go the way of yesterday's pampered conglomerates).

What about the soar-away pay and perks of even mediocre managers? Jensen's defenders blame two things: the stock market boom that lifted all boats regardless of performance and a widespread misunderstanding of his work. Central to Jensen's argument was that CEOs needed to experience the downside as well as the upside of the free market: Their pay should go downward as well as upward, and they should lose their jobs if they performed badly. CEOs gamed the system to ensure that they won whatever happened. They provided themselves with golden parachutes in case things went badly and they manipulated share prices to make sure that they sold their options at the right time. Far too many behaved like rent-seekers who benefited regardless of whether they created value or not.

Jensen was profoundly disappointed by what he saw as the misuse of his ideas to justify alpha rewards for beta performance. "Managerial heroin" was how he described the implementation of share options in many US companies. In the late 1990s he underwent the equivalent of a religious conversion. He became a follower of Werner Hans Erhard, the founder of Erhard Seminars Training, more popularly known as EST, a quasi-religious movement that promised to empower its followers and heal their spiritual wounds. Jensen collaborated with Erhard to produce a thousand-slide PowerPoint presentation heralding the wisdom of their respective lifetimes, a mishmash of management theory, self-help, neurobiology and linguistics. He also devoted much of his time to delivering seminars, some of them lasting for days. For Jensen, his collaboration with Erhard supplied the missing piece of the jigsaw of the agency theory: Provided that managers followed the precepts that he and Erhard laid out, they would refrain from the self-dealing that had hitherto marred his theory; instead, they would act like honest capitalists.

Few of us would be willing to follow Jensen down this path. But the “misuse” argument is only a little more plausible. Jensen’s problem is that he fails to carry his rent-seeking argument to its conclusion. If “agents” act as rent-seekers when they are running big companies, lining their own pockets at the expense of the company’s owners, why would we assume that they will behave differently if they are given share options?

Jensen failed to reckon with the importance of power. CEOs are not just regular players in the marketplace. They are powerful people who can structure their remuneration systems and decide when to sell their own shares. This is particularly true in America’s CEO-focused companies, where CEOs often double as chairpersons and exercise a disproportionate influence over the composition of the board. Because he ignored the importance of power, he failed to acknowledge the importance of having a robust moral code to regulate the behavior of the elite.

Jensen and Meckling began their great 1976 article with a quotation from Adam Smith’s *Wealth of Nations* (1776), a book that, among many other things, explained how the acquisitive urges (self-love, egotism, self-interest, pride, and acquisitiveness) can be transformed into social virtues if they were channeled by the free market. But Smith also wrote another great book, *The Theory of Moral Sentiments* (1759), that argued that markets require more recondite virtues if they are to flourish in the long run: the higher virtues of wisdom, benevolence, self-sacrifice and public spiritedness. Keeping these virtues alive in a market society is difficult because the market doesn’t know how to value or reward them. The job of doing so belongs to a small party of the “wise and the virtuous,” what Samuel Taylor Coleridge was later to call “the clerisy” and we call public intellectuals, who devote their lives to studying and correcting the public sphere.

For all his theoretical brilliance, Jensen was a creature of his time. His ideas delivered a needed shock to a sclerotic and self-indulgent business world. But this worshipper of the stock market failed to reckon with the growing market bubble. When he first pondered agency costs in the 1970s, the big problem was the under-utilization of company assets and their consequent under-valuation. When he was in his pomp, as a star HBS professor and a leading figure in the Monitor Group, a strategic consultancy, the big problem was over-valuation. This ultimate cynic about human motivation was strangely naive about the propensity of powerful people to destroy incentive structures. As a result, the Jensen revolution devolved into an excuse for cost-cutting and self-indulgence.

The challenge today is to go beyond agency theory – beautiful though it is – and produce a new framework that combines the dynamism of the market with a broader sense of common purpose, social justice and political sustainability. If stakeholder capitalism, the purpose-driven corporation and other attempts to displace agency theory thus far seem jejune by comparison, that’s all the more reason to try harder.

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Accounting Changes Promise More Uniform Global Income Statements

By Michael Kapoor

- Overhaul of standard-setter's requirements takes effect in 2027
- Changes target operating profit, informal financial measures

Bloomberg Law News 2024-04-09T09:44:22890283106-04:00

Accounting Changes Promise More Uniform Global Income Statements

By Michael Kapoor 2024-04-09T05:00:47000-04:00

- Overhaul of standard-setter's requirements takes effect in 2027
- Changes target operating profit, informal financial measures

The global accounting standard-setter on Tuesday published sweeping changes to income statement requirements designed to provide investors with more consistent and easily comparable information about companies' financial health.

The new requirements adopted by the International Accounting Standards Board will define for the first time frequently used measures such as operating profit and ask companies to reconcile unofficial accounting information with their audited financials. The new standards will take effect starting in fiscal year 2027 and will replace International Accounting Standards 1 Presentation of Financial Statements, which was first issued in 1975.

"It plugs the gaps," IASB chair Andreas Barckow said in an interview.

Countries that follow international accounting standards must approve the new rules for national use. More than 140 countries require companies to use IFRS accounting standards, including most major economies outside of the US.

The rules, published as IFRS 18, call for new income statement subtotals covering operating, investing, and financing. This will bring uniformity to how companies calculate operating profit, which is sales after operating costs, but is not fully defined under existing accounting rules.

Under the changes, the IFRS accounting standard tells companies what items to classify as investing and financing. Everything else, except for taxation and discontinued operations, will go into operating profit.

The rules are intended to bring consistency to companies' existing approach. National regulators in countries such as China and Japan already define operating profit in their own accounting standards, Barckow said, and firms from those countries use national definitions in their accounts. But the national definitions vary, leading to inconsistent reporting that is hard for investors to understand.

The new standard also offers more detailed guidance on when companies should explain expenses in financial statements or in footnotes, so that investors can understand important performance indicators. Barckow gave the example of airlines' fuel costs, which fluctuate according to global prices, as something that the new rules would lead companies to highlight for investors in the financial statement.

IASB also spelled out how companies should report widely used, informal financial measures that don't comply with generally accepted accounting principles—known as non-GAAP measures. One such informal measure is earnings before interest and tax.

For the first time, non-GAAP measures must now be explained in the notes to the accounts and reconciled back to the audited financials. The requirement to explain the components of non-GAAP measures is designed to give investors a better understanding of these measures and more confidence over their accuracy.

The changes will not affect companies' stated profits, and Barckow said they were designed to balance extra work for companies against investors' information needs.

Long-Awaited Overhaul

The IASB has been working on these income statement changes since 2016, with a draft proposal published in 2019.

Steve Cooper, a financial analyst who served on IASB from 2007 to 2017 called the accounting changes "fundamental." The changes will give investors more comparable and consistent information. However, he told Bloomberg Tax that in some ways they didn't go far enough.

IASB had been looking at income statement changes for more than 20 years, Cooper said, with nothing happening until now. In 2011, it abandoned as too complex a joint project with the US Financial Accounting Standards Board to overhaul not just the income statement but also the balance sheet and cash flow statement. The US board separately has focused on income statement expense items.

The IASB is at the early stages of researching cash flow statement changes but doesn't have a proposal in the pipeline for changing balance sheet presentation. "It would be useful," Cooper said.

Sheffield University accounting professor Richard Murphy also said he supported the latest changes and the extra consistency and detail they would bring. "The income statement has been short of visibility and detail for 20 years," he said by phone.



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New Relic Shareholder Sues To Force Open Corp. Books

By **Leslie A. Pappas**

Law360 (April 9, 2024, 2:15 PM EDT) -- Another shareholder of web analytics firm New Relic Inc. has sued in Delaware's Court of Chancery for corporate records related to the company's \$6.5 billion, \$87-per-share buyout by private equity firms Francisco Partners and TPG, the latest in a string of shareholder suits seeking records on the deal.

Arkansas Teacher Retirement System, which held more than \$4.28 million worth of New Relic stock when the transaction closed Nov. 8, filed the 19-page complaint on Friday, saying New Relic still hadn't fully responded to a demand for records that was made in October.

The pension fund sought the documents under Section 220 of Delaware's General Corporation Law, which allows shareholders to inspect a Delaware company's books and records if it can show a proper purpose, such as investigating potential corporate wrongdoing.

There is "more than a credible basis to suspect potential wrongdoing" in relation to the buyout, the complaint alleges: New Relic's board originally rejected the idea of a take-private merger, but after shareholder activists got representation on the board, it "reversed itself and started a sale process."

San Francisco-headquartered New Relic, which was publicly traded on the New York Stock Exchange before it was acquired, provides a cloud-based "observability" platform that allows its customers — which include Adobe, the American Red Cross, TopGolf, and World Fuel Services — to view all their data in one place.

New Relic **announced in July** that Francisco Partners and TPG would take the company private. The announcement said that New Relic founder Lew Cirne, JANA Partners LLC, and HMI Capital Management LP — which held about 20% of New Relic's outstanding shares at the time — had signed voting agreements supporting the transaction.

Cirne, then executive board chairman, rolled over approximately \$250 million of his equity interest as part of the deal, according to the complaint.

Activist investors — including JANA, Engaged Capital LLC, Eminence Capital LP and their affiliates — were a "looming presence throughout the sale process," the complaint alleges.

"Here, there is reason to believe certain board members, including Cirne and the activists' representatives, favored a transaction regardless of whether it was in the best interests of the Company and its stockholders," the pension fund said in its complaint.

The pension fund made a formal demand to the company for records on Oct. 19 and entered into an agreement with the company on Oct. 31, the complaint says. New Relic produced 194 documents between November and the end of February, but since March has not resolved deficiencies in the document production, the complaint says.

The suit is the fourth that shareholders have filed in Delaware's Court of Chancery seeking books and records relating to New Relic's acquisition.

Operating Engineers Construction Industry and Miscellaneous Pension Fund, represented by Grant & Eisenhofer PA, filed the first case on Oct. 27, a few days before shareholders were scheduled to vote

on the deal.

City of Miami Fire Fighters' and Police Officers' Retirement Trust, represented by Bernstein Litowitz Berger & Grossmann LLP, **followed up** with a complaint on Oct. 31.

And The City of Southfield Fire & Police Retirement System, represented by Robbins Geller Rudman & Dowd LLP, sued on Nov. 1.

All the cases have been assigned to Magistrate Selena E. Molina.

The parties did not respond Tuesday to Law360's request for comment.

Arkansas Teacher Retirement System is represented by Javier Bleichmar, Erin Woods, Derrick Farrell, Matthew Miller and Robert Lackey of Bleichmar Fonti & Auld LLP.

Counsel information for New Relic was not immediately available.

The earlier cases are Operating Engineers Construction Industry and Miscellaneous Pension Fund v. New Relic Inc., case number 2023-1089; City of Miami Fire Fighters' and Police Officers Retirement Trust v. New Relic Inc., case number 2023-1098; and The City of Southfield Fire & Police Retirement System v. New Relic Inc., in the Court of Chancery of the State of Delaware.

The newest case is Arkansas Teacher Retirement System v. New Relic Inc., case number 2024-0367, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Al Barbarino. Editing by Alex Hubbard.

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (April 8, 2024, 4:48 PM EDT) -- Last week, a much-watched Chancery Court Match.com decision got reversed, a Philip Morris motion got stubbed out, and a long-frozen Blue Bell Creameries suit started churning again. Delaware's Court of Chancery also saw new suits filed for legal fees, arguments over multibillion-dollar pay packages, and a judge flummoxed over Truth Social.

In case you missed it, here's all the latest from Delaware's Chancery Court.

In the Courtroom

Vice Chancellor Sam Glasscock III said he was "**dumbfounded**" when Donald Trump's social media company filed a Florida lawsuit against the two former "Apprentice" contestants who helped the former president create the Truth Social platform, rendering a decision in related Chancery Court litigation "nugatory."

Vice Chancellor Nathan A. Cook **pushed an attorney** for defunct job board startup Joonko — which closed last year after its CEO resigned amid fraud allegations — to explain why it shouldn't advance her defense costs in federal government investigations, since she was once an officer of the company.

The Trade Desk Inc. told Vice Chancellor Paul A. Fioravanti Jr. that a **potentially \$5.2 billion stock option grant** the company gave its CEO is nothing like a recently voided \$55 billion compensation package that Tesla's board gave Elon Musk, and urged the court to dismiss a shareholder suit challenging the award.

Decisions

Delaware's Supreme Court **undid** Vice Chancellor Morgan T. Zurn's dismissal of a challenge to Match.com's 2019 reverse-spinoff from Barry Diller-controlled IAC Interactive, rejecting the lower court's finding that Match had justified the use of a less-onerous fairness test in a conflicted merger.

Vice Chancellor Lori W. Will **signed off on an agreement** between Donald Trump-tied Digital World Acquisition Corp. and its former CEO to have the venture pay his legal costs related to federal probes and litigation in multiple states.

But Vice Chancellor Will **rejected** Philip Morris USA's request to intervene in a long-running dispute between ITG Brands LLC and Reynolds American Inc. over how much each should pay Florida under a settlement related to cigarette advertising, calling its years-long delay "inexcusable."

New Cases

An investor in software development security venture GitLab Inc. **hit the company with a proposed class challenge** to advance notice nominating restrictions for proxy contests, the latest in a string of suits branding the provisions "restrictive and coercive."

A Wells Fargo & Co. stockholder, citing billions in regulatory agency sanctions, fines and judgments, **sued 23 current and former bank directors and officers** seeking derivative recoveries for the losses.

Investors in a blank-check company, Fusion Acquisition Corp., **sued its sponsor and several of its directors and controllers**, accusing them of overvaluing a merger with digital finance platform

MoneyLion, which was sued by the Consumer Financial Protection Bureau in 2022.

BioMarin Pharmaceutical Inc. stockholder Aaron Jones **challenged board-investor voting agreements** that the company entered into last year with stockholder interests of Elliott Investment Management to head off a threatened proxy contest following negative financial news.

Shareholders of the Arena Group — the digital publisher behind Sports Illustrated, TheStreet, Men's Journal and other brands — **sued** the group's former CEO Ross Levinsohn, alleging wrongdoings ranging from fraud to gross negligence and demanding more than \$10 million in compensatory damages.

Legal Fee Fights

St. Paul Fire and Marine Insurance Co., an insurer for two former Oxbow Carbon LLC directors, **sued the company to recover millions paid** to defend the pair in a long-running battle over investor efforts to force a sale of the energy company.

The former corporate secretary and outside counsel of EpicentRx **sued the biopharmaceutical company** for advancement of the legal fees he has incurred in response to ongoing litigation that accuses the company and its officers of fraud.

RJG Global Education LLC, a company controlled by the former chief executive of a Grand Bahama-based medical school, **sued the school's developers and indirect owner** for legal fee advancements, citing a federal suit accusing the ex-officer of selling undocumented stakes in the business.

Appraisals

Driver Opportunity Partners II LP, a fund invested in clinical-stage biopharmaceutical company Theseus Pharmaceuticals Inc., **petitioned** the court for an appraisal of the investor's 250,000 shares following Theseus' \$4.05 per-share consolidation in February with Concentra Biosciences LLC.

Ongoing Disputes

Citing a failure to reach a mediated settlement, a Blue Bell Creameries Inc. board panel **moved to reactivate a long-sidelined derivative suit** seeking to hold the ice cream company's past directors and officers accountable for deadly food-safety oversight failures in 2015.

Fees, Fees, Fees

Attorneys for Straight Path Communications Inc. shareholders who mostly lost their Chancery Court suit seeking damages from IDT Corp. founder Howard Jonas **told the court** that they deserve a \$9.5 million attorney fee award.

Quotable

"I'm agog." – Vice Chancellor Sam Glasscock III, after Donald Trump's social media company **filed a Florida lawsuit** that rendered the vice chancellor's decisions in a Chancery Court case practically moot.

--Additional reporting by Jeff Montgomery, Rose Krebs, Sydney Price, and Madeline Lyskawa. Editing by Kelly Duncan.



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BitMEX Co-Founder Can't Escape Investors' Manipulation Suit

By **Aislinn Keely**

Law360 (April 8, 2024, 11:20 PM EDT) -- A case against a co-founder of cryptocurrency trading platform BitMEX will move forward after a Manhattan federal judge found investors showed the executive was "central" to an alleged manipulation scheme that benefited the firm at the expense of its customers.

Ben Delo co-founded HDR Global Trading Limited, which operated BitMEX. Delo has been accused of manipulating prices on the platform and failing to tell customers about an internal "insider trading desk" to trade against customers using their purportedly private information. Alongside Delo, HDR's Chief Technical Officer Samuel Reed and CEO Arthur Hayes are also named in the suit.

Delo sought to escape the suit in May, arguing the allegations failed to show personal jurisdiction, but U.S. District Judge Andrew L. Carter Jr. found in an **order made public Monday** that the investors had shown Delo was key to the alleged scheme. According to the order, Delo conceived of and designed a system that liquidated customer accounts, which enabled BitMEX to profit from the alleged manipulation.

The complaint from investors Brett Messieh of Tampa, Florida, and Drew Lee of New York City details that the BitMEX platform automatically liquidates a customer's contracts when the value falls below a certain level. The liquidated funds are then diverted to an insurance fund the investors claim the platform has total discretion over.

According to the investors, the platform ran a secret insider trading desk staffed by at least three employees with "God Access" to customer accounts. Despite telling customers that certain information was private, the platform allegedly used the information to determine trades in order to liquidate the highest number of customer accounts.

The investors also claimed the platform manipulated prices on other exchanges and occasionally blocked customers from trading to give its own trades an edge.

In addition to designing the liquidation system, the order said the investors had shown Delo's senior role at the company would have had him sign off on key trading decisions, like the operation of the insider trading desk. Delo himself also traded on the platform, according to the order, which would mean he benefited from the alleged lack of disclosure.

The firm did disclose the existence of the trading desk in 2018, but positioned it as a market maker, though the complaint claims BitMEX "continued to trade secretly against its customers, using burner accounts."

Judge Carter also noted that Delo's work for BitMEX had ties to the U.S., highlighting that "he developed key marketing techniques, including posting up next to a Lamborghini to promote BitMEX at a major cryptoasset conference in New York."

The HDR subsidiary that Delo helped found, ABS Global Trading, is also a Delaware entity registered to do business in New York, according to the order, and the complaint also alleges Delo knowingly allowed U.S. citizens to trade on the exchange.

"Plaintiffs' claims directly arise out of and relate to Delo's contacts with the United States, which

include marketing efforts, creating the systems that led to plaintiffs' injuries, running the defendant corporations that managed and profited from this manipulation," Judge Carter said.

The judge **kept the suit alive** last week after broadly refusing to toss it for extraterritoriality concerns when he found the investors' complaint sufficiently showed the alleged trading desk operated from Manhattan, among other ties.

The order denying Delo's dismissal bid was also signed April 3, but became public Monday.

In a statement to Law360, counsel for the investors, Jordan Goldstein of Selendy Gay PLLC, said the legal team is looking forward to pursuing the class action claims against BitMEX, Delo, Hayes and the other defendants.

"On behalf of investors who traded on BitMEX, we are gratified that Judge Carter has acknowledged the strength of our claims and permitted this action to proceed," said Goldstein.

Counsel for Delo did not immediately respond to a request for comment on Monday.

BitMEX and its executives came under fire in 2020 for allegedly offending the Bank Secrecy Act and operating the platform without an effective anti-money laundering program. In 2022, Delo **received** a probationary sentence following a guilty plea, while Hayes received six months of home confinement and two years of probation.

The investors are represented by Jordan A. Goldstein and Oscar Shine of Selendy Gay PLLC.

HDR Global Trading and its affiliates are represented by David C. Esseks and Todd S. Fishman of Allen & Overy LLP.

Delo is represented by Patrick J. Smith and Selbie L. Jason of Clark Smith Villazor LLP, and Harlan A. Levy and Allen M. Thigpen of Foley Hoag LLP.

Hayes is represented by James J. Benjamin Jr. and Peter I. Altman of Akin Gump Strauss Hauer & Feld LLP.

Reed is represented by Douglas K. Yatter and Hanyu Xie of Latham & Watkins LLP.

Dwyer is represented by Jenna M. Dabbs and Michael Ferrara of Kaplan Hecker & Fink LLP.

The case is Brett Messieh et al. v. HDR Global Trading Ltd. et al., case number 1:20-cv-03232, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Dorothy Atkins and Stewart Bishop. Editing by Lakshna Mehta.



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Walmart Beats Investor Suit Over Opioid Probe Disclosures

By **Katryna Perera**

Law360 (April 8, 2024, 10:24 PM EDT) -- Walmart beat back an investor class action on Monday alleging it failed to properly disclose that it was the subject of parallel criminal and civil investigations over its opioid sales, with a Delaware federal judge ruling that the suit's challenged statements were not false or misleading.

U.S. District Judge Colm F. Connolly issued an **opinion** agreeing with the big box retailer that the statements it issued in its filings with the U.S. Securities and Exchange Commission from 2017 to 2020 were not false or misleading.

Investors accused Walmart of violating the Controlled Substances Act "even as it recognized the prescription drug abuse epidemic gripping the nation," and of failing to publicly disclose that federal prosecutors from the Eastern District of Texas had launched civil and criminal investigations into its involvement in the epidemic.

The suit identified 13 SEC filings that investors said were misleading, but Judge Connolly said Monday that all the filings contained adequate information and disclosures.

"Plaintiffs argue that 'defendants were required to disclose the existence of [the] investigations to make their existing statements affirming disclosure of all liabilities that may be material not misleading.' But plaintiffs cite no legal authority for the proposition that being the subject or target of an investigation constitutes 'a liability,'" the opinion states.

The judge also said Walmart made clear in its filings that it had been responding to subpoenas, information requests and investigations from government entities related to its controlled substance dispensing practices and sale of opioids, and also stated that it could not make any assurances about the outcome of the matters or whether it would affect its operations or financial condition.

Investors argued that those disclosures were too vague and downplayed the severity of the investigations, but Judge Connolly said that argument ignores the fact that the investigations were ongoing and that prosecutors' conclusions "were challenged by Walmart's lawyers and subject to review by [U.S. Department of Justice] officials who had yet to weigh in and hear from Walmart's lawyers."

"Walmart did not downplay the investigations; rather it informed investors that it did not know whether they would have a material effect on its performance and operations," the judge said. "From this disclosure, a reasonable investor would understand that Walmart was responding to investigations and that these investigations could possibly have a material adverse effect on Walmart."

Judge Connolly also said Walmart is correct in its claim that it could not have known whether it would sustain any losses until prosecutors informed the retailer at the end of April 2018 that they intended to indict it.

"Until [Eastern District of Texas] prosecutors told Walmart of their intent to indict it, defendants' opinions about the likelihood of charges or claims resulting from the investigations would have been purely conjectural," the opinion states. "Defendants therefore had no obligation ... to disclose the existence of the investigations before that time."

Finally, the judge on Monday disagreed with the investors' claim that Walmart violated the affirmative disclosure obligations of SEC Regulation S-K Item 103 by failing to disclose the investigations in its SEC filings, as the investigations were "material legal proceedings known to be contemplated by a governmental authority."

Judge Connolly said investigations are not considered "legal proceedings" under Item 103, therefore Walmart did not have any disclosure obligations.

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

The investors are represented by Brian E. Farnan and Michael J. Farnan of Farnan LLP, and Laurence Rosen, Phillip Kim and Sara Fuks of The Rosen Law Firm PA.

Walmart is represented by Robert W. Whetzel and Raymond J. DiCamillo of Richards Layton & Finger PA, and Sean Berkowitz, Nicholas Siciliano, Whitney Weber, Jordan Mundell and Renatta Gorski of Latham & Watkins LLP.

The case is In re: Walmart Inc. Securities Litigation, case number 1:21-cv-00055, in the U.S. District Court for the District of Delaware.

--Editing by Adam LoBelia.

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3 Firms To Lead Weber Investor Suit Over \$3.7B PE Buyout

By **Emilie Ruscoe**

Law360, Wilmington, Del. (April 8, 2024, 10:43 PM EDT) -- Prickett Jones & Elliot, Grant & Eisenhofer PA, and Kessler Topaz Meltzer & Check will together represent a proposed class of investors in grill maker Weber Inc. in consolidated litigation in Delaware's Court of Chancery over a \$3.7 billion squeeze-out by private equity firm BDT Capital Partners LLC, Chancellor Kathaleen St. Jude McCormick decided on Monday in what she described as a "close call."

Chancellor McCormick said the three firms would serve as co-lead counsel with an assist from additional counsel at Julie & Holleman LLP, saying that, among other things, the legal team's "vigor in pursuing their claims tips the balance in their favor" for appointment.

The team beat out a proposed legal team comprising attorneys proposed co-lead counsel at Friedlander & Gorris PA and Friedman Oster & Tejtell PLLC, who would have additional counsel working with them from Labaton Sucharow LLP, Block & Leviton LLP, Wohl & Fruchter LLP, and Kaskela Law LLC.

Another proposed legal team vying for appointment had Scott+Scott Attorneys at Law LLP as lead counsel, with Christensen & Dougherty LLP as Delaware counsel and the Kehoe Law Firm PC as additional counsel.

"All counsel should be congratulated for their work to date," the chancellor said, saying that the lead counsel appointment decision was a "close call" but citing the relative ownership stake of plaintiffs Micah Marshall II and Richard J. Bishop, who are represented by the prevailing legal team, as a decisive factor in her decision.

Marshall and Bishop claimed that together, they had held 18,606 shares of Weber Class A common stock prior to the acquisition at the heart of the allegations and that Marshall alone held 18,206 shares, which comprised about 25% of his total personal equity portfolio, the judge noted.

The action consolidates claims from three suits that all alleged that Weber's board and BDT, its controller, breached their fiduciary duties when BDT took the company through a merger that minority shareholders have taken umbrage with.

On Monday, the chancellor said, "At this stage, it would be imprudent for the court to opine on the merits of the strategies, except to acknowledge that they appear similar enough and present strong theories."

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

Bishop is represented by Eric L. Zagar, J. Daniel Albert and Cameron N. Campbell of Kessler Topaz Meltzer & Check LLP, and Corinne Elise Amato, Kevin H. Davenport, Eric J. Juray and Stacey A. Greenspan of Prickett Jones & Elliott PA.

Marshall is represented by David Wissbroecker, Christine M. Mackintosh and Rebecca A. Musarra of Grant & Eisenhofer PA, Douglas E. Julie and W. Scott Holleman of Julie & Holleman LLP, and Leslie F. Portnoy of Portnoy Law Firm.

Julie & Holleman LLP is additional counsel for the plaintiffs.

Counsel information for Weber was not immediately available.

The case is In re: Weber Inc. Stockholder Litigation, case number 2023-0993, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie A. Pappas. Editing by Vaqas Asghar.

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Chancery Approves \$36M Sirius XM Settlement, \$9.6M Atty Fee

By **Leslie A. Pappas**

Law360, Wilmington, Del. (April 8, 2024, 8:19 PM EDT) -- Sirius XM Holding Inc. stockholders who sued in Delaware's Court of Chancery over an alleged ongoing squeeze-out by Liberty Media Corp. won court approval Monday of a \$36 million settlement to end their litigation, along with a \$9.6 million payout for their attorneys and \$50,000 for the lead plaintiff.

In a bench ruling after arguments in Wilmington, Chancellor Kathaleen St. J. McCormick called the \$36 million deal "substantial" and the 28% fee award for Bernstein Litowitz Berger & Grossmann LLP and McCollom D'Emilio Smith Uebler LLC "appropriate," since attorneys did more than two-thirds of the pre-trial prep work, reaching a settlement just five weeks before the trial was supposed to start.

In January, attorneys said they **might seek up to \$12.5 million** in fees and \$1.7 million in expense reimbursements, but briefs filed in March lowered the requested amounts to \$9.6 million and \$1.6 million, respectively. The chancellor awarded the full amounts requested.

Although attorneys argued lead plaintiff Vladimir Fishel deserved a \$75,000 incentive award because he spent more than 500 hours on the case and was heavily involved in the litigation, Chancellor McCormick reduced the amount by a third, citing precedent from previous cases.

"I'm not convinced that \$75,000 is totally appropriate," she said. "I think that the appropriate number here is \$50,000."

Fishel **sued in September 2021**, alleging Liberty Media, Sirius' controlling investor, was implementing a slow-moving squeeze-out of minority shareholders through stock buybacks. The suit also said the Sirius board had failed to extract any benefits for the company from a tax-sharing agreement that was connected to the purported scheme.

The parties announced in December 2023 that they had **reached a settlement** but didn't include specifics.

They filed **a stipulation of settlement** in January, noting that mediation proceedings in September and November, overseen by Jed D. Melnick of dispute resolution business JAMS, had helped them reach a deal.

The settlement came from "hard fought, truly adversarial negotiations," and the mediation was "neither easy nor swift," one of Fishel's attorneys, Gregory V. Varallo, told the court at Monday's hearing.

The settlement was also important because as the parties headed to trial, Sirius and Liberty announced a proposed business combination that would "merge Sirius out of existence," Varallo said.

Sirius XM **disclosed in late September** that it was weighing an offer from Liberty Media to combine the satellite radio company with the Liberty SiriusXM tracking stock group.

Under the deal, Liberty Media will split off its SiriusXM tracking stock group into a new subsidiary that will subsequently merge with Sirius XM, creating a new public company that will continue to operate under the SiriusXM name and brand.

Sirius XM said in December that it had **accepted the offer**. Varallo told the court on Monday that the merger "is almost certain to close and scheduled to close in the next quarter or so."

Fishel and the proposed class are represented by Gregory V. Varallo, Daniel E. Meyer, Jeroen van Kwawegen, Thomas G. James, Maria Nudelman, Eric J. Riedel and Margaret Sanborn-Lowing of Bernstein Litowitz Berger & Grossmann LLP and Thomas A. Uebler and Sarah P. Kaboly of McCollom D'Emilio Smith Uebler LLC.

Sirius XM Holdings and certain directors are represented by Raymond J. DiCamillo, Matthew W. Murphy, Daniel E. Kaprow and Nicholas F. Mastria of Richards Layton & Finger PA and Jonathan K. Youngwood, Janet A. Gochman, Jonathan S. Kaplan, Amy L. Dawson and Nicole A. Palmadesso of Simpson Thacher & Bartlett LLP. Sirius is also represented by Daniel B. Rath, Rebecca L. Butcher and Jennifer L. Cree of Landis Rath & Cobb LLP.

Liberty Media and certain directors are represented by Kevin R. Shannon, Jaclyn C. Levy, Daniel M. Rusk IV and Christopher D. Renaud of Potter Anderson & Corroon LLP and Richard B. Harper and Thomas E. O'Brien of Baker Botts LLP.

The case is Fishel v. Liberty Media et al., case number 2021-0820, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery, Rose Krebs and Al Barbarino. Editing by Janice Carter Brown.

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Glancy Prongay To Lead EB-5 Grocery Co. Fraud Stock Suit

By **Sydney Price**

Law360 (April 8, 2024, 2:27 PM EDT) -- Glancy Prongay & Murray LLP will lead a proposed class action alleging Asian specialty grocery chain Maison Solutions' stock price was severely damaged after a third-party research report accused it and its executives of participating in illegal activities, including using supermarkets as a front for immigration fraud.

U.S. District Judge Sherilyn Peace Garnett of the Central District of California said in an order Thursday that five investors represented by Glancy Prongay & Murray, collectively known as the Maison Investor Group, had the largest alleged losses in the class. The group said it lost a total of \$1.6 million in connection with the grocer's securities during the class period.

Glancy Prongay & Murray beat out competing bids from Pomerantz LLP and The Rosen Law Firm, whose clients alleged losses of approximately \$110,000 and \$354,000, respectively.

Judge Garnett said the Maison Investor Group also advanced claims typical of the class and could be expected to fairly and adequately protect the interests of the class.

Shareholders Rick Green and Evgenia Nikitina **filed the suit** in January. According to the complaint, Maison Solutions — which had its initial public offering in October — said in its September registration statement that the company was not aware of any potential litigation. A report from short-seller Hindenburg Research in December, however, alleged Maison was involved in a previously undisclosed lawsuit related to CEO John Xu's attempt to use supermarkets to defraud the U.S. visa program for investors and their families, known as EB-5.

According to the report, Xu helped forge a visa application for the plaintiff of a 2020 lawsuit by listing him as a fake employee of a supermarket location now owned by Maison.

In addition to Xu, Maison Chief Financial Officer Alexandria M. Lopez and several of Maison's registration statement signatories and IPO underwriters are defendants in the suit.

The Hindenburg report also alleged Maison's stock price was being manipulated by a pump-and-dump scheme via WhatsApp chat rooms.

On the release of the Hindenburg report on the afternoon of Dec. 15, Maison's stock price fell \$12.71 per share, or nearly 84%, to close at \$2.50 per share that day. On Friday, Maison shares closed at \$1.32.

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

The Maison Investor Group is represented by Robert V. Prongay, Charles H. Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP, and Frank R. Cruz of The Law Offices of Frank R. Cruz.

The Maison Solutions defendants are represented by Alicia Y. Hou and Ellen S. Robbins of Akerman LLP.

The case is Green et al. v. Maison Solutions Inc. et al., case number 2:24-cv-00063, in the U.S. District Court for the Central District of California.



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Goldman Investors Closer To Class Cert. In 1MDB Bribery Suit

By **Katryna Perera**

Law360 (April 8, 2024, 4:54 PM EDT) -- A proposed class of Goldman Sachs investors alleging losses from the 1MDB bond bribery scandal is one step closer to clinching class certification, with a magistrate judge recommending that a New York federal court grant partial approval to their request.

U.S. Magistrate Judge Katharine H. Parker issued a **report and recommendation** on Friday stating that the district court should grant certification to all persons and entities that purchased or acquired Goldman's common stock between Dec. 22, 2016, and Nov. 8, 2018, and were injured.

The judge narrowed the class definition from the requested period of Oct. 29, 2014, to Nov. 8, 2018, after finding that some of the misstatements on which the investors rely to assert their claims did not impact the price of Goldman's shares. Last year, Judge Parker allowed investors to amend their complaint for the **third time**.

AP7, the court-appointed lead plaintiff for the proposed investor class, alleges shareholders suffered losses because of Goldman's misstatements and omissions about its interactions with Malaysia's sovereign wealth fund, 1MDB, and knowledge of corruption associated with it. The fund was meant to spur economic development in the country, but instead, hundreds of millions of dollars were misappropriated by high-level officials of the fund and their associates.

Goldman underwrote \$6.5 billion of the 1MDB debt in three bond offerings in 2012 and 2013 and was paid \$600 million in fees, according to court documents. AP7 alleges Goldman's stock dropped in November 2018 when the Wall Street Journal and other media outlets published stories about a purported meeting in 2013 between the bank's then-CEO Lloyd Blankfein, then-Malaysian Prime Minister Najib Razak and the alleged architect of the 1MDB scheme, Jho Low.

In opposing certification of the class, Goldman argued that AP7 is not an adequate representative, that it cannot satisfy the predominance requirement for certification and that the investors are unable to show damages on a class-wide basis.

In her Friday report, Judge Parker said AP7 has demonstrated its commitment to the suit and has engaged experienced counsel.

"AP7's counsel point out that AP7 undertook the time and expense of investigating the claims, filing amended pleadings, opposing a motion to dismiss, searching for and producing discovery, sitting for a Rule 30(b)(6) deposition, reviewing and analyzing defendants' document production, taking 32 depositions, including 10 of witnesses outside the U.S., participating in case management conferences, retaining experts, and otherwise fully participating in this action," the report states. "These facts all demonstrate that AP7 is an adequate class representative."

She also tossed Goldman's claim that the investors cannot show damages on a class-wide basis, noting that Federal Rule of Civil Procedure 23 does not require a plaintiff to set forth a detailed model for calculating damages at this stage of the litigation.

Regarding predominance, Judge Parker said only two misstatements out of 13 identified in the suit match up with the alleged Wall Street Journal corrective disclosure and are sufficient for the class to assert.

According to the report, the first was made in December 2016 in the Wall Street Journal, stating that Goldman had not found any evidence showing that Jho Low, the architect of 1MDB, was involved in the bond transactions.

Judge Parker said this statement is not generic or puffery. Instead, it "disavows any knowledge that a specific person was involved in a specific series of transactions."

It was known that a high-level Goldman executive had met with Low to discuss the fund, "which may have hinted that the denial of Low's involvement was a lie," the judge said, but it was the eventual corrective disclosure revealing that the executive was Goldman's then-CEO Lloyd Blankfein that renders this statement false.

The second misstatement is a comment made by Blankfein in November 2018 that he was unaware of "red flags" associated with the 1MDB transactions. Judge Parker said this comment is at least a "partial match" to the corrective disclosure.

"The corrective disclosure, which states that Blankfein's 2013 meeting with Low 'came after [the] bank's compliance department had raised concerns about dealing with financier Jho Low' renders false Blankfein's statement that he was unaware of any red flags," the report states.

"While the corrective disclosure does not mention the 'red flags' comment specifically, it does quote Blankfein saying the scandal was the result of employees 'who evaded our safeguards and lie,'" the report further states. "That statement was made as part of an answer to the same question as the 'red flags' statement — and therefore must be read together with the 'no red flags' remark. Goldman does not persuasively argue otherwise."

The remaining 11 statements identified in the suit do not "match" with the corrective disclosure, Judge Parker said, and therefore, the investors "cannot rely on the inference that the front-end statements had any impact on price, and the basic presumption does not apply as to these statements."

After the truth about the scandal came to light, Goldman agreed to pay \$2.9 billion to resolve the U.S. government's criminal investigation into the bank's role in the affair under a 2020 deferred prosecution agreement and paid \$3.9 billion to end a probe by the Malaysian government. Low was criminally charged and remains a fugitive, while former Goldman Chair of Southeast Asia Tim Leissner pled guilty and former Managing Director **Roger Ng** was convicted at trial.

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

The investors are represented by Andrew L. Zivitz, Matthew L. Mustokoff, Johnston de F. Whitman Jr., Jamie M. McCall, David A. Bocian, Nathan A. Hasiuk, Vanessa Milan and Nathaniel C. Simon of Kessler Topaz Meltzer & Check LLP, and by Salvatore J. Graziano and Rebecca E. Boon of Bernstein Litowitz Berger & Grossmann LLP.

Goldman Sachs is represented by Robert Y. Sperling, Audra J. Soloway, Staci Yablon and Gregory F. Laufer of Paul Weiss Rifkind Wharton & Garrison LLP.

Lloyd Blankfein is represented by Brad S. Karp, Andrew J. Ehrlich and Kristina Bunting of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is *Sjunde AP-Fonden v. The Goldman Sachs Group Inc. et al.*, case number 1:18-cv-12084, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Ivan Moreno. Editing by Vaqas Asghar.



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McMahon Sells Millions More In TKO Stock Amid Abuse Suit

By **Elaine Briseño**

Law360 (April 8, 2024, 6:23 PM EDT) -- WWE's disgraced founder Vince McMahon, who was recently accused of trafficking a former employee, continues to loosen his grip on the wrestling company he founded, most recently selling \$311 million worth of stock in WWE's parent, according to a Monday securities filing.

McMahon sold roughly 3.5 million of his TKO Group Holdings Inc. shares to TKO and Endeavor Group Holdings in separate deals, according to the U.S. Securities and Exchange Commission filing Monday. Endeavor is the parent company of TKO, which owns and operates World Wrestling Entertainment. The transaction continues McMahon's recent streak of selling TKO stock. Including this month's sale, he has sold more than 17 million shares since November, for a total of more than \$1.2 billion.

According to the Monday filing, McMahon entered into a stock purchase agreement April 7 to sell 1.85 million shares of TKO common stock back to TKO at a price of \$89.01 a share, totaling about \$165 million. He entered a separate agreement April 4 to sell 1.6 million shares of TKO stock for the same price to Endeavor, for a total transaction amount of \$146.2 million, according to the filing.

Last month, McMahon sold 5.35 million in TKO shares, totaling about \$408 million, and in November he sold 8.4 million shares, according to previous SEC filings. The November stock sale totaled a reported \$670.3 million.

It is not clear what McMahon's motive may be with his divestiture. McMahon resigned as executive chair of WWE's board of directors Jan. 26, the day after former WWE employee Janel Grant filed a **graphic lawsuit** in Connecticut federal court against WWE and McMahon accusing him of forcing her to have sex with him and others in exchange for employment, among other things.

WWE did not immediately respond to a request for comment and McMahon could not be reached for comment. No attorney information is yet listed for him on the lawsuit.

Adrienne J. Lawrence, an attorney and author, writes in her book "Staying in the Game: The Playbook for Beating Workplace Sexual Harassment" that when it comes to sexual harassment claims, public knowledge is the biggest threat to a company's value and brand name.

Lawrence, currently vice president and senior consultant at Jennifer Brown Consulting, told Law360 on Monday that McMahon may be liquidating his stock and other assets to shield them from being seized in the event he loses a lawsuit.

"Putting his assets into trusts, offshore accounts, insurance policies and other vehicles could make it more difficult for those assets to be taken to satisfy a court judgment," she said. "McMahon also may be selling his WWE stock because he realizes that the stock will be adversely impacted by what information may come out during the litigation."

She added that the discovery process could unveil "significant wrongdoings" by McMahon and others within WWE.

"Members of the public are less likely to patronize a business that knowingly treats people unfairly," she said. "Additionally, the public learning of further misconduct at WWE could result in shareholder suits against the company for enabling a culture of harassment, which could end in a significant

judgment against the organization."

In a February filing, TKO **expressed concerns** about the impact McMahon's troubles could have on the business. He has had a string of allegations leveled against him, and a special committee comprising independent directors from WWE's board was formed in June 2022 to investigate the alleged misconduct. The filing from February of this year warned investors that "any further allegations, claims or investigations may have an adverse financial and operational impact on our business performance."

"Professional costs resulting from WWE's special committee's investigation have been significant and are expected to continue to be significant as the company continues to incur costs arising from ongoing and/or potentially new regulatory, investigative and enforcement inquiries, subpoenas, and demands and claims," the February filing said. "We expect Mr. McMahon to reimburse the company for reasonable expenses incurred in connection with the investigation."

In addition to Grant's lawsuit, the Laborer's District Council and Contractors Pension Fund of Ohio, which is a former WWE stockholder, filed a proposed class action on behalf of itself and other stockholders on Nov. 17.

This was followed three days later by an additional WWE stockholder, Dennis Palkon, filing a similar suit. Both suits name McMahon, were filed in Delaware's Chancery Court and allege breaches of fiduciary duty.

Monday's transaction comes on the heels of this month's **announcement** that private equity firm Silver Lake was purchasing Endeavor for \$13 billion and taking the company private. However, TKO is not part of that deal and will remain a publicly traded company. Endeavor acquired UFC in 2016 and merged the mixed martial arts group with WWE a year ago to create TKO.

--Additional reporting by David Steele and Al Barbarino. Editing by Marygrace Anderson.

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3 Firms Score \$885K Fee In Synchrony Investor Deal

By **Aaron Keller**

Law360 (April 8, 2024, 4:52 PM EDT) -- A Connecticut federal judge has approved \$885,000 in fees and expenses for three law firms that won corporate governance changes at Synchrony Financial after investors sued the bank's leaders during an offshoot of a securities case that netted a \$34 million judgment over consumer credit card practices.

U.S. District Judge Victor A. Bolden's Friday **order** says the **fee award** will be split among Faxon Law Group LLC of Connecticut and The Brown Law Firm PC and The Rosen Law Firm PA of New York. He also granted lead plaintiffs Jeffrey Gilbert and Maureen Aldridge \$2,000 each as an incentive for filing the derivative case.

"As consideration for the settlement, Synchrony's board of directors agreed to implement corporate governance reforms for a period of no less than three and a half years," the judge noted, saying "sophisticated" attorneys conducted talks that ended the case in a "procedurally fair" manner.

Gilbert sued Synchrony's officers and directors on behalf of the company in January 2019, alleging breaches of fiduciary duties, unjust enrichment, waste of corporate assets and violations of the Exchange Act, according to court records. Aldridge filed a similar case in March 2019.

The **derivative cases** were combined, and the parties agreed to a stay in December 2020 pending the outcome of a broader securities case surrounding the end of Synchrony's 20-year relationship as the provider of Walmart's store credit cards.

The securities case, led by a union retirement fund, accused Synchrony's leaders of failing to explain or misrepresenting to investors policy changes that loosened the bank's underwriting standards.

According to both lawsuits, those alleged moves allowed the bank to offer private-label credit cards to higher-risk consumers via deals with major retailers. Synchrony created a pool of bad loans that both weakened its financial position and caused several stock slides, the lawsuits alleged.

Walmart cut ties with Synchrony, moved its credit card business to Capital One, and sued Synchrony for "no less than \$800 million" in federal court in Arkansas, arguing that Synchrony "intentionally underwrote the Walmart/Synchrony credit card program in a way that exposes the program to significant unique credit risk and harmed Walmart," the securities complaint stressed, claiming that the Walmart litigation caused Synchrony's stock to drop yet again.

The Walmart case against Synchrony ended in 2019, the docket indicates.

After a **trip to the Second Circuit**, the securities case ended with a **\$34 million settlement**.

With that matter resolved, Judge Bolden lifted the stay on the combined Gilbert and Aldridge derivative cases in August 2023. According to the case docket, talks between the parties bore fruit in November, and a formal settlement was entered and preliminarily approved in December.

According to Judge Bolden's Friday order, the securities case produced internal company documents that Gilbert and Aldridge used to press for reforms at Synchrony.

Attorneys for the two investors spent 841 hours reviewing that and other material to move the derivative lawsuit forward, the judge noted.

"The benefits achieved here are the corporate governance reforms tailored to strengthen Synchrony's disclosure controls, oversight, risk assessment practice, and overall corporate governance, and to address the specific deficiencies and misconduct relating to Synchrony's loan portfolio, risk management and disclosure controls," Judge Bolden wrote, noting that a derivative settlement need not necessarily involve a large monetary award to be valuable.

Counsel for the derivative plaintiffs did not respond to inquiries on Monday. An attorney for Synchrony declined to comment.

The investors are represented by Timothy P. Pothin of Faxon Law Group LLC, Timothy Brown of The Brown Law Firm PC, and Phillip Kim of The Rosen Law Firm PA.

Synchrony and its leaders are represented by Jared Gerber and Victor L. Hou of Cleary Gottlieb Steen & Hamilton LLP, Meredith Kotler of Freshfields Bruckhaus Deringer LLP, and James T. Shearin of Pullman & Comley LLC.

The case is In re: Synchrony Financial Derivative Litigation, case number 3:19-cv-00130, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Sydney Price, Brian Steele and Sarah Jarvis. Editing by Adam LoBelia.

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9th Circ. Urged To Revive J&J, Bausch Talc False Ad Suit

By **Craig Clough**

Law360 (April 8, 2024, 9:35 PM EDT) -- An attorney for a proposed class alleging they were misled by Johnson & Johnson and Bausch Health about their talc products' safety urged a Ninth Circuit panel on Monday to revive the suit, saying a lower court erred in finding his clients needed to point to specific advertisements that misled them.

James Michael Treglio of Potter Handy LLP, who represents the two plaintiffs in the case, appeared before the three-judge panel in Pasadena, California, at a hearing that was also livestreamed and said his clients' complaint alleging the defendants' products were falsely advertised as being safe when they contain asbestos and other harmful chemicals should not have been dismissed with prejudice.

When Circuit Judge Salvador Mendoza Jr. pushed Treglio to pinpoint in the complaint "where, when [and] how" it alleges an advertisement misled his clients, Treglio said he could not, but also that he should not have to because of the long time the product has been for sale in America.

"So, it's not specifically in there, because again, we can't point to a specific, we can't point to a specific advertisement made that they could rely on," Treglio said. "Again, this is a product that was for sale for over 100 years."

U.S. District Judge Todd W. Robinson **dismissed with prejudice** the plaintiffs' fifth amended complaint in 2021, finding that after multiple chances they failed to plead which advertisements they allegedly relied on and how they were misled about the alleged asbestos content of the products.

The complaint included claims for violations of California law under the Consumer Legal Remedies Act, the False Advertising Law and the Unfair Competition Law.

Judge Robinson said much of the two plaintiffs' claims failed to specify which statements they saw or when and where they saw them. The statements they do claim to have seen and been misled by aren't relevant to the case, as they are not about the talc products or speak to whether they were "pure," the judge said.

Instead, the judge wrote, the pair merely pled their own interpretations of the advertisements as touting the "safety" of the talc products, which isn't enough. Some of the cited advertisements make no statements about the talc products at all, the judge wrote.

Where the pair did point to advertisements they saw and relied on, those statements only said the products were safe to use, while the plaintiffs have failed to allege that the products are unsafe or that the statements would mislead reasonable consumers.

Judge Robinson also rejected the pair's claims that J&J and Bausch had such a pervasive, long-running advertising campaign that they could avoid pleading with specificity which advertising they saw.

Much of Monday's hearing focused on this last point, with Treglio arguing that there is an exception to the Civil Code of Procedure Rule 9(b) that allegations of fraud must be pled with particularity established in the California Supreme Court's 2009 ruling *In re Tobacco II* . Judge Robinson held that the exception did not apply to the case.

The problem addressed in the Tobacco II case "is that you have a marketing campaign that goes on for so long, that how do you point out which one, when you first decided to start buying this product, and it's a product that you bought over and over and over and over again throughout the course of their lifetime?" Treglio said.

Johnson & Johnson Consumer Inc. and Bausch Health US LLC were named defendants in the lower court case, with Bausch Health US LLC having purchased from Johnson & Johnson the Shower to Shower talc product line in and around 2012 for \$150 million, according to the complaint, bringing allegations over Johnson & Johnson's baby powder and Shower to Shower.

The issue of whether talc in baby powder and other products contains asbestos and causes cancer has been the subject of litigation for years against Johnson & Johnson, which faces tens of thousands of suits that the company **tried to resolve twice** by placing a spinoff called LTL Management LLC, which took over J&J's talc-related liabilities, into bankruptcy to address the claims.

In March, the Ninth Circuit panel approved for Johnson & Johnson subsidiary LLT Management LLC to be substituted in as a defendant, replacing Johnson & Johnson Consumer Inc. LLT was previously known as LTL.

Naomi J. Scotten of Orrick Herrington & Sutcliffe LLP, who represents LLT, told the panel that the lower court was correct in finding the plaintiffs did not adequately plead any advertisements they relied upon, as the closest they get to is saying they were "subject to television advertisements along with the rest of the class. That's not even saying, 'I saw them.' It's just saying, 'I existed at the time that the TV ads existed.'"

Karin Bohmholdt of Greenberg Traurig LLP, who represents Bausch, said that "there is no allegation throughout six iterations of this complaint, as to anything that Bausch, my client, said about the Shower to Shower product," and that "there is no reliance on anything that my client Bausch said."

U.S. Circuit Judges Marsha S. Berzon and Salvador Mendoza Jr. and U.S. District Judge Susan R. Bolton sat on the panel for the Ninth Circuit.

The plaintiffs are represented by James M. Treglio of Potter Handy LLP.

LLT is represented by Naomi J. Scotten of Orrick Herrington & Sutcliffe LLP.

Bausch is represented by Karin Bohmholdt of Greenberg Traurig LLP.

The case is Gutierrez et al. v. Johnson & Johnson Consumer Inc. et al., case number 21-55141, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Mike Curley. Editing by Jay Jackson Jr.



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Norton, Quinn Emanuel Rip Contempt Order In \$600M IP Case

By **Ryan Davis**

Law360 (April 8, 2024, 8:23 PM EDT) -- A more than \$600 million judgment against NortonLifeLock for infringing Columbia University patents, based partly on a contempt finding against its former law firm, Quinn Emanuel Urquhart & Sullivan LLP, is "indefensible" and cannot stand, the company and the firm have told the Federal Circuit.

Norton argued in an **appeal brief** Friday that it did not infringe the anti-malware patents and that Quinn Emanuel's purported misconduct was merely standard patent practice. The firm filed a **separate brief** appealing the contempt orders and sanctions against it, saying they were "riddled with errors from start to finish."

Norton, which changed its name to Gen Digital Inc. last year, said some of Quinn Emanuel's purported misconduct was irrelevant to the case, while the rest "was not misconduct at all, just the ordinary grist of patent litigation" and "led to an indefensible award of nearly \$300 million in enhanced damages" by U.S. District Judge M. Hannah Lauck of the Eastern District of Virginia.

Quinn Emanuel, represented by Paul Clement, a former U.S. solicitor general, similarly said that the judge's contempt sanctions were based on an "egregious misunderstanding" by the judge, and urged the appeals court to "eliminate the indefensible sanctions that flowed from it."

A Virginia jury **found in 2022** that Norton sold antivirus software and other products that willfully infringed two Columbia patents, and it awarded \$185 million in damages.

Judge Lauck then increased the damages to **\$481 million**, criticizing Norton's "abhorrent litigation conduct" and cited contempt by Quinn Emanuel for which she sanctioned the firm. She also awarded Columbia attorney fees, which the parties stipulated should be nearly \$120 million, bringing the judgment to over **\$600 million**.

The contempt ruling and enhanced damages were tied to the relationship between Quinn Emanuel and Marc Dacier, a former Norton employee who was a witness in the case. The judge said there was a conflict in Quinn Emanuel representing both Dacier and Norton, and she ordered the firm to identify any information it had learned from him, then imposed contempt sanctions when it invoked privilege and refused.

Norton told the Federal Circuit that the firm's conduct related to Dacier had nothing to do with the company's infringement defense, so "any purported misconduct relating to Dacier was an invalid basis for enhancement."

Quinn Emanuel, which was replaced by Latham & Watkins LLP as Norton's counsel two weeks before trial, told the appeals court that the judge wrongly turned an "offhanded conversation" by Dacier into a conflict requiring massive sanctions.

"The rulings' manifest substantive flaws are explicable only by the district court's serial disregard for the most basic principles of party presentation and due process, culminating in improper contempt sanctions unaccompanied by even the minimum necessary procedural protections," the firm said. "The extraordinary orders and sanctions here cannot stand."

Dacier retained Quinn Emanuel to represent him at Norton's expense in a deposition in 2014, and

during a yearslong lull in the case, allegedly attended a conference at which he expressed regret about some of Norton's actions to a Columbia professor.

Judge Lauck later found that Dacier's alleged remarks were adverse to Norton, and that it was a potential conflict of interest for Quinn Emanuel to represent them both. She ordered the firm to turn over information it had received from Dacier.

Quinn Emanuel told the Federal Circuit that it "was well within its rights to disobey this extraordinary order." Attorneys routinely represent companies and their former employees, it said, and there is no ethical conflict unless there are concrete adverse interests. As a nonparty witness, Dacier had no interest in the case, and there was no conflict, the firm said.

"Contrary to what the district court apparently believed, the fact that a current or former employee expresses regret or provides some testimony that could potentially be unhelpful to his employer's case does not create an ethical conflict of interest, let alone one that would disqualify the same firm from representing both," the firm said.

Norton claimed that the \$300 million enhanced damages award tied to the firm's actions was "deeply flawed" because litigation misconduct "should play (at most) a background role" in the analysis, while the judge used it as "the catalyst for and the centerpiece of its enhancement ruling."

The company also argued that there was no basis for the underlying infringement finding, because its products do not operate in the same manner as Columbia's patents, which it argued should have been found invalid.

According to Norton, Columbia's patents require a component that emulates computer processes, which Norton said its products cannot do, but the judge wrongly interpreted the patents not to require emulation. The company also said that the patents are directed to the abstract idea of comparing data to identify anomalies like malware and are therefore invalid.

In addition, Norton maintained that \$94 million of the \$185 million jury verdict was wrongly based on foreign sales of Norton products, which it said violated case law that "the overseas sale of an accused product is not infringement."

An attorney for Columbia declined to comment on the filings. An attorney for Gen Digital and a representative of Quinn Emanuel could not immediately be reached for comment Monday.

The patents-at-issue are U.S. Patent Nos. 8,601,322 and 8,074,115.

Columbia is represented by Garrard R. Beeney, Jeffrey B. Wall, Oliver Engebretson-Schooley, Dustin F. Guzor, Alexander N. Gross and Stephen J. Elliott of Sullivan & Cromwell LLP.

Gen Digital is represented by Melissa Arbus Sherry, Michael A. Morin, Gabriel K. Bell, Charles S. Dameron, Margaret A. Upshaw, Ashley N. Finger, Brent T. Murphy, Andrew J. Slottje, Douglas E. Lumish, David K. Callahan and Nicholas Luongo of Latham & Watkins LLP.

Quinn Emanuel is represented by Paul Clement, C. Harker Rhodes IV and Joseph DeMott of Clement & Murphy PLLC.

The case is Trustees of Columbia University in the City of New York v. Gen Digital Inc., case number 24-1243, in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Andrew Cohen.



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Plot Holes Doom JPMorgan 'Fraud' Narrative, Frank Exec Says

By **Elliot Weld**

Law360 (April 8, 2024, 2:33 PM EDT) -- The founder of a startup meant to help college students apply for financial aid said an indictment claiming she duped JPMorgan Chase & Co. into a buyout should be dismissed because it fails to identify her alleged co-conspirators or fraudulent statements.

Charlie Javice, founder of the now-defunct startup Frank, said in a Friday motion to dismiss that the indictment was "nowhere close" to being specific enough to inform her defense against claims of wire fraud, bank fraud, securities fraud and conspiracy.

"The indictment alleges that Ms. Javice and her co-defendant Olivier Amar conspired with 'others known and unknown' to commit wire fraud and bank fraud but does not say who those 'others' are or when or how they joined the alleged conspiracy," the motion said. "With respect to the fraud charges, the indictment alleges that Ms. Javice made multiple fraudulent statements but does not specify what she said or indicate when or how or to whom she said it."

Both Javice and Amar, a former Frank executive, have pled not guilty. They are scheduled to go on trial in October.

According to prosecutors, Javice and Amar had a fake client list made up to trick JPMorgan into buying Frank for \$175 million. The sale allegedly resulted in a \$45 million payout to Javice, and both she and Amar were offered positions at the financial services giant. After the deal closed, prosecutors said Javice bought student data to pass off as Frank's customer base.

A superseding indictment against Javice said she and Amar schemed to defraud JPMorgan and another unnamed bank by submitting "false and fraudulent statements and representations about Frank and its user data." The original indictment said Javice made oral and electronic statements, as well as a PowerPoint presentation, claiming that the startup had over 4 million customers, when it actually had less than 300,000.

Attorneys for Javice argued Friday that prosecutors had alleged she defrauded a group of "potential acquiring companies," but other than JPMorgan, the original indictment hadn't identified any alleged victims and therefore was unconstitutionally vague. Including JPMorgan doesn't "cure the indictment's failure to state a bank fraud claim," the motion stated.

Javice also argued that prosecutors hadn't shown that any of her purportedly fraudulent statements were material to Frank's acquisition.

The indictment "merely states that certain unidentified fraudulent statements were made and recites the statutory elements," she said in Friday's filing.

Prosecutors improperly lumped more than one potential acquiring company into a single bank fraud charge, Javice also noted, adding that, if she's alleged to have defrauded multiple financial institutions, the constitution requires a grand jury to charge her separately for each distinct instance.

If the court declines to dismiss the case, Javice said it should at least order the government to produce a bill of particulars to clarify details about when and to whom each alleged false statement was made and how the purported assertions impacted JPMorgan's decision to purchase Frank. The government should further be required to disclose the identities of each unindicted co-conspirator,

according to the filing.

A representative for the Manhattan U.S. Attorney's office declined to comment on Monday, and counsel for Javice did not immediately respond to requests for comment.

The government is represented by Dina McLeod, Micah Fergenson, Nicholas Chiuchiolo and Rushmi Bhaskaran of the U.S. Attorney's Office for the Southern District of New York.

Javice is represented by Alex Spiro, Erica Perdomo, Jan Kernisan, Maaren Shah, Samuel Nitze, Sara Clark and Sarah Concannon of Quinn Emanuel Urquhart & Sullivan.

The case is USA v. Javice, case number 1:23-cr-00251, in the U.S. District Court for the Southern District of New York.

--Editing by Melissa Treolo.

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Norfolk Southern Settles Train Derailment Suits For \$600M

By **Ryan Harroff**

Law360 (April 9, 2024, 9:19 AM EDT) -- Norfolk Southern Corp. has agreed to settle the consolidated class action claims brought against it over its tragic train derailment and toxic chemical spill in East Palestine, Ohio, for \$600 million, according to a joint motion filed in federal court Tuesday.



Norfolk Southern has agreed to pay \$600 million to settle claims related to its train derailment and toxic chemical spill in East Palestine, Ohio. (AP Photo/Gene J. Puskar)

In the joint motion, the parties told the Northern District of Ohio that they have agreed to a settlement in principle, which will resolve "all class action claims within a 20-mile radius from the derailment and, for those residents who choose to participate, personal injury claims within a 10-mile radius from the derailment." The final terms of the deal — which would also resolve claims brought against railcar lessors GATX Corp., OxyVinyls LP and Trinity Industries Leasing Co. over their alleged role in the derailment — are still being hashed out, the motion states.

Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine PC, M. Elizabeth Graham of Grant & Eisenhofer PA, Jayne Conroy of Simmons Hanly Conroy LLC and T. Michael Morgan of Morgan & Morgan PA, counsel for the plaintiffs, thanked the court for overseeing the consolidated claims brought by their clients and lauded the deal in a Tuesday statement.

"We believe this is a fair, reasonable and adequate result for the community on a number of levels, not

the least of which is the speed of the resolution, and the overall amount of the awards residents can expect, which will be significant for those most impacted by the derailment," Katz, Graham, Conroy and Morgan said.

--Editing by Alyssa Miller.

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Target's Acne Treatments Contain Benzene, Customer Says

By **Lauraann Wood**

Law360 (April 8, 2024, 10:51 PM EDT) -- A Target customer in Illinois has launched consumer protection claims in federal court targeting acne treatments the retail giant allegedly manufactures and markets without disclosing benzene among their active ingredients.

Consumer Lucinda O'Dea claims in her Friday suit that Target Corp. unlawfully failed to test for, detect or prevent benzene's presence in the company's Up & Up acne treatments before making the products available to customers.

"These products are not designed to contain benzene, and the use of benzene in the manufacturing process is not 'unavoidable,'" O'Dea asserted in her suit. "Thus, the presence of benzene in the products renders them adulterated and misbranded, and therefore illegal to sell under both federal and state law."

Benzene is a component of crude oil, gasoline, and cigarette smoke, and is associated with blood cancers and leukemia, according to O'Dea's suit. The chemical has been known to cause harm at any level of exposure since at least the 1930s, her suit said.

Thermal decomposition of benzoyl peroxide leads to the creation of benzene, and that process is often accelerated by exposure to temperatures equivalent to a hot bathroom or a hot shipping container, which is associated with goods transportation, O'Dea alleged.

Target knew benzoyl peroxide contains such degradation issues, and that benzene can cause serious illness in humans, but still "did nothing" to reduce the possibility that the chemical would contaminate its acne products and harm consumers, she claimed.

And while Target lists benzoyl peroxide in its acne products' active ingredients, it amounts to only a "partial representation" because the product label doesn't warn consumers anywhere that it contains or risks containing benzene, O'Dea alleged.

"Any reasonable consumer would find the presence of dangerous substances, such as benzene, material in a drug product," she claimed. "Indeed, had the presence of benzene been disclosed by [Target], the product would not have likely been on the shelves."

O'Dea is looking to represent a nationwide class of consumers who similarly purchased Target's Up & Up acne treatment products without knowing the products at least risked containing benzene. She's also seeking to represent subclasses of consumers in California, Florida, Washington and other states with similar consumer fraud statutes.

She's asking the court to award the proposed classes compensatory, statutory and punitive damages alongside interest, attorney fees and any other relief deemed appropriate.

Representatives for the parties didn't immediately respond Monday to a request for comment.

O'Dea is represented by Gary Klinger, Nick Suciu III, J. Hunter Bryson and Luis Cardona of Milber Coleman Bryson Phillips Grossman PLLC and Philip Fraietta of Bursor Fisher PA.

Counsel information for Target couldn't immediately be determined Monday.

The case is Lucinda O'Dea v. Target Corp., case number 1:24-cv-02763, in the U.S. District Court for the Northern District of Illinois.

--Editing by Kelly Duncan.

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W.Va. Blocks Citi, HSBC, Others Over Fossil Fuel 'Boycotts'

By **Sarah Jarvis**

Law360 (April 8, 2024, 10:58 PM EDT) -- West Virginia's state treasurer announced Monday that Citigroup Inc., HSBC Holdings PLC, TD Bank NA and The Northern Trust Co. are ineligible for state banking contracts, finding they boycott fossil fuel companies under a Mountain State law, while two other banks escaped such a designation.

State Treasurer Riley Moore said that after reviewing the four banks' environmental, social and governance, or ESG, policies and publicly available statements, he determined they meet the threshold under West Virginia law for engaging in boycotts of fossil fuel companies.

The firms join a list that also includes BlackRock Inc., Goldman Sachs Group Inc., JPMorgan Chase & Co., Morgan Stanley and Wells Fargo & Co, which were deemed ineligible to provide banking services to the state when it first published its Restricted Financial Institution List in 2022.

"We cannot allow institutions that seek to destroy our state's critical energy industries and the economic activity they generate to also profit from handling the very taxpayer dollars they seek to diminish," Moore said in a statement. "My action today represents our continued commitment to protect state funds from furthering these politically motivated, subjective ESG policies that attempt to cut off financing for our coal, oil and natural gas industries and harm our state."

The announcement from Moore's office indicated that BMO Bank and Fifth Third Bancorp had been notified along with the other firms in February that they may be included on the list, but the pair "successfully demonstrated" to Moore that they weren't engaged in a boycott of fossil fuel companies.

Moore said BMO specifically "removed an offending policy" from its website and "subsequently demonstrated other existing policies had been revoked."

"I applaud both of these institutions for working with us in a cooperative way to ensure the free market remains free and our state's critical industries are treated fairly," Moore said.

According to the announcement, the 2022 Restricted Financial Institution List law authorizes the state treasurer to publish a list of financial institutions that have "publicly stated they will refuse, terminate or limit doing business with coal, oil or natural gas companies without a reasonable business purpose."

A spokesperson for HSBC in the U.S. said in a statement that the bank aims to work with energy companies rather than boycott them.

"Our policies anticipate that we will continue to provide corporate lending and capital markets transaction support to energy-based customers to both maintain supplies as well as support an orderly and just transition that helps with the creation of new jobs," the spokesperson said. "We are supportive of energy companies throughout the United States, whom we are pleased to have as clients."

Northern Trust said in a statement that it doesn't restrict or prohibit investment in fossil fuel-based energy companies, noting among other things that it provides services for managing fossil fuels for clients in its wealth management business and doesn't manage any registered vehicles in the U.S. that fully divest from fossil fuels.

The bank further indicated that as of February, it maintains about \$52 billion in investment exposure to companies in the traditional energy sector and companies with commercial activities tied to fossil fuel production and supply.

A representative of TD Bank didn't immediately respond to a request for comment late Monday, and Citi declined to comment.

Other red states have taken similar steps to signal their disapproval of corporate ESG practices, including Texas, where Attorney General Ken Paxton **blocked** Barclays from underwriting state municipal bonds in January because of the bank's stated carbon emission commitments.

Among other actions, Mississippi **announced** last month that it would fine BlackRock multiple millions of dollars for allegedly making false and misleading statements about its involvement in steering portfolio companies toward ESG factors. And the asset manager was hit with a **lawsuit** in December brought by the state of Tennessee, which accused it of issuing conflicting statements to appeal to investors in favor of and against ESG goals,

BlackRock said in a statement on the heels of Mississippi's announcement last month that it is "always bound to invest consistent with our clients' choices, their best financial interests, and applicable law."

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

--Additional reporting by Henrik Nilsson. Editing by Andrew Cohen.

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