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APRIL 11, 2024

Apple To Pay Investors \$490 Million Over China iPhone Comments

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Apple has reached a \$490 million tentative settlement to resolve allegations that in late 2018, the company misrepresented the state of the business in Greater China, its most important growth market at the time.

As the Trump Administration imposed steep tariffs (<https://www.cbsnews.com/news/4-things-to-watch-as-trumps-tariffs-hit-china/>) on Chinese goods, Apple and its top executives allegedly concealed that the “trade war” with China had negatively impacted demand for iPhones. On a conference call with investors and analysts on November 1, 2018, Apple CEO Tim Cook stated Apple was not experiencing the negative economic pressures in China it had been in other emerging markets. Four days later, however, Apple cancelled production for the iPhone XR, leading to approximately a 30% reduction in sales.

On January 2, 2019, Apple announced it will miss its earnings guidance for the first time in fifteen years — by up to \$9 billion. CEO Cook explained (<https://www.apple.com/newsroom/2019/01/letter-from-tim-cook-to-apple-investors/>) in a letter to investors that lower than anticipated iPhone sales, particularly in Greater China, accounted for the revenue shortfall. Apple's stock price dropped about 10% as the result of the news, from \$157.92 to \$142.19 per share.

The class action complaint further alleges the following:

- In 2018, China began experiencing slowing economic growth, compounded by tariffs imposed on Chinese goods imposed by the Trump Administration in April, July, and September 2018.
- Geopolitical tensions occurred just as Apple introduced in September 2018, two new expensive iPhones, the iPhone XS and the iPhone XR, leading analysts to question whether they would sell in the economic climate.
- Nevertheless, on November 1, Apple released its revenue guidance for 1Q19 at “a new all-time record” of \$89 billion to \$93 billion. Later that day, Apple held a conference call, where analysts expressed concerns about deceleration in China.
- Apple CEO Tim Cook allayed analyst concerns on the November 1 conference call, stating he would not put China in the category of emerging markets like Turkey, India, Brazil, and Russia. Cook further added business in China was “very strong” last quarter, and Chinese iPhone sales had gotten off to a “really great start.”
- Four days after the call, *Nikkei Asian Review* reported (<https://asia.nikkei.com/Business/Companies/Apple-cancels-production-boost-for-budget-iPhone-XR-sources>) that Apple cancelled its “production boost” for the iPhone XR. On December 4, in what was interpreted as a “fire drill” response to poor iPhone sales, *Bloomberg* noted (<https://www.bloomberg.com/news/articles/2018-12-04/apple-is-said-to-reassign-marketing-staff-to-boost-iphone-sales>) Apple had moved marketing staff to sales.
- On January 2, 2019, Cook sent a letter to investors explaining Apple will miss its earnings guidance by up to \$9 billion, because “it did not foresee the magnitude of the economic declaration, particularly in Greater China.”
- In an interview (<https://www.cnbc.com/2019/01/02/cnbc-exclusive-cnbc-transcript-apple-ceo-tim-cook-speaks-with-cnbc-josh-lipton-today.html>) with CNBC later that evening, Cook further explained the impact that the slowing economy in China had on the Company's 1Q 19 sales in.

Investor Class Action Details		ISS SCAS
COURT VENUE	CASE NUMBER	INITIAL COMPLAINT
U.S.D.C. – Northern District of California	4:19-cv-02033	Filed on April 16, 2019
TOTAL SETTLEMENT AMOUNT	CASE STATUS	
\$490 million	Tentative Settlement	
CLASS DEFINITION		
On behalf of all persons and entities that purchased or otherwise acquired the publicly traded securities of Apple Inc., including purchasers of call options and sellers of put options, during the period from November 2, 2018, through January 2, 2019, inclusive.		
LEAD PLAINTIFFS	LEAD PLAINTIFFS' COUNSEL	
Norfolk County Council as Administering Authority of the Norfolk Pension Fund	Robbins Geller Rudman & Dowd LLP	
DEFENDANTS	DEFENSE COUNSEL	
Apple Inc., Timothy D. Cook, and Luca Maestri	Orrick, Herrington & Sutcliffe; Paul Weiss Rifkind Wharton and Garrison	
www.issgovernance.com/scas		

After more than five years of protracted litigation, the parties reached the tentative settlement before the trial date set for September 2024. The case initially had a different lead plaintiff and alleged a far-reaching deception, including iPhone “throttling” and the impact of a battery

replacement program. The Court dismissed the majority of those allegations, and transitioned the lead plaintiff and lead counsel to the Norfolk Pension Fund and Robbins Geller Rudman & Dowd, respectively.

Norfolk filed a revised complaint on narrower grounds which partially survived defendants' motion to dismiss. The class was initially certified for common stock purchasers in February 2022 and later certified as to option purchasers and sellers in March 2023. In June 2023, the court denied (<https://www.law360.com/articles/1693473/attachments/0>) defendants' motion for summary judgment, rejecting defendants' arguments that Cook did not have the requisite intent and that CFO Luca Maestri did not have control over Cook's statements.

If approved, the \$490 million payout will become the third largest securities class action settlement in the Northern District of California, behind McKesson HBOC Inc. (\$960 million) and Twitter, Inc. (<https://insights.issgovernance.com/posts/twitters-809-5-million-settlement-close-to-the-goal-line/>) (\$809 million). The tentative settlement is also the largest to be announced so far this year.

ISS SCAS will continue to monitor and file claims for this high-profile action and others, if and when, they progress toward an official settlement.

By:

Jarett Sena, Esq., Director of Litigation Analysis, ISS Securities Class Action Services

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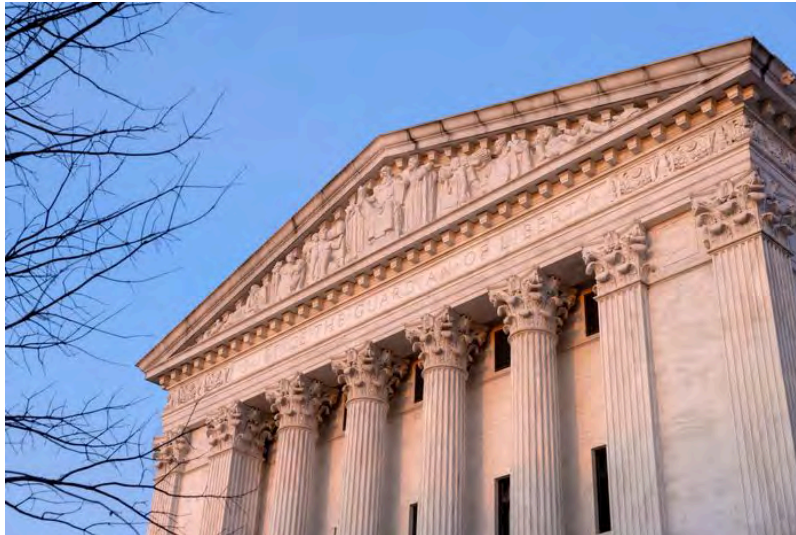
RISK & COMPLIANCE JOURNAL

Supreme Court Finds Macquarie Infrastructure Not Liable to Investors for Omitting Regulatory Risk

Investors can't hold the infrastructure business liable for securities fraud for failing to disclose how a U.N. regulation would affect its commodities storage business

By [Dylan Tokar](#) [Follow](#)

Updated April 12, 2024 8:51 pm ET



The Supreme Court in a unanimous decision on Friday shot down a shareholder lawsuit that would have expanded civil liability for companies under securities fraud rules. PHOTO: AMANDA ANDRADE-RHOADES/ASSOCIATED PRESS

Shareholders can't sue a company for remaining silent on risks or trends that might have a material impact on its business, the Supreme Court ruled Friday.

In a unanimous decision, justices for the court found that Macquarie Infrastructure couldn't be held liable by investors for securities fraud by failing to disclose how a United Nations regulation on fuel oil might impact the bottom line of the terminals it operates to store bulk liquid commodities.

The ruling, which reverses a decision by the U.S. Court of Appeals for the Second Circuit, is part of a trend by the Supreme Court to limit civil liability for securities fraud. It benefits public companies that would have otherwise faced a new avenue for costly securities litigation, said Jonathan Wagner, a partner at law firm Kramer Levin Naftalis & Frankel.

“In a way, it also benefits shareholders, because a decision opening the door to civil liability could have led to overdisclosure, to bombarding shareholders with information, making it harder for shareholders to focus on the important disclosures,” Wagner added.

Linda Coberly, a partner at law firm Winston & Strawn who represented Macquarie Infrastructure in the litigation, welcomed the Supreme Court’s ruling. “It will give critical guidance to companies, litigants and courts in our case and beyond,” she said.

A lawyer for hedge-fund manager Moab Partners, which brought the suit, didn’t immediately return a request for comment.

The case stretches back to 2016, when the U.N.’s International Maritime Organization adopted a regulation capping the sulfur content of the fuel oil used in shipping beginning in 2020. Macquarie Infrastructure didn’t disclose the impending regulation to investors in the years following the IMO’s decision.

The regulation eventually caused a drop in the amount of space contracted from Macquarie Infrastructure for the storage of the fuel oil. When the company announced the drop in February 2018, its stock price fell 41%, according to the Supreme Court.

Macquarie Infrastructure was sued by shareholders at Moab, which argued that the company’s statements had been misleading because Macquarie Infrastructure had concealed from investors that its subsidiary’s single largest product was facing a “near-cataclysmic ban.”

Specifically, Moab accused Macquarie Infrastructure of violating a securities fraud rule prohibiting public companies from making “any untrue statement of a material fact” or omitting “a material fact necessary in order to make the statement made...not misleading.”

But the fraud rule allows for shareholders to sue over “half-truths”—not “pure omissions,” the Supreme Court ruled Friday.

A separate Securities and Exchange Commission regulation requires companies to disclose “known trends or uncertainties that have had or are reasonably likely to have a material...impact” on net sales or revenues. That duty doesn’t allow shareholders to bring a lawsuit under the securities fraud rule for such an omission, the court ruled.

“The substance of the decision is that corporate silence alone is not securities fraud,” said Wagner.

Write to Dylan Tokar at dylan.tokar@wsj.com

Appeared in the April 13, 2024, print edition as ‘High Court Says Macquarie Infrastructure Not Liable in Shareholder Suit’.

Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/04/macquarie-infrastructure-corp-v-moab-partners-l-p.html

I've frequently posted about omissions liability under the federal securities laws; you can read many of those posts, in reverse chronological order, [here](#), [here](#), and [here](#). But, here's the CliffsNotes version of where we are now, after the Supreme Court's decision today in *Macquarie Infrastructure Corp. v. Moab Partners, L. P.*

Once upon a time, there was a statute, Section 10(b) of the Exchange Act. That statute made it unlawful:

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The Commission did, in fact, adopt those rules and regulations, in the form of Rule 10b-5, which made it unlawful:

- (a) To employ any device, scheme, or artifice to defraud,
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
- in connection with the purchase or sale of any security.

These subparts, collectively, were intended to prohibit the full extent of conduct prohibited by Section 10(b) itself. See *SEC v. Zandford*, 535 U.S. 813 (2002). That is, if it could fall into the category of a “manipulative or deceptive device or contrivance” in connection with the purchase or sale of a security, then it must be prohibited by at least one of Rule 10b-5's subparts.

Back in kinder, simpler times, U.S. courts throughout the land interpreted Section 10(b) and Rule 10b-5 to prohibit not only “manipulative or deceptive device[s] or contrivance[s]”, but also conduct that *aids and abets* the “manipulative or deceptive device or contrivance” of someone else. But, alas, in *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164 (1994), the Supreme Court said – nay! Section 10(b) prohibits “only the

making of a material misstatement (or omission) or the commission of a manipulative act”; mere “aiding” someone else’s “manipulative or deceptive device or contrivance” is not prohibited.

That, of course, kicked off years of litigation over the distinction between aiding a “manipulative or deceptive device or contrivance” and actually participating in one.

Which brought us to *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). There, investment adviser Janus Capital Management caused its affiliated mutual funds to file false prospectuses about those funds’ policies. The Supreme Court held that the investment adviser had not violated Rule 10b-5(b), because it had not actually “made” a false statement. The *funds* made false statements. Though the funds’ statements had been drafted by its investment adviser, the statements had been filed under the funds’ name, making the funds – and only the funds – responsible for their contents. This highly technical definition of the word “make,” the Court further explained, was necessary to preserve the line between primary liability and aiding and abetting liability.

Oh no.

Because, aiding and abetting, we learned from *Central Bank*, is *outside the scope of the Section 10(b) statute*. But the *Janus* holding was based on a technical definition of the word “make,” which appears only in *one subpart* of Rule 10b-5. Was the Court seriously proposing that intentionally causing a captured entity to issue false statements is not a “manipulative or deceptive device or contrivance” within the meaning of Section 10(b)? Or was the Court merely holding that such conduct does not run afoul of Rule 10b-5(b), but still could run afoul of Rule 10b-5(a) or (c)?

In *Lorenzo v. SEC*, 587 U.S. 71 (2019), we got an answer. *Janus* was about Rule 10b-5(b); there may well be conduct – including distributing false statements that someone else made, with an intent to deceive – that falls within Section 10(b), but not Rule 10b-5(b) (i.e., that falls within Rule 10b-5(a) or 10b-5(c)).

Which brings us to *Moab v. Macquarie*, wherein the Supreme Court decided that the *Central Bank* to *Janus* to *Lorenzo* journey was so much fun, it was worthwhile to do it again.

In *Moab*, shareholders of Macquarie Infrastructure Corp. brought a fraud on the market class action, alleging that Macquarie filed its 10-K without including certain information required to be disclosed under Item 303. The shareholders contended that omitting required information was prohibited by Rule 10b-5(b).

The Supreme Court rejected the claim. According to the Court, Rule 10b-5(b)’s language is limited solely to affirmatively false or misleading statements – not “pure” omissions. The Court contrasted the language of Rule 10b-5(b) with the language of Section 11 of the

Securities Act of 1933. The latter prohibits not only false statements and misleading omissions, but also failure to disclose required information; Rule 10b-5(b), however, says nothing about failure to disclose required information. Therefore, concluded the Court, absent an affirmative false or misleading statement, Rule 10b-5(b) does not create liability.

Except, we know that Section 10(b) prohibits “pure” omissions. We know that because the Supreme Court has said so. See *Chiarella v. U.S.*, 445 U.S. 222 (1980) (“the Commission recognized a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation. This relationship gives rise to a duty to disclose because of the ‘necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority stockholders.’”); *SEC v. Zandford*, 535 U.S. 813 (2002) (“each [sale] was deceptive because it was neither authorized by, nor disclosed to, the Woods”); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972) (“The individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 8 1/3% of the sales, but for the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers.”).

Which makes perfect sense! Because whatever the language of 10b-5(b), it seems entirely unobjectionable that it should be considered a “manipulative or deceptive device or contrivance” within the broader meaning of Section 10(b) to intentionally withhold information you have a duty to disclose – from some other source – in order to mislead someone else.

The inescapable conclusion, then, is that if pure omissions are not prohibited under 10b-5(b), they must be prohibited under either 10b-5(a) or 10b-5(c).

Except *Moab* included this curious footnote:

The Court granted certiorari to address the Second Circuit’s pure omission analysis, not its half-truth analysis. See Pet. for Cert. i (“Whether . . . a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), *even in the absence of an otherwise-misleading statement*” (emphasis added)) ... The Court does not opine on issues that are either tangential to the question presented or were not passed upon below, including what constitutes “statements made,” when a statement is misleading as a half-truth, or whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions.

It also included such language as:

Neither Congress in §10(b) nor the SEC in Rule 10b–5(b) mirrored §11(a) to create liability for pure omissions...

So ... either pure omissions – even if the omissions were part of an intentional effort to deceive someone to whom there was a duty of disclosure – do not count as “manipulative or deceptive device[s] or contrivance[s]”, which will come as a pleasant surprise to various insider traders and faithless brokers, or Rules 10b-5(a) and (c) prohibit conduct outside the scope of Section 10(b).

Or ... we'll be walking all this back in a couple of years.

Okay, fine, here's the actual way out: The Court didn't *exactly* say omissions aren't prohibited; it said “A pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence.” Only these “pure omissions” are not prohibited.

Presumably, circumstances that give meaning to the silence are when one acts as a broker, or a market maker, or trades on the information provided in the context of a trusting relationship. Or, it is not a “pure” omission – it is an omission coupled with conduct – when one misuses a brokerage account, or acts as a market maker, or trades in stock.

Without explanation – or even an acknowledgment of the inferential leap – the Supreme Court apparently concluded that *no* conduct is involved, or no “circumstances ... giv[ing] any particular meaning to that silence” exist, when a defendant engages in the action of filing an official document with the SEC that omits required information.

So I *assume* that the next smartass who tries to cite *Moab* as a defense to insider trading will be told “but that's a circumstance that gives particular meaning to the silence!”

In other words, the rule, such as it is, appears to be that it's *not* fraud if it's in connection with a fraud on the market class action, and it *is* fraud anywhere else. Which means, we must ask – is it a circumstance that gives particular meaning if *someone* doesn't merely leave required information out of a form but fails to file a form at all?

I guess we'll soon find out.

Finally, as I previously mentioned, the SEC can fix this – or most of this – by adding a line item to every filed form declaring that it is not only accurate, but also complete. That would be the explicit statement rendered false by a failure to include required information. Still, such a certification is not a complete panacea – there would still be uncertainty around entire failures to file a form, and over whose scienter would be attributed to the company for a false certification, but it would solve some of the problem.

Also, icymi, earlier today I posted a plug about stuff I've done recently.

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April 15, 2024, 10:19 AM PDT

Matt Levine's Money Stuff: Silence Is Not Securities Fraud

By Matt Levine
Opinion

Bloomberg Law News 2024-04-15T13:57:16824059049-04:00

Matt Levine's Money Stuff: Silence Is Not Securities Fraud

By Matt Levine 2024-04-15T13:19:11426-04:00

Not everything is securities fraud

"Everything is securities fraud," I [like to say](#) around here, meaning:

- 1. Sometimes a public company does a bad thing, or has a bad thing happen to it.
- 2. News of the bad thing comes out and the stock drops.
- 3. Shareholders sue, saying "you didn't tell us about the bad thing in advance, so we bought the stock thinking there was no bad thing, but then we found out that there was a bad thing. We were defrauded; we overpaid for the stock because of your lies."

Occasionally I add a technical clarification: Simply *not mentioning* a bad thing is not fraud under US securities law. The law (Rule 10b-5) says that it's fraud "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." So *lying* – saying something that isn't true – is securities fraud. And many *omissions* are securities fraud, if the company omits information that is "necessary in order to make the statements made ... not misleading." (So [for instance](#) if a company's public statements say "we have an ethics policy and try to be ethical," and omit to mention "our executives did an unethical thing," somebody will sue over that, claiming that the description of the ethics policy was misleadingly positive.)

But it is not securities fraud *simply* not to mention a bad thing. If a bad thing happens, and the company doesn't say anything about it, and it doesn't say anything that might be misleading, that's not securities fraud. This does not come up that often, because companies are always going around saying generic things that might be contradicted by their bad news. If a company has a sexual harassment scandal, its statements about its ethics policy might be misleading; if it has a [computer hack](#), its statements about its information security policy might be misleading; etc. But in theory pure silence is not securities fraud.

Still, you could imagine pure silence being misleading. For instance, you could imagine things that the market would *expect to be disclosed* if they happened, so that *not* disclosing them sort of implies that they didn't happen. If a company's chief executive officer died suddenly, and the company didn't tell anyone for a few weeks, that would be weird! The company hasn't *lied*, but everyone kind of went around assuming that the CEO was alive, and the company didn't bother to correct their mistaken impression.

Or: There are a lot of US Securities and Exchange Commission rules requiring companies to disclose certain things. Regulation S-K, for instance, requires companies to disclose certain specific types of information about their business in their quarterly filings: Companies are supposed to "describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations," "describe briefly any material pending legal proceedings," discuss "material factors that make an investment in the registrant or offering speculative or risky," etc.

If the law says that you have to disclose any material lawsuits in your quarterly report on Form 10-Q, and there is some material lawsuit against you, and you file a 10-Q and don't mention the lawsuit, then that is arguably misleading. "If there was a lawsuit, they would be required to mention it, and they didn't mention a lawsuit, so there must not be one," investors could reasonably conclude. The omission, *combined with the reporting requirement*, is misleading. If Form 10-Q consisted of a literal form with a box saying "Are there any material lawsuits against you," and you wrote "no," the "no" would be a false statement. Arguably just leaving out the required disclosure has the same effect.

Anyway that is the view of the US Securities and Exchange Commission:

An MD&A [management's discussion and analysis] that makes certain statements but omits information that [Regulation S-K] Item 303 requires to be included is a misleading half-truth. ... By filing an MD&A describing certain known trends and uncertainties, an issuer makes statements. If the issuer omits other known trends or uncertainties that meet Item 303's threshold, the MD&A's statements will be misleading to a reasonable investor, who will be aware of Item 303's requirement to list all material known trends or uncertainties, and therefore will assume that the MD&A provides a complete list. ...

Where regulatory disclosure requirements apply, reasonable investors will infer from an issuer's silence that the types of events for which disclosure is required have not occurred.

Macquarie Infrastructure Corp. operated terminals for No. 6 fuel oil. In 2016, the United Nations essentially banned No. 6 fuel oil by 2020. But:

In the ensuing years, Macquarie did not discuss IMO 2020 [the UN ban] in its public offering documents. In February 2018, however, Macquarie announced a drop in the amount of storage contracted for use by its subsidiary due in part to the decline in the No. 6 fuel oil market. Macquarie's stock price fell 41%.

Shareholders naturally sued, arguing that (1) Regulation S-K required Macquarie to "describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations," (2) this was a known trend or uncertainty that was likely to be bad for sales, (3) Macquarie did not disclose it and (4) that was misleading. Macquarie argued that it couldn't be securities fraud just to *not mention* the new UN rule. The district court agreed and dismissed the lawsuit, but an appeals court disagreed, finding that, when there's a rule requiring disclosure of something, it can be fraud not to disclose the thing.

Macquarie appealed to the Supreme Court, and last Friday it won. The unanimous Supreme Court said:

The question in this case is whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any "statements made" misleading. The Court holds that it cannot. Pure omissions are not actionable under Rule 10b-5(b).

I guess that is the better reading of the actual words of the rule, though it is a weird reading of its intent. Omitting things that you're required to disclose really does seem misleading. In any case, there you go, some things are not securities fraud.

Save Mart

Merger agreements are long and boring and most people don't read them all the way through. In theory, this might make them a good place for tricks. If you are selling your company, maybe you could try putting on page 47: "Notwithstanding anything else in this agreement, Buyer shall pay Seller an amount in cash equal to the product of (1) the Purchase Price and (2) two (2)." Maybe no one will notice, everyone will sign the contract, you'll get to closing, the buyer will hand you a check for the agreed purchase price, and you'll say "no actually on page 47 it says you have to give me twice this amount." The buyer will flip to page 47 and say "huh I missed that but come on, that was not the deal," you will say "no, it was the deal, it's right there in the contract," you'll go to court, and the judge will say "well this is mighty weird but a contract is a contract so here's your money."

In practice, you do not hear much about this sort of thing in big mergers and acquisitions, for several reasons:

- 1. Many mergers are fairly collaborative, friendly endeavors. The buyer is buying a business that it likes, it is working with the seller to make sure the business is as good as possible, everyone is trying to win each other's trust, and often it is better to win points by saying "hey we noticed that this formula would underpay you, let's fix it" than it is to try to sneak a tricky formula into the contract.
- 2. Parties to merger agreements have *huge* incentives to catch tricks, and they pay lawyers to read the contracts and look out for tricks.
- 3. Mergers are often one-shot deals for the seller – after the merger, the target company vanishes – but there are a lot of repeat players around. Private equity firms and big companies do a lot of acquisitions, and developing a reputation for trickiness might make that harder. Their professionals – bankers and lawyers – also do lots of deals, for buyers and sellers, and also care about their reputation.
- 4. This is not legal advice, but as a broad generalization, if there is something in a merger agreement that is *manifestly a trick*, and you go to court to enforce it, there's a decent chance that a judge will say "oh come on that's a trick, you can't enforce that," and your trick won't work. It's possible that a judge will say "a contract is a contract and congratulations on your trick," but it's also quite possible that she won't, and will be annoyed, and you'll be in a worse place than if you hadn't done the trick at all.

I have become a bit of a connoisseur of contractual trickiness around here, and also in my previous careers. But mostly I am sort of an efficient-markets guy, in many areas of life, and I tend to assume that most big-dollar high-finance contracts probably say what people expect them to say.

But last week at FT Alphaville, Sujeet Indap had a wild story about Save Mart, a closely held supermarket whose family owners sold it in 2022 to Kingswood Capital Management. Kingswood agreed to pay the sellers \$245 million, net of cash and debt; at closing, the sellers swept about \$200 million of cash from the company, and Kingswood wrote them a check for about \$40 million. And then a few months later, Kingswood sent the sellers a bill for \$87 million, effectively asking them to *pay Kingswood* for taking over the company. "The saga is a window into the vagaries of private-company dealmaking," writes Indap, "and how esoteric financial accounting can be weaponised by a canny counterparty." It's the rare trick M&A!

Here is the trick. Save Mart owned a one-third interest in a joint venture called Superstore Industries. It carried this interest on its books as an equity investment. Superstore, meanwhile, had \$109 million of its own debt, which Save Mart apparently guaranteed, but which was not reflected on Save Mart's balance sheet: Save Mart's balance sheet showed only the \$22.5 million value of its equity investment in Superstore (net of that debt and its partners' equity interests). And part of what Kingswood was buying from Save Mart was that equity interest.

The way the purchase agreement worked was that, after closing, there was a true-up based on the final balance sheet of Save Mart at closing. Basically if Save Mart had more debt than expected, the sellers would have to pay Kingswood for the extra debt: You take the company's actual debt at closing, subtract the debt reflected on the pre-closing balance sheet, and the sellers pay Kingswood back an adjustment for any excess. If the sellers went on a borrowing spree just before closing, and then paid the cash out to themselves, they'd have to pay it back to Kingswood in the true-up.

But the purchase agreement's definition of "Closing Date Indebtedness" included Save Mart's own debt and also debt that it guaranteed. This means that:

- The \$109 million Superstore debt counts, under the terms of the purchase agreement, as Save Mart debt at closing.
- It was *not* reflected on the pre-closing balance sheet, because it is not Save Mart debt under accounting rules.
- Therefore, you take the \$109 million debt, you subtract the *zero* dollars of that debt reflected on the balance sheet, and that's the true-up that the sellers owe to Kingswood.

Kingswood paid the sellers about \$40 million for the company at the closing on March 28, 2022. And then in July, it sent them a post-closing statement, asking them to *pay it back \$87 million*. (The \$87 million apparently reflected the \$109 million debt, minus other post-closing adjustments in the sellers' favor.) So the total purchase price of the company would be negative.

The sellers replied to the effect "no obviously that debt doesn't count, that's not the deal, we're not paying." Kingswood replied "well the purchase agreement says it counts, so pay up." They went to arbitration, and the arbitrator – a former Delaware Chancery Court judge – ruled in favor of Kingswood, finding that obviously they didn't *mean* for the sellers to have to pay for all that debt, but that's what the contract says, and a contract is a contract:

The buyer relies heavily on the definitions in the purchase agreement to argue that the parties contemplated potential downward adjustments to the purchase price to account for debt that resided within the target's subsidiaries. The seller acknowledges the buyer has not misread the applicable definitions, but argues the proper construction of those definitions must account for other provisions in the contract that reflect the parties' intent that the sizable debt at issue would not be counted in the purchase price adjustment. ...

Extrinsic evidence, says the seller, reveals that the parties never intended for the debt at issue to be part of the purchase price adjustment. For its part, the buyer struggles to explain much of this extrinsic evidence, but maintains the adjustment is entirely consistent with the parties' overarching understanding that the sale would be a cash free, debt free transaction. ...

Delaware law is more contractarian than most, and Delaware courts will enforce the letter of the parties' contract without regard for whether they have struck a good deal or bad deal.

Kingswood and the sellers then went to the actual Delaware Chancery Court, which disagreed with the arbitrator but had to defer to his decision. So Kingswood gets its money. The sellers are appealing to the Delaware Supreme Court.

To be fair, this is not exactly a trick in the contract; it's a trick in the balance sheet, or perhaps a tricky interaction between the two. Indap quotes the Kingswood deal guy:

We were surprised that the seller didn't put any SSI debt in their definition of indebtedness as of the closing, and our view was, if that's what they believed and we raised it, we thought it would be a contentious topic ...

Again, we had had a draft purchase agreement from them dating back to, you know, December that clearly laid out the debt of operating subsidiaries, as well as debt guaranteed by Save Mart was, in fact, indebtedness for purposes of the transaction. Again, it's a very standard definition. So no, we assumed that they had read their own document that they drafted ...

Because our perspective was, per the purchase agreement, SSI debt was to be included in indebtedness. For some reason, which we don't know why, that appeared not to be the perspective of the seller at the time that they delivered the preclosing statement.

Indap writes: "In other words, Kingswood had believed, all along prior to signing and closing, that the gross SSI debt belonged on Save Mart's main balance sheet. But they decided to keep quiet about that until after the deal closed."

I said above that you don't often see trickiness in M&A in part because it is a cooperative endeavor where everyone is trying to work nicely together. Here, though Indap quotes another Kingswood employee saying that "given the contentiousness of the negotiations and the transaction with the seller, we made a strategic decision to address the SSI debt post close" with the adjustment. If they already don't like you, and you already don't like them, you're not going to go out of your way to point out mistakes that hurt them.

And I said above that you don't often see trickiness in part because, at least for private equity buyers, it's a repeat game in which reputation is valuable. On the other hand, do you know what else is valuable? One hundred nine million dollars. If you are about to close a middle-market M&A deal for \$40 million, and you get a mistaken balance sheet from the seller that will cause you to unfairly underpay by \$500,000, you might, in the spirit of cooperation and fair dealing, email them back to say "hey you missed \$500,000 here, let's fix that." And they'll email back and say "thanks" and keep the \$500,000 and think fondly of you.

But if you get a mistaken balance sheet that will create a \$109 million windfall for you, you might decide to keep the money.

Adam Neumann

Adam Neumann founded WeWork Inc., a company built on short-term office rentals, happy hours, cool vibes, amazing tech-visionary patter and a tech valuation. He tried to take it public, failed, was ousted with a giant payout, and went off to start a new company called Flow that is roughly WeWork but apartments. (Apartment rentals, happy hours, vibes, patter, venture capitalist investors.)

Meanwhile WeWork went bankrupt [without Neumann's patter](#) (that may not actually be the reason), and Neumann started talking about maybe [buying it back](#). Last month he apparently submitted a \$500 million bid. I have no idea how seriously to take any of this, because "how serious is this" is always the wrong question with Adam Neumann, but last week Ben Bergman at Business Insider interviewed him and asked "what's the likelihood you think you'll be successful at acquiring WeWork?" and he gave a vintage Adam Neumann response:

I can't share more, but what I can tell you is the future of living has working integrated into it, and this is something we understand a lot. And another thing I'll say that connects to what you asked before is part of the lessons of what we learned from the past. We obviously learned a lot about, we built a global brand, we helped redefine a category with an amazing group of people that helped lead this thing and everything with around community.

So you take all those thoughts, you bring them back into Flow, you take the lessons learned, you apply them, you bring better partners, you recruit the best talents in the world, you take your time on delivering a great product, and it's really going to be headed in the right direction.

"The future of living has working integrated into it" is a different sort of answer from "we have committed financing lined up," but it is a very Adam Neumann sort of answer, and that sometimes works for him.

Delve

One possibility is that you should try to make your writing sound like a large language model wrote it:

- Having an LLM write your stuff demonstrates that you understand how to use LLMs, which is perhaps the most useful general business skill in 2024.
- Probably an LLM is going to *read* your stuff, to summarize it for your actual audience, so having it sound like an LLM makes it more legible and persuasive.
- Even if a human does read your stuff, probably that human is reading a lot of LLM-generated text these days, so she'll find your stuff more legible and persuasive if it sounds like an LLM.

Another possibility is that you should try to make your writing sound like a large language model did *not* write it:

- It's artisanal, you know? The human touch?
- Venture capitalists love contrarianism, and I suppose that these days generating text without an LLM is a bit contrarian.

Anyway here is a fun Business Insider story from last week:

The word "delve" has been getting a lot of attention online over the past few days.

In fact, it's been searched more this week than it has in the past 90 days, according to Google Trends.

That's because the Y Combinator cofounder Paul Graham said in a post on X, formerly Twitter, that using the word "delve" in an email pitch was a sign ChatGPT wrote it. ...

The Y Combinator cofounder said in a reply on the post that he disliked the word because no one actually used it when speaking English.

"It's one of those words like 'burgeoning' that people only use when they're writing and want to sound clever," Graham wrote.

Just, you know, never mind his aesthetic preferences: Should Paul Graham be more receptive to pitches that were written by ChatGPT, or ones that weren't? If you're a founder, *shouldn't* you have ChatGPT write your cold emails to Paul Graham to free up more time for you to focus on operations? It's possible that I don't understand business at all. I'm pretty sure the last appearance of the word "delve" in Money Stuff was in 2018, so I'm doing okay, or perhaps badly.

Things happen

America's Bonds Are Getting Harder to Sell. [Goldman's Wall Street Machine](#) Revs Up Driving Surprise Profit Surge. Franklin Templeton Turns Toward Private Investing as Mutual-Fund Business Shrinks. The Swedish kingmakers behind European private equity giant EQT. A Day in the Life of a Walmart Manager Who Makes \$240,000 a Year. Crypto Trader [Searched Web for 'Fraud'](#) Before \$110 Million Haul. Bull Case Fizzles for [Big Banks](#) to Earn Ever-More on Lending. US [Regional Banks](#) Dramatically Step Up Loans to Oil and Gas. Alleged Rent-Fixing of Apartments Nationwide Draws More Legal Scrutiny. [Tesla](#) to Cut Over 10% of Workforce in Global Retrenchment. LVMH succession plans accelerate as Arnault children step up. Bitcoin 'Halving' Will Deal a \$10 Billion Blow to [Crypto Miners](#). [Thames Water](#) Given June 12 Deadline to Gain Regulator's Backing. Two Brothers, a Big Biotech Bet and an \$8 Billion Payout. On Himalayan Hillsides Grows Japan's Cold, Hard Cash. Wrong couple get divorced after solicitor 'clicks wrong button.'

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- 1. Also the lawyers have redlining technology, so you can't drop a random adjustment into page 47 in the ninth draft of the contract and expect them not to notice.
- 2. Obviously developing a reputation for trickiness, as a lawyer, is not all bad. Some clients will want to hire you to play tricks on their behalf, or at least to prevent you from doing tricks against them.
- 3. I can never resist a [one-day lookback in a derivatives contract](#), for instance; small but valuable trickiness abounds in financial markets. And we talked a few years ago about, not exactly a trick, but a huge [*mistake* in a convertible bond contract](#), which some hedge funds tried to exploit for billions of dollars. But the court said "oh come on" and let the company [fix the mistake](#).

- 4. Facts here come from Indap's post, a Cleary Gottlieb client memo, and the arbitration and Chancery Court decisions. Some of my numbers differ from some of the sources for reasons that are not relevant to us (other adjustments, interest, etc.); for instance, the \$40 million is about a \$32.6 million check a \$7 million escrow.

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Corporate silence on impactful trends not securities fraud, US Supreme Court rules

 [reuters.com/legal/corporate-silence-impactful-trends-not-securities-fraud-us-supreme-court-rules-2024-04-12](https://www.reuters.com/legal/corporate-silence-impactful-trends-not-securities-fraud-us-supreme-court-rules-2024-04-12)

Jody Godoy

The United States Supreme Court building is seen in Washington, U.S., February 29, 2024. REUTERS/Evelyn Hockstein/File Photo Purchase Licensing Rights , opens new tab

April 12 (Reuters) - Shareholders cannot sue companies for fraud if they flout a rule requiring disclosure of trends expected to affect their bottom line unless the omission makes another statement misleading, the U.S. Supreme Court ruled on Friday.

The 9-0 ruling , opens new tab authored by liberal Justice Sonia Sotomayor handed a victory to Macquarie Infrastructure in a proposed shareholder class action accusing the company of failing to disclose that its revenues were vulnerable to an international phase-out of high-sulfur fuel oil between 2016 and 2018.

The justices reversed a decision by the New York-based 2nd U.S. Circuit Court of Appeals to allow the class action brought by Hedge fund Moab Partners to proceed. A federal judge earlier had dismissed the litigation.

Sotomayor wrote that while the anti-fraud provision of a federal law called the Securities Act of 1933 clearly prohibits companies from telling misleading half truths, it does not automatically apply when a company remains silent.

Linda Coberly, an attorney who represents Macquarie, said the ruling "provides guidance to companies, litigants, and judges, for our case and beyond."

Attorneys for Moab declined to comment.

U.S. publicly traded companies are required to make various disclosures under federal rules that are enforced by the Securities and Exchange Commission.

Moab sued Macquarie in 2018, accusing it of hiding the fact that a subsidiary's revenues relied on demand for storage of a freighter fuel that international regulators sought to eliminate by 2020. Both companies are based in New York.

According to the lawsuit, Macquarie violated an SEC rule requiring companies to disclose known trends and uncertainties likely to significantly affect their financial position.

The Supreme Court decided that a violation of the rule does not by itself amount to a misleading omission under the anti-fraud law, which bars companies from omitting facts in a way that would make a statement misleading.

The court rejected Moab's argument that such a ruling would give companies immunity for violating disclosure laws, saying the SEC can take enforcement action.

Macquarie had argued that the ruling that had let the claim proceed conflicted with another decision blocking a similar lawsuit. Business groups said fear of such lawsuits had led to bloated corporate disclosures.

Reporting by Jody Godoy in New York; Editing by Will Dunham and Deepa Babington

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Thomson Reuters

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[Securities Law News](#)

April 12, 2024, 7:20 AM PDT; Updated: April 12, 2024, 2:22 PM PDT

High Court Sides With Business on SEC Liability Requirement (3)

By Kimberly Strawbridge Robinson

Documents

 [Opinion](#)

-
- Plaintiffs must point to affirmative statement to plead liability
 - Justices' narrow ruling doesn't discuss how specific it needs to be

Bloomberg Law News 2024-04-15T09:45:53757962171-04:00

High Court Sides With Business on SEC Liability Requirement (3)

By Kimberly Strawbridge Robinson 2024-04-12T10:20:35000-04:00

- Plaintiffs must point to affirmative statement to plead liability
- Justices' narrow ruling doesn't discuss how specific it needs to be

The US Supreme Court agreed that a "pure omission" in an SEC filing can't give rise to a securities class action without some statement shareholders can point to that's misleading.

The court's narrow ruling Friday by Justice Sonia Sotomayor for a unanimous court agreed that some statement was required, but it didn't go further to say how specific it must be.

Plaintiffs must identify "affirmative assertions" before a court can consider whether "other facts are needed to make those statements 'not misleading,'" Sotomayor said.

The case concerns Item 303 of the Security and Exchange Commission's Regulation S-K, also known as Management's Discussion and Analysis or "MD&A," which requires that management provide investors with an understanding of trends or events that could affect the business's financial condition.

Shareholder Moab Partners LP sued Macquarie Infrastructure Corp., now Macquarie Infrastructure Holdings LLP, for its failure to disclose that a new rule would eliminate nearly half of its business.

In ruling for Macquarie, the court distinguished between “half-truths” and “pure omissions.”

The latter “occurs when a speaker says nothing, in circumstances that do not give any particular meaning to silence,” Sotomayor wrote. The former are “representations that state the truth only so far as it goes, while omitting critical qualifying information.”

The SEC’s Rule 10b–5(b), one of the rules implementing Section 10(b) of the Securities Exchange Act, “covers half-truths, not pure omissions,” Sotomayor said.

‘Extremely Rare Occurrence’

“It’s a short, succinct decision by Justice Sotomayor,” said Elizabeth Gingold Clark of Alston & Bird LLP in Atlanta and New York. The decision offers clarity for courts throughout the country and “important reminders” that Rule 10-b “covers fraud, not disclosure obligations,” she said.

Another securities litigator who represents companies, Michael Hines of Skadden, Arps, Slate, Meagher & Flom LLP in Boston, said the decision applies the plain language of Rule 10-b, especially its reference to omissions that render “statements made” misleading. It stops plaintiffs from attempting to plead around the Private Securities Litigation Reform Act’s particularity requirement “by using Item 303 or some other regulation or statute,” Hines said.

“The courts ought to be wary of plaintiffs attempting to end-run the decision, dressing up pure omissions as purported half-truths,” he said.

Laura Posner, who represents investors in securities suits, said the ruling is very narrow. “Pure omission” suits are an “extremely rare occurrence,” because investors “almost always allege at least a half-truth,” she said. Moab did so and will be able to move forward, said Posner, who’s with Cohen Milstein Sellers & Toll PLLC in New York and is also president of the Institute for Law & Economic Policy.

The US Court of Appeals for the Second Circuit revived Moab’s suit based on both types of allegations, and now the half-truth allegations will likely be remanded to the district court, she said.

The court isn’t “opining on anything related to half-truths,” she said. “It left open scheme liability under Rule 10-b5 a and c, and half-truths under Item 303.”

Moab alleged that Macquarie knew the International Maritime Organization’s impending regulation restricting No. 6 fuel oil would materially affect the company because it owned numerous fuel tanks for holding that type of oil—tanks that would have to be repurposed at considerable expense.

But Macquarie didn’t disclose the extent of its No. 6 tank holdings, the anticipated repurposing expense, and other factors, said Moab, which serves as the lead plaintiff in the proposed investors’ class action.

Moab argued that under Section 10(b) and Rule 10b-5, fraud liability encompasses misleading Item 303 statements. The requirement to report material information is a circumstance where omitting information can make other statements misleading, it said. Macquarie wasn't silent when it wrote the report and certified the completeness of its annual filings, the investment fund said.

But that argument reads the requirement for an affirmative statement out of the rule and "shifts the focus" from fraud to disclosure, Sotomayor said.

The ruling won't lead to "broad immunity" for a stock issuer's fraudulent omission of information, the high court said. "For one thing, private parties remain free to bring claims based on Item 303 violations that create misleading half-truths. For another, the SEC retains authority to prosecute violations of its own regulations," Sotomayor said.

Although the government participated in argument and supported Moab, attorneys didn't see significant implications for the SEC from the ruling. "The SEC doesn't typically go out on a limb," Posner said. "I don't know that I've seen an Item 303 pure omission suit by the SEC."

"Nothing in the appeal changes the SEC's authority," Clark said. "The court is speaking to a private right of action."

The SEC didn't immediately respond to an email requesting comment.

The case is *Macquarie Infrastructure Corp. v. Moab Partners*, U.S., No. 22-1165, 4/12/24.

(Updates with comment from attorney Michael Hines in 10th and 11th paragraphs.)

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<https://www.law.com/nationallawjournal/2024/04/12/in-win-for-securities-industry-justices-curb-investor-suits-over-pure-omissions/>

NOT FOR REPRINT

In Win for Securities Industry, Justices Curb Investor Suits Over 'Pure Omissions'

Investors can bring such suits only when such omissions create "misleading half-truths," Justice Sonia Sotomayor wrote for a unanimous court.

April 12, 2024 at 01:39 PM

United States Supreme Court



Jimmy Hoover



The U.S. Supreme Court handed a unanimous victory to the securities industry on Friday, curbing investor lawsuits based on a company's mere failure to disclose known trends likely to affect their revenues.

In a 9-0 opinion, Justice Sonia Sotomayor wrote that such "pure omissions are not actionable" under the U.S. Securities and Exchange Commission's securities fraud rule known as Rule 10b-5. Instead, investors can bring such suits only when such omissions create "misleading half-truths."

The decision represents a narrow victory for infrastructure conglomerate Macquarie Infrastructure Corp., which is being sued by investor Moab Partners. Moab alleges Macquarie failed to disclose in its securities filings the risk that an international regulation of shipping fuel oil would have on the health of a subsidiary company that stored fuel oil.

After the rule took effect, Macquarie's subsidiary lost a substantial part of its business and Macquarie's stock price fell around 41%.

Macquarie had asked the Supreme Court to reverse a U.S. Court of Appeals for the Second Circuit ruling that a company's failure to identify such a trend or uncertainty, as required by SEC regulation Item 303, allows an investor to bring a private claim under Rule 10b-5(b).

The Supreme Court for decades has recognized a private right of action under Rule 10b-5, which makes it illegal "to omit to state a material fact necessary in order to make the statements made ... not misleading."

Sotomayor's opinion held that not all Item 303 violations give investors the right to sue a company in federal court under Rule 10b-5.

"Rule 10b-5(b) does not proscribe pure omissions," she wrote. "The Rule prohibits omitting material facts necessary to make the 'statements made ... not misleading.'"

The decision did not explicitly say whether Macquarie's statements represented "pure omissions" or actionable "half-truths" and instead remanded the case to the lower court for further proceedings.

Sotomayor’s opinion explained the difference between half-truths and omissions with a familiar example: “[T]he difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert,” she wrote.

Rule 10b-5, therefore, “requires disclosure of information necessary to ensure that statements already made are clear and complete (i.e., that the dessert was, in fact, a whole cake),” Sotomayor added.

Sotomayor rejected Moab’s argument that a holding for Macquarie would create broad immunity for companies that omit key information from their securities filings.

“For one thing, private parties remain free to bring claims based on Item 303 violations that create misleading half-truths,” she wrote. “For another, the SEC retains authority to prosecute violations of its own regulations.”

According to Macquarie, the Second Circuit’s holding entrenched a “square circuit split” among the federal courts of appeal that has deepened over the last five years.

The Washington Legal Foundation, the Securities Industry and Financial Markets Association and the U.S. Chamber of Commerce had encouraged the Supreme Court to take the case, saying the Second Circuit’s ruling would lead to expanded liability for companies under Rule 10b-5.

The U.S. Solicitor General’s Office had backed Moab, arguing that omissions under Item 303 do lay the groundwork for private investor lawsuits. The “pure omissions” argument advanced by Macquarie is “incorrect,” the office wrote.

Winston & Strawn attorney Linda Coberly argued the case to the Supreme Court on Macquarie’s behalf in January. David Frederick of Kellogg, Hansen, Todd, Figel & Frederick represented Moab.

The Supreme Court rendered its decision in *Macquarie Infrastructure v. Moab Partners*, No. [22-1165](#).

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He Ate a Whole Cake

 10b5daily.com/2024/04/14/he-ate-a-whole-cake

April 15, 2024

The U.S. Supreme Court has issued a decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.* holding that the failure to disclose information required by Item 303 of Regulation S-K can support a Rule 10b-5(b) claim only if the omission renders affirmative statements misleading. It is a unanimous decision authored by Justice Sotomayor.

Item 303 of Regulation S-K requires companies to describe “known trends or uncertainties” that may have a material impact on the company’s operations. There has been a circuit split over whether a company’s failure to meet its Item 303 disclosure requirement can support a private claim under Section 10(b) and Rule 10b-5(b) in the absence of an otherwise-misleading statement. The Second Circuit has held that a private claim can be brought based on this omission, while other circuits – notably the Ninth Circuit and Third Circuit – have disagreed.

In *Macquarie*, the Court had little trouble concluding that the Second Circuit had gone too far in expanding the scope of potential securities fraud liability. The Court clarified that “Rule 10b-5(b) does not proscribe pure omissions.” Instead, it prohibits only affirmative misstatements and the omission of material facts necessary to ensure that statements are not misleading (i.e., “half-truths”). The failure to provide required information under Item 303 is not a half-truth, but instead is a pure omission of information. Had Congress or the SEC wanted to make pure omissions a basis for liability under Section 10(b) or Rule 10b-5, the Court noted, they knew how to do so because that type of liability exists under Section 11 of the Securities Act for misstatements in registration statements.

Holding: Judgment vacated and case remanded for further proceedings consistent with opinion.

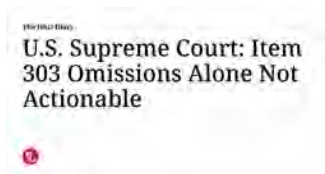
Quote of note: “[T]he difference between an omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert. Rule 10b-5(b) does not proscribe pure omissions. . . . Put differently, it requires disclosure of information necessary to ensure that that statements already made are clear and complete (*i.e.*, that the dessert was, in fact, a whole cake.)”

Disclosure: The author of The 10b-5 Daily participated in an amicus brief in support of Macquarie filed by the Washington Legal Foundation.

U.S. Supreme Court: Item 303 Omissions Alone Not Actionable

K [dandodiary.com/2024/04/articles/securities-litigation/u-s-supreme-court-item-303-omissions-alone-not-actionable](https://www.dandodiary.com/2024/04/articles/securities-litigation/u-s-supreme-court-item-303-omissions-alone-not-actionable)

April 14, 2024



By Kevin LaCroix on April 14, 2024

Posted in Securities Litigation



Justice Sonia Sotomayor

On April 12, 2023, in a short, unanimous opinion written by Justice Sonja Sotomayor, the U.S. Supreme Court held that a failure to disclose information required under Item 303 of Regulation S-K is, standing alone, not an actionable omission under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Supreme Court said that in the absence of affirmative statement that is rendered misleading by the omission, an Item 303 violation alone is not sufficient to state a claim under Rule 10b-5. As the Supreme Court opinion put it in summarizing its decision, “pure omissions are not actionable under Rule 10b–5.” The Court’s opinion in *Macquarie Infrastructure Corp. v. Moab Partners L.P.* can be found [here](#).

Background

Macquarie Infrastructure Corporation (MIC) operates several global infrastructure businesses, one of which is International-Matex Tank Terminals (IMTT). As much as 40% of IMTT’s business involved storing “6-Oil,” a high-sulfur fuel. In October 2008, the International Maritime Organization (IMO) announced new regulations that, effective January 2020, would eliminate the use of 6-Oil in global shipping.

The underlying complaint alleges that before the effective date of new IMO regulations, MIC materially misled investors about the impact of the eventual elimination of 6-Oil. The plaintiffs allege that company concealed from investors the company’s exposure to IMO’s impact. The “truth” emerged, the plaintiffs allege, in February 2018, when the company announced it was cutting its quarterly dividend to reflect IMTT’s declining performance, which resulted in part from a number of customers terminating 6-Oil contracts.

In a consolidated and amended complaint, the plaintiffs presented six difference securities law claims based on MIC's alleged misrepresentations and omissions regarding IMTT's 6-Oil exposure. The amended complaint contains allegation based both on Securities Act of 1933 and the Securities Act of 1934. In their '34 claims under Section 10(b) and Rule 10b-5, the plaintiffs alleged that defendants' "half-truths" and failure to disclose material information required by Item 303 deceived investors.

The defendants moved to dismiss the amended complaint. The district court granted the defendants' motion to dismiss. In particular, the district court held that the plaintiffs had failed to allege a violation of Item 303 or that the omission was material. The Second Circuit reversed in part the district court's ruling, holding with respect to the Item 303 claim that, under the Second Circuit's own authority, an omission of information required by Item 303, standing alone, and even in the absence of an affirmative statement that the omission rendered misleading, could be actionable under Rule 10b-5.

The defendants sought a writ of certiorari from U.S. Supreme Court, arguing that the Second Circuit's holding about Item 303 omissions conflicted with contrary holdings by the Ninth Circuit, which has held that Item 303 does not create a duty to disclose under Section 10(b). The Ninth, Eleventh, and Third Circuits have held that "pure omissions cases" are not actionable. The U.S. Supreme Court granted the writ of certiorari.

Item 303 of Reg. S-K states in pertinent part that in its periodic reports to the SEC, a company is to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a materially favorable or unfavorable impact" on the company.

The April 12, 2024, Opinion

In a brief opinion written by Justice Sonia Sotomayor for a unanimous nine-judge panel, the U.S. Supreme Court reversed the Second Circuit, holding that an omission of information required by Item 303 does not by itself give rise to liability under Section 10(b), at least in the absence of any affirmative statement that the omission rendered misleading.

Rule 10b-5 prohibits omitting a material fact necessary "to make the statements made . . . not misleading." The question the court addressed in this case is whether this prohibition extends to "pure omissions" – a pure omission occurs when "a speaker says nothing, in circumstances that do not give any special significance to that silence." (The Court contrasted "pure omissions" with "half-truths" – representations that are "accurate as far as the truth goes, but that omit critical qualifying information.") Rule 10b-5(b) reaches half-truths, not pure omissions, because the rule requires identifying affirmative assertions (i.e., "statements made") before determining if other facts are needed to make those statements "not misleading."

It is a long-established securities law principle that silence, absent a duty to disclose, is not misleading under Rule 10b–5. A duty to disclose, however, does not automatically render silence misleading under Rule 10b–5. The failure to disclose information required by Item 303 can support a Rule 10b–5 claim *only if the omission renders affirmative statements made misleading*.

The Court rejected the plaintiff’s argument that pure omissions (that is, silence) should give rise to liability, noting that the plaintiff’s argument would read the words “statements made” out of Rule 10b-5. The Court also rejected the plaintiff’s argument that denying liability for pure omissions would give reporting companies immunity any time they fraudulently omit information the SEC or Congress requires them to disclose. The Court said investors are still free to bring claims for half-truths and the SEC is still free to bring enforcement actions for violations of its rules.

Discussion

This case had the potential to be significant holding that could affect many liability actions under the U.S. securities laws; if the Court had ruled in favor the plaintiffs and held that pure omissions cases were actionable, it could have significantly affected many cases and indeed could have perhaps encouraged many more cases to be filed. The implications of the case, had the court ruled in the plaintiffs’ favor, could have been particularly significant SEC’s significant recent changes to Reg. S-K, including for example with respect to cyber security disclosure.

As it has turned out, however, with the Court rejecting the possibilities that the plaintiffs urged the court to take up, the case likely will have a more modest impact. At a practical level, the court’s opinion rejecting plaintiffs’ attempt to rely on Item 303 is unlikely to reduce the number of securities cases filed. While plaintiffs’ lawyers frequently include Item 303 omission allegations in securities complaints, their complaints rarely allege only Item 303 omissions (indeed, the complaint in this case alleged multiple violations of which the alleged Item 303 omissions were only one).

The likeliest impact is that the decision in this case will cause plaintiffs’ lawyers to alter the way they plead Item 303 allegations – plaintiffs’ lawyers are likely to replead Item 303 omissions cases as “misleading statement” cases. During oral argument in this case, Justice Kagan pointed out that if a reporting company’s MD&A “lists three trends, but it doesn’t list a fourth that’s actually much more consequential” that “cuts in the opposite direction,” a securities plaintiff may have satisfied its Rule 10b-5 pleading requirement even without relying on Item 303.

It should be noted that this case is far from over. The plaintiff’s Item 303 allegations were only one set of allegations raised in the complaint. In a final footnote, Justice Sotomayor noted that in the course of the Supreme Court’s consideration of this case, the parties had

spilled “much ink” in disputing whether the case before the Court was about half-truth allegations as well as about pure omissions allegations. In the footnote, Justice Sotomayor emphasized that the Court was only addressing the pure omissions issue, and that it expresses no opinion as to issues that were not raised, such as what constitutes “statement made” when a statement is alleged to be misleading as a half-truth.

For those who may be wondering what exactly a “half-truth” might be and how it might differ from a “pure omission,” Justice Sotomayor provides an example in her opinion: “the difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert.”

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<https://www.law.com/delbizcourt/2024/04/11/bent-on-entrenchment-shareholder-suits-claim-2-poison-pills-are-anti-takeover-front-for-boards/>



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NEWS

'Bent on Entrenchment'?: Shareholder Suits Claim 2 Poison Pills Are Anti-Takeover Front for Boards

The two complaints mirror each other, with each citing the same Delaware case law and bringing two breach of fiduciary duty claims—one alleging disclosure violations and the other that board members are using the plans as a means of entrenching themselves.

April 11, 2024 at 06:08 PM

Corporate Governance



Ellen Bardash



Bernstein Litowitz Berger & Grossman has filed two shareholder suits in the Court of Chancery that claim [LSB Industries Inc.](#) and [United Airlines](#) are each trying to sidestep poison pill laws and thwart shareholder activism.

Aside from the language referring to facts specific to one company or the other and their respective plans, the two complaints mirror each other. They cite the same Delaware case law, bring two breach of fiduciary duty claims—one alleging disclosure violations and the other that board members are using the plans as a means of entrenching themselves—and are brought by the same shareholder plaintiff, Colleen Witmer.

Both companies implemented shareholder rights plans with the stated goal of protecting their net operating losses (NOLs) that can be carried forward and used to obtain tax benefits. If any party gains ownership of 5% or more of the company’s stock, it would trigger the poison pill, giving shareholders other than the one that triggered a plan a right to purchase additional shares at a discount.

Chicago-headquartered United and Oklahoma City-based chemical manufacturer LSB are seeking extension of their plans, to be voted on during their annual meetings in May. In both cases, Witmer claims the plans violate legal precedent on when a poison pill with the relatively low 5% ownership triggering threshold can be used.

“The law is clear: a pill with a 4.9% trigger is extraordinary and the use of such a trigger is reserved solely for pills carefully tailored to protect NOL assets,” the complaints state. “Where directors, bent on entrenchment, lard what is supposed to be a rare and special-purpose NOL pill with anti-takeover provisions, they breach their fiduciary duties.”

The Delaware courts have cautioned corporations multiple times about the ownership parameters of NOL plans. Both the Supreme Court’s 2010 ruling in *Versata Enterprises, Inc. v. Selectica* and Chancellor Kathaleen McCormick’s 2021 [opinion](#) in shareholder litigation against the Williams Companies indicated poison pills triggered by a shareholder’s 5% ownership are to be used sparingly and only for the purpose of protecting NOL assets.

The LSB and United complaints allege the companies are circumventing that narrow definition by billing their plans as NOL pills but including in them features that stretch their effects beyond the advertised and legally allowed purpose.

In particular, the complaints claim the pills have “sprawling” definitions of what constitutes “beneficial ownership,” stating a shareholder’s stake in the company extends to include shares owned by parties the shareholder has an agreement, arrangement or understanding (AAU) with. They claim those definitions are “the most important indicator of whether an NOL poison pill is a disguised board entrenchment device.”

Witmer also takes issue with the “daisy chain” provisions in the poison pills that lumps shares held by those with AAUs together regardless of whether those parties are aware of each other.

The daisy chain issue is one that’s come up recently in other corporate [litigation](#) in which shareholders similarly have made allegations that boards are trying to stifle shareholder activism by implementing advance notice bylaws that require prospective board nominees to disclose extensively their connections to other parties.

The daisy chain feature was also present in the Williams litigation, but the Delaware courts haven’t addressed their legitimacy directly.

In the LSB case, an April 8 [letter](#) from Witmer’s attorneys indicated the parties are seeking a preliminary injunction before the May 23 meeting and a three-day trial on the merits of the NOL pill in the fall.

LSB is represented in the case by Abrams & Bayliss attorneys who did not immediately respond for comment. United Airlines declined to comment.

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Big Banks' Underwriting Firewalls at Risk in Archegos-Tied Suit

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April 15, 2024, 2:10 AM PDT

Matthew Bultman

Reporter

- Morgan Stanley, other banks must face Viacom investors' suit
- New York appeals court ruling takes aim at underwriter conflicts

Wall Street giants fear a New York appeals court decision could upend the entire process for underwriting stock offerings.

The decision allows ViacomCBS Inc. investors to sue Morgan Stanley, Goldman Sachs Group Inc., and Wells Fargo & Co. over alleged conflicts in the media company's offerings that weren't disclosed. It puts under a microscope the firewalls inside the banks that are supposed to prevent investment bankers and underwriters from sharing information.

Legal scholars say the case also risks creating fuzzy obligations for banks to disclose their own potential trading when they facilitate offerings of new securities to investors. Offering documents typically focus on the company that is selling the securities, said Andrew Vollmer, a scholar at the Mercatus Center at George Mason University and former SEC deputy general counsel.

"The wider consequence here is altering the nature of the disclosure document," said Vollmer, who joined an amicus brief in the case.

The banks can pursue further appeals of last week's ruling, which upheld a lower court's decision not to dismiss the case against Morgan Stanley, Goldman, and Wells Fargo. Investors allege they violated federal securities laws by failing to disclose their own investment bankers were preparing to dump Viacom stock — while underwriters at the same banks helped bring the stock to market.

Investment banks' fire sale of Viacom stock was meant to avoid further losses tied to the demise of Archegos Capital Management. Archegos, Bill Hwang's former powerhouse investment firm, collapsed in 2021 after plummeting shares of Viacom, one of his big holdings.

Archegos' downfall led to about \$10 billion in losses for the various banks that helped structure Hwang's trades.

Investor Harm

The lawsuit, led by the Camelot Event-Driven Fund and the Municipal Police Employees' Retirement System in Louisiana, followed an offering of Viacom common and preferred stock in March 2021.

Morgan Stanley and Goldman Sachs helped underwrite the offerings, which raised \$2.65 billion. Unbeknownst to investors, the banks at the same time were planning to dump billions of dollars' worth of the media company's stock linked to Archegos trades, Camelot and MPERS allege.

The banks' sell-off, which occurred just days after the Viacom offering, cratered the company's stock price and contributed to "enormous losses" for Camelot and other investors, the lawsuit alleges.

A New York trial court in February 2023 said the case against Morgan Stanley and Goldman could move forward, with banks warning the decision would upend capital markets.

Upholding much of that decision, the state appeals court this month found investors could be misled by a statement in the offering documents that said underwriters "may" conduct transactions that affect the stock price, if the banks were in fact already planning to sell their shares.

Investor claims against Wells Fargo, which underwrote the Viacom offerings and provided brokerage services to Archegos, can also move forward, the appeals court said.

Peeking Over Walls

Banking groups, legal scholars, and former SEC officials are all interested in what happens.

Some say the New York courts created new requirements for underwriters who, until now, didn't have to disclose their own potential transactions in an issuer's securities.

The courts imposed a disclosure obligation "that goes beyond what the SEC normally requires," said Ronald Colombo, a Hofstra University law professor focused on securities fraud. He and others argue the court mandates threaten to disrupt the roles of Congress and the SEC.

What's more, the American Bankers Association said in court filings, banks are required to have ethical walls designed to prevent confidential information from flowing between investment bankers and underwriters. Securities laws require broker-dealers to have

procedures in place to prevent misuse of such information.

"We have these walls up to prevent conflicts of interest and now they're saying, you need to peek over them to prevent conflicts of interest," said Colombo, who signed on to an amicus brief supporting the banks.

'Understanding the Consequences'

Other legal scholars don't anticipate the sea change that banks predict.

Material conflicts of interest "go to the heart of an underwriter's role," Columbia Law School securities professor John Coffee and three former SEC commissioners said in an amicus brief. They say the trial court's ruling in the case, which involves one of the "most pointed conflicts possible," is consistent with New York federal court decisions..

"Underwriters are not allowed to not know about their own material conflicts of interest," Allison Herren Lee, one of the former commissioners who signed on to the brief, said in an interview.

There are reasons to believe higher-ups at the banks did know about the alleged Archegos conflict, investors and their supporters say. Court filings note comments from Morgan Stanley's then-CEO James Gorman, who in 2021 said the Archegos situation was complicated "by the fact that one of the large single stock positions related to a security in which we have been an underwriter."

The state appeals court acknowledged banks' concerns about eroding ethical walls in its opinion, but said that at "the pleading stage, the mere possibility that such barriers may have existed does not warrant dismissal of the complaint."

The language seems to suggest that Morgan Stanley, Goldman Sachs, and Wells Fargo might win the case if they could prove sufficient barriers existed. That could make such walls a focal point in the trial court.

The potential that banks could still win hasn't alleviated concerns. It's unclear, for example, when a conflict rises to the level of requiring disclosure, the banks supporters' say. Given the size of the banks, there may be no quick way to do the kind of conflict check that appears to be required, they added.

The court is "jumping into disclosure obligations in registered offerings of very technical, highly relegated areas without really understanding the consequences," the Mercatus Center's Vollmer said.

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April 15, 2024, 9:11 AM PDT

Mylan Investors Get Swift Rebuff in EpiPen, Drug Pricing Appeal

By [Martina Barash](#)

Documents

[Court Opinion](#)

[2d Cir. Docket](#)

- Argument that lower court missed finding intent fails
- Investors’ proof of loss causation falls short, 2d Cir. says

Bloomberg Law News 2024-04-15T12:54:42882228264-04:00

Mylan Investors Get Swift Rebuff in EpiPen, Drug Pricing Appeal

By Martina Barash 2024-04-15T12:11:37000-04:00

Argument that lower court missed finding intent fails

Investors’ proof of loss causation falls short, 2d Cir. says

Mylan N.V. investors failed to adequately support class claims of securities fraud tied to EpiPen rebates and allegedly collusive drug pricing practices, the Second Circuit affirmed Monday, just three weeks after hearing argument in the case.

The lower court found that the investors lacked proof of deceptive intent by the pharmaceutical company and its executives in statements about the EpiPen’s rebate classification, the appeals court said in an unsigned, unpublished decision. The panel rejected the investors’ argument that the judge’s finding on intent didn’t apply to those statements.

And the investors failed to connect their stock losses to disclosures about alleged anticompetitive conduct in Mylan’s pricing of certain generic drugs, given other negative factors in the market, the US Court of Appeals for the Second Circuit said.

The class action filed in 2016 in US District Court for the Southern District of New York alleged that Mylan misclassified its EpiPen treatment for allergic reactions to avoid paying higher rebates, pocketing hundreds of millions of additional dollars from Medicaid.

Shareholders also alleged that the drugmaker artificially boosted generic drug revenue through a collusive scheme with the other makers of generics, while concealing the price-fixing endeavor from investors.

The lower court granted summary judgment for Mylan in March 2023.

Judges Barrington D. Parker Jr., Denny Chin, and Joseph F. Bianco appeared skeptical of the investors’ position at oral argument at the Second Circuit March 21.

https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X8C55JFS000000?bc=W1siU2VhcmNoICYgQnJvd3NlliwiaHR0cHM6Ly...

1/2

Pomerantz LLP and Goldstein, Russell & Woofers LLC represented the investors. Cravath, Swaine & Moore LLP represented Mylan.

The case is *In re Mylan N.V. Secs. Litig.*, 2d Cir., No. 23-00720, unpublished 4/15/24.

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Litigation

April 15, 2024, 7:28 AM PDT

Musk, Other Tesla Leaders Beat Investors' 'Toxic Workplace' Suit

By [Matthew Bultman](#)

Documents

 Docket

- Judge gives shareholders a chance to amend their complaint
- Automaker has faced various legal claims alleging racial bias

Bloomberg Law News 2024-04-15T13:31:11031387983-04:00
Musk, Other Tesla Leaders Beat Investors' 'Toxic Workplace' Suit

By Matthew Bultman 2024-04-15T10:28:44000-04:00
Judge gives shareholders a chance to amend their complaint
Automaker has faced various legal claims alleging racial bias

A federal court in Texas dismissed a lawsuit brought by Tesla Inc. investors against CEO Elon Musk and other company leaders alleging they fostered a toxic workplace culture.

The shareholders will have until mid-May to amend the complaint, after Judge David Ezra in the US District Court for the Western District of Texas dismissed their suit without prejudice in a sealed order entered Friday.

Initially filed in June 2022, the lawsuit alleges Tesla directors and executives allowed a “toxic workplace culture grounded in racist and sexist abuse and discrimination.” The derivative suit, brought on behalf of Tesla, alleges the issues exposed the automaker to significant liability risk.

Ezra dismissed the complaint in September 2023 after finding the shareholders weren’t excused from making a demand that the company’s board take legal action. The plaintiffs filed an amended complaint a couple months later.

Tesla has been embroiled in several legal battles related to allegations of race bias.

A California federal judge in late March said the company must face US Equal Employment Opportunity Commission allegations that Black employees at the company’s plant in Fremont, Calif., were subjected to racial harassment.

A federal jury in San Francisco awarded an individual Tesla worker \$3.2 million in April 2023 over similar discrimination claims.

Robbins LLP and the Kendall Law Group, PLLC represent the investors. Ewell, Brown, Blanke & Knight LLP and Freshfields Bruckhaus Deringer US LLP represent the defendants.

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The case is In re Tesla Inc. S'holder Derivative Litig. , N.D. Cal., No. 22-CV-00592, sealed order entered 4/12/24 .

– With assistance from Martina Barash.

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NEWS

Shareholder Suit: Meta, Mark Zuckerberg Accused of Keeping Status Quo Despite Increased Presence of Online Child Sexual Predators

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

April 12, 2024 at 05:16 PM

Securities Litigation



Mason Lawlor



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

Meta and Mark Zuckerberg were hit with a shareholder lawsuit in federal court Thursday, alleging they have refused to disclose the increased threat of sexual predators on Facebook and Instagram, while maintaining ineffective controls to prevent them.

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

The lawsuit was filed in the U.S. District Court for the Northern District of California by attorneys of Bottini & Bottini in La Jolla, California, on behalf of plaintiff and investor Matt Eisner for violation of Section 14(a) of the Securities Exchange Act of 1934.

According to the [complaint](#), Meta's "2024 Proxy Statement" contained several false statements and omissions in advance of the planned shareholder meeting May 29. The allegations stem from the [\\$400 million fine](#) imposed against the company by the European Union in 2022, for "failing to safeguard children's information on Instagram."

Due to growing concerns of the infiltration of Instagram by sexual predators and pedophiles, Meta shareholders included the proxy proposal in 2024 that, if passed, would require the company to implement more protections for minors on the social media platforms.

The shareholder proposal noted that in 2022, nearly 32 million cases of online child sexual abuse material were reported, with over 27 million of those appearing on Meta platforms. However, Eisner claims that Zuckerberg has pushed Meta to refuse the drafted changes proposed in the shareholder plan by misrepresenting that Meta already has effective controls in place.

Eisner asserted that Zuckerberg’s claims that significant steps were taken to stop child sexual exploitation were false, and that the recommendation to reelect the current board of directors was not aligned with this goal.

“In reality, the prevalence and activity of pedophiles and sexual predators on Instagram and Facebook has significantly increased, and [Meta's] internal controls are ineffective to stem such harmful conduct,” the complaint said.

Eisner described the purported successes announced by Meta and Zuckerberg in protecting children’s information as “self-serving public statements claiming that Meta is doing all it can to eliminate and curtail the exploitation of minors.” Among the representations made by the company were the disabling of more than 500,000 accounts for violating their child sexual exploitation policies, and hiring online child safety specialists, the complaint said.

In December, the company received backlash for its “end-to-end encryption” for Facebook messages, which hide the contents of messages from anyone but the sender.

The lawsuit noted that child safety experts have expressed concerns about this encryption obstructing efforts to rescue sex-trafficking victims. Eisner also stated that Meta’s own internal documents reveal that about 100,000 children per day using Facebook and Instagram receive sexual harassment, including exposure to adult genitalia.

Eisner is seeking declaratory and injunctive relief for the violation of the Exchange Act and enjoining the 2024 Annual Meeting of Shareholders until “corrective disclosures and an amended proxy statement are disseminated to Meta shareholders,” while also invalidating the results of the 2024 election of the board of directors if not enjoined beforehand.

Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini could not be reached for comment. A representative for Meta could not be reached.

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Meta Hit With Shareholder Lawsuit Over Child Safety Claims

By Matthew Bultman

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [24-cv-02175](#)

Bloomberg Law News 2024-04-15T09:50:06849910239-04:00

Meta Hit With Shareholder Lawsuit Over Child Safety Claims

By Matthew Bultman 2024-04-12T13:52:13000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [24-cv-02175](#)

Meta Platforms Inc. and CEO Mark Zuckerberg were sued by an investor who alleges the company's annual proxy statement misleads shareholders about its child safety practices.

The lawsuit, filed Thursday in the US District Court for the Northern District of California by Meta shareholder Matt Eisner, alleges Meta isn't taking adequate steps to protect children on its social media platforms, despite representing that it has effective controls in place.

Eisner is asking a judge to block the tech giant's annual shareholder meeting until its proxy statement is amended. The meeting is scheduled for late May.

"Internal Meta documents undermine and contradict the statements in the 2024 Proxy and Zuckerberg's self-serving public statements claiming that Meta is doing all it can to eliminate and curtail the exploitation of minors on its social media networks," the complaint said.

Meta didn't immediately respond to a request for comment. Zuckerberg was one of several tech CEOs who testified in January at a Senate hearing about online child sexual exploitation.

The complaint highlights recent media investigations, including a Wall Street Journal report about child-sex content on Meta-owned Instagram, as well as actions from lawmakers and regulators. It notes Ireland's data privacy regulator fined Instagram \$402 million in 2022 following an investigation into its handling of children's data.

The complaint also cites internal company documents, including a presentation referenced in a lawsuit brought against Meta by the New Mexico attorney general, which states Meta is “underinvested in minor sexualization” on Instagram.

Meta rejected a 2024 shareholder proposal that pushed the social media company to do more to protect children, according to the new lawsuit.

Bottini & Bottini Inc. represents Eisner.

The case is Eisner v. Meta Platforms Inc. , N.D. Cal., No. 24-cv-02175, 4/11/24 .

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

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[NEWS](#)

Shareholder Suit Alleges Meta, Zuckerberg Kept Status Quo Despite Increase in Online Child Sexual Predators

Due to growing concerns of infiltration by sexual predators, Meta shareholders included a proxy proposal that would require the company to implement more protections for minors on its social media platforms.

April 12, 2024 at 05:16 PM

Securities Litigation

By Mason Lawlor | April 12, 2024 at 05:16 PM

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Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini could not be reached for comment. A representative for Meta could not be reached.

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-  Patterson Complaint
-  E.D. Pa. Docket
-  Judge Kelley Brisbon Hodge
-  Ocugen Inc.

- **COURT:** E.D. Pa.
- **TRACK DOCKET:** [No. 2:24-cv-01500](#)

Ocugen Hit With Investor Suit Over Financials Going Back to 2020

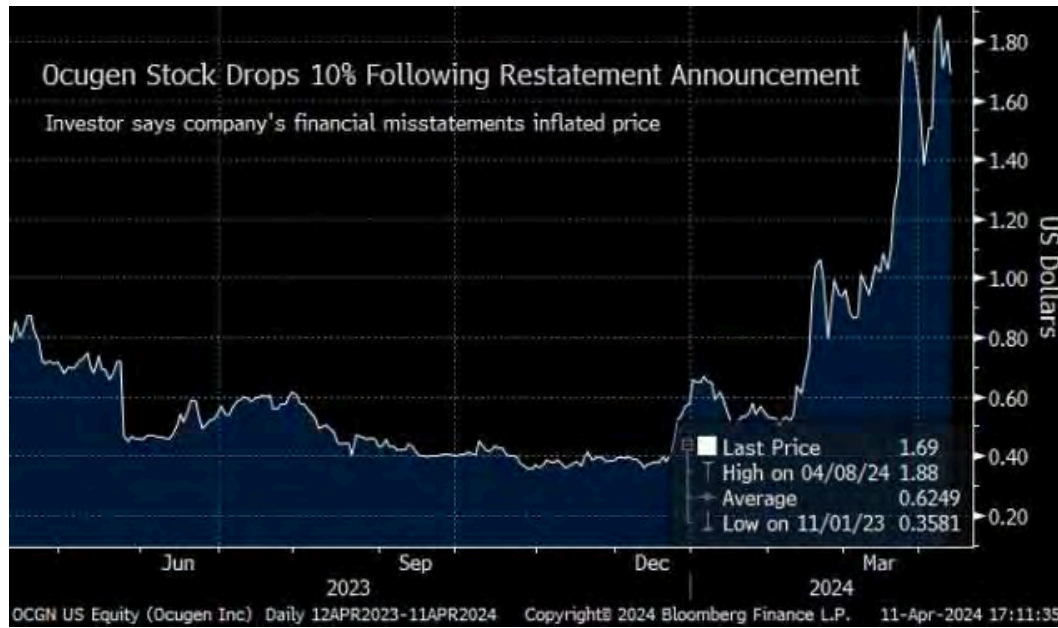
COURT: E.D. Pa.

TRACK DOCKET: No. 2:24-cv-01500

Ocugen Inc.'s recent announcement that it had misstated its financial statements for 2020 and subsequent years sent its stock price down more than 10%, investors said Thursday in a proposed class action.

The biotech company told the Securities and Exchange Commission April 1 that it had identified accounting errors in connection with "certain agreements with one of its business partners related to a collaboration agreement," investor Austin Patterson said. He filed his complaint in the US District Court for the Eastern District of Pennsylvania.

The company said it will restate its consolidated financial statements for 2022 and delay a key submission to the SEC on 2023 financials, according to the complaint.



Ocugen just notched a court win in a securities fraud suit alleging the company misled investors about the likelihood its Covid-19 vaccine would receive fast-track review from US regulators. The US Court of Appeals for the Third Circuit affirmed that case's dismissal March 21.

There are hundreds or thousands of members of the proposed class, the complaint estimates.

Patterson seeks damages on his securities fraud claims.

Ocugen didn't immediately respond to an emailed request for comment.

The Rosen Law Firm PA represents Patterson.

The case is Patterson v. Ocugen, Inc. , E.D. Pa., No. 2:24-cv-01500, complaint 4/11/24 .

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Masonite Sued Over Proxy for \$3.9 Billion Owens Corning Buyout

By Ben Miller

- COURT: S.D.N.Y.
- TRACK DOCKET: [1:24-cv-02779](#)

Bloomberg Law News 2024-04-15T09:49:40081581101-04:00

Masonite Sued Over Proxy for \$3.9 Billion Owens Corning Buyout

By Ben Miller 2024-04-12T15:42:10000-04:00

- COURT: S.D.N.Y.
- TRACK DOCKET: [1:24-cv-02779](#)

Masonite International Corp. and its directors filed a proxy statement missing key details about the company's proposed \$3.9 billion acquisition by Owens Corning, including financial data and potential conflicts of interest, according to a complaint filed Friday seeking to block the deal.

The proxy statement recommends shareholders vote to approve the proposed deal at a meeting scheduled for April 25, but they can't cast informed votes without Masonite's projections or financial analyses used by advisers Goldman Sachs & Co. LLC or Jeffries LLC, according to the complaint filed in US District Court for the Southern District of New York.

Owens Corning's proposed acquisition would pay out \$133 per share, which represented a 38% premium to Masonite's Feb. 8 closing price. The company expects the deal to close midyear, pending shareholder and regulatory approval, according to a press release. Masonite closed near \$131 on Thursday, a narrow deal spread that signals investors think the transaction will likely get completed.

Shareholders can't vote to approve or deny the deal without the key details missing from the proxy, the complaint says. The deficient proxy allegedly failed to disclose unlevered free cash flows that Masonite was forecasted to generate from 2023 through fiscal year 2028, as well as the underlying earnings data used to calculate the company's terminal values and the number of outstanding shares.

Goldman Sachs and Jeffries also used certain financial metrics when comparing Masonite to other public companies to determine the proposed deal's fairness, which are also missing from the proxy, among other inputs utilized by the advisers.

The proxy also doesn't disclose whether Jeffries stands to receive a fee upon consummation of the proposed transaction, in addition to the \$5 million it already received upon delivering its fairness opinion, according to the complaint.

Company insiders' potential conflicts are also missing from the proxy, which doesn't mention whether any of Owens Corning's proposals mentioned management retention or participation in the equity of the surviving corporation, the complaint says.

Shareholder Kenneth Collins seeks to prevent the merger from being completed or otherwise to rescind it once it is consummated and collect rescissory damages for the alleged Securities Exchange Act violations, as well as legal fees.

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

Long Law LLC and Rowley Law PLLC represent the plaintiff.

The case is Collins v. Masonite Int'l Corp. , S.D.N.Y., No. 1:24-cv-02779, complaint filed 4/12/24 .

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Endeavor and Silver Lake didn't immediately respond to requests for comment Monday.

'Gluttonous'

According to the lawsuit, the \$27.50 a share going to public investors falls short of recent price targets for Endeavor announced by analysts including JPMorgan, Deutsche Bank, UBS, and Piper Sandler & Co., all of which provided estimates in the \$30 to \$33 range. The deal allegedly offers just a 14.6% premium over Endeavor's initial public offering, which was priced at \$24 in 2021.

Emanuel will get the chance to roll over nearly \$330 million worth of equity in the buyout, while Whitesell will roll over about \$248 million, according to the complaint. The transaction wasn't conditioned on a vote by minority stockholders, the suit says, quoting a media commentator who referred to the deal as "gluttonous."

The new court case comes about seven months after Endeavor led a \$21.4 billion merger combining UFC with Vince McMahon's WWE Inc. A different pension fund, represented by the same law firm, has challenged that deal in a lawsuit against McMahon, retired wrestling champion Triple H, and other former WWE board members. The earlier suit doesn't name Endeavor as a defendant.

The lawsuit against Endeavor and Silver Lake was filed by Stockholm-based Handelsbanken Fonder AB, an Endeavor stockholder, which is represented by Bernstein Litowitz Berger & Grossmann LLP. The companies haven't yet made court appearances.

The case is Handelsbanken Fonder AB v. Endeavor Grp. Holdings Inc. , Del. Ch., No. 2024-0391, complaint filed 4/12/24 .

(Updates with additional reporting starting at third paragraph.)

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Boston College Retirement Row Heads to Trial With Judge's Lament

By Jacklyn Wille

- Expert witness battles typically require trial, judge says
- Veteran judge has ruled on high-profile retirement fee suits

Bloomberg Law News 2024-04-15T09:50:51815584868-04:00

Boston College Retirement Row Heads to Trial With Judge's Lament

By Jacklyn Wille 2024-04-12T10:47:18000-04:00

- Expert witness battles typically require trial, judge says
- Veteran judge has ruled on high-profile retirement fee suits

A class action challenging two Boston College retirement plans will go to trial after a Massachusetts federal judge said efforts to resolve the case at the summary judgment stage were a "monumental waste of time."

The plan participants can argue at trial that college trustees breached their fiduciary duties by failing to consolidate to a single retirement plan recordkeeper and failing to understand key details about the plans' fee levels and potential conflicts of interest, Judge William G. Young said. They also raised triable claims over how the trustees monitored certain investments criticized as poor performers, and they showed the plan suffered losses with respect to some of their claims, Young said.

Young also said the trustees followed a "prudent process" for monitoring plan investments, but this isn't enough for them to prevail at summary judgment, because there are factual disputes over whether they should have done more in the face of investment underperformance. The trustees also failed to meet their "heavy burden" of showing that the loss demonstrated by the plaintiffs wasn't caused by their breaches of duty, the judge said.

The 126-page opinion, issued Thursday in the US District Court for the District of Massachusetts, granted summary judgment to the trustees on some issues but allowed the bulk of the case to move toward trial. Young also used the opinion to lament the time and effort spent attempting to resolve the case at the summary judgment stage, which he said is "well-nigh impossible" when there are qualified experts on both sides.

Young said he'd try in certain future cases to "prioritize trial as the more apt means of dispute resolution," though he said restricting parties from filing summary judgment motions is "not the answer."

After nearly four decades as a federal judge and recently assumed senior status, Young has issued several high-profile rulings in litigation challenging retirement plan fees under the Employee Retirement Income Security Act. In 2020 he ruled that Fidelity Investments violated its ERISA duties in monitoring the affiliated mutual funds in its employees' 401(k) plan. In 2017 he issued a post-trial ruling for Putnam Investments LLC in a lawsuit challenging the affiliated funds in its 401(k) plan; that decision was later vacated by the First Circuit, which used the case to issue a significant ruling on the burden for proving loss causation under ERISA.

Boston College is one of more than 20 prominent universities to be accused of mismanaging its retirement plan through high fees and faulty investments since 2016. These cases have spawned nearly \$140 million in settlements, several major appeals court rulings, two trials, and a recent US Supreme Court decision.

Goodwin Procter LLP represents the Boston College trustees. Fair Work PC represents the plan participants.

The case is *Sellers v. Trs. of Bos. Coll.*, 2024 BL 124524, D. Mass., No. 1:22-cv-10912, 4/11/24 .

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April 15, 2024, 2:00 AM PDT
This Week in Chancery Court: Poison Pill Ruling, NuVasive
By [Jennifer Kay](#)

Bloomberg Law News 2024-04-15T13:19:22881335141-04:00
This Week in Chancery Court: Poison Pill Ruling, NuVasive

By Jennifer Kay 2024-04-15T05:00:17000-04:00

A ruling is expected in one of the many recent lawsuits asking Delaware’s Court of Chancery to reconsider how companies can deploy so-called “poison pills.”

Here’s a look at what else is coming up in Chancery Court and the Delaware Supreme Court:

Monday: Camac Fund LP v. Wagner, Del. Ch., No. 2023-0817, bench ruling 4/15/24.

At issue: Vice Chancellor Morgan T. Zurn will deliver a bench ruling on a motion to dismiss a lawsuit against the leaders and certain backers of Forte Biosciences Inc. Filed by an activist hedge fund seeking board seats, the litigation attacks an array of defensive measures, including a poison pill with a 10% ownership trigger. Camac Fund LP is pursuing the case only “to further its personal agenda of forcing a liquidation of Forte, an agenda Camac has been unable to advance through proper means outside of the courtroom,” the company and the individual defendants said in a brief supporting their motion to dismiss. Camac wants the case to proceed but also to be resolved before Forte’s 2024 annual meeting to clarify “the composition of the Board and the persons entitled to vote,” according to the fund’s reply brief.

Court action: Zurn will deliver her bench ruling via teleconference.

Poison Pills Targeting Activists Push Judges to Draw New Lines

Tuesday: NuVasive Inc. v. Miles, Del. Ch., No. 2017-0720, oral arguments 4/16/24.

At issue: Remaining claims in a long-running dispute between two spinal surgery device makers went to trial in October before Vice Chancellor Sam Glasscock III. The judge now will hear closing arguments in the case. Patrick Miles, the ex-president of NuVasive Inc., said in a post-trial brief that his former company has likened him to a Nazi collaborator when he “merely wanted to change jobs.” NuVasive launched the litigation “to tarnish Miles’s reputation and ruin him and his new employer financially,” Miles’s brief said.

Court action: Post-trial oral arguments will be heard in Georgetown, Del.

Alphatec Ducks Part of Suit Over NuVasive President Who Defected

Wednesday: Manheim v. Young Min Ban, Del., No. 377,2023, oral arguments 4/17/24.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XNAR2BG000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d...> 1/3

At issue: The owner of a business that coordinates US infrastructure investments for foreign nationals seeking EB-5 visas is appealing a Chancery Court order that found him liable for \$442,000 in compensation to a board member of an affiliated company. Joseph Manheim also argues the Chancery Court erred in dismissing his counterclaims alleging that a minority investor in Delaware Valley Regional Center LLC improperly accessed Manheim's Dropbox files. The minority investor, Young Min Ban, argues Manheim waited too long after the Chancery Court's ruling to file an appeal.

Court action: Oral arguments before the Supreme Court will be held in Dover, Del.

Investment-for-Visas Business Owner on the Hook for \$2.4 Million

Wednesday: OptimisCorp v. Atkins, Del. Ch., No. 2020-0183, trial 4/17/24.

At issue: Zurn previously ruled that three former OptimisCorp board directors had no right to keep millions in damages they won on the physical therapy company's behalf in arbitration proceedings against its former lawyer. She declined, however, to determine how much the ex-directors needed to return; that amount will be resolved in a three-day trial. The arbitration award totaled about \$8.7 million.

Court action: Trial will be held in Wilmington, Del.

Therapy Chain Gets Win Against Ex-Directors Who Kept Legal Award

Wednesday: MKE Holdings Ltd. v. Schwartz, Del. Ch., No. 2018-0729, oral arguments 4/17/24.

At issue: Glasscock previously decided that Verdesian Life Sciences LLC's board and the private equity firm it's linked to couldn't dodge allegations they duped two of Verdesian's part-owners into investing millions. Verdesian's former managers and its former private equity sponsor, Paine Schwartz Partners LLC, now seek summary judgment. They argue those claims were filed too long after a 2014 transaction being challenged, according to a brief. Two equity holders who filed the litigation argue discovery produced in the case is "replete with evidence of Defendants' bad faith and fraudulent conduct," according to their answering brief.

Court action: Oral arguments on the motion for summary judgment will be heard in Georgetown, Del.

Verdesian, Paine Schwartz Must Face Fraud Claims Over Merger

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/04/new-stuff-from-me.html

Friday, April 12, 2024

New Stuff From Me

By Ann Lipton

Just posting the obligatory plug of a couple of new things. First up, I reviewed Stephen Bainbridge's book, *The Profit Motive: Defending Shareholder Value Maximization* for the Harvard Law Review. Here is the abstract:

Professor Stephen Bainbridge's new book, *The Profit Motive: Defending Shareholder Value Maximization*, uses the Business Roundtable's 2019 statement of corporate purpose as a jumping off point to offer a spirited defense of shareholder wealth maximization as the ultimate end of corporate governance. Beginning with an analysis of classroom standards like *Dodge v. Ford Motor Co.*, and continuing through the modern era, Bainbridge argues both that shareholder value maximization is the legal obligation of corporate boards, and that it should in fact be so, partly because of wealth maximization's prosocial tendencies, but also because of the lack of a viable alternative. Drawing on his decades of work as one of America's most influential corporate governance theorists, Bainbridge offers up sharp critiques of the kind of enlightened managerialism reflected in the Business Roundtable's statement, and advocated by academics like Professor Lynn Stout and practitioners like Martin Lipton. Along the way, he also has harsh words for trendy alternatives such as "environmental, social, and governance" (ESG) investing and proposals to reform the structure of the corporation itself.

In many ways, *The Profit Motive* is an essential resource for any theorist, or student, in this field. Deftly intertwining economic theory with sharp anecdotes and historical retrospectives, Bainbridge offers an entertaining account of the realpolitik of corporate functioning and the major legal developments that brought us to where we are today. However, as I argue in this book review, there are many facets to stakeholderism and the ESG movement, and the very features Bainbridge identifies as flaws could, in fact, turn out to be hidden virtues.

Second, last week, I spoke to students at College of the Holy Cross in Worcester, Massachusetts about ESG and the social responsibility of business. The talk was somewhat similar to one I gave at Marquette Law School a few months ago, but this was the first time I had the opportunity to present to undergraduate students rather than law-type people. Anyway, there's video:

Watch Video At: <https://youtu.be/PV0fSrRv5K4>

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April 15, 2024, 6:40 AM PDT
Visa, Mastercard Lose High Court Bid to Review ATM Pricing Case
By [Katie Arcieri](#)
Documents

[Petition](#)

- Card companies argued judge erred in certifying three classes
- Plaintiffs accused Visa, Mastercard of fixing ATM fees

Bloomberg Law News 2024-04-15T13:07:47626847209-04:00
Visa, Mastercard Lose High Court Bid to Review ATM Pricing Case

By Katie Arcieri 2024-04-15T09:40:40000-04:00
Card companies argued judge erred in certifying three classes
Plaintiffs accused Visa, Mastercard of fixing ATM fees

The US Supreme Court on Monday denied a request to review class certification in a case accusing Visa Inc. and Mastercard Inc. of fixing the price of fees charged at automated teller machines.

Visa and Mastercard asked the Supreme Court in January to review a decision by the US Court of Appeals for the District of Columbia Circuit that sided with a district court in granting certification to three classes of ATM owners and customers seeking billions of dollars in damages.

The Supreme Court in its orders that Justice Brett Kavanaugh took no part in the consideration or decision of this petition.

At issue is whether the district court appropriately certified the classes of plaintiffs. Judges must use the Rule 23 predominance method, in which facts common to class members must supersede any questions affecting only individual members. Some courts take a more strict approach to the Rule 23 method, while others are more relaxed.

“This Court’s intervention is necessary to resolve the rampant confusion in the lower courts and to provide guidance on the appropriate level of scrutiny mandated by Rule 23(b)(3),” Visa and Mastercard’s petition stated.

The case is among several antitrust suits against the card companies, including cases brought by merchants over swipe fees.

ATM operators and two groups of consumers sued Visa and Mastercard in 2021, with claims the credit card companies enforced an illegal agreement to fix prices for ATMs and suppressed competition between ATM networks. Visa and Mastercard own and operate networks that allow consumers to withdraw cash from their bank accounts using ATMs.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XCALD2NO000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6L...> 1/3

The card companies argued against the appellate court's decision to affirm class certification, saying there was no common evidence to establish injury for all members, and that the certified classes swept in tens of thousands of uninjured plaintiffs.

"The court's certification order does not rest on an incorrect legal standard," the D.C. Circuit countered. "And we discern no substantive inadequacy or other legal error in the district court's evidentiary assessment."

The DRI Center for Law and Public Policy, which advocates for defense lawyers and their clients, supported the card companies' petition in a February amicus brief, saying that letting the decision stand would "embolden district courts to certify plaintiff classes and then let the chips fall where they may."

The card companies are represented by Arnold & Porter Kaye Scholer LLP and Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Visa Inc. v. National ATM Council Inc. , U.S., No. 23-814, 4/15/24 .

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<https://www.law.com/thelegalintelligencer/2024/04/11/judge-reapproves-3-2m-class-counsel-fee-award-thrown-out-by-3rd-circuit-in-wawa-litigation/>



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NEWS

Judge Reapproves \$3.2M Class Counsel Fee Award Thrown Out by 3rd Circuit in Wawa Litigation

“The court got it right the first time, but we’re pleased that the court took the time to write a thorough opinion that will undoubtedly be cited in future fee motions filed within the Third Circuit,” co-lead plaintiffs counsel Benjamin Johns, with Shub & Johns, said.

April 11, 2024 at 05:29 PM

Fee Disputes



Aleeza Furman
Litigation Reporter



What You Need to Know

- Judge Gene Pratter approved a \$3.2 million counsel fee award in a data breach class action against Wawa for the second time.
- The Third Circuit had vacated her first approval in light of a challenge from a class member.
- Attorneys said it's rare for class members to object to settlements, and even more uncommon for them to seek appeals.

An objection to a \$3.2 million counsel fee award in a class action settlement went further than most challenges of its kind.

Theodore Frank, a class member in a data breach lawsuit against Wawa, took his objections up to the U.S. Court of Appeals for the Third Circuit, which vacated the fee award and returned it to the district court for reevaluation.

But six months later, Frank’s challenge was once again rejected.

On Tuesday, U.S. District Judge Gene Pratter of the Eastern District of Pennsylvania approved, for the second time, the award of \$3.2 million in attorney fees and other costs to counsel in the Wawa data breach class action.

“The court got it right the first time, but we’re pleased that the court took the time to write a thorough opinion that will undoubtedly be cited in future fee motions filed within the Third Circuit,” said co-lead plaintiffs counsel Benjamin Johns, a partner at Shub & Johns.

Adam Schulman of the Hamilton Lincoln Law Institute’s Center for Class Action Fairness, who represents Frank, said

the objector will likely be seeking another appeal.

Schulman asserted that Pratter “made some errors, and her opinion is inconsistent with what the Third Circuit asked her to do and what the Third Circuit actually found.”

Pratter’s [52-page opinion](#) evaluated the proposed \$3.2 million fee award through two questions directed by the Third Circuit on remand: whether the court should base its analysis on funds made available to the class or on money actually claimed by the class, and whether the objector’s allegation of “side agreements” between class counsel and the defendants rendered the fee award unreasonable.

Frank asserted that the counsel fee award amounted to a higher value than the class members’ total recovery. He contended that the calculation should be based on the \$2.9 million that class members claimed and not the \$9 million that Wawa made available to the class under the settlement.

Pratter, however, rejected Frank’s argument.

She ruled that “under the circumstances of this data breach class action, in which difficult-to-monetize injunctive relief is a central feature of class relief, the court exercises its discretion to evaluate the fee in light of the amounts made available.”

Frank also claimed the settlement agreement contained a “clear sailing” provision—in which the defense agreed not to contest class counsel’s request for attorney fees up to a certain amount—and that an earlier version of the agreement included a provision establishing that a reduction in fee awards would return to Wawa.

Pratter was again unconvinced.

Pratter determined that the agreement never contained a “clear sailing” provision, and that the alleged “fee reversion” provision was an error that counsel went on to collect.

“A knee-jerk adversarial lawyer might balk at defense counsel’s decision not to contest the fee award,” Pratter held. “However, lawyering is not an exclusively adversarial endeavor. The court finds that Wawa’s counsel made a strategic decision not to contest the fee, and this strategic decision was advantageous to Wawa.”

The approved award includes about \$3 million in attorney fees, \$46,000 in litigation expenses, \$100,000 in settlement administration fees, and \$14,000 in class representative awards.

Morgan, Lewis & Bockius partner Gregory Parks, who represents Wawa, did not respond to requests for comment.

Johns, the plaintiffs attorney, said objections to class counsel fee awards are fairly infrequent and “more often than not when it’s decided at the trial court or district court level that’s it.”

He said the settlement process had gone relatively smoothly, so counsel was surprised at the objection.

Schulman, too, said not many class members raise challenges to settlements.

“The main reason for that is that every individual has a very small amount at stake,” he said.

Schulman said objections typically only reach the appellate level with the assistance of nonprofit attorneys like himself who seek to challenge resolutions they view as not benefitting class members.

He asserted that he pursued the objection because the Wawa settlement provided “an illusion of relief but not actual relief.”

Case 2:19-cv-06019-GEKP Document 438 Filed 04/09/24 Page 1 of 52

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE WAWA, INC.
DATA SECURITY LITIGATION

CIVIL ACTION

This document applies to the
Consumer Track.

No. 19-6019
and all related cases.

MEMORANDUM

PRATTER, J. APRIL 9, 2024

A good lawyer wears many hats. The multifaceted nature of lawyering is so fundamental that it occupies the opening passages of the Model Rules of Professional Conduct:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the lawyer's duties, the risks, benefits, and alternatives to proposed actions. As negotiator, a lawyer seeks the best outcome for the client. As mediator or arbitrator, a lawyer helps resolve disputes. As investigator, a lawyer helps develop facts. As a writer, a lawyer drafts documents. As a counselor, a lawyer advises clients on business decisions. As a problem solver, a lawyer seeks out potential conflicts and resolves them before they become legal disputes. As a public servant, a lawyer helps shape the law, writes or revises legislation, and administers justice through the courts.

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Execs got money, in part for 'record' railroad train length

 [10news.com/execs-got-money-in-part-for-record-railroad-train-length](https://www.10news.com/execs-got-money-in-part-for-record-railroad-train-length)

Carrie Cochran, Mark Greenblatt

April 11, 2024

When Norfolk Southern's derailed train spewed toxic chemicals into East Palestine, Ohio, Scripps News was the first news organization to uncover how company executives received millions in cash for actions that compromised safety, including making its trains longer and heavier. Weighing 18,000 tons, the derailed train was nearly two miles long.

Industry insiders, Congressional members, and former Federal Railroad Administration leaders expressed shock at what Scripps News uncovered:

-Norfolk Southern gave large cash payouts to executives for achieving "record performance for train length and weight."

-It made its "operating ratio" the single biggest trigger for executive cash awards. Pressure to lower this controversial Wall Street metric led to dangerous cost-cutting.

-As operating ratio hit a record low, the company's accident rate hit a 10-year high.

-It spent millions lobbying against safety proposals that jeopardized a low operating ratio.

Scripps News' reports pushed the corporation to overhaul the incentives that drive company strategy.

SEE MORE: Norfolk Southern reaches \$600M agreement with East Palestine residents

Trending stories at Scrippsnews.com

- Railroad execs got money, in part for 'record' train length
- Missing teenage twins found after woman reports stolen debit card
- O.J. Simpson dead from cancer at age 76, family says

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NEWS

Tyco Agrees to \$750M Settlement Over Contaminated Drinking Water

On Friday, lawyers in the multidistrict litigation over aqueous film-forming foam announced the Tyco settlement, which would compensate 12,000 public water systems nationwide with contaminated drinking water supplies.

April 12, 2024 at 05:08 PM

News



Amanda Bronstad
staff reporter



What You Need to Know

- The Tyco settlement follows similar agreements with DuPont, for \$1.19 billion, and 3M, for up to \$12.5 billion.
- More than a dozen defendants remain in the multidistrict litigation, including BASF and Buckeye, some of which are in settlement talks.
- On Wednesday, the EPA set a new national drinking water standard to reduce exposure to perfluoralkyl and polyfluoralkyl substances, or PFAS.

Tyco has agreed to pay \$750 million to settle lawsuits by thousands of public water systems nationwide with contaminated drinking water supplies.

On Friday, lead class counsel announced the settlement, which compensates an estimated 12,000 public water systems and follows similar agreements with DuPont, for \$1.19 billion, and 3M, for up to \$12.5 billion.

“The current condition of our public water systems cries out for immediate attention,” co-lead class counsel said in a combined statement. They are Michael London, of New York’s Douglas & London; Paul Napoli, of Napoli Shkolnik in San Juan, Puerto Rico; Scott Summy, of Baron & Budd in Dallas; and Joe Rice, of Motley Rice in Mount Pleasant, South Carolina.

“It is our belief that this infusion of funds, in addition to the previously approved settlements, will provide much needed resources swiftly for our public water providers,” they wrote. “Through collaboration with the defendant, we have achieved a critical next step in the ongoing pursuit of cleaner drinking water across the country.”

They added, “We will continue to seek additional financial resources from those responsible for contaminating our public drinking water.”

More than a dozen defendants remain, including BASF, Buckeye and AGC.

London told Law.com that class counsel were in settlement talks with Tyco for “a good number of months” and that discussions are ongoing with several of the other defendants, which face bellwether trials this fall.

“Certainly, there are bellwether trials coming up for other water providers, and trial dates oftentimes bring interest in resolution,” he said. “So we’re moving forward on any and all tracks toward resolution, be it through trials or settlement vehicles like this. “

‘It Just Got Real’

On Wednesday, the U.S. Environmental Protection Agency [set a new national drinking water standard](#) to reduce exposure to perfluoralkyl and polyfluoralkyl substances, or PFAS, which have been linked to serious illnesses and developmental harm in children and infants. The U.S. Department of Justice filed a letter to inform Judge Richard M. Gergel of the U.S. District for the District of South Carolina about the new rule, which set maximum contaminant levels under the Safe Drinking Water Act of 4 parts per trillion.

That makes the settlements even more essential, London said.

“It just got real,” he said. “Water systems are now going to have to come into compliance with this federal law, which means their damages are real.”

Unlike the 3M and DuPont agreements, which allowed public water systems to make claims if they discovered contamination at a later date, the Tyco settlement applies only to those that, as of May 15, were found to have PFAS in their drinking water supplies.

Johnson Controls, which owns Tyco Fire Products, said in a statement: “We are pleased to have reached this broad settlement with a nationwide class of public water systems.”

The Tyco settlement must be approved by Gergel, who is overseeing multidistrict litigation in South Carolina involving aqueous film-forming foam that contains PFAS. Once finalized, the settlement’s funds could be paid in full by Dec. 31.

London said he anticipated filing a motion for final approval in 14 days. He declined to provide the amount of attorney fees that class counsel plans to request, although in the 3M and DuPont deals they sought 8% of the settlements for a [combined total of nearly \\$1 billion](#).

The next status conference is April 26.

On March 29, Gergel [granted final approval](#) to 3M’s settlement, despite the [objections of several water providers](#). On Feb. 8, he [granted final approval](#) to the DuPont deal, which one water provider, the Metropolitan Water District of Southern California, plans to appeal to the U.S. Court of Appeals for the Fourth Circuit, citing overbroad releases. Class counsel [filed a motion for sanctions](#) against the provider’s lawyers.

“We’re hoping there won’t be that many objections in light of the similarity of these settlements, and, certainly, in light of the guidance opinions already issued by Judge Gergel in both the 3M and DuPont settlements,” London said of the Tyco settlement.

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April 15, 2024, 7:42AM PDT
3M Loses Bid to Move PFAS Landfill Case From Vermont Court
By [Pat Rizzuto](#)
Documents

-  [Order](#)
-  [Docket](#)

- Federal court remands Vermont's lawsuit back to superior court
- Case part of focus on landfills' role in PFAS contamination

Bloomberg Law News 2024-04-15T13:18:37143006531-04:00
3M Loses Bid to Move PFAS Landfill Case From Vermont Court

By Pat Rizzuto 2024-04-15T10:42:32000-04:00
Federal court remands Vermont's lawsuit back to superior court
Case part of focus on landfills' role in PFAS contamination

Vermont's allegations that the 3M Co. damaged natural resources from PFAS placed in landfills will remain under the state court's jurisdiction, a federal district court ruled.

3M unduly delayed its attempt to transfer the case from Vermont's Superior Court to the US District Court for the District of Vermont, District Judge William K. Sessions III ruled April 12 in an order remanding the case back to the superior court.

This decision focuses on Vermont's claims about contamination 3M allegedly caused by disposing of multiple products in Vermont at the Rutland City landfill as part of broader investigations and litigation the state filed in 2019 against 3M, E. I. du Pont de Nemours and Co., the Chemours Co., and other PFAS manufacturers.

That lawsuit focused on per- and polyfluoroalkyl substance (PFAS) contamination from "hundreds of consumer and industrial products that are not used in firefighting foam and that have caused the majority of the State's PFAS contamination," Sessions said.

The broader case involves state landfills, a disposal method that's increasingly recognized as a way these persistent chemicals get into the environment, wildlife, and people where they may increase the risk of cancer, weakened immune systems, and other diseases.

The case is Vermont v. 3M Co. , D. Vt., No. 24-cv-00019, 4/12/24 .

To contact the reporter on this story: Pat Rizzuto in Washington at prizzuto@bloombergindustry.com

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April 12, 2024, 11:56 AM PDT
Johnson & Johnson Faces Class Action After PFAS, Bandages Report
By [Pat Rizzuto](#)
Documents

- [Docket](#)
- [Complaint](#)

- Complaint alleges safety advertising misleads consumers
- Adds to litigation alleging state consumer law violations

Bloomberg Law News 2024-04-15T13:34:20653555009-04:00
Johnson & Johnson Faces Class Action After PFAS, Bandages Report

By Pat Rizzuto 2024-04-12T14:56:44000-04:00
Complaint alleges safety advertising misleads consumers
Adds to litigation alleging state consumer law violations

A consumer watchdog’s recent report that found molecular indications that PFAS are in some bandages spurred a class action complaint against a health-care company and Johnson & Johnson.

Georgia resident Jo Aronstein asked the US District Court for the District of New Jersey on April 8 to allow her on behalf of other Band-Aid purchasers to bring a class action against Johnson & Johnson (J&J), Johnson & Johnson Consumer Inc., and Kenvue Inc., a health-care company that spun off from J&J in 2023 and manages Band-Aid® Brand Adhesive Bandages.

The plaintiff seeks more than \$5 million in damages and injunctions against allegedly misleading advertisements about Band-Aid’s safety. The focus on consumer law is consistent with many other lawsuits filed about PFAS in personal care and other products.

Neither Kenvue nor Johnson & Johnson responded immediately to questions.

The complaint cites a report that Mamavation, a consumer watchdog, released earlier this month. It found more than 10 parts per million total organic fluorine, a molecular signal of per- and polyfluoroalkyl substances (PFAS), in 26 out of 40 bandages tested including 10 out of 16 bandages marketed to people with black and brown skin tones. Environmental advocacy groups supported the report’s research.

The report did not identify specific PFAS detected, but the complaint lists hormonal problems, cancer, and other illnesses studies have attributed to some of the thousands of chemicals in this group.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X6CP58QC000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93...> 1/2

"Because bandages are placed upon open wounds, it's troubling to learn that they may be also exposing children and adults to PFAS," Linda Birnbaum, scientist emeritus and former director of the National Institute of Environmental Health Sciences and National Toxicology Program told Mamavation regarding the findings.

The case is Aronstein v. Kenvue, Inc. , D.N.J., No. 24-cv-04665, Complaint filed 4/8/24 .

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Johnson Controls unit to pay \$750 mln to settle 'forever chemicals' lawsuit

 [reuters.com/legal/johnson-controls-unit-pay-750-mln-settle-forever-chemicals-lawsuit-2024-04-12](https://www.reuters.com/legal/johnson-controls-unit-pay-750-mln-settle-forever-chemicals-lawsuit-2024-04-12)

Clark Mindock, Aishwarya Jain

April 12 (Reuters) - Johnson Controls (JCI.N) [opens new tab](#) said on Friday its subsidiary Tyco Fire Products had agreed to a \$750 million settlement with some U.S. public water systems that claimed toxic "forever chemicals" in firefighting foam made by the company had contaminated their water supplies.

The money provided by the settlement, which must be approved by a federal judge, will help cities, towns and other public water systems remediate contamination of per- and polyfluoralkyl substances, or PFAS.

The settlement does not constitute an admission of liability or wrongdoing by Tyco, Johnson Controls disclosed in a regulatory filing, adding that a charge for the amount was recorded in the second quarter ended March 31.

"This settlement resolves claims involving contaminated drinking water and provides compensation critical to protecting our nation's drinking water supplies and upgrading our water treatment infrastructure to deal with this new emerging threat," said Paul Napoli, an attorney for the water systems.

PFAS are a class of chemicals used in thousands of consumer and commercial products, including firefighting foams, non-stick pans and stain-resistant fabrics. They have been tied to cancers and other diseases, and are often called forever chemicals because they do not easily break down in nature or the human body.

Tyco is among nearly two dozen chemical companies that have faced lawsuits brought by water systems over PFAS pollution in sprawling litigation that has been centralized in a South Carolina federal court. The lawsuits focus on PFAS that contaminated groundwater after being sprayed in firefighting foams at fire houses and airports across the country.

In 2023, those lawsuits led to more than \$11 billion in settlements between major chemical companies and U.S. water systems.

The largest settlement, agreed to by 3M (MMM.N) [opens new tab](#) in June, will provide \$10.3 billion to U.S. public water systems for testing and treating PFAS in American drinking water systems. A similar settlement involving Chemours (CC.N) [opens new tab](#), Corteva (CTVA.N) [opens new tab](#) and DuPont de Nemours (DD.N) [opens new tab](#) was also reached last year for \$1.19 billion.

U.S. District Judge Richard Gergel in Charleston, who is overseeing the litigation, has warned the lawsuits could pose an "existential threat" to companies facing PFAS claims.

Friday's settlement is subject to Gergel's approval. Tyco expects to pay \$250 million of the settlement by May, and the remaining \$500 million six months after the court gives its preliminary approval.

In addition to the lawsuits brought by water systems, chemical companies also face thousands of personal injury lawsuits consolidated in the South Carolina court by people who claim exposure to PFAS caused their cancers and other diseases. Other lawsuits have been filed by states and property owners who claim PFAS damaged their lands as well.

On Thursday, the U.S. Environmental Protection Agency finalized the first federal regulations on forever chemicals in drinking water, setting tight limits on the amount of PFAS present in public water.

Those EPA regulations could make it easier for water systems to sue companies over PFAS contamination, but are likely to be challenged in court.

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Reporting by Aishwarya Jain in Bengaluru and Clark Mindock in New York; Editing by Alexia Garamfalvi and David Holmes

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9th Circuit punts on viability of 'snap' removals but bars 'super snaps'

 [reuters.com/legal/litigation/column-9th-circuit-punts-viability-snap-removals-bars-super-snaps-2024-04-11](https://www.reuters.com/legal/litigation/column-9th-circuit-punts-viability-snap-removals-bars-super-snaps-2024-04-11)

Alison Frankel

A view of the judge's chair in court room 422 of the New York Supreme Court at 60 Centre Street February 3, 2012. Picture taken February 3, 2012. REUTERS/Chip East (UNITED STATES- Tags: CRIME LAW) Purchase Licensing Rights [↗](#), opens new tab

April 11 (Reuters) - The 9th U.S. Circuit Court of Appeals had a chance on Wednesday to become the fourth federal circuit to weigh in on "snap removal," a controversial but increasingly common defense tactic to shift cases from state to federal court.

The appeals court ended up ducking any final decision on the viability of snap removals in its ruling [↗](#), opens new tab in consolidated appeals by diabetes equipment supplier Dexcom (DXCM.O) [↗](#), opens new tab. But that's only because Dexcom tried to pull off an even more aggressive tactic, attempting to shift three product liability suits from San Diego Superior Court to federal court before the cases were even formally docketed in the California state court system.

That's a no go, according to the 9th Circuit, which coined the phrase "super snap removal" to describe Dexcom's strategy. The appeals court held, in a matter of first impression in the circuit, that a case is considered to be filed in California state court when it is "processed and endorsed or otherwise acknowledged as officially filed by the clerk of the court."

So Dexcom's attempt to remove the cases against it before they were processed by the San Diego state court clerk, the 9th Circuit said, was invalid.

The facts of the Dexcom super snap removals are unusual, as I'll explain. But considering that the three other federal appellate courts to have opined on snap removals – the 2nd, 3rd and 5th Circuits – have all blessed the tactic, it's significant that the 9th Circuit has at least established a starting line for defendants' race to federal court.

Dexcom counsel Joshua Klarfeld of UB Greensfelder did not respond to my query. The company's 9th Circuit brief [↗](#), opens new tab argued, among other things, that its removals were not premature as a matter of California state law and that plaintiffs' lawyers failed to raise a timely challenge to the shift to federal court.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

Plaintiffs' lawyer Min Koo of the Tosi Firm said the decision is "a much-needed reminder [that] procedural gamesmanship has no place in our jurisprudence and access to federal courts must be obtained fairly."

Snap removals, as you may recall, take advantage of language in the Federal Rules of Civil Procedure that was intended to block plaintiffs from improperly naming local defendants solely to defeat federal-court diversity jurisdiction. The relevant rule says defendants can remove cases to federal court if plaintiffs fail to serve their complaints on in-state defendants.

The critical word is "serve." State-court electronic dockets have made it easier for defendants to spot new lawsuits as soon as they're filed. About a decade ago, savvy corporations realized that there's often a time lag between when plaintiffs file their complaints electronically and when they serve those complaints on defendants. Companies capitalized on that time gap by racing to federal court as soon as cases showed up in state electronic dockets, sometimes removing lawsuits even before plaintiffs were permitted under local rules to serve complaints.

In the Dexcom cases, there was no question of fraudulent joinder: California-based Dexcom was the only defendant. But because the plaintiffs were from out of state, Dexcom could invoke federal court diversity jurisdiction if plaintiffs failed to serve the company with their complaints.

The company learned of the lawsuits through Courthouse News's notification service on the day before Thanksgiving in 2022. On the following Monday – before the San Diego court clerk had officially docketed the cases or issued summonses – Dexcom removed the suits to federal court in San Diego. Thirty-one days later, plaintiffs' lawyers moved to remand the lawsuits to state court.

The two sides wrangled on several issues before U.S. District Judge Jinsook Ohta, including the timeliness of plaintiffs' remand motions, which are supposed to be filed within 30 days of removal.

The trial judge's key finding, however, was that Dexcom's initial removal notice was defective because plaintiffs' complaints hadn't been officially filed.

On appeal, Dexcom asked the 9th Circuit to rule not only that its removal notice was properly filed but also, more broadly, that snap removals are a permissible tactic.

Judges Consuelo Callahan, Ryan Nelson and Bridget Bade said they couldn't decide that question because Dexcom's removal was defective to begin with. But they roundly rejected Dexcom's argument that defendants are entitled to remove cases as soon as filings appear in electronic documents.

"Whatever the benefits might be to litigating in federal court, there is no manifest injustice to a California-based company having to defend itself in a California court," Callahan wrote in the court's opinion. "Often-overburdened state trial courts deserve the chance to at least register the pleadings that come to them before having cases removed by nimble parties."

Ultimately, the appeals court said, “the final chapter on snap removals in the 9th Circuit remains to be written.” But when it comes to “ever-snappier snap removals,” Callahan wrote, “today we close the book.”

Read more:

House Dems introduce bill to combat defense tactic of 'snap removals'

3rd Circuit blesses 'emerging' defense tactic to evade state court

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Reporting By Alison Frankel

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Alison Frankel

Thomson Reuters

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

'A Mess': Harvard Med School Professor Plagiarized in Expert Report, Judge Says



[thecrimson.com/article/2024/4/15/hms-professor-plagiarized-report](https://www.thecrimson.com/article/2024/4/15/hms-professor-plagiarized-report)

A federal judge determined that Harvard Medical School assistant professor Dipak Panigrahy plagiarized significant portions of an expert report he submitted in a class action lawsuit. By Joey Huang

Harvard Medical School assistant professor Dipak Panigrahy plagiarized large portions of an expert report on possibly carcinogenic chemicals, a federal judge wrote last month.

Panigrahy submitted a more than 500-page report on behalf of the plaintiffs in a class action lawsuit against weapons manufacturer Lockheed Martin, alleging the company's manufacturing facility in Orlando released toxic chemicals into the surrounding area causing various injuries, including cancer.

But in a March 18 court order, U.S. District Court Judge Roy B. Dalton Jr. granted a motion by Lockheed Martin to exclude Panigrahy's report as evidence, saying that the report extensively plagiarized from works by the International Agency for Research on Cancer. "Dr. Panigrahy's report is — put plainly — a mess," Dalton wrote.

"Indeed, the plagiarism is so ubiquitous throughout the report that it is frankly overwhelming to try to make heads or tails of just what is Dr. Panigrahy's own work," Dalton added.

Numerous sections of Panigrahy's report are word-for-word identical to IARC publications. The passages cite the IARC broadly but are not enclosed by quotation marks.

In an emailed statement to The Crimson, Panigrahy — a cancer researcher at Beth Israel Deaconess Medical Center — wrote that he fully cited his sources, including the IARC.

"I cited to all of the underlying articles and reports that I was accused of plagiarizing, and made clear that I was relying on these sources as part of my analysis," Panigrahy wrote.

"I relied on IARC reviews for their comprehensive discussion of the available literature and study results, and then conducted my own analysis based on the body of available evidence," he wrote, adding that he referenced more than 1100 other works in his report. But Dalton's order said that Panigrahy's insistence on the volume of citations in the report did not refute the accusations of plagiarism.

"His deposition made the plagiarism appear deliberate, as he repeatedly outright refused to acknowledge the long swaths of his report that quote other work verbatim without any quotation marks at all — instead stubbornly insisting that he cited over 1,100 references, as if that resolves the attribution issue (it does not)," Dalton wrote.

“The volume of references actually makes the problems with Dr. Panigrahy’s methodology more glaring, as he admitted that he did not even read the 1,100 papers in their entirety,” he added in a footnote, referring to a deposition of Panigrahy as part of the case.

The report also alleges that at times, Panigrahy misrepresented the IARC’s research.

“Several times, he copied lengthy paragraphs from IARC verbatim but conveniently left out sentences in which IARC urged caution about the limitations of its findings, misleadingly presenting the science as more definitive than it actually is,” Dalton wrote.

“In sum, the rampant plagiarism in Dr. Panigrahy’s report leads the Court to conclude that his general causation methodology as a whole is too unreliable to put before a jury,” Dalton added.

The IARC did not respond to a request for comment.

Panigrahy — who has been at BIDMC since 2013 and runs the Panigrahy Lab — is available for hire as part of the Expert Institute, a website which allows attorneys to find experts for their cases.

The report filing comes weeks after top Dana-Farber Cancer Institute researchers and a Brigham and Women’s Hospital scientist were accused of research misconduct, with most of these instances pertaining to image manipulation and duplication. The Broad Institute and Boston Children’s Hospital have since begun offering research integrity tools.

Other Harvard affiliates have also faced increasing allegations of plagiarism in recent months.

Right-wing activists have amplified anonymous plagiarism complaints of varying levels of severity against several Black women scholars of race and diversity, including former Harvard President Claudine Gay — accusations which many Harvard academics have called politically and racially-motivated.

Harvard Business School professor Francesca Gino, who is suing the University and a data investigation blog for \$25 million dollars after being accused of data fraud, was also accused of plagiarism this month in an analysis by Science Magazine.

Panigrahy’s testimony has been called into question in previous court cases.

In October, his report in an Ohio case was dismissed after the judge determined that it was based on a “novel” theory regarding chemical markers — a topic on which “no expert has ever been permitted to offer an opinion.”

In his email, Panigrahy objected to Dalton’s ruling and suggested it may not last.

“The Court ignored this, or did not understand this, and heedlessly accepted the defendants’ mischaracterization of my work,” Panigrahy wrote.

“We expect the Judge’s order to be overturned,” he added.

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NEWS

Orrick to Pay \$8M to Settle Data Breach Class Action

Lawyers for the class members could receive 25% of the settlement fund, depending on their application for attorney fees.

April 15, 2024 at 12:00 PM

Cybersecurity



Justin Henry
Reporter



What You Need to Know

- In August, plaintiffs began filing lawsuits against Orrick, alleging they and more than 600,000 others were impacted by an unauthorized access of the firm's computer network.
- Plaintiffs in four separate data breach actions consolidated their cases in January.
- This month, the parties told the court they have reached a settlement agreement to compensate the plaintiffs for alleged injuries.

Orrick Herrington & Sutcliffe has agreed to pay \$8 million to settle claims with members of a class action who said their personal information was compromised in a data breach that affected more than 600,000 people, according to settlement documents filed in federal court last week.

The settlement, coming after eight months of litigation in California federal court, could see class members receive up to \$2,500 for out-of-pocket expenses, \$7,500 for “extraordinary losses,” \$125 for up to five hours of attested time and \$150 for subclass members’ California Consumer Privacy Act claims, documents state.

In an email statement, a spokesperson for Orrick said: “We regret the inconvenience and distraction that this malicious incident caused. We made it our priority to resolve this matter as quickly as possible for our clients, the individuals whose data was impacted, and our team. We are pleased to reach this settlement, which brings this matter to a close, and will continue our ongoing focus on protecting our systems and the information of our clients and our firm.”

Lawyers for the class members said the decision to settle factored in the expense, time, complexity and risk in continuing to prosecute the claims.

“While plaintiffs and Class Counsel believe their claims are meritorious, they also recognize the expense and amount of time it would take to continue prosecuting this Action through trial and any subsequent appeals,” lawyers for the plaintiffs stated in a motion for approval of the parties’ proposed settlement.

“Plaintiffs and Class Counsel have taken into account the uncertain outcome and risk involved in any litigation, especially complex actions such as this one, including the difficulties and delays inherent in the litigation process,” lawyers said.

Lawyers for the class members could receive 25% of the \$8 million settlement fund, depending on their application for attorney fees, settlement documents state.

Orrick discovered evidence of third-party criminal activity on its network in March 2023, according to documents filed in the case and disclosures made to the Maine Attorney General’s Office.

From August to December 2023, plaintiffs filed four separate lawsuits against the firm in the U.S. District Court for the Northern District of California, which consolidated the court actions into a single case in January.

The terms of the settlement stipulate that the agreement shouldn’t be construed as evidence of admission of wrongdoing by Orrick nor as an admission by the plaintiffs that their claims are without merit.

Robert S. Green of Green & Noblin and William Federman of Federman & Sherwood, two of the lawyers representing injured plaintiffs, didn’t immediately return a request for comment Monday morning.

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Orrick's Data Breach Was Bigger Than Previously Reported



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\$20M Verdict, \$10M in Legal Fees? Morgan & Morgan Prevails

The parties tried this case four times, attorneys said.

April 15, 2024 at 12:12 PM

Verdicts-Settlements



Lisa Willis



A Jacksonville jury has awarded \$20 million to Scott Winckler, a motorcyclist who alleged he suffered severe injuries from a crash linked to defective brakes in his Suzuki motorcycle.

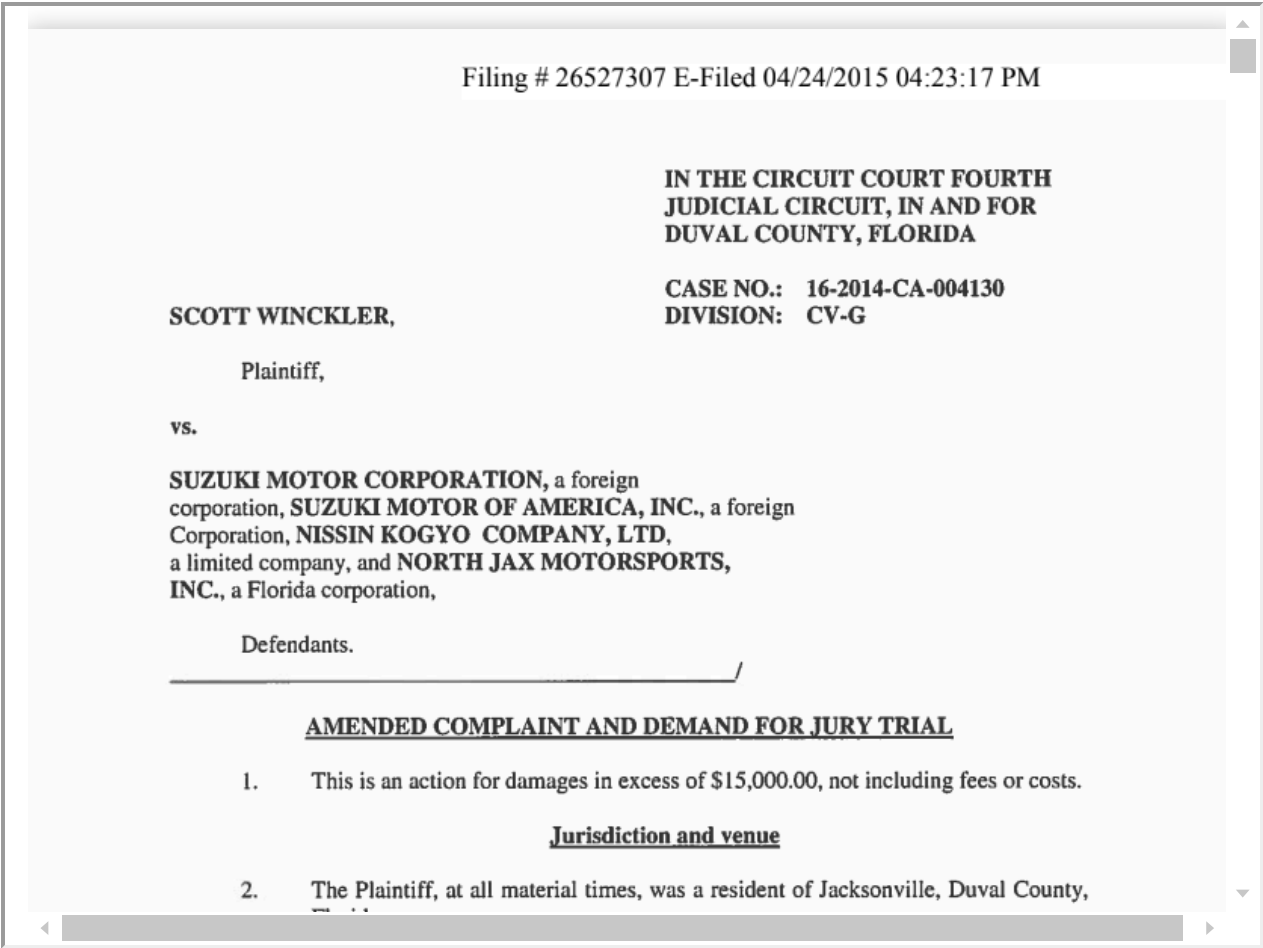
The Florida verdict was delivered in Duval County Circuit Court, marking a pivotal moment in a decade-long battle for compensation.

In *Scott Winckler vs. Suzuki Motor Corp., Suzuki Motor of America, Nissin Kogyo Co. Ltd. and North Jax Motorsports Inc.*, the jury found the defendants liable for the plaintiff’s catastrophic injuries.

The jury’s award covered all of Winckler’s past medical expenses, and provided for future medical costs and pain and suffering, acknowledging the profound impact of the injuries on his life, attorneys said.

Judge Katie Dearing presided.

Read the Complaint Here



Evidence

Winckler was represented by attorneys Joshua Moore, Mike Morgan, Keith Mitnik and Harris Yegelwel of Morgan & Morgan. He was riding a 2007 Suzuki GSX R-1000 motorcycle in June 2013, when the incident occurred.

Moore said there were many challenges for litigators.

“They wouldn’t admit or acknowledge that any of their documents were admissible,” he said. “They filed every motion you can imagine to keep any of our experts from talking about their documents.”

According to the complaint, Winckler was operating a motorbike, owned by someone else, when he attempted to brake, but the front braking system allegedly failed.

Attorneys had argued the motorcycle’s front braking system failed because its decreased braking power prevented Winckler from stopping before crashing into another vehicle.

The crash left Winckler paralyzed from the waist down.

Plaintiff counsel also presented evidence they said revealed that Suzuki Motor Corp. had been aware of the defects in the GSX-R’s FBMC as early as 2007 after a similar problem was reported in Germany.

They argued that despite a subsequent crash in 2012 linked to the same issue, Suzuki allegedly only redesigned the breaking port for future models, and delayed issuing a recall until October 2013—four months after Winckler’s crash and only when replacement parts became available.

Tried 4 Times

For the Mogan & Morgan team, it took multiple bites of the apple to lead to victory for the client.

Moore said they tried this case four times.

“We ended in a hung jury in 2019. We ended in a hung jury in 2022. And 2023, at day eight, they mistried the case,” he said.

National Counsel for Suzuki Motors Corp, Rick Mueller of Mueller Counts, told the Daily Business Review the defense plans to appeal.

“A jury previously determined that Mr. Winckler’s incident was not caused by a defectively designed or manufactured brake system,” Mueller said. “Suzuki is now in the process of post-trial motions and appealing the recent verdict to obtain a complete reversal.”

Mueller believes the company will eventually prevail.

“Suzuki believes in and stands by all of its products,” he said.

Plaintiff counsel Moore said originally his team went to trial litigating a design-defect case against the part manufacturer.

“But after we lost that on the split verdict and the part component manufacturer got out of the case, we only had Suzuki left, and we did it as a straight failure-to-warn case,” Moore said. “We are confident that our client will prevail in any post-trial motions and the court will affirm the jury’s verdict.”

Moore said Morgan & Morgan founding partner John Morgan had said, “‘I’m not sure this happens at any other firm anywhere,’ because it took us a lot of time and a lot of money to get it to that point.”

Moore said there was some doubt about the ability to win the case because the jury needed to be clear on deciding between driver error and product failure.

“Because the crash was such a close call, when you’re on the side of right, when the documents paint a pretty clear picture, you just have to be persistent and not let them wear you down.”

Read Motion for Attorney Fees

\$10 Million in Legal Fees?

The motion for attorney fees has been filed.

“After going to Japan and taking all those depositions and four trials, I think the fee claim alone approaches \$10 million,” Moore said.

The legal representatives for Suzuki Motor Corp. included Rick Mueller and Heather Counts of Mueller Counts; Kat Carrington of Butler Snow; and Niels Murphy and Catherine Mitchell Licandro of Murphy & Anderson in Jacksonville. None of the attorneys returned requests for comment.

Meanwhile, plaintiff counsel Moore said the case involved a lot of travel to Japan for depositions and the use of multi-lingual translators, and sometimes the interpretation of words became an issue.

“American Suzuki, the dealer had one document where they said they were reporting to Japan. ‘This problem is occurring in numerous models of the break, and it is never-ending,’ Well, there’s a big dispute with the translators about never-ending versus ongoing, and they wanted it to be obviously ‘ongoing,’ and we said, ‘this is a problem that’s never-ending.’

Moore said the process was exhausting.

“But if you think you’re right, you just [have to] be persistent,” he said. “It’s not going to be pleasant, but in the end, I can tell you getting a result like that—it’s really worth it.”

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Law firm Quinn Emanuel, litigation funder Longford ink \$40 mln deal for private equity clients

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Sara Merken

A sheet of United States one dollar bills is seen on a light table during production at the Bureau of Engraving and Printing in Washington November 14, 2014. REUTERS/Gary Cameron (UNITED STATES - Tags: BUSINESS POLITICS) Purchase Licensing Rights , opens new tab

April 11 (Reuters) - Litigation finance firm Longford Capital Management LP has committed up to \$40 million to finance lawsuits for law firm Quinn Emanuel Urquhart & Sullivan's private equity clients under a deal made public Thursday.

The agreement will help Quinn Emanuel's clients and their portfolio companies "pursue meritorious legal claims without diluting the valuation of their company," Longford's co-founder and managing director William Farrell told Reuters.

Los Angeles-founded Quinn Emanuel, a 1,000-lawyer business litigation firm, has previously worked with Longford on individual, case-by-case alternative funding arrangements, according to Jonathan Bunge, co-chair of the law firm's national trial practice and managing partner of its Chicago office.

The new deal came in response to concerns the firm heard from private equity firms and clients, he said.

"There were situations where private equity firms were choosing not to pursue claims that otherwise were legitimate meritorious claims" for their portfolio companies in business disputes such as breach of contract or trade secrets matters, Bunge said.

It "may not make economic sense" for the portfolio company to take on a litigation expense that would affect their profit and loss statement and reduce earnings, Bunge said. Longford's funding can "preserve upside" for the private equity firm and the portfolio company, he said.

Quinn Emanuel has represented private equity clients in litigation including the Carlyle Group, Centerbridge Partners and MHR Fund Management, according to its website. Spokespeople for those firms did not immediately respond to requests for comment on the Longford agreement.

Under the deal, Longford will fund attorneys' fees and litigation costs and give Quinn Emanuel's private equity clients the ability to receive a portion of the value of their legal claim before the case concludes, which Farrell described as treating the legal claim "as a

corporate asset capable of being monetized."

That could be attractive to private equity companies trying to generate profit and offset liquidity problems as exits of their portfolio companies have been slowed by high interest rates, he said.

Large law firms are increasingly working with litigation funders, which invest in lawsuits or tranches of litigation in exchange for a cut of recoveries.

Firms among the 200 highest-grossing U.S. law firms increased their share to 35% of total new funder commitments in 2023, up from 28% the prior year, according to a report last month by Westfleet Advisors. Overall commitments by U.S. commercial litigation funders dropped by 14% last year.

Longford, which has more than \$1.2 billion in assets under management, entered into a \$50 million funding agreement with Willkie Farr & Gallagher in 2021.

Such funding deals are rarely made public. Farrell said the agreements with Quinn Emanuel and Willkie were announced publicly to make sure the firms' clients were aware of the offering. Longford's relationships with law firms vary from single case investments to portfolio arrangements where it has invested in a dozen cases.

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Reporting by Sara Merken

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Chamber Pivots to Defend SEC Against Green Groups' Lawsuits (1)

By Andrew Ramonas

Documents

 [Motion to Intervene](#)

-
- Sierra Club, Natural Resources Defense Council sued over rules
 - Environmental groups sought more robust disclosure regulations

Bloomberg Law News 2024-04-15T09:46:50832198962-04:00

Chamber Pivots to Defend SEC Against Green Groups' Lawsuits (1)

By Andrew Ramonas 2024-04-12T11:49:44000-04:00

- Sierra Club, Natural Resources Defense Council sued over rules
- Environmental groups sought more robust disclosure regulations

The US Chamber of Commerce is trying to challenge environmental groups' bids to strengthen the SEC's climate disclosure regulations in court, after the business association sued to kill the rules.

The Chamber on Thursday asked the US Court of Appeals for the Eighth Circuit to let it defend the Securities and Exchange Commission against lawsuits from the Sierra Club and the Natural Resources Defense Council, which have said the March rules were too weak.

The business organization's motion to intervene in the green groups' legal challenges came after it and other corporate interests, as well as 25 Republican attorneys general, sued over the regulations, saying the SEC overstepped its authority. The rules require companies to report their greenhouse gas emissions and disclose climate-related risks to their business. The agency paused the regulations April 4 in the face of the lawsuits.

The Sierra Club and Natural Resources Defense Council sued after the SEC abandoned plans to require companies to report indirect emissions from their suppliers and customers, known as Scope 3 emissions. The groups pushed for the SEC's final rules to include the requirement, which companies opposed putting in the regulations because of the additional reporting burden it would place on them.

Intervention is "appropriate and necessary to ensure that the business community's interests are protected in the adversary proceeding between the SEC and the environmental groups," the Chamber said in its court filing.

Andres Restrepo, a Sierra Club senior attorney, declined to comment on the Chamber's motion, but said in a statement his organization looks "forward to briefing the merits in court." An SEC spokesperson declined to comment.

A Natural Resources Defense Council representative didn't immediately respond to a request for comment.

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

The Chamber's bid to intervene is the second such request pending at the Eighth Circuit. Democratic attorneys general from Massachusetts, New York and 16 other states, plus the District of Columbia, on April 3 asked to join the litigation to defend the SEC against corporate and Republican challenges.

The Eighth Circuit is reviewing 10 lawsuits over the rules, after it won a March lottery to consider all challenges filed in appeals courts across the country. The US District Court for the Northern District of Texas also is handling a separate legal challenge.

The green groups' cases are Natural Resources Defense Council v. SEC , 8th Cir., No. 24-1623, motion to intervene filed 4/11/24 and Sierra Club v. SEC , 8th Cir., No. 24-1633, motion to intervene filed 4/11/24 .

(Updates with SEC response in the sixth paragraph)

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Randazzo suicide note made no mention of guilt or innocence in scandal

B [toledoblade.com/local/courts/2024/04/12/randazzo-suicide-note-made-no-mention-guilt-innocence-scandal/stories/20240412138](https://www.toledoblade.com/local/courts/2024/04/12/randazzo-suicide-note-made-no-mention-guilt-innocence-scandal/stories/20240412138)



Jim Provance

The Blade

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Apr 13, 2024

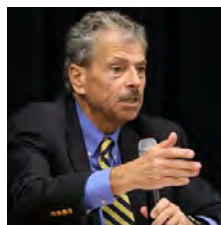
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COLUMBUS — The final words scrawled by Ohio's former top utilities regulator shortly before he apparently hanged himself this week made no mention of the corruption charges against him, his co-defendants, or his guilt or innocence.

It provided no reason for his apparent decision to kill himself.

Instead, a brief handwritten note found placed on a table not far from where Samuel C. Randazzo's body was found on Tuesday worried about the effects of his suicide on his wife, family, and friends.

Not addressed to anyone, the note sought to shield family and close friends from the photos of his body found in the Columbus warehouse owned by one of his companies. It provided the name and phone number of his wife.



Jim Provance

Indicted former PUCO chairman found dead

“They thought I was doing better, so this will be a schock [sic]...,” he wrote.

In response to a public records request, the Franklin County coroner's office allowed reporters to review documents related to the case but prohibited them from taking any notes or using any recording device.

The body of Mr. Randazzo, 74, was found shortly before noon Tuesday. He appeared to have strung a blue nylon rope through metal rafters in the warehouse building at 492 E. Mount St., Columbus, owned by Sustainability Funding Alliance of Ohio, Inc. That company had also been named as a defendant in state court.

While the investigation into the scandal is expected to continue, the charges pending in U.S. District Court in Cincinnati against Mr. Randazzo are likely to be dropped.

The former chairman of the Public Utilities Commission of Ohio was still wearing the GPS ankle-monitor he was equipped with by Summit County Common Pleas Court. It was that GPS device that led authorities to his whereabouts when his family requested a wellness check.

The preliminary report indicated he told his wife he was going for a walk on Monday. He never returned home.

A second note found next to the apparent suicide letter provided information and two business cards to help with returning the GPS device.

Police reported finding no signs of foul play, drugs, or alcohol at the scene. The injuries were preliminarily found to be consistent with asphyxia by hanging. A final report will be issued later along with a toxicology report.

Photographs of the scene suggest Mr. Randazzo used a ladder to string the rope and hang himself. He had apparently removed his shoes.

Mr. Randazzo had been awaiting trial in state and federal courts on a variety of bribery, embezzlement, theft, corruption, money laundering, and other charges related to the scandal that convicted former Ohio House Speaker Larry Householder and former Ohio Republican Party Chairman Matt Borges. If convicted, Mr. Randazzo could have spent the rest of his life in prison.

The state case pending in Summit County Common Pleas Court involves two other defendants — both former executives at Akron-based FirstEnergy Corp. who are alleged to have made the key decisions steering the money at the center of the case.

Former CEO Charles “Chuck” Jones and former Vice President Michael Dowling this week asked the court to postpone a pretrial conference set for next week as the effects of Mr. Randazzo's death are assessed.

That broader \$61 million scheme involved use of largely FirstEnergy money to engineer Householder's return as speaker so that he could use his office to steer passage of House Bill 6, a \$1.3 billion consumer bailout of two struggling nuclear power plants owned at the time by a utility subsidiary.

Mr. Randazzo was separately accused of taking a \$4.3 million bribe from FirstEnergy just as he was appointed chairman of the powerful PUCO by Gov. Mike DeWine. The attorney, lobbyist, consultant, and regulator was accused of meeting his end of the bargain by helping to get House Bill 6 passed and maneuvering other PUCO decisions to benefit the utility.

At the same time, he was accused of stealing from his consulting clients, large industrial users of power, by skimming off the top of settlements with FirstEnergy before the rest of the proceeds were distributed.

This would be the second suicide connected with the bribery scandal, described by prosecutors as the biggest in Ohio history. Columbus lobbyist Neil Clark, a co-defendant in the federal Householder-Borges case, shot himself in Florida while awaiting trial.

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Jim Provance

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Matt Levine's Money Stuff: Tech Employees Want to Diversify
By Matt Levine
Opinion

Bloomberg Law News 2024-04-15T13:59:58850391747-04:00
Matt Levine's Money Stuff: Tech Employees Want to Diversify

By Matt Levine 2024-04-11T12:59:05534-04:00

Oh hey it's a podcast

Programming note! We are trying something new around here. It's a podcast. There's going to be a Money Stuff podcast, in which I'll discuss topics from that week's column and other financial news with my friend Katie Greifeld, a Bloomberg reporter and television anchor.

It will come out on Fridays, starting tomorrow, and we are all going to be very chill and laid-back about it? This is an experiment, we'll see how it goes, and I'm sure it will change over time as we figure out what it is. Perhaps we'll answer reader questions, probably we'll have guests, we'll see. If you want Money Stuff, but in podcast form, then there is some chance that this will be the podcast for you.

If that sounds interesting, you can check out Money Stuff: The Podcast at Apple, Spotify, or wherever you get your podcasts, as one says when one is a podcaster. You can listen to the trailer now, and the first episode will be out tomorrow afternoon.

Hedging

If you work at a big public technology company, you might get a large chunk of your pay in the form of stock in your company. Over time, you will accumulate a lot of stock; a lot of your net worth might consist of shares in your company. This is good, this is what the company wants, this aligns incentives: If you own a lot of stock, you will work hard so the company does well so your stock will go up.

On the other hand, *you* may not like it. You have a lot of undiversified risk: A lot of your financial net worth is tied up in one company, and a lot of your human capital is tied up in that same company, and if the company goes under you will lose everything. And while it is nice to align incentives, if you are one of thousands of well-paid employees at a large public tech company, there might not be all that much *you personally* can do to shape the company's destiny.

So you might want to diversify. The easy way to do this is to sell your stock and buy an index fund. Your stock probably has vesting periods and restrictions, so you can't sell all it as soon as you get it, but if you've been there a long time you will have lots of unrestricted shares and can sell down.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X13HQ72C000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6...> 1/8

But tech stocks mostly go up, so if you've been there a long time and are selling shares you got years ago, you will have large capital gains. That's nice for you, really, but it does mean you have to pay taxes when you sell your stock and buy index funds.

On the other hand, what you could do is:

- Start a *partnership* with some other people who happen to own stocks in *other* tech companies. There are lots of those people: If you're a well-paid Meta engineer with a bunch of stock, you can probably find well-paid Amazon and Alphabet engineers who also own a bunch of their companies' stocks.
- *Contribute* your shares to the partnership, in exchange for a stake in the partnership. You put in \$1 million of Meta stock for 1/3 of the partnership; your friends put in \$1 million of Amazon and Alphabet stock in exchange for 1/3 stakes in the partnership.
- Now, instead of owning \$1 million of Meta stock, you own a one-third share in a somewhat more diversified \$3 million pot of stocks. (And you can expand this to more stocks for more diversification.)

The advantage is that, while selling your stock for cash and then reinvesting the cash in an index fund is a taxable transaction, contributing your stock to a partnership in exchange for a share of that partnership is not. And if you do it right, you can make the partnership's holdings look a lot like an index fund. (Not tax advice! It is not in fact quite as simple as this, though this is the right general idea.)

It is not trivial to do this right, *for you*: You have to get the technical tax structuring right, plus what are the odds that you know a bunch of other engineers at other companies with exactly the right amounts of stock to contribute? But with enough well-paid engineers at big public tech companies, it is sensible for someone else to do this at scale and offer it as a product. Bloomberg's [Eliyahu Kamisher reports](#) :

Known as an exchange fund or a swap fund, the product is familiar to the super rich. Now, share-price rallies at companies such as Meta Platforms Inc. and Nvidia Corp. are creating an opportunity to offer the structure to moderately wealthy techies as well, says Srikanth Narayan, founder of San Francisco-based Cache.

"The mission is to make these financial products - that have typically been in the upper echelon - available more broadly," said Narayan, a former engineer at Uber Technologies Inc. "All of my friends and colleagues are talking about the same thing, which is that more of their net worth is tied up in a single stock." ...

Cache's swap-fund offering enables participants to pool their stock holdings together, creating a more diversified collection of assets. Investors then get shares of the fund equivalent to their contributions, giving them the benefits of more varied holdings without having to sell their stock.

There's a limit to how much stock of a particular company Cache can accept because the swap fund is designed to mirror the tech-heavy Nasdaq, Narayan said. Currently, he can bring in more Amazon.com Inc. and Microsoft Corp. shares, and he's seeking stock from non-tech Nasdaq companies such as PepsiCo Inc. and Costco Wholesale Corp.

Here are more details from Cache. Kamisher notes that, if this really takes off (so far it's pretty small), it could be bad for tax revenue; California gets a lot of money from tech equity compensation. But that effect depends on what this product *replaces*. If it replaces "sell your stock and buy index funds," it will lower tax revenue. If it replaces "just hold onto your stock until you retire," it won't.

Me, though, I'm more interested in what it could do for incentives. Presumably the big tech companies pay their employees with lots of stock (in part for accounting reasons sure but also) in order to align incentives and motivate the employees. You would expect that a lot of Meta employees own a lot of Meta stock, a lot of Alphabet employees own a lot of Alphabet stock, a lot of Amazon employees own a lot of Amazon stock and so forth. Each company has employees with strong financial incentives – not just the desire for raises and bonuses, but also the desire to increase the value of their existing stock – to help their company win in the general competition among tech giants.

But what if all of the midlevel employees of all of these companies ended up owning diversified portfolios of all of them? What if workers in Big Tech were compensated with, effectively, a portfolio of Big Tech Index shares? (Plus Costco, if Cache can find any.) What does that do for competition?

"Should index funds be illegal," I [sometimes ask around here](#) : If every public company is owned by diversified investors who also own all of its competitors, will those companies have less incentive to compete? One of the [main responses](#) to this concern is that, while the *institutional shareholders* are mostly diversified, the *executives and employees* tend to own concentrated positions in their employers' stocks, so *they* are motivated to compete. And they run the company from day to day. But what if the employees were all diversified too?

PCAOB/KPMG

Here are three stylized facts about accounting:

- 1. If you are a junior or mid-level accountant at a big public accounting firm, you probably know a lot about accounting. Your accounting training is reasonably fresh in your mind, and you are applying it all day in your job as an accountant.
- 2. If you are a quite senior accountant at a big public accounting firm, you might know *ever so slightly less* accounting? Your accounting training occurred a long time ago. Your day job involves a lot of managing people, schmoozing clients and setting firm strategy; you probably spend less time in the details of technical accounting questions than you used to. You didn't get to where you are today *exclusively* by being good at accounting, though that probably helped; you owe your promotions to some other, less accounting-related skills.
- 3. Accountants are subject to continuing-education requirements, where professional bodies, regulators and their firms require them to periodically take classes on accounting and pass exams to make sure they still know accounting stuff.

When you combine those stylized facts, you get stories like this:

From 2012 to 2015, and again from January 2020 to July 2023, [Marc] Hogeboom served on KPMG Netherlands' Management Board. ...

In 2018, Hogeboom solicited subordinates in the Firm to assist him with passing a test in connection with mandatory training for audit supervisors. Eventually, a subordinate on one of his audit engagement teams agreed to sit with him and assist while he took the online test. ...

In 2020, while serving as the Head of Assurance, on the Firm's Management Board, and in its Regulatory Office Core Team, Hogeboom prevailed upon several subordinate members of his engagement team to share test answers with him by accompanying him while he took online training tests.

Yesterday the US Public Company Accounting Oversight Board, which regulates US accountants, fined the Dutch unit of the global accounting firm KPMG NV \$25 million because "widespread improper answer sharing occurred at the firm over a five-year period and that the firm made multiple misrepresentations to the PCAOB about its knowledge of the misconduct." KPMG Netherlands employees had to take lots of internal training courses, some of the courses had tests that they had to pass, a lot of it was online, and apparently nobody took the tests that seriously so they regularly shared answers with each other:

From at least October 2017 through 2022, hundreds of KPMG Netherlands personnel, including partners, were involved in improper answer sharing related to training tests, and in some cases the NBA Knowledge tests. This misconduct occurred primarily through emails attaching documents or images containing the contents of the tests and/or answers to test questions. KPMG Netherlands personnel also jointly took tests that were intended to assess individual knowledge.

Some of this was peer employees sharing the answers with each other, but some of it was the bosses specifically demanding that their underlings help them take the tests. Makes sense! The bosses are good at managing people; the underlings are good at accounting.

There are lots of [cases like this](#) ; KPMG itself had another one in 2022. Cheating on internal exams is for the PCAOB a little like [improper cell-phone use](#) for the US Securities and Exchange Commission. It's a perpetual cash cow – every bank has people who did business on personal cell phones, every accounting firm apparently has people who cheated on training exams – and, while it isn't particularly bad in itself, perhaps it is a sign of bigger problems. For one thing, it is bad if accountants are unethical and cheat on exams. For another thing, it's bad if they can't pass the exams without cheating! They're supposed to know accounting.

But you don't want to overstate that. The problem here does not seem to be that they didn't know accounting. The problem is that they didn't take the trainings or exams seriously; they did not see the trainings as essential to their work as accountants, but as meaningless administrative box-checking to be done as quickly as possible before they got back to their actual jobs. Actually sometimes they were in such a hurry to get back to their actual jobs that they left early and made someone else finish checking the boxes:

In 2021, another senior leader at the Firm, the Supervisory Chairman, engaged in improper answer sharing. ... Shortly after joining the Supervisory Board, the Supervisory Chairman received assistance from a staff member while taking two mandatory trainings that the Supervisory Board had assigned to the Supervisory Chairman. The staff member sat next to the Supervisory Chairman while he took the two training tests, and the staff member finished one of the tests for the Supervisory Chairman when he left for a meeting before completing the test.

I guess if your boss tells you to finish his mandatory training exam for him, you have to do it? Does seem like a problem though.

Change of control

Many companies have debt agreements that include a "change of control put." If the company has a change of control, the creditors can demand their money back immediately, often at a premium. This can be a big deal. If a company has bonds outstanding that are due in 2030 and trade at 80 cents on the dollar, and then it has a change of control, it might have to buy the bonds back immediately at 101. It will need to come up with a lot of money, probably by borrowing it at more expensive rates.

The intuition here is that, often, when a company is taken over, its debt becomes riskier: If you are a bondholder of some reasonably stable public company, and then it gets bought in a leveraged buyout and loaded up with more debt, you will be sad; your debt will lose value. The deal that you originally struck with the company has changed, and you'll want to get out.

What is a change of control? There are lots of ways for a company to change hands, some of which are bad for creditors and some of which aren't. The rough idea is that if the company is acquired for cash, that's probably bad. So an all-cash merger is normally a change of control, or a sale of "all or substantially all" of the assets, or someone (a person or firm) acquiring a majority of the stock. Whereas an all-stock merger with another public company is less likely to hurt the credit, and so normally does not trigger a change of control put.

Here's a weird one, though: Arguably *losing a proxy fight* is a change of control. If an activist buys stock in a public company and agitates for change, or a hostile bidder proposes a takeover, and the company rejects the proposal, so the activist/bidder launches a proxy fight to get her own candidates on the board of directors, and the company fights back, and the activist/bidder wins and gets a majority of directors, then:

- 1. In some real sense, the activist or hostile bidder has taken control of the company: Her allies now control the board and can change the company's policies or approve a sale.
- 2. That is, in expectation, bad for creditors: The activist will typically want the company to be more levered and riskier than the incumbent board did, and the hostile bidder will probably acquire the company in a way that is bad for its debt.

And so it is common for debt agreements to have a change of control put for losing a proxy fight. Technically the way this is written is that it is a change of control for a majority of the company's board of directors to not be "continuing directors," where a continuing director is either (1) a director who is in place at the time of the debt deal or (2) a new director who was approved by a majority of the previous continuing directors. So the board can amicably replace itself over time, but if it is replaced all at once by a hostile slate, that's a change of control.

This strikes me as a basically correct intuition about creditors' interests, but it causes a problem. The problem is that management can use the change of control put as a weapon in the proxy fight. It can say: "Look, we have all this debt outstanding, and we are not in the best financial shape. (Thus the proxy fight!) If we lose this proxy fight, the debt will all come due immediately at 101 cents on the dollar. We won't be able to refinance all that debt immediately, and so losing the proxy fight will cause the company to go bankrupt. So vote for us!"

That is a bit harsh, to tell shareholders that they *can't* vote for an alternative board of directors because that would bankrupt the company. It is not a good look for the incumbent directors to threaten to blow up the company unless they keep their jobs. There is a solution, though it is a bit of a silly one: The incumbent board can just "approve" the activist's candidates, for purposes of the change of control put. This way, if the company loses the proxy fight, the activist's directors are still "continuing directors" and the change of control put isn't triggered. Of course, the provision is there in the first place because creditors really *don't* want the company to lose a proxy fight. But somebody's interests will suffer, and if the board can help shareholders while being a bit rude to creditors it probably should.

Anyway Bloomberg's Jef Feeley and Mike Leonard [reported Tuesday](#) :

Macy's Inc. has "weaponized" its debt agreements as part of a proxy fight with a pair of investment firms, putting its financial future at risk, a pension fund claimed in suing the retailer.

The takeover defense, which Macy's is threatening to deploy in a fight with Arkhouse Management and Brigade Capital Management, would accelerate the payment of more than \$1.5 billion in debt and burden the company's finances, according to the lawsuit.

From the complaint:

If half of the Board is replaced in a proxy contest, that would constitute a Change of Control under the terms of the Relevant Notes unless the incumbent Board simply "approves" the dissident nominees. The incumbent directors can approve dissident director nominees for the limited purpose of disabling debt acceleration while simultaneously recommending that stockholders vote to elect the incumbent candidates over the dissident candidates. Moreover, under well-established Delaware law, the incumbent directors have a duty to approve dissident nominees unless they have a good faith belief that the dissidents are known looters or would implement a business program that would cause the Company to be unable to meet its legal obligations to creditors.

If the Company were forced repurchase the Relevant Notes at 101% of their principal, it could be devastating to Macy's financial health. Overall, the Company has \$1.059 billion outstanding under the Relevant Notes and only \$1.034 billion in cash and cash equivalents as of February 3, 2024. ...

Moreover, the Federal Reserve's current federal funds target interest rate is 5.25% to 5.5%, which means if Macy's was forced to refinance the Relevant Notes in the near future, it would have to pay significantly higher interest rates.

Therefore, a loyal board acting in the best interests of the Company and not motivated by a desire to perpetuate its term in office would do everything in its power to avoid triggering the Change of Control provisions in the Relevant Notes in connection with a contested director election unless the dissident candidates were criminals or known looters.

Arkhouse and Brigade don't seem like "known looters," and in fact this thing seems to be going the way hostile takeover fights normally go, with a grudging transition to friendliness. Bloomberg's Crystal Tse [reported yesterday](#) :

Macy's Inc. named two new directors nominated by activist investor Arkhouse Management Co., which agreed to end its effort to seek majority board representation as it attempts to acquire the department-store operator.

Richard Clark and Richard Markee will join the board and its finance committee that oversees acquisition proposals, according to a statement from the retailer Wednesday. Macy's is "continuing to engage" with Arkhouse and Brigade Capital Management on their proposal to acquire the company, the company said.

Settling a proxy fight doesn't trigger the puts. Of course presumably if Arkhouse and Brigade *acquire the company*, that *will* be a change of control. But that will be their problem, not the shareholders'.

Who controls a company?

A reader, knowing how [fond I am of this sort of thing](#), sent me three articles in *Bicycle Retailer and Industry News* with the following perfect sequence of headlines:

- "Scott Sports replaces CEO 'to refresh' brand" (March 29)
- "Beat Zaugg says he's still CEO of Scott Sports" (April 1)
- "Police called to Scott Sports headquarters" (April 4)

Honestly that's all you need to know, but the details are pretty good too. From the April 1 story:

Industry veteran Beat Zaugg, who has been an owner of Scott Sports since 1998, says he remains the brand's CEO, a minority shareholder and chairman of its parent company board, despite a news release Friday saying that the board had fired him.

"This announcement was made to destabilize the company and its employees," Zaugg told BRAIN on Monday; he said the announcement had been made via a PR agency that works for Scott's majority shareholder – Korea's Youngone – not Scott Sports. ...

However, the PR firm responded to BRAIN later on Monday with a statement from the Scott Corporation board insisting that Youngone representatives have a majority on the board and had voted to terminate Zaugg.

"We understand that it may be difficult for Mr. Zaugg to accept his termination (given his long-standing role as CEO). But this is ultimately irrelevant as a matter of law: the ultimate decision body of a company is the board of directors and the board is clearly entitled to terminate the employment with the CEO," the statement read in part. ...

Zaugg conceded that Youngone controls a majority of the board, but said the board did not terminate him correctly. "So far they did it wrong," he told BRAIN, without elaborating. "This has to be my secret for the time being," he said.

Every dispute of this kind has a paragraph like that: Generally the dispute is between the majority shareholder and the chief executive officer, and the CEO can't usually deny that (1) the majority shareholder owns a majority of the shares and (2) that ultimately gives them the power to fire him. So the CEO is reduced to saying "well, sure they *could* fire me, but they have to follow proper procedures, and they forgot to send the notice of the board meeting by registered mail so nyah nyah nyah nyah nyah here I still am." Usually the CEO stands on some minor, debatable point of procedure. This is the first time I've seen a CEO stand on a *secret* point of procedure. I like this guy's style.

Also the April 4 story contains a tantalizing hint that the Swiss police might *regularly* be involved in disputes like this:

Fribourg police spokesperson Bertrand Ruffieux told Euro Day France: "Nothing serious happened. We intervened in a civil matter, a dispute between managers. In this type of case, the police are called to the scene to find a way to open a discussion, and for people to understand each other. But there are no injured or anyone arrested."

Like you call the Swiss police and the Corporate Disputes Unit shows up with sirens blaring and they get out the bullhorn and shout "we have a copy of your bylaws right here! Don't do anything rash! A quorum of your board of directors is on the way!"

Things happen

[Cocoa's Surge](#) Is Drawing Africa's Farmers Back to the Bean. BlackRock loses appeal over UK tax on \$13.5bn BGI deal. Top Crypto Exchanges Look to Move Beyond Settlements With U.S. Regulators. Grant Thornton retirees escalate revolt over private equity deal. Managers to shut or convert \$220bn of US money market funds before rule change. Hedge fund takes on shipping magnates over oil tanker deal. "Vulture holdouts of the Elliott-Argentina variety in sovereign debt restructurings aren't really a thing now." UnitedHealth Chair, Executives [Sold \\$102 Million in Stock](#) Before US Probe Became Public. Vertex Pharmaceuticals to Acquire Alpine Immune Sciences for \$4.9 Billion. The Hidden Costs of Homeownership Are Skyrocketing. Vietnamese property tycoon sentenced to death over \$12bn fraud. Instagram to Start Blurring Nude Images in Messages to Protect Teens. This disruptive late-night train commuter is ... a horse.

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- 1. In [particular](#) : "In the 1960s, the federal government tried to squash exchange funds by banning tax-free swaps into partnerships with more than 80% of their assets in liquid investments such as stocks. Wealth managers skirted the measure by putting 79% of the fund in liquid assets and the rest in holdings such as real estate."
- 2. Though the Information reported yesterday that "Amazon will give many U.S. corporate employees the option of reducing the amount of stock they receive next year by a quarter in exchange for more cash, according to an internal memo reviewed by The Information. In doing so, Amazon joins a growing list of tech companies, including Tesla and Shopify, that are putting less emphasis on equity compensation as a way to motivate workers."
- 3. Can it? In 2023, Amazon paid \$24 billion of stock-based compensation, a bit more than 4% of revenue and about 1.2% of its current market cap. Meta paid \$14 billion of stock-based comp, about 10% of revenue and 1% of market cap. Costco paid \$774 million of stock-based comp, about 0.3% of revenue and 0.2% of market cap. Pepsi paid about \$380 million (0.4%, 0.2%). Just not a ton of Costco and Pepsi engineers walking around with big stock grants looking for swap funds.
- 4. KPMG Netherlands does enough US-related accounting work, and had enough exams on US auditing standards, that the PCAOB has oversight over it.
- 5. For a sample, see page 11 of this 2012 indenture governing some Macy's Inc. bonds: "'Change of Control' means the occurrence of any of the following: (1) the direct or indirect sale, lease, transfer, conveyance or other disposition (other than by way of merger or consolidation), in one or a series of related transactions, of all or substantially all of the properties or assets of the Guarantor and its subsidiaries taken as a whole to any Person other than the Guarantor or one of its subsidiaries; (2) the consummation of any transaction (including, without limitation, any merger or consolidation) the result of which is that any Person becomes the beneficial owner, directly or indirectly, of more than 50% of the then outstanding number of shares of the Guarantor's Voting Stock or other Voting Stock into which the Voting Stock of the Guarantor is reclassified, consolidated, exchanged or changed, measured by voting power rather than number of shares; (3) the Guarantor consolidates with, or merges with or into, any Person, or any Person consolidates with, or merges with or into the Guarantor, in any such event pursuant to a transaction in which any of the outstanding shares of the Guarantor's Voting Stock or the Voting Stock of such other Person is converted into or exchanged for cash, securities or other property, other than any such transaction where the shares of the Guarantor's Voting Stock outstanding immediately prior to such transaction constitute, or are converted into or exchanged for, a majority of the Voting Stock of the resulting or surviving Person or any direct or indirect parent company of the resulting or surviving Person immediately after giving effect to such transaction; (4) the first day on which a majority of the members of the Guarantor's Board of Directors are not Continuing Directors; or (5) the adoption of a plan providing for the liquidation or dissolution of the Guarantor."

Trump Media & Technology Group**Trump Media's first auditor quit months after being appointed**

Accountancy firm did not want to be associated with ex-president's social media venture



Shares in TMTG, which operates the Truth Social network, have been volatile since its IPO © Getty Images

Stephen Foley and **Ortenca Aliaj** in New York 4 HOURS AGO



Donald Trump's social media company scrambled to find a new auditor after its first pick resigned after just a few months on the job, according to people familiar with the matter.

[Trump Media & Technology Group](#) engaged WithumSmith+Brown to check its financial statements shortly after the company was founded in 2021, but by the end of the year the accounting firm had decided it did not want to be associated with a business venture by the former US president, these people said.

The resignation explains why TMTG [floated on the stock market](#) this year with a much smaller audit firm than would typically be used by such a high-profile company.

TMTG is instead using BF Borgers, [an accounting firm](#) that is run from a single-storey building in a suburb of Denver and has been repeatedly criticised by regulators for the poor quality of its audit work. Borgers was engaged on January 22 2022 for a fee of \$150,000 for the first annual audit, according to an internal document seen by the Financial Times.

Withum's resignation came at a time of mounting scrutiny on the former president's business affairs. New York's attorney-general had launched a civil investigation that led to the indictment and conviction of the [Trump Organization](#) for fraud. Mazars, the Trump Organization's longtime auditor, said in February 2022 that a decade of Trump Organization financial statements should [no longer be relied upon](#).

TMTG itself was also in the crosshairs of the authorities, as the Securities and Exchange Commission in December 2021 investigated trading in shares of the cash shell through which it planned to go public. Tensions between the Trump family and co-founders of TMTG in that first year are also now the subject of [civil litigation](#).

Shares in TMTG have been volatile since it finally went public via the cash shell merger last month. Its popularity with retail investors and traders — including fans of the former US president — briefly sent the lossmaking company's valuation rocketing to about \$14bn before falling back.

The stock was down another 15 per cent in early trading on Monday, after the company signalled some of its early financial backers were preparing to exercise warrants and sell shares. TMTG's valuation was below \$6bn on a fully diluted basis accounting for warrants and other instruments.

Trump Media & Technology's volatile market debut

Share price, \$



Source: LSEG via markets.ft.com

© FT

Every public company is required to have its financial statements signed off by a regulated auditor who acts as a check against mistakes or outright fraud. Auditors, by turn, are required to have rigorous client acceptance procedures to determine whether they are comfortable taking on a particular company.

Withum declined to comment on the reasons for its resignation.

BF Borgers has targeted small- and microcap companies unwilling or unable to engage larger, more expensive firms, and has built the eighth-largest client list of any US audit firm despite having a staff of only 10 certified public accountants. Regulators have warned that it has taken on work faster than it can manage.

The FT reported earlier this month that the firm has one of the worst inspection records among the hundreds of audit firms overseen by the Public Company Accounting Oversight Board in the US. It has also been barred from taking on new clients in Canada for failing to meet professional standards in public company audits there, and founder Ben Borgers has been censured in Colorado over the poor quality of audits of some retirement plans.

In a previously unreported development, BF Borgers has also been thrown out of the accounting profession's own inspection programme in the US, a peer review system run by the American Institute of Certified Public Accountants. Reviewers found multiple instances of the firm failing to meet professional standards in its audit work.

"The firm was found to be so seriously deficient in its performance that education and remedial, corrective actions are not adequate," the AICPA concluded in November.

BF Borgers did not return messages seeking comment. TMTG said: "Apparently, the Financial Times' business model is to charge its subscribers \$75 per month for the privilege of reading outdated stories touting irrelevant information."

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Trump In Line for Extra SPAC Payday Despite \$4.5 Billion Selloff

By Bailey Lipschultz

- Insiders are due 40 million bonus shares if stock doesn't tank
- Stock price driven by 'non-rational factors': NYU's Ohlrogge

Bloomberg Law News 2024-04-15T09:47:30007087432-04:00

Trump In Line for Extra SPAC Payday Despite \$4.5 Billion Selloff

By Bailey Lipschultz2024-04-13T11:00:07000-04:00

- Insiders are due 40 million bonus shares if stock doesn't tank
- Stock price driven by 'non-rational factors': NYU's Ohlrogge

A rocky start for Trump Media & Technology Group Corp. shares has wiped out \$4.5 billion in market value in just a couple of weeks. But it will have to lose a lot more than that to put at risk the massive special bonus due to the former president and his corporate insiders.

As part of the startup's blank-check deal, Trump Media insiders — Donald Trump himself is by far the largest holder — will divvy up 40 million new shares if the stock trades can stall their latest slide, regulatory filings show. The so-called earnouts, which can be a standard part of deals involving special purpose acquisition companies, or SPACs, are designed to reward the original investors, but they also punish ordinary shareholders by diluting the value of their stakes through the issuance of millions of extra shares.

In the case of Trump Media, the stock needs to trade above \$17.50 for 20 days out of a 30-day period — Friday marked its 13th session — over the next three years. With the company closing Friday at \$32.59, those conditions could be met as soon as April 23, despite the stock's 59% tumble from a high of \$79.38 on March 26. In fact, the shares would need to plunge another 46% for the now \$1.3 billion paper payday for the former president and his co-founders to be in doubt.



That said, Trump Media is not a normal business or stock, so there are few sure things when it comes to its behavior in the market.

A representative for Trump Media didn't respond to requests for comment.

Value Spirals

"So much about the stock price movements of this company are driven by non-rational factors that it's hard to make particularly firm predictions," said Michael Ohlrogge, a New York University law professor who studies SPACs.

Of course, the value of the additional windfall has spiraled with shares tumbling. The earnout has shed some \$1.3 billion in value from a debut peak through Friday's close, with Trump's current stake losing billions on paper in a matter of weeks.

The insiders are somewhat protected even if the shares keep falling and drop below \$17.50, because the payout slides, but doesn't disappear, as the stock hits certain levels. So, as long as Trump Media trades above \$15, the group will get 30 million shares to split. And if the shares fall toward \$12.50 the payout drops to 15 million shares.

But the reality is trying to figure out what these stakes are worth is an ever-changing exercise because of the stock's swings, and in practical terms moot since the former president and the other insiders must wait until September before even trying to sell some of their holdings because of the SPAC deal's six-month lockup period. So while the millions of shares would deliver Trump some \$1 billion in additional stock, turning that paper profit into real cash is going to take some time.

The company's board — made up of Trump Media insiders and members of the former president's administration — could expedite that lockup to open the door for him to start capitalizing on his current stake of 78.75 million shares. But before that happened US regulators would have to finalize some filings, and even if they did, selling any stock in the company wouldn't be as simple as cashing a lottery ticket.

Liquidation Risk

"It's extremely unlikely that he'd be able to liquidate any substantial portion of his holdings without seriously tanking the stock price," NYU's Ohlrogge said. However, he added that if Trump sold shares at a fraction of "their current market price he'd still do exceptionally well in the deal overall."

The actual value of Trump Media has been hotly debated given it lost more than \$55 million last year while bringing just \$4.1 million in revenue. As of Friday's close, it was worth roughly \$4.5 billion after shedding nearly half its value in less than a month.

The shares have become an expensive way for speculators to treat the stock market as a casino, raising memories of 2021's meme stock mania.

Still, the big focus for investors is how quickly Trump can take advantage of his paper wealth and what that will do to the stock.

Trump is embroiled in a lawsuit with two Trump Media co-founders who claim he tried to dilute their stakes. A Delaware judge granted their request to amend the suit to include allegations that Trump retaliated against them by locking up their shares for six months, which they claim will cause "irreparable harm" to their finances. Trump himself is subject to the same restrictions.

Meanwhile, Trump is due to start his first criminal trial on Monday in Manhattan, where he's accused of falsifying business records to hide a hush-money payment to a porn star before the 2016 election. It's one of four criminal prosecutions Trump is facing as he campaigns to return to the White House.

--With assistance from Erik Larson.

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Tesla Inc

Tesla to cut 10% of global workforce

About 14,000 jobs set to go as brutal price war and EV slowdown hit US automaker



Tesla chief Elon Musk said the job cuts would enable the electric-car maker to be 'lean, innovative and hungry for the next growth phase cycle' © AP

Arjun Neil Alim in Frankfurt and **Gloria Li** in Hong Kong 3 HOURS AGO



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Tesla is cutting more than 10 per cent of its workforce — at least 14,000 jobs — as the worldwide EV slowdown and brutal price war hits the American automaker.

“We have . . . made the difficult decision to reduce our headcount by more than 10 per cent globally . . . this will enable us to be lean, innovative and hungry for the next growth phase cycle,” wrote Tesla’s chief executive Elon Musk in an internal memo to employees seen by the Financial Times.

The job cuts come as the slowdown in sales of EVs makes waves across the global car industry, with companies across the supply chain from South Korea to Germany slashing jobs and costs.

Unlike legacy carmakers, [Tesla](#) is particularly exposed to the slowdown in battery-powered cars given it exclusively makes EVs. Shares in the company, which declined 3 per cent on Monday, have fallen more than a third this year, making it the second-worst performer in the S&P 500 and underperforming those of legacy carmakers. In contrast, Toyota’s stock price has rallied more than 44 per cent in the same period.

Tesla's share price has dropped sharply in 2024

Share price (\$)



Source: LSEG via markets.ft.com

© FT

The pressure is especially high in China, the world’s biggest auto market and the US EV maker’s second-largest market by sales, where competition between [local EV makers and foreign carmakers](#) is heating up.

Tesla’s share in China’s EV and hybrid market segment fell from 7.7 per cent to 6.6 per cent in the first two months of the year, according to the China Passenger Car Association.

The industry association expected Tesla to record sales of about 25,000 units in China this month, a 37 per cent decline from a year earlier.

In another setback for Musk, two of his top lieutenants have left the company. Drew Baglino, senior vice-president leading Tesla's engineering and technology development for batteries, motors and energy products, announced on X today that he would leave after 18 years at the auto group. Another executive, Rohan Patel, Tesla's vice-president of public policy, has also departed, the company confirmed.

On Tesla's job cuts, Craig Irwin, senior research analyst at Roth MKM, said the news was not a "surprise per se". "It's more of a confession that growth isn't going to come roaring back than anything," he added.

One source familiar with the situation said it was still unclear how they would fall globally, with more restrictive rules on hiring and firing employees in countries such as Germany where Tesla has a gigafactory near Berlin.

The world's largest EV maker had just over 140,000 employees, up from 48,000 in 2019, according to its latest SEC filing. The FT last week reported that [Tesla was scouting locations in India](#) for a new EV plant in which it would invest \$2bn-\$3bn.

The company has been through previous rounds of job cuts. In 2022, Musk announced a 10 per cent reduction in salaried workers, citing overstaffing and a "[super bad feeling](#)" about the state of the economy.

Tesla's announcement comes as CATL, the world's largest EV battery maker, on Monday reported lower-than-expected revenues of Rmb79.8bn (\$11bn) for the January-March period. The battery maker's second consecutive decline in quarterly sales highlighted the impact the EV slowdown was having on key suppliers.

Electrek, the tech publication, first reported news of the job cuts. Tesla declined to comment.

Additional reporting by Sylvia Pfeifer in London and Stephen Morris in San Francisco

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<https://www.wsj.com/tech/tesla-layoffs-elon-musk-email-29388d4e>

TECHNOLOGY

Tesla Plans to Lay Off More Than 10% of Workforce

Two of Elon Musk's top deputies also depart the world's most valuable automaker

By [Rebecca Elliott](#) [Follow](#), [Selina Cheng](#) [Follow](#) and [Raffaele Huang](#) [Follow](#)

Updated April 15, 2024 12:44 pm ET



Tesla delivered around 387,000 vehicles globally in the first three months of 2024, down 8.5% from a year earlier.

PHOTO: ALY SONG/REUTERS

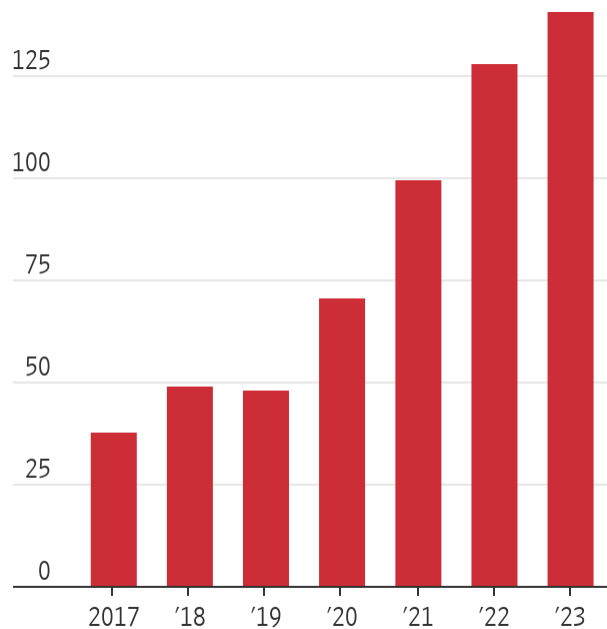
Tesla **TSLA -4.69%** ▼ was rocked Monday by a series of internal changes that included plans to slash more than 10% of the carmaker's global workforce and the departure of prominent executives.

The shakeup comes as the company's growth prospects have dimmed and the electric-vehicle market has cooled. Tesla's once-enviable profit margins have also narrowed in recent quarters as the company has resorted to deep price cuts to stimulate sales.

Number of Tesla's global employees

150 thousand

Tesla Chief Executive Elon Musk, who has warned of "notably" lower



Source: the company

growth this year, sent a note Monday to employees informing them about job cuts and citing the need to reduce costs and increase productivity, according to the email, which was seen by The Wall Street Journal.

Hours later, Drew Baglino, a senior vice president and 18-year company veteran, posted on X saying he had made the “difficult decision” to leave Tesla.

Baglino, who frequently joined Musk on earnings calls and at events, had been a stabilizing force in a company known for high executive churn. As the head of powertrain and energy engineering, he oversaw initiatives including Tesla’s efforts to manufacture its own battery cells.

Another top executive, Rohan Patel, who oversaw policy and business development, also posted on X Monday bidding colleagues farewell. Musk, in a reply, thanked him for “everything you’ve done for Tesla.”

Bloomberg earlier reported the two executive departures.

As the electric-vehicle market has cooled, Tesla has leaned into the development of autonomous vehicles. Employees recently were told to give priority to a robotaxi project, the Journal has reported.



China's BYD briefly surpassed Tesla as the world's largest EV seller in the last quarter of last year, though Tesla has since reclaimed the title. PHOTO: LAM YIK/BLOOMBERG NEWS

Tesla had more than 140,000 employees globally as of the end of 2023, according to a securities filing.

Tesla earlier this month reported its first year-over-year decline in quarterly deliveries since 2020, stoking concern about the company's prospects this year. The EV maker delivered around 387,000 vehicles globally in the first three months of 2024, down 8.5% from a year earlier. It was the company's lowest quarterly performance since the third quarter of 2022.

The world's most valuable automaker has shown signs of stress as growth in the overall EV market is slowing and automakers are scaling back investment plans. The company has an aging lineup and faces fierce competition, especially in China where homegrown EVs have become more popular.

China's BYD briefly surpassed Tesla as the world's largest EV seller in the last quarter of last year, though Tesla has since reclaimed the title. The headwinds Tesla faces have made investors jittery, with the company's stock down around 31% in 2024.

Tesla executives have described the company as being between two growth waves: the first driven by the company's popular Model 3 car and Model Y crossover, and the second by its next generation of vehicles.

This next generation has been expected to include both a robotaxi and a less expensive model designed to extend Tesla's reach into the mass market.

Musk said in his email that workers remaining at Tesla faced a difficult job ahead as Tesla is developing “some of the most revolutionary technologies in auto, energy and artificial intelligence.”



Tesla had more than 140,000 employees globally as of the end of 2023. PHOTO: CFOTO/ZUMA PRESS

Analysts are looking for more clarity on Tesla’s strategy, noting that a lower-cost car is important for its near-term growth. A robotaxi, which Musk said earlier this month Tesla plans to reveal in August, could have a longer adoption curve.

Morgan Stanley analyst Adam Jonas wrote in a recent research note: “While we are prepared for Tesla to unveil an actual physical robotaxi-prototype this summer, we would urge caution on potential commercialization time-lines for a fully autonomous taxi service.”

In China, the number of Tesla’s vehicles both made and sold in the country slid for two consecutive quarters from a year earlier, based on data from the China Passenger Car Association.

Senior managers in China said they were told by the company in recent months to identify roles that are critical to their teams. Some of them said they were asked to rank their team members in order of performance.

Tesla has made layoffs in some previous years, including in 2022, when Musk told employees he planned to cut 10% of salaried workers.

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Elon Musk's Tesla Bait-and-Switch Is Getting Old

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By Liam Denning

(Bloomberg Opinion) --



Looking for that next phase of growth.
Photographer: Krisztian Bocsi/Bloomberg

In case you didn't know that Tesla Inc. is on the cusp of a new wave of growth, it is now slashing its workforce by more than one-in-ten. It's all there in the memo.

Chief Executive Elon Musk informed the ranks this weekend that more than 14,000 of them — based on year-end 2023 figures — would be leaving the electric vehicle manufacturer forthwith. The announcement is one part regret, three parts optimism. The phrase “next phase of growth” appears up top and in the kicker, with a derivative of it somewhere in the middle, too. This is all quite normal corporate stuff: Companies doing big layoffs must emphasize the leaner, fitter organism that will emerge. But this is Tesla at an interesting moment in its development, so the context matters.

The past year has witnessed a sequence of events concerning Tesla that mark it out as a car company. It has built too many vehicles relative to supply. It has slashed prices to shift them, with decidedly mixed results. Margins have been squeezed as a result. It has launched a flashy new model to reinject some vigor, with less-than-certain success. And it has done its best to reposition itself in the minds of investors as an artificial intelligence company.

OK, that last bit isn't very car company-like. It is Tesla-like. After the debacle of quarterly sales figures earlier this month that missed by a mile and then the bizarre drama of a Reuters report that Tesla had ditched plans for a low-cost model — denied, sort of — Musk announced a forthcoming robotaxi reveal. Whatever ends up getting unveiled in August, the sense of Tesla seeking to reframe the story around expansive visions of AI, rather than the current reality of shrinking volumes of vehicles, is palpable.

Indeed, the same weekend Tesla informed employees of the layoffs, it slashed the monthly subscription fee on its full-self driving driver assistance package in half. As with boxes on four wheels, the future does not sell itself, it seems. While the new price of \$99 per month may tempt more drivers to sign up for FSD that way, it is also likely to take away from those who buy the package upfront, which is \$12,000 currently, adding a further headwind to profit margins, at least in the near term.



The layoffs will offer some shield, but it is tough to quantify the benefits. As of 2022, Tesla's global median employee compensation was about \$34,000. Assuming a 10% increase since then — inflation's been sticky — and 14,500 layoffs, that's about \$550 million before

severance costs and taxes. Based on the current consensus forecast, that's maybe 4-5% of 2024 earnings. Of course, these are guesstimates, but this feels more like saving pennies than something transformational for the finances — and the stock.

For that, Tesla needs a new low-cost model to revamp its lineup and expand the market. Or a truly functional robotaxi. The former looks at least a year or two off. And the sudden departure of one of Tesla's few named company officers, Andrew Baglino, senior engineer of energy and powertrain, suggests even that timeline may be optimistic. The latter looks, as ever, vastly oversold as a concept.

Tesla's layoffs add to the narrative of being a car company dealing with a slowdown. Yet its stock remains priced at about 55 times forward earnings — roughly where it was at the start of the month before those sales figures blew a hole through forecasts (or should have). Investors don't seem to have gotten the memo quite just yet. Results come out next week.

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Tesla lays off more than 10% of staff globally as sales fall

 [reuters.com/business/autos-transportation/tesla-lay-off-more-than-10-its-staff-electrek-reports-2024-04-15](https://www.reuters.com/business/autos-transportation/tesla-lay-off-more-than-10-its-staff-electrek-reports-2024-04-15)

Victoria Waldersee

The electric vehicle maker is facing soft demand in a highly competitive market and a price war.

Tesla to lay off over 10% of its staff - memo

- Staff notified of layoffs effective immediately - source
- Tesla looking to cut costs, boost productivity - memo
- Q1 deliveries fell for first time in nearly four years
- Battery development chief, public policy chief announce departure on X

BERLIN, April 15 (Reuters) - Tesla (TSLA.O) , opens new tab told staff it is laying off more than 10% of its global workforce, an internal memo seen by Reuters on Monday shows, as it grapples with falling sales and an intensifying price war for electric vehicles (EVs).

In response to commentary on the news on X, Tesla CEO Elon Musk posted: "About every five years, we need to reorganize and streamline the company for the next phase of growth."

Musk last announced a round of job cuts in 2022, after telling executives he had a "super bad feeling" about the economy. Tesla never outlined how many jobs it cut in 2022, but its employee headcount has risen from around 100,000 in late 2021 to over 140,000 in late 2023, according to SEC filings.

Monday's dismissals were effective immediately, according to a copy of the email sent to laid off employees seen by Reuters.

Also on Monday, Tesla's senior vice president Drew Baglino, in charge of battery development, and Rohan Patel, vice-president for public policy and business development, both announced their exits from the company on X.

Baglino was one of four members in Tesla's leadership team listed on the company's investor relations website that includes CEO Elon Musk. Musk thanked both executives for their work in a response to their respective notes on X.

Scott Acheychek, CEO of Rex Shares - who manage ETFs with high exposure to Tesla stock - described the headcount reductions as strategic, pointing to Tesla's overall year-on-year headcount increase as a sign that the carmaker was still in a phase of growth.

Still, Michael Ashley Schulman, chief investment officer at Running Point Capital Advisors, deemed the departures of the senior executives as "the larger negative signal today" that Tesla's growth was in trouble.

Tesla shares were down 2.6% in midday trading on Monday, with other EV makers such as Rivian Automotive (RIVN.O) [opens new tab](#), Lucid Group (LCID.O) [opens new tab](#) and VinFast Auto also trading between 2% and 7.4% lower.

"As we prepare the company for our next phase of growth, it is extremely important to look at every aspect of the company for cost reductions and increasing productivity," Musk said in the memo sent to all staff.

"As part of this effort, we have done a thorough review of the organization and made the difficult decision to reduce our headcount by more than 10% globally," it said.

Reuters saw an email sent to at least three U.S. employees notifying them their dismissal was effective immediately.

Tesla did not immediately respond to a request for comment.

MASS MARKET

The layoffs follow an exclusive Reuters report on April 5 that Tesla had cancelled a long-promised inexpensive car, expected to cost \$25,000, that investors have been counting on to drive mass-market growth. Musk had said the car, known as the Model 2, would start production in late 2025.

A Tesla car is seen in Santa Monica, California, United States, October 23, 2018.

REUTERS/Lucy Nicholson/File Photo Purchase Licensing Rights [opens new tab](#)

Shortly after the story published, Musk posted "Reuters is lying" on his social media site X, without detailing any inaccuracies. He hasn't commented on the car since, leaving investors and analysts to speculate on its future.

Reuters also reported on April 5 that Tesla would shift its focus to self-driving robotaxis built on the same small-car platform. Musk posted on X that evening: "Tesla Robotaxi unveil on 8/8," with no further details.

Tesla could be years away from releasing a fully autonomous vehicle with regulatory approval, according to experts in self-driving cars and regulation.

Tesla shares have fallen about 33% so far this year, underperforming legacy automakers such as Toyota Motor (7203.T) [opens new tab](#) and General Motors (GM.N) [opens new tab](#), whose shares have rallied 45% and about 20% respectively thanks to a slow consumer transition away from traditional internal combustion engine vehicles.

Energy major BP (BP.L) [opens new tab](#) has also cut more than a tenth of the workforce in its EV charging business after a bet on rapid growth in commercial EV fleets didn't pay off, Reuters reported on Monday, underscoring the broader impact of slowing EV demand.

WORKS COUNCIL

A newly elected works council of labour representatives at Tesla's German plant was not informed or consulted ahead of the announcement to staff, said Dirk Schulze, head of the IG Metall union in the region.

"It is the legal obligation of management not only to inform the works council but to consult with it on how jobs can be secured," Schulze said.

Analysts from Gartner and Hargreaves Lansdown said the cuts were a sign of cost pressures as the carmaker invests in new models and artificial intelligence.

Tesla reported this month that its global vehicle deliveries in the first quarter fell for the first time in nearly four years, as price cuts failed to stir demand.

The EV maker has been slow to refresh its aging models as high interest rates have sapped consumer appetite for big-ticket items, while rivals in China, the world's largest auto market, are rolling out cheaper models.

The company is looking to shore up its margins, which have been dented by repeated price cuts, especially in China where it faces stiff competition from local rivals including market leader BYD (002594.SZ) [opens new tab](#), which briefly overtook the U.S. company as the world's largest EV maker in the fourth quarter, and new entrant Xiaomi (1810.HK) [opens new tab](#).

It is also gearing up to start sales in India, the world's third-largest auto market, this year, producing cars in Germany for export to India and scouting locations for showrooms and service hubs in major cities.

Tesla recorded a gross profit margin of 17.6% in the fourth quarter, the lowest in more than four years.

It had laid off 4% [opens new tab](#) of its workforce in New York in February last year as part of a performance review cycle and before a union campaign was to be launched by its employees.

Tech publication Electrek first reported [opens new tab](#) the latest job cuts.

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Reporting by Yuvraj Malik in Bengaluru, Victoria Waldersee in Berlin, Zhang Yan in Shanghai and Hyunjoo Jin in San Francisco; Additional reporting by Zaheer Kachwala, and Akash Sriram; Editing by Mark Potter, David Holmes and Chizu Nomiya

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Victoria Waldersee

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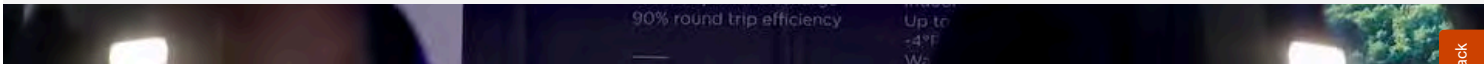
Tesla's senior battery executive exits company

By Reuters

April 15, 2024 7:33 AM PDT · Updated 5 hours ago



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The logo of Tesla on display at the Everything Electric exhibition at the ExCeL London international exhibition and convention centre in London, Britain, March 28, 2024. REUTERS/Peter...

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April 15 (Reuters) - Tesla's (TSLA.O) senior vice president of powertrain and energy engineering, Drew Baglino, is leaving after 18 years at the auto-maker, he said in a post on social media site X on Monday.

Drew Baglino

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I made the difficult decision to move on from Tesla after 18 years yesterday. I am so thankful to have worked with and learned from the countless incredibly talented people at Tesla over the years.

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Rohan Patel has also left Tesla, reporting with [@danahull](#)

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90

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Securities Law

April 15, 2024, 5:55 AM PDT

EY Says NMC Administrators Being Misleading in Collapse Spat (1)

By Upmanyu Trivedi

Bloomberg Law News 2024-04-15T13:56:460444468961-04:00

EY Says NMC Administrators Being Misleading in Collapse Spat (1)

By Upmanyu Trivedi2024-04-15T08:55:30365-04:00

EY accused the administrators of NMC Health Plc of withholding crucial documents in a \$2.7 billion London dispute as the fallout from the collapse continues to work its way through courts.

Alvarez & Marsal sued EY alleging [negligence](#) and failure to spot billions of dollars of hidden debt between 2012 and 2018 when EY was the auditor. NMC Health was put into administration in 2020 following allegations of fraud at the health care provider.

"Full and proper" disclosure is essential to defend against the "enormous alleged claim" worth more than \$2.7 billion, EY's lawyers said in court filings prepared for Monday's hearing. "The lack of transparency is unhelpful" and the administrator's stance risks being misleading, the lawyers said.



Video: How EY's Ambitious Split Went Awry

Alvarez & Marsal has made relevant disclosure running to around 400,000 documents in the case compared to 60,000 by EY, lawyers for Alvarez & Marsal said.

NMC's administrator last year accused EY of trying to [delay](#) the case, in which a trial is scheduled for May 2025. "We will continue to defend this claim vigorously," EY said.

Alvarez & Marsal didn't respond to an emailed request for comment while NMC's lawyers declined to comment.

The collapse of NMC sparked a flurry of lawsuits and investigations in the UK and US as different sides point the finger of blame.

Bavaguthu Raghuram Shetty, the firm's founder, alleged EY " [actively](#) " concealed a six-year fraud from investors and turned a blind eye to thousands of suspicious transactions. While Shetty is also being [pursued](#) in a London court by Alvarez & Marsal.

Meanwhile, the UK's Financial Conduct Authority censured hospital operator for [misleading](#) investors about its debt position by as much as \$4 billion.

(Updates with details from the hearing and EY's comments in the third and sixth paragraphs respectively.)

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China Vows to Tighten Stock Market Supervision as Rebound Stalls

By Charlotte Yang

- New guideline focuses on quality development of capital market
- CSI 300 Index down 1.7% in April after two months of advance

Bloomberg Law News 2024-04-15T09:49:00934922312-04:00

China Vows to Tighten Stock Market Supervision as Rebound Stalls

By Charlotte Yang2024-04-12T05:06:14873-04:00

- New guideline focuses on quality development of capital market
- CSI 300 Index down 1.7% in April after two months of advance

China's cabinet vowed to tighten stock listing criteria and urged companies to improve corporate governance in a new guideline released Friday, the latest effort to shore up the equity market.

The State Council will ensure "high quality development" of listed companies, crack down on illegal share sales and strengthen the supervision of dividend payouts, according to a statement. It will also promote the entry of medium-to-long term funds into the market.

The statement from the cabinet marks an elevated response compared to previous pledges, which came from the securities watchdog. Stocks have rebounded since a February low, aided by a raft of policy steps including purchases by state funds and restrictions on quant funds. But the advance has stalled this month amid uncertainties over corporate earnings and the economy's recovery.



The guideline shows “that the changed regulatory stance is not just coming from the CSRC, but a chief task coming from the top decision makers,” said Yang Zhiyong, a fund manager at Beijing Gemchart Asset Management Co. “We expect more cases of punishment for IPO fraud or corruption in the IPO pipeline as first steps toward rectifying problems in the market.”

The statement was released after onshore markets closed Friday. The Hang Seng China Enterprises Index showed little reaction to the guideline, ending the day down 2.1%.

Separately, Wu Qing, who leads the China Securities Regulatory Commission, said in an interview with Xinhua News that the guideline aims to protect investors’ rights and ensure stability of the capital market.

The CSI 300 Index has lost 1.7% in April as foreign funds sold mainland shares on a net basis for two consecutive weeks. The benchmark fell for the seventh straight session on Friday in its worst losing streak since March 2020.

In the latest setback to sentiment, China’s exports slumped more than expected in March, dealing a blow to hopes that booming sales abroad will offset weak demand at home. Data earlier this week showed consumer prices barely grew as deflationary pressure persisted.

Earlier measures including a crackdown on short selling, tighter IPO process, and other risk control measures have helped onshore markets recover, and “this new statement shows that this may be an ongoing focus with the attention of the top policymakers,” said **Marvin Chen**, an analyst with Bloomberg Intelligence.

--With assistance from **April Ma** and **Kelly Li**.

Companies can advertise 'American-made' products with foreign parts, US court says

 [reuters.com/legal/government/companies-can-advertise-american-made-products-with-foreign-parts-us-court-says-2024-04-12](https://www.reuters.com/legal/government/companies-can-advertise-american-made-products-with-foreign-parts-us-court-says-2024-04-12)

Blake Brittain

A view of the judge's chair in court room 422 of the New York Supreme Court at 60 Centre Street February 3, 2012. Picture taken February 3, 2012. REUTERS/Chip East Purchase Licensing Rights , opens new tab

April 12 (Reuters) - A company that assembles products with foreign components in the United States can legally advertise them as "American made," a U.S. appeals court said on Friday.

The 10th U.S. Circuit Court of Appeals in Denver determined , opens new tab that construction-equipment maker I Dig Texas can call its equipment American made even though some of it was assembled in China with Chinese and Canadian parts, rejecting a lawsuit from the company's competitor Creager Services.

Attorneys for Creager and IDT did not immediately respond to requests for comment on the decision.

Creager and IDT both make "skid steer attachments" that are used with construction equipment for digging or hauling. Both companies have store locations in Texas and Oklahoma.

IDT used photos of Creager's equipment in an ad that described Creager's equipment as "Made in China," while describing its own skid steer attachments as "100% American Made." Creager sued IDT in Oklahoma, accusing it of copyright infringement based on its unauthorized use of Creager's photos and false advertising based on the argument that IDT's products were not "American made."

U.S. District Judge Claire Eagan ruled for IDT last year. A three-judge 10th Circuit panel affirmed Eagan's decision on Friday.

The appeals court said that IDT's ads were not literally false, rejecting Creager's argument that IDT's equipment was not "American made" because it included some foreign components.

"The term make could refer either to the origin of the components or to the assembly of the product itself," U.S. Circuit Judge Robert Bacharach said. "For example, if Chrysler says that its cars are American-made, someone might regard the statement as truthful if Chrysler assembles the cars in the United States even if some components came from overseas."

The court also rejected Creager's argument that all of IDT's products had to be made in the U.S. for its "100% American Made" statement to not be misleading. IDT could reasonably have meant that "only some of the products consist entirely of domestic components assembled in the United States," Bacharach said.

Bacharach also ruled for IDT on Creager's copyright claim, finding that Creager failed to prove that IDT profited from the use of its photos.

The case is I Dig Texas LLC v. Creager, 10th U.S. Circuit Court of Appeals, No. 23-5046.

For I Dig Texas: Zach Oubre of McAfee & Taft

For Creager: Evan Talley of Ryan Whaley

Reporting by Blake Brittain in Washington

Blake Brittain
Thomson Reuters

Blake Brittain reports on intellectual property law, including patents, trademarks, copyrights and trade secrets, for Reuters Legal. He has previously written for Bloomberg Law and Thomson Reuters Practical Law and practiced as an attorney.

Crypto Trader Searched Web for 'Fraud' Before \$110 Million Haul

By David Voreacos

- Avraham Eisenberg accused of fraud, manipulating Mango Markets
- Prosecutors suggest searches show he knew he was breaking law

Bloomberg Law News 2024-04-15T09:48:29995846465-04:00

Crypto Trader Searched Web for 'Fraud' Before \$110 Million Haul

By David Voreacos2024-04-12T17:02:55627-04:00

- Avraham Eisenberg accused of fraud, manipulating Mango Markets
- Prosecutors suggest searches show he knew he was breaking law

A trader accused of stealing \$110 million from the Mango Markets cryptocurrency exchange searched the web for terms like “elements of fraud” and “statute of limitations market manipulation,” evidence presented at his criminal trial showed.

Prosecutors allege Avraham Eisenberg manipulated Mango Markets futures contracts on Oct. 11, 2022 — when he boosted the price of swaps by 1,300% in 20 minutes — and then “borrowed” against those inflated contracts using anonymous accounts before fleeing Puerto Rico for Israel.

Before and after his alleged theft, Eisenberg, 28, searched the web for terms like “market manipulation criminal” and “FBI surveillance,” as well as information about extradition from Israel, according to documents shown Friday to jurors in New York federal court. He was arrested on Dec. 26, 2022, after flying from Tel Aviv to Puerto Rico.

Eisenberg also had tweeted about the arrest of Glen Point Capital co-founder **Neil Phillips** on charges of manipulating the foreign-exchange market, documents showed. Phillips was convicted in September.

Prosecutors, who began presenting evidence Tuesday and rested their case Friday, showed jurors Eisenberg’s web history to suggest he knew he was breaking the law. Defense attorneys will offer their version of the case Monday, and closing arguments are expected on Tuesday.

Eisenberg is accused of commodities fraud, commodities manipulation and wire fraud. The US alleges he deceptively used two anonymous accounts at Mango Markets to buy and sell himself futures contracts. Those contracts were based on the relative value of Mango's token, known as MNGO, and a stablecoin called USDC.

Prosecutors also showed jurors an Eisenberg chat in which he said MNGO "looks primed for a pump."

Jurors also heard from a Mango Markets investor, Oliver Tonkin, the chief executive officer of BCB Group, a payment service provider for crypto. Tonkin had moved 122,628 USDC stablecoins to the site, and couldn't withdraw them after Eisenberg's actions, he testified.

"Obviously, that puts at risk my funds, if somebody can manipulate that price," Tonkin testified. He said he was able to access his funds about two weeks later.

Mango Markets is run by smart contracts and overseen by a decentralized autonomous organization, or DAO, that lets people borrow, lend and trade cryptocurrencies. Eisenberg agreed to repay \$67 million to the Mango DAO in exchange for it not pursuing any criminal investigation against him, prosecutors say. The DAO's treasury also repaid investors, authorities say.

The criminal case is US v. Eisenberg, 23-cr-00010, US District Court, Southern District of New York (Manhattan).

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Steve Stroth, Anthony Aarons

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Jamie Dimon Dumped \$150 Million of His JPMorgan Stock in February; Now He Says His Regulators Want 25 Percent More Capital at his Bank

 wallstreetonparade.com/2024/04/jamie-dimon-dumped-150-million-of-his-jpmorgan-stock-in-february-now-he-says-his-regulators-want-25-percent-more-capital-at-his-bank

By Pam Martens and Russ Martens: April 15, 2024 ~

On October 27 of last year, JPMorgan Chase filed an 8K form with the Securities and Exchange Commission (SEC) advising that, for the first time ever, its long-tenured Chairman and CEO, Jamie Dimon, and his family, intended to “sell 1 million shares” of his common stock holdings in the bank in 2024.

The news made headlines because an insider selling a large amount of stock in any company – and particularly a bank with JPMorgan Chase’s serial history of running afoul of the law – can be a harbinger of bad news ahead for other shareholders.

Dimon didn’t wait long into 2024 to start dumping stock. JPMorgan Chase filed another SEC form this past February showing that Dimon had sold 821,778 shares of the bank’s common stock for \$150,167,222.52, or an average share price of \$182.73 – which was suspiciously close to the stock’s all-time high at that point.

Dimon has acquired the bulk of his shares in the same fashion as his former mentor, Sandy Weill, acquired his shares in Citigroup – through stock grants from his hear no evil, see no evil Board of Directors. (Dimon had, in his earlier years, been Weill’s first lieutenant at Citigroup.)

Weill stepped down as CEO of Citigroup in 2003. Just one day after stepping down as CEO, Citigroup’s obliging Board of Directors allowed Weill to sell back to the corporation 5.6 million shares of his Citigroup stock for \$264 million. This eliminated Weill’s risk that his big share



Jamie Dimon, Chairman and CEO of JPMorgan Chase

sale would drive down his own share prices as he was selling. The Board negotiated the price at \$47.14 for Weill's shares. Six years later, in the spring of 2009, Citigroup was a 99-cent stock and receiving the largest taxpayer and Federal Reserve bailout in U.S. history.

Between December 2007 and July 2010, Citigroup received the following bailouts to keep it afloat: The U.S. Treasury injected \$45 billion of capital into Citigroup; there was a government guarantee of over \$300 billion on certain of its assets; the FDIC provided a guarantee of \$5.75 billion on its senior unsecured debt and \$26 billion on its commercial paper and interbank deposits; and secret revolving loans from the Federal Reserve sluiced a cumulative \$2.5 *trillion* in below-market-rate loans to Citigroup according to an audit released by the Government Accountability Office in 2011.

On May 9, 2011, Citigroup did a 1 for 10 *reverse* stock split to dress up the disaster of its share price history. For each 100 shares the shareholder held previously, he or she now owned just 10 shares. Citigroup investors who have held onto their shares since Weill's stock sale in 2003 are down 87 percent at yesterday's closing price of \$59.68 – which is actually \$5.97 adjusted for the reverse stock split.

In spin that is similar to Weill's tactics, Jamie Dimon has, for more than a decade, attempted to brainwash Congress, the media, and the public at large by referring to his bank as the "Fortress Balance sheet." His latest letter to shareholders uses the phrase five times – at one point phrasing it as an "unquestionable fortress balance sheet."

And yet, in the same letter to shareholders, Dimon concedes that his bank's federal regulators don't have the same level of confidence in this so-called "Fortress." Dimon writes that if the capital rules proposed by the FDIC, Office of the Comptroller of the Currency and the Federal Reserve are implemented, they "would increase our firm's required capital by 25%."

Another reasonable way to read that is that federal banking regulators, whose bank examiners have intensely examined the books of the bank, believe that JPMorgan Chase is *undercapitalized* by 25 percent and thus poses a potential systemic risk to the U.S. financial system until it bulks up its capital.

This capital battle is officially known as the proposed Basel III rules and Dimon is leading the charge to stop federal bank regulators from implementing the rules. Internal government documents show that Dimon and his Chief of Staff, Judith Miller, met separately with the following Fed Governors on December 15 to argue against the proposed rules: Fed Governor Adriana Kugler; Fed Vice Chair Philip Jefferson; and Fed Governor Christopher Waller.

According to Fed Chair Jerome Powell's daily calendar, he met personally with Jamie Dimon on January 26, 2024 from 4:45 p.m. to 5:15 p.m.

Financial Times reporters Joshua Franklin and James Politi report that in mid March, Dimon met in a one-on-one meeting with Vice President Kamala Harris and separately with President Biden's Chief of Staff, Jeff Zients.

At a Senate Banking Committee hearing on March 7, Senator Elizabeth Warren said that the 37 largest banks that would be impacted by the higher capital rules have "spent tens of millions of dollars running ads during Sunday night football and millions more for an army of lobbyists to try to twist arms here in Congress."

The TV ads have been grossly misleading, making it sound as if the higher capital requirements at just 37 banks would hurt working families and farmers – ignoring that inadequate capital levels collapsed giant Wall Street banks in 2008 and put millions of innocent Americans out of work and in foreclosure as the U.S. economy collapsed along with the toxic debt bombs exploding at the banks.

Fed Chair Powell was the sole witness at the March 7 Senate Banking hearing. Warren told Powell this:

"Despite all you said last year when the banks failed about supporting Vice Chair Barr's recommendations to strengthen rules for big banks, public reporting now says that you are driving efforts inside the Fed to weaken the capital rule. You even told the House Financial Services Committee representatives yesterday that you think it's 'very plausible' that you withdraw the rule."

Warren concluded with this zinger to Powell:

"You are the leader of the Fed and when the heat was on last year, you talked a lot about getting tougher on the banks. But now the giant banks are unhappy about that and you've gone weak-kneed on this. The American people need a leader at the Fed who has the courage to stand up to these banks and protect our financial system."

For more key background on the Basel III capital proposal, see our reports below:

The Fed Has a Dirty Little Secret: It's Been Allowing the Wall Street Mega Banks to Calculate their Own Capital Requirements

Jamie Dimon Hires Dodd-Frank Hatchet Man to Weigh Suing the Fed Over Proposed Capital Rules

Wall Street CEOs Want the Line Between a Federally-Insured Bank and a Wall Street Trading Casino Erased; Regulators Want Higher Capital to Prevent That

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April 11, 2024, 1:23 PM PDT

Morgan Stanley Drops on Report of US Probes Into Wealth Unit (2)

By Sridhar Natarajan

Bloomberg Law News 2024-04-15T13:59:21645666387-04:00

Morgan Stanley Drops on Report of US Probes Into Wealth Unit (2)

By Sridhar Natarajan2024-04-11T16:23:21537-04:00

Morgan Stanley shares fell the most in five months after a report that a cadre of US regulators are scrutinizing the firm's efforts to prevent potential money laundering by wealthy clients.

The Securities and Exchange Commission, the Office of the Comptroller of the Currency and other Treasury Department offices are digging into whether the New York-based bank has done enough to investigate the identities of risky clients, the Wall Street Journal [wrote](#) , citing unidentified people familiar with the matter. The Federal Reserve was already known to be looking into those controls last year.



WATCH: Bloomberg Intelligence's Elliott Stein comments on the report of US probes into Morgan Stanley's Wealth Unit.

Source: Bloomberg

The stock fell 5.3% to \$86.84 during regular trading in New York on Thursday, its biggest drop since mid-October. A Morgan Stanley spokesperson declined to comment.

The SEC and the Treasury's Financial Crimes Enforcement Network have sought information on certain clients outside the US who've raised red flags and the bank's policies to address it, the Journal said. Specifically, the SEC pressed Morgan Stanley about why it did business with some who had been cut off by E*Trade, the digital-trading platform the company acquired.

The inquiries, which haven't been publicly disclosed by the bank, focus on a wealth management arm that has swelled into Morgan Stanley's biggest business, generating almost half of the company's revenue last year. The US government has been ramping up pressure on the industry to tighten money-laundering controls as authorities make greater use of sanctions.

The bank has told regulators it's improving controls and procedures and met with Federal Reserve officials to [allay concerns last year](#).

The OCC also sent the firm a formal warning last year, known as a matter requiring attention, demanding executives address its concerns, according to the Journal. That followed an annual exam of the bank's anti-money-laundering programs, and a document shows the bank sent the regulator detailed plans for action, the publication said.

Regulators have issued MRAs with greater frequency in recent years. When concerns are deemed more urgent, they also issue matters requiring immediate attention. Such notices are typically flagged to the board and generate a reply including a timeline for corrective action. Deeper investigation or enforcement action may follow if officials are dissatisfied.

(Updates stock's decline, adds background on regulatory concerns from first paragraph.)

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David Scheer

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Justices Limit Shareholder Suits Over Corporate Disclosures

By **Jessica Corso**

Law360 (April 12, 2024, 10:29 AM EDT) -- A unanimous U.S. Supreme Court on Friday ruled that a corporation's failure to disclose certain information about its future business risks, absent any affirmative statement that would make such silence misleading, cannot itself be the basis of a private securities fraud claim.



The U.S. Supreme Court on Friday limited when shareholders can bring litigation over a corporation's disclosures. (Nicolas Economou/NurPhoto via AP)

The court vacated and remanded a Second Circuit decision in favor of Macquarie Infrastructure Corp. shareholder Moab Partners LP. Moab accused Macquarie of misleading investors by remaining silent about the impact that a soon-to-be-implemented global ban on high-sulfur fuels would have on its oil storage business.

The investor said the company committed fraud under U.S. Securities and Exchange Commission Rule 10b-5(b) by remaining silent on the issue.

But a "duty to disclose ... does not automatically render silence misleading under Rule 10b-5(b)," the high court reasoned in an **opinion** authored by Justice Sonia Sotomayor.

Instead, management's failure to disclose trends or uncertainties that could harm their business can

support a claim "only if the omission renders affirmative statements made misleading," the court said.

Question presented in *Macquarie Infrastructure Corp. et al. v. Moab Partners LP et al.*

Can the failure to disclose information required by Item 303 support a private action under Rule 10b-5(b), even if the failure does not render any statements made misleading?

Held

No. Pure omissions are not actionable under Rule 10b-5(b).

Salvatore Graziano of Bernstein Litowitz Berger & Grossmann LLP, one of the lawyers representing Moab Partners, told Law360 on Friday that the Supreme Court's decision was not the end of the road for his client.

"There is going to be no impact on our case, because the Supreme Court has given us a road map to plead a half-truth, which we have," Graziano said, pointing to statements made in 2015 and 2016 that he said made it appear as if demand for the stored products was not decreasing.

He also said the proposed class of investors will continue to push securities fraud claims under separate provisions of Rule 10b-5(b) that the high court did not rule on, as well as under the Sarbanes-Oxley Act of 2002.

Linda Coberly of Winston & Strawn LLP, one of the attorneys representing Macquarie, said she was thrilled with the justices' decision.

"It provides critical guidance to companies, litigants and judges, for our case and beyond," she said. "Our case will now move forward with this important clarification in the law."

The lawsuit was filed in 2018 and accuses Macquarie of failing to warn investors that the company's most profitable segment stood to lose a significant amount of fuel storage business once an international fuel standard known as IMO 2020 went into effect.

The regulation was adopted in 2016, four years before going into effect, but shareholders allege that Macquarie waited two years before publicly announcing a drop-off in customers due to the decline in fuel sales. The announcement led the stock price to drop 41%, according to Friday's Supreme Court opinion.

Macquarie **won dismissal** of the case at the district court, which ruled that Moab Partners had not alleged that the company made any actionable half-truths about its reliance on the regulated fuel oil.

The Second Circuit **revived the case**, saying that corporations have a duty not to omit material information. The company argued that a split still lingered between the Second Circuit and other circuit courts over the applicable standard of disclosure under Item 303, which requires management to discuss trends or uncertainties facing the company.

The high court initially planned to address the split in 2017 through a case brought by Leidos Inc., but that case **settled** before the court could hear oral arguments or issue an opinion.

Any broader impact on securities litigation from Friday's ruling will be limited, Graziano said, since companies can still be sued by the SEC for outright omitting necessary information from Item 303 statements.

The SEC **weighed in** on the Supreme Court case in favor of Moab Partners, telling the court that investors rely on a company's MD&A disclosures to understand a company's financial risks and that

allowing companies to omit those risks "would allow unscrupulous parties to exploit the very trust that disclosure requirements are designed to foster."

The agency didn't immediately respond to a request for comment.

Macquarie is represented by John E. Schreiber, Kerry C. Donovan, Lauren Gailey and Linda Coberly of Winston & Strawn LLP, as well as by Richard W. Reinthaler.

Moab Partners is represented by Salvatore J. Graziano, Lauren Amy Ormsbee, Jesse L. Jensen and William E. Freeland of Bernstein Litowitz Berger & Grossmann LLP, David C. Frederick, Joshua D. Branson and Dustin G. Graber of Kellogg Hansen Todd Figel & Frederick PLLC, and Lori Marks-Esterman and John G. Moon of Olshan Frome Wolosky LLP.

The government is represented by Megan Barbero, Michael A. Conley, Jeffrey A. Berger and Rachel M. McKenzie of the U.S. Securities and Exchange Commission and Elizabeth B. Prelogar, Malcolm L. Stewart and Ephraim A. McDowell of the U.S. Department of Justice.

The case is Macquarie Infrastructure Corp. et al. v. Moab Partners LP et al., case number 22-1165, in the Supreme Court of the United States.

--Editing by Alyssa Miller and Daniel King.

Update: This story has been updated with background about the case and commentary on the ruling.

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Flopped Casino SPAC Investor Sues In Del. To Block Payout

By **Leslie A. Pappas**

Law360 (April 11, 2024, 7:54 PM EDT) -- An investor in a special purpose acquisition company that made a doomed, \$2.7 billion effort to buy a casino in the Philippines has asked Delaware's Court of Chancery to prevent the SPAC from redeeming its outstanding shares, arguing it would violate Delaware law because the SPAC is insolvent.

The suit from Zama Capital Master Fund LP against 26 Capital Acquisition Corp. – filed under seal on Monday and unsealed in a redacted form on Thursday – also seeks an injunction and a motion to expedite.

Zama argues that a share redemption would violate Section 160 of Delaware's General Corporation Law, which governs stock rights and redemption, because the SPAC's liabilities exceed its assets. The details of the SPAC's alleged liabilities are redacted.

"A redemption of the Company's Class A Common Stock in the present circumstances would constitute a clear statutory violation," Zama said in its motion to expedite. "Any redemption would also result in a seismic shift in the capitalization table of the company that would be difficult, if not impossible, to untangle, thus resulting in irreparable harm."

The suit comes on the heels of a settlement of another Chancery Court case that included a temporary restraining order preventing 26 Capital from redeeming its shares. In its motion for expedited proceedings, Zama urged the Court to impose another temporary restraining order to prevent the share redemption.

Zama Capital, a New York hedge fund that helped draft the failed deal, claims to be the beneficial owner of 123,055 shares of 26 Capital's class A common stock.

The lawsuit stems from a long-running saga dating back to 2021 to take public the 100-acre, 993-room Okada Manila Resort & Casino.

The deal called for 26 Capital to merge with Universal Entertainment Corp., the parent company of the casino's operator, Tiger Resort Leisure and Entertainment Inc.

26 Capital **sued** Tiger Resort and three affiliates in a Chancery Court lawsuit in February 2023, accusing the casino's operators of dragging their feet and trying to tank the \$2.6 billion merger.

After a **trial in July**, Vice Chancellor J. Travis Laster in September **refused to force** the deal to close, finding that the deal had potentially been tainted by Zama Capital's investment in the SPAC and the work that Zama did as an adviser behind the scenes.

26 Capital announced later in September that it **planned to liquidate**. The SPAC said it would cancel the shares it issued in its \$275 million initial public offering and return money to investors.

Schulte Roth & Zabel LLP **sued** 26 Capital less than a week later, seeking to recover nearly \$2 million in unpaid legal fees before the company's liquidation. The court entered a temporary restraining order in that case, enjoining the SPAC from making any distribution to stockholders, the Zama complaint said.

26 Capital and the casino's operators subsequently reached a tentative settlement to end their Chancery Court litigation. Zama **sought to intervene** in the lawsuit in January to challenge the pending settlement, and later sued 26 Capital for **books and records** in an attempt to understand the SPAC's financial situation.

Zama learned on April 5 that the Schulte Roth litigation had settled, the Zama complaint said. The Schulte Roth suit was dismissed on April 10, according to the docket.

"Upon Schulte's dismissal of its action against the Company, the Schulte TRO will no longer be in place and Zama believes the Company will seek to redeem its shares as it tried to merely six months ago," the complaint said.

Counsel for Zama declined to comment. Attempts to reach 26 Capital for comment were not successful.

Zama Capital Master Fund LP is represented by Jason J. Rawnsley, Matthew D. Perri, Andrew L. Milam, Elizabeth J. Freud, and Alfred P. Dillione of Richards Layton & Finger PA.

Counsel information for 26 Capital Acquisition Corp. was not immediately available.

The case is Zama Capital Master Fund LP v. 26 Capital Acquisition Corp., case number 2024-0370, in the Court of Chancery of the State of Delaware.

--Additional reporting by Tom Zanki, Jeff Montgomery and Katryna Perera. Editing by Alex Hubbard.

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HomeStreet Hit With Shareholders Suit Over FirstSun Merger

By **Jade Martinez-Pogue**

Law360 (April 12, 2024, 2:12 PM EDT) -- Banking company HomeStreet Inc. has been hit with a proposed class action alleging that it failed to disclose details about the sale process of its merger with FirstSun Capital Bancorp., saying that the company entered into the agreement with "little to no consideration" to any of its shareholders.

Plaintiff shareholder Marsha Ederer filed the suit in New York Federal Court on Thursday against HomeStreet and its board of directors, arguing that the previously announced merger is "unfair for a number of reasons," including the fact that it will significantly dilute the shares held by herself and her fellow shareholders.

HomeStreet announced on Jan. 16 that it will merge with and into FirstSun in an all-stock transaction under which its shareholders will receive 0.4345 of a share of FirstSun common stock for each share of HomeStreet common stock they own, representing a value of \$14.75 per share. The terms of the deal were set in stone via filing with the U.S. Securities and Exchange Commission three days later.

Ederer alleges that the registration statement filed for the proposed deal is "materially deficient" and deprives shareholders of the information necessary to make an informed and rational decision as to whether to vote in favor of the deal.

Among other things, Ederer claimed that the statement leaves out or misrepresents material information regarding the sale process and certain conflicts of interest for management, the financial projections for HomeStreet and FirstSun to the board and the company's financial advisor and the data and inputs underlying the financial valuation analyses.

"As detailed in the registration statement, the process deployed by the individual defendants was flawed and inadequate, was conducted out of the self-interest of the individual defendants and was designed with only one concern in mind – to effectuate a sale of the company," the complaint said.

Ederer continued that the registration statement did not disclose reasoning as to why the board would agree to a deal in which its shareholders' interest would be diluted and why the board created a transaction committee to oversee the strategic process while allowing itself final approval on entering into the deal.

Additionally, the shareholder claims that there was a first bidder that made higher offers for the company and that didn't require additional financing, but the board allegedly failed to disclose how and why those draft agreements with the first bidder differed from the deal with FirstSun that it ultimately landed. Also left out of the SEC filing was the totality of communications surrounding post-transaction employment during the negotiation of the underlying deal, the complaint said.

Ederer claims that HomeStreet insiders are the primary beneficiaries of the proposed transaction, not its public shareholders.

"The board and the company's executive officers are conflicted because they will have secured unique benefits for themselves from the proposed transaction not available to plaintiff as a public stockholder of HomeStreet," the suit explained. "For example, company insiders, currently own large illiquid blocks of company stock all of which will be converted into the merger consideration not shared with public company stockholder such as plaintiff upon the consummation of the proposed transaction."

Ederer alleges two violations of the Securities and Exchange Act of 1934 and is demanding a jury trial.

Counsel information for the defendants was not immediately available Friday, and a representative for the bank declined a request for comment.

Ederer is represented by Evan J. Smith of Brodsky & Smith.

The case is Marsha Ederer v. HomeStreet Inc. et al., case number 1:24-cv-02748, in the U.S. District Court for the Southern District of New York.

--Editing by Patrick Reagan.

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3 Firms Vie To Lead RTX Stockholder Suit Over Engine Cracks

By **Aaron Keller**

Law360 (April 11, 2024, 4:36 PM EDT) -- Saxena White PA and Labaton Keller Sucharow LLP on Thursday sought appointments as co-lead counsel in pension fund lawsuits alleging RTX Corp.'s stock fell when it revealed that cracks in a subsidiary's jet engines cost billions to repair, with Kaplan Fox & Kilsheimer LLP also seeking to lead the case for an individual investor.

Francis P. McConville of Labaton Keller Sucharow LLP argued during a remote hearing that the New England Teamsters Pension Fund, which he represents, was the largest plaintiff that was affected when RTX's **stock price dropped** and is therefore an adequate lead plaintiff due to its financial stake. He said the fund he represents was poised to sign a joint agreement with two other pension funds and would work cooperatively and efficiently with those funds' attorneys at Saxena White PA to represent the interests of all stockholders.

McConville urged U.S. Magistrate Judge Robert A. Richardson of the U.S. District Court for the District of Connecticut to find that the pension funds should be considered the presumptive lead plaintiffs because they were "sophisticated institutional investors" whose losses were typical of the entire class.

Congress intended for such investors to serve as lead plaintiffs when drafting PSLRA, the Private Securities Litigation Reform Act of 1995, he said.

The funds also boasted experience serving as lead plaintiffs in similar actions and have recovered \$300 million through their efforts, McConville noted.

The funds were not "thrown together merely to aggregate their claims," he cautioned, citing case law that frowns upon such tactics. Rather, according to McConville, the funds standing alone would each have been proper candidates to serve as lead plaintiffs because they held the largest chunks of stock at issue in several combined shareholder lawsuits rolled into a single Connecticut federal court docket.

Jeffrey P. Campisi of Kaplan Fox & Kilsheimer LLP said individual investor William Chow should be named the lead plaintiff.

Citing **Galmi v. Teva Pharmaceutical Industries Ltd.**, a 2017 Connecticut securities case, Campisi urged a different approach, suggesting the court should first examine whether the pension funds were appropriately banded together.

"They got together, presumably through the lawyers, to put together this group," he suggested, arguing that the funds had no meaningful prior relationship and that the consortium could hypothetically "inflate legal expenses and costs" for the class.

If that was true, he argued, it was improper under Galmi. Only after analyzing how the group emerged should the judge rank the plaintiffs in terms of financial interest, Campisi suggested.

"Our position is that the group should not be afforded the presumption [as lead plaintiffs] because it's not a proper group," he said.

According to Campisi, Chow is retired and lost \$250,000 on RTX stock. While Chow has no experience

being a lead plaintiff in a securities case, he does have other litigation experience, Campisi said.

McConville said Chow was "well-meaning," but that it was unclear whether he had the finances and experience to drive a case like this forward.

Judge Robinson's few questions surrounded the proper ordering of the analysis under the different approaches suggested; he did not issue an immediate decision or hint which side might prevail.

Rather, the judge said, it was clear Chow, the pension funds and their attorneys could cooperate as the case progressed regardless of who the lead plaintiff would be.

Counsel for RTX and several individual defendants participated in the remote hearing but declined Judge Robinson's offer to address the issue at hand.

The current lawsuit is the result of several **combined securities cases** filed against RTX leaders and the company itself. The complaints generally allege that RTX leaders touted the fuel savings offered by subsidiary Pratt & Whitney's geared turbofan, or GTF, engines while downplaying quality control issues.

When news that the engines had developed cracks became public, RTX stock stopped 10.2%, according to one of the several complaints.

Investors alleged that RTX leaders calculated repairs at around \$500 million during a subsequent earnings call. However, additional news reports suggested repair costs could top \$7 billion, and the company on Sept. 11, 2023, announced that profits could be impacted by up to \$3.5 billion spread across several years. That news caused RTX stock to slide another 7.9%, according to case filings.

RTX's 2023 annual report says the company took "swift and decisive action to ensure flight safety" once the "rare" problem occurred. It blamed the issue on a type of powdered metal.

The company's annual reports list net sales of \$57.1 billion in 2020, \$64.4 billion in 2021, \$67.1 billion in 2022 and \$74.3 billion in 2023. Earnings per share and dividends also increased through the four-year period despite the issues with the GTF engines.

Two **other cases** about the **jet engine troubles** are unfolding in Delaware.

Counsel for the New England Teamsters Pension Fund declined to comment.

Counsel for the other pension funds and for Chow did not respond to inquiries.

An RTX spokesperson did not respond to a request for comment.

William Chow is represented by Jeffrey P. Campisi and Pamela A. Mayer of Kaplan Fox & Kilsheimer LLP and Stuart M. Katz of Cohen & Wolf PC.

The New England Teamsters Pension Fund is represented by Francis P. McConville and Eric J. Belfi of Labaton Keller Sucharow LLP and Ian W. Sloss and Johnathan Serebinski of Silver Golub & Teitell LLP.

The Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund and the Waterproofers & Allied Workers Local Union No. 8 WBPA Fund are represented by Lester R. Hooker and Marco A. Dueñas of Saxena White PA.

RTX Corp. and several individual defendants are represented by John W. Cerreta of Day Pitney LLP and Graham W. Meli and Adam L. Goodman of Wachtell Lipton Rosen & Katz.

The case is Peneycad v. RTX Corporation et al., case number 3:23-cv-01035, in the U.S. District Court for the District of Connecticut.

--Editing by Michael Watanabe.



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FTX Brass, Investors Can't Move Bankruptcy Suit To MDL

By **Elliot Weld**

Law360 (April 11, 2024, 4:04 PM EDT) -- The Judicial Panel on Multidistrict Litigation on Thursday denied a bid to move a Delaware bankruptcy proceeding regarding the collapse of cryptocurrency exchange FTX Trading Ltd. to an ongoing multidistrict litigation brought by the company's investors seeking to recoup their losses.

A six-judge panel said in its **order** that while the bankruptcy adversary case "undoubtedly shares common factual questions" with the MDL, it has more in common with FTX's Chapter 11 bankruptcy case and its issues are better addressed by the bankruptcy court.

Transferring the case "appears likely to create significant inefficiencies," the panel said.

The request was made by attorneys for the investors in the MDL and supported by Samuel Bankman-Fried, the exchange's founder who separately filed notice Thursday that he will appeal his conviction and 25-year sentence. Fellow FTX executives Zixiao "Gary" Wang, Nishad Singh and Caroline Ellison, who pled guilty and testified at trial against Bankman-Fried, also supported transfer of the case, according to the order.

An attorney for the plaintiffs in the Delaware adversary proceeding who opposed the transfer, led by Austin Onusz, said in a statement Thursday that "the customer class appreciates the thoughtful ruling by the multidistrict panel denying the motions by certain MDL plaintiffs and looks forward to the continued prosecution of the class adversary litigation before Judge [John] Dorsey as part of the FTX bankruptcy proceedings."

According to the panel, the primary questions posed in the adversary proceeding are whether customer deposits are property of the FTX debtors' estates and, if so, "what priority FTX customers have in the distribution of the estates' assets."

"Movants' arguments in support of transfer rest mainly on the factual overlap between Onusz and the MDL and our authority to transfer bankruptcy adversary proceedings under Section 1407," the panel said, referring to the law that gives it discretion to consolidate cases with common issues. "But they fail to account for the inefficiencies that likely would be caused by separating Onusz from the rest of the proceedings in the Delaware bankruptcy court."

Adam Moskowitz, an attorney for the investors, said Thursday that the order was "correct." He said his clients had filed a motion to the bankruptcy court to make an initial determination on the questions posed in the adversary proceeding.

"As MDL co-lead counsel, we certainly believe that Judge Dorsey should make those specific bankruptcy decisions," Moskowitz said in an email. "After those decisions are made, there will be no reason to keep this adversary proceeding in the bankruptcy court and it should be transferred, as every other FTX related case has been tagged and transferred."

The Florida MDL was brought by a class of FTX customers who wanted to recoup funds they lost during the exchange's epic collapse in 2022 from the exchange's executives and from celebrities who endorsed FTX.

Ellison — who headed FTX affiliate Alameda Research — Wang and Singh reached a **settlement** with

the investors in March, agreeing to pay more than \$1.3 million and provide testimony for the investors going forward. Jacksonville Jaguars quarterback Trevor Lawrence also agreed to settle with the investors as part of the agreement.

Other promoters of FTX, including athletes Stephen Curry and Naomi Osaka and comedian Larry David — the latter of whom appeared in a 2022 Super Bowl advertisement for the company — have sought to be dismissed from the case on jurisdictional grounds.

In its ongoing bankruptcy in Delaware, FTX asked the court Wednesday to approve a **deal** between it and crypto brokerage Voyager Digital Holdings to resolve FTX's \$445 million claims against Voyager and Voyager's \$130 million claim against FTX. Under the agreement, FTX will stop trying to claw back loan repayments made to Voyager, and the brokerage will drop claims against FTX over its withdrawal from an asset purchase agreement.

The investors are represented by Adam M. Moskowitz and Joseph M. Kaye of the Moskowitz Law Firm PLLC, and David Boies, Alexander Boies, Steve Zack and Brook A. Alexander of Boies Schiller Flexner LLP.

Onusz and the other Delaware Bankruptcy plaintiffs are represented by Robert Cappucci, Andrew Entwistle, Sal Lee and Joshua Porter of Entwistle & Cappucci LLP, and Robert Kriner and Scott Tucker of Chimicles Schwartz Kirner & Donaldson-Smith LLP.

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

--Additional reporting by Emily Lever and Aislinn Keely. Editing by Adam LoBelia.

Update: This story has been updated with additional counsel information.



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IoT Co. Execs Sued Over Projected Revenue Shortfall

By **Sydney Price**

Law360 (April 12, 2024, 6:03 PM EDT) -- Executives and directors of Internet of Things services company Lantronix Inc. have been hit with a shareholder derivative suit accusing them of misleading investors about its revenue prospects for nearly a year.

According to the suit filed by shareholder Renata Jernigan in California federal court Thursday, Lantronix is an IoT solutions provider and software services company. Its directors and executives repeatedly assured the public since last May that revenue could be expected to be in the \$175 million to \$185 million range despite knowing Lantronix customers had elevated inventory levels for IoT products and that some of its revenues would be delayed until the next fiscal year, the suit says.

Shares of Lantronix declined nearly 33% when the company announced in February that it was negatively adjusting its revenue guidance, the suit says.

In addition to nominal defendant Lantronix, the suit's individual defendants include its former CEO Paul Pickle, current Chief Financial Officer Jeremy Whitaker and several current and former directors. Jernigan also accuses Pickle and Whitaker of raking in nearly \$70 million in proceeds through insider trading.

The suit says Lantronix's October 2023 proxy statement was false and misleading because it did not disclose, among other things, that the board was not effectively managing risk, which resulted in the company's inability to meet its previously issued guidance. Shareholders would not have approved the reelection of several defendants to Lantronix's board of directors in November 2023 had they known the truth, the complaint says.

Lantronix issued its new, lower guidance on Feb. 8, 2024. The company's management revealed that guidance for fiscal year 2024 was now expected to be between \$155 million to \$165 million after it had previously forecast a revenue range of \$175 million to \$185 million, a figure that had remained unchanged for months. Management told investors the revision was made in part due to general slowdown caused by customers' elevated inventories and expected revenues that would now be pushed into fiscal 2025.

Lantronix's stock price declined \$1.89 per share, or about 33%, to close at \$3.92 a share on Feb. 9.

The suit accuses the defendants of breaching their fiduciary duties, wasting corporate assets, gross mismanagement and being unjustly enriched. It also claims the director defendants allowed the company to engage in a scheme to mislead the public.

The complaint also notes that Lantronix, Pickle and Whitaker are facing a securities class action in California federal court.

"As a direct and proximate result of the individual defendants' gross mismanagement and breaches of duty alleged herein, the company has sustained significant damages in excess of hundreds of millions of dollars," the suit says.

Counsel for Jernigan and a representative for Lantronix did not immediately respond to requests for comment Friday.

Jernigan is represented by Betsy C. Manifold, Rachele R. Byrd, Alex J. Tramontano and Ferdeza Zekiri of Wolf Haldenstein Adler Freeman & Herz LLP and Thomas J. McKenna and Gregory M. Egleston of

Gainey Mckenna & Egleston.

Counsel information for Lantronix and the individual defendants was not immediately available Friday.

The case is Renata Jernigan et al. v. Jason W. Cohenour et al., case number 8:24-cv-00803, in the U.S. District Court for the Central District of California.

--Editing by Stephen Berg.

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Credit Suisse, Lloyds, Others Ink \$3.5M Libor Deal

By **Katryna Perera**

Law360 (April 12, 2024, 4:07 PM EDT) -- Plaintiffs in the yearslong suit alleging various big banks manipulated the London Interbank Offered Rate, or Libor, have reached a \$3.45 million settlement with Credit Suisse AG, Lloyds Bank and others, bringing the total settlement recovery amount to more than \$780 million.

A **motion** for preliminary approval, filed Thursday, states that the deal is on behalf of a class of all individuals and entities that transacted in Eurodollar futures and/or options on Eurodollar futures on exchanges, including without limitation, transactions on the Chicago Mercantile Exchange, between Jan. 1, 2003, and May 31, 2011. They are referred to as the "exchange-based plaintiffs."

The settling defendants include Credit Suisse, Lloyds Bank, Royal Bank of Canada and UBS AG, among others. The motion states that the deal was reached after "extended, frank, and hard-fought negotiations," and will provide immediate recovery to the class in what has been a long and complex suit.

"In the absence of the settlement, the litigation of this complex case would likely consume many more years of the court's resources," the order states.

According to the order, the proposed class meets all the requirements for certification, and it asks that attorneys from Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP be appointed class counsel.

"Plaintiffs' counsel are qualified, experienced, and well-informed about the strengths and weaknesses of the claims against the remaining settling defendants. This court previously found that plaintiffs' counsel have the requisite qualifications and experience in class actions to lead this litigation on behalf of the proposed settlement class," the order states. "Plaintiffs' counsel have zealously represented the interests of the exchange-based plaintiffs and were well-informed of all material facts."

The order further states that plaintiffs' counsel intends to seek attorney fees of no more than one-third of the settlement fund, plus litigation costs.

Credit Suisse and UBS declined to comment Friday, and representatives for the other parties did not immediately respond to requests for comment.

In October, the court granted nearly **\$22 million to attorneys** from Susman Godfrey LLP and Hausfeld LLP for brokering a **\$90 million settlement deal** in the litigation with MUFG Bank Ltd., the Norinchukin Bank and Société Générale.

Over the course of the litigation, which now dates back nearly 12 years, Barclays has settled the proposed class' claims for \$120 million, Citibank for \$130 million, HSBC for \$100 million and Deutsche Bank for \$240 million.

The relevant cases were launched after financial institutions admitted to submitting skewed data as part of the process of setting Libor rates to benefit them.

Plaintiffs, including bondholders, exchange-based traders and lenders, have brought claims against the banks involved, alleging that they profited to the tune of millions — and potentially billions — of dollars in connection with the scheme.

The exchange-based plaintiffs are represented by Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP.

The settling bank defendants are represented by Cahill Gordon & Reindel LLP, Davis Polk & Wardwell, Herbert Smith Freehills New York LLP, King & Spalding LLP, Schindler Cohen & Hochman, The Law Office of Steven J. Fink PLLC, Katten Muchin Rosenman LLP, Milbank LLP, Sidley Austin LLP, Sullivan & Cromwell LLP and Gibson Dunn & Crutcher LLP.

The case is In Re: Libor-Based Financial Instruments Antitrust Litigation, case number 1:11-md-02262, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Emilie Ruscoe. Editing by Alyssa Miller.

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Investors Get OK For \$111M Ponzi Case Receiver Passed On

By **Daniel Ducassi**

Law360 (April 11, 2024, 5:47 PM EDT) -- A Colorado federal judge has given the green light for a group of investors to seek over \$111 million from a forex-focused financial technology firm in the U.K. and its affiliate, in a lawsuit alleging they played an instrumental role in a scheme that duped investors and drew the attention of U.S. securities regulators and prosecutors.

In a two-page **order** issued Wednesday, U.S. District Judge Raymond P. Moore granted permission to the investors of Blue Isle Markets Inc. and Blue Isle Markets Ltd., who are now creditors of the companies' receivership estate, to launch **their fraudulent transfer case** against Equiti Capital UK Ltd. and Equiti Armenia CJSC on behalf of the estate.

The Blue Isle entities were put in receivership in 2020 alongside Mediatrix Capital Inc. as part of an enforcement action by the U.S. Securities and Exchange Commission against the companies and their owners. Blue Isle's receiver has indicated he does not have the resources to pursue the fraudulent transfer claims.

Blue Isle's investors said in a **complaint** filed last week in Colorado federal court they were defrauded into believing Mediatrix could make them money using a purportedly successful algorithmic forex trading strategy that was in fact quickly losing investor funds. They alleged the owners of Mediatrix and Blue Isle convinced more than 200 investors to let them handle more than \$129 million of their money, with \$74 million of that money fraudulently given to the Equiti entities between September 2016 and March 2019.

"Investors were informed, and therefore believed, that their money was being invested in lucrative forex trading," the complaint said. "In reality, however, the Mediatrix/Blue Isle principals were operating an excessive trading/Ponzi scheme through which they pocketed, diverted, or otherwise misappropriated a portion of the investors' monies, while funneling the remaining monies into trading that, unbeknownst to the investors, was excessive, costly, and losing in nature and was designed solely to maximize markups, commissions, and other undisclosed fees."

The investors accused Equiti of serving an essential role in the fraud scheme by executing Blue Isle's trades and providing the company credit, as well as providing the Mediatrix and Blue Isle owners access to the trading software used to generate fraudulent account statements and keep investors in the dark.

The Equiti firms did this "to enrich themselves," the investors said, as Blue Isle was Equiti Capital's "biggest customer."

The fraudulent transfer suit seeks a recovery worth more than \$111 million, one and a half times the \$74 million that the investors said were sent to the Equiti entities for "excessive forex trading."

Federal prosecutors have leveled criminal claims against the Mediatrix and Blue Isle principles. Mediatrix CEO Michael S. Young pled guilty in January 2024 to one count of making a false statement and is awaiting sentencing. Two other executives, Michael S. Stewart and Bryant E. Sewall, have pled not guilty to charges of wire fraud and conspiracy.

The SEC declined to comment Thursday. Representatives of the Blue Isle investors, the receivership and Equiti did not immediately respond to requests for comment.

The Blue Isle investors are represented by Michael R. MacPhail, Isaac T. Smith, Kyle R. Hosmer, David W. Porteous and James L. Volling of Faegre Drinker Biddle & Reath LLP

The SEC is represented in-house by Sharan Lieberman.

The Equiti entities are represented by Douglas W. Henkin of Dentons US LLP.

The receiver is represented by Mark B. Conlan, David N. Crapo and Michael A. Conforti of Gibbons PC.

The cases are U.S. Securities and Exchange Commission v. Mediatrrix Capital Inc. et al., case number 1:19-cv-02594, and The Receivership Estate of Blue Isle Markets Inc. and Blue Isle Markets Ltd. v. Equiti Capital UK Ltd. et al., case number 1:24-cv-00912, in the U.S. District Court for the District of Colorado.

--Editing by Covey Son.

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Judge Grants \$3.2M In Fees For Wawa Class Counsel

By **James Boyle**

Law360 (April 11, 2024, 4:44 PM EDT) -- There is no evidence of side agreements or collusion between attorneys representing a proposed class in a suit against Wawa Inc. and the convenience store's defense counsel, according to a Pennsylvania federal judge's order approving \$3.2 million in attorney fees following appellate court review.

The firms representing the consumers in a suit against Wawa over a 2019 data breach will receive a \$3.2 million fee award and allocate the funds according to the settlement agreement, U.S. District Judge Gene E.K. Pratter's order said. The sum includes \$1,000 payments to each of the 14 class representatives.

Judge Pratter issued a similar order in April 2022, but putative class member Theodore Frank, an attorney at Hamilton Lincoln Law Institute, objected to the fee award and appealed at the Third Circuit.

The Third Circuit vacated the order in November, directing Judge Pratter to review the fee award with "fresh guidance" on certain arrangements, including a "clear-sailing" agreement in which Wawa would not contest any fee petitions and a fee-reversion provision that was removed under Frank's objections before Judge Pratter signed off on the deal.

According to the provision, if the court awarded fees less than the agreed \$3.2 million, Wawa would receive the difference. The provision was replaced with instructions to split the difference equally among the gift cards that would be awarded to the putative consumer class.

Following additional review, Judge Pratter determined an explicit clear-sailing agreement never existed in the final negotiated fee agreement, and the fee-reversion clause was a de facto provision created by the parties' omission in the original agreement.

During their negotiations, managed by a mediator, neither the plaintiffs counsel nor the defense's attorneys considered the possibility that the court would not match their negotiated fee agreement. The lack of explicit instructions created the de facto clause to which Frank objected, Judge Pratter said a memo supporting the fee order.

The Third Circuit defines a clear-sailing agreement as an agreement by the defense to not contest a request for attorney fees up to an agreed amount, but no such language appears in the settlement documents negotiated with a third-party mediator, Judge Pratter said.

Judge Pratter noted that Frank never expressly accused the parties' attorneys of working together to benefit counsel at the expense of the class and also made clear that there is no evidence to support a collusion claim.

"The court cannot conclude that the tale of the fee reversion in this case represents anything other than human error that was diligently corrected through the good-faith participation of class counsel, defense counsel, and [Frank's] counsel in the final approval process," Judge Pratter said.

Frank's attorney, Adam Schulman of the Hamilton Lincoln Law Institute, told Law360 Pulse on Thursday in an email that he and his client are still "digesting" the opinion, but are likely to appeal.

"The court's analysis appears inconsistent with the Third Circuit's opinion vacating the initial fee order," Schulman said.

The clause Frank's objected to said Wawa would cooperate with class counsel in providing information while preparing the fee petition. That paragraph did not prevent Wawa from objecting to the final fee petition, Judge Pratter said. Wawa's decision to not object to the \$3.2 million attorney fees was strategic, not the result of a side deal between the attorneys, the order said.

Frank's is represented by himself and Adam E. Schulman of Hamilton Lincoln Law Institute.

The consumer class is represented by Shannon J. Carson and Sherrie R. Savett of Berger Montague PC, and Gerard A. Dever and Roberta D. Liebenberg of Fine Kaplan and Black RPC.

Wawa is represented by Ezra D. Church, Gregory T. Parks, Kristin M. Hadgis, Eric C. Kim and Terese M. Schireson of Morgan Lewis & Bockius LLP.

The case is In Re: Wawa Data Security Litigation, case number 2:19-cv-06019, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Drashti Mehta.

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Abbott Labs Gets Price Claims Tossed In Baby Formula MDL

By **Mike Curley**

Law360 (April 12, 2024, 6:08 PM EDT) -- An Illinois federal judge on Friday threw out a suit from parents alleging that Abbott Laboratories benefited from increased prices during a shortage of baby formula kicked off when one of its facilities was shut down, saying they haven't shown that the company's profits during that time were unjustly retained.

In the **order**, U.S. District Judge Matthew F. Kennelly dismissed a suit from Stephanie Sampsell, April James and Brittany Clark from the **multidistrict litigation** that sprung up after the U.S. Food and Drug Administration announced a wide recall of infant formula, specifically Abbott products, and said it would be investigating the company's Sturgis, Michigan, facilities, for contamination.

The investigation was sparked by reports of infant illnesses and deaths. The recall and resulting slowdown in production following the Sturgis facility's shutdown resulted in a formula shortage that lasted for months.

In their suit, the Sampsell plaintiffs claim they had to put in extra effort to find baby formula during that time, and when they did find the Abbott products they were seeking, the prices had climbed as a result of the shortage.

While Judge Kennelly found that the plaintiffs' need to pay more than the usual price was an injury in fact that gave them standing, and that the increase can be linked to Abbott's quality control issues, the FDA investigation and shutdown, he found that their claims fall short in pointing to a duty that Abbott breached.

According to the order, Sampsell's unjust enrichment theory is premised on the assumption that Abbott was obligated to maintain particular levels of production or otherwise ensure that the prices of its products remain stable, based on it holding a 40% share of the nation's production of powdered baby formula.

However, the complaint provides no basis from which the court can conclude that the size of a company's market share makes it obligated to continue producing a product at all, let alone maintaining its supply and prices, the judge wrote. Courts have declined to impose such a duty in cases involving drug shortages, he added.

If Abbott had any duty imposed on it related to the contamination at its facility, it was stopping the release and distribution of the tainted formula, which was achieved through the recall and shutdown, according to the order.

The judge further found that the plaintiffs' claims that there was 2.6% increase in the baby formula industry's profits are based on industry-wide figures, not specific to Abbott.

"Perhaps more importantly, even if profit margins increased, it's likely — given the alleged shortfall in supply — that overall sales revenues during the pertinent period were way down and thus that net profits (as opposed to the percentage profit margin) dropped during that period," Judge Kennelly wrote.

Representatives for the parties could not immediately be reached for comment Friday.

The Sampsell plaintiffs are represented by Ephraim Samuel Geisler of Aylstock Witkin Kreis & Overholtz PLLC.

Abbott is represented by James F. Hurst, Erin E. Cady and Michael A. Glick of Kirkland & Ellis LLP.

The case is Sampsell et al. v. Abbott Laboratories, case number 1:23-cv-14262, and the MDL is In re: Recalled Abbott Infant Formula Products Liability Litigation, case number 1:22-cv-04148, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Jonathan Capriel. Editing by Adam LoBelia.

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Del. Justices OK Denial Of Icahn-Illumina Midcase Appeal Bid

By **Leslie A. Pappas**

Law360 (April 11, 2024, 4:49 PM EDT) -- Billionaire investor Carl Icahn may not put his Chancery Court litigation against biotechnology company Illumina Inc.'s board on hold for a review of a decision that struck portions of the complaint that were based on confidential information, Delaware's Supreme Court said Thursday, upholding the lower court's rejection of the midcase appeal.

In a **five-page opinion**, Delaware Supreme Court Justice Karen L. Valihura agreed with Chancery Court Vice Chancellor Paul A. Fioravanti Jr. that there were no "exceptional circumstances" that called for an interlocutory appeal.

"Exceptional circumstances that would merit interlocutory review of the interlocutory rulings do not exist in this case," Justice Valihura wrote, "and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption and probable costs caused by an interlocutory appeal."

The Icahn-controlled conglomerate Icahn Enterprises LP and its two affiliates, Icahn Partners Master Fund LP and Matsumaura Fishworks LLC, sought the midcase appeal of two Chancery Court rulings: a **Jan. 16 letter ruling** granting a motion to strike, and a subsequent Feb. 19. denial of the Icahn entities' bid to reargue that motion.

Vice Chancellor Fioravanti **denied the request for an interlocutory review** in March.

The interlocutory bid grew out of a class and derivative complaint that the Icahn parties **filed** against current and former Illumina directors in October, accusing them of breaching their fiduciary duties in connection with the biotech company's decision to reacquire cancer-testing firm Grail Inc. for \$8 billion.

San Diego, California-headquartered Illumina, which develops tools and systems for genetic analysis, formed Grail in 2015 and then spun it off in 2017. In 2020, shortly after Grail went public, Illumina announced that it would reacquire its former subsidiary, sparking scrutiny from the Federal Trade Commission and European regulators.

The FTC **ordered** Illumina to unwind the reacquisition in April 2023. In December, Illumina **said it would divest** Grail after the Fifth Circuit largely upheld the FTC's findings.

Icahn, who has called the Grail reacquisition "ill-advised" and "frankly inexplicable," launched a proxy battle against Illumina in March 2023, proposing three new director candidates. One of his candidates — Andrew Teno of Icahn Capital LP — won a seat on the biotech's board.

Illumina filed its motion to strike in November, arguing that portions of the Chancery Court complaint were based on confidential information that Teno obtained after he became a board member in May 2023.

In granting the strike motion, Vice Chancellor Fioravanti said in his January letter ruling that "this court has broad power to protect confidential information and to formulate an appropriate remedy in the event confidential or privileged information is improperly interjected into litigation."

In his February denial of the Icahn parties' reargument motion, the vice chancellor said the court had not misapprehended the law, overlooked any principle or facts, or misapplied any standard of review.

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

Icahn Partners LP, Icahn Partners Master Fund LP and Matsumura Fishworks LLC are represented by C. Barr Flinn and M. Paige Valeski of Young Conaway Stargatt & Taylor LLP, and Michael A. Hanin, Christian T. Becker, Andrew L. Schwartz and Andrew M. Meerwarth of Kasowitz Benson Torres LLP.

Directors named in the suit are represented by A. Thompson Bayliss, Eric A. Veres and Michael T. Manuel of Abrams & Bayliss LLP, and William Savitt, Jonathan M. Moses, Lauren M. Kofke and Emily R. Barreca of Wachtell Lipton Rosen & Katz.

Illumina Inc. is represented by Peter J. Walsh Jr., Michael A. Pittenger and Justin T. Hymes of Potter Anderson & Corroon LLP, and Kevin J. Orsini and Brittany L. Sukiennik of Cravath Swaine & Moore LLP.

The case is Icahn Partners LP et al. v. Francis deSouza et al., case number 2023-1045, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera and Hailey Konnath. Editing by Melissa Treolo.

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Visa Beats Some Merchant Claims In Antitrust MDL

By **Katryna Perera**

Law360 (April 11, 2024, 7:55 PM EDT) -- A New York federal judge has trimmed claims lodged by Home Depot and other merchants against Visa and several banks in sprawling multidistrict antitrust litigation dating back to 2005 over network rules forcing merchants to accept the companies' cards.

U.S. District Judge Margo K. Brodie issued an order Wednesday saying the direct action plaintiffs, Home Depot and a group called the 7-Eleven plaintiffs, have adequately pled their debit monopolization and attempted monopolization claims. However, Judge Brodie granted summary judgment to Visa and the banks on the suit's conspiracy to monopolize claim.

The direct action plaintiffs are also members of a class that reached a **\$30 billion deal last month** with Visa and Mastercard. Mastercard's motions for summary judgment against the direct action plaintiffs were addressed in January.

Visa and the banks had argued that the merchants hadn't raised a triable question of fact on the debit monopolization claim. The merchants allege that Visa "monopolized the market for general purpose debit card transactions by possessing monopoly power and engaging in unlawful exclusionary practices to maintain that monopoly power."

Judge Brodie disagreed with the defendants, pointing to the pled evidence of Visa's sustained market share, high barriers to entry for competitors, supracompetitive prices and exclusivity deals. The judge said all of these facts, along with other alleged conduct, are sufficient evidence of an anti-competitive effect.

"A jury could reasonably find that Visa's strategy successfully excluded competition, because Visa maintained a market share in signature debit greater than 70%, and grew its PIN debit share from roughly 10% to 40% between 2001," the order said.

Judge Brodie also found that evidence asserted by the merchants "permits the reasonable inference that Visa had the 'specific intent to monopolize.'"

Based on the evidence, a reasonable fact-finder could conclude that Visa pushed certain policies "with the specific intent to prevent merchants from routing transactions through competitor PIN debit networks, and that 'this conduct was not motivated by a valid business justification,'" the order said.

On the conspiracy to monopolize claim, though, the judge said that although there is some evidence of Visa's specific intent to obtain or maintain a monopoly in debit transactions, it's not enough to give rise to the inference that the banks "had the specific intent to facilitate Visa's acquisition or maintenance of a monopoly over debit card transactions."

Judge Brodie rejected the merchants' theory that Visa's top brass approved the alleged anti-competitive strategies and policies specifically to maintain the company's dominance in debit and supracompetitive pricing, saying the evidence was ambiguous.

She also granted summary judgment to the defendants on debit and credit monopolization claims asserted by a class of merchants seeking equitable relief. On debit claims, the judge said there was insufficient evidence that the defendants' conduct was exclusionary, and the class has not sufficiently explained how the conduct they allege could lead to a monopoly.

On the credit monopolization claim, she said the plaintiffs "allege a one-sided theory of monopoly

power as to merchants only that is legally flawed."

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

Wednesday's decision arrives a few weeks after Visa and Mastercard reached their deal with another group of merchants that will reduce fees by \$30 billion over the next several years, while eliminating restrictions on steering customers to cheaper payment options. The pact follows the Second Circuit's decision last year to uphold a **\$5.6 billion monetary settlement**.

In the recent settlement, Visa and Mastercard agreed to roll back credit card processing fees and remove restrictions that prevent merchants from adjusting prices and discounts based on the cost of accepting different credit cards.

Several **other companies**, including Amazon and Lowe's, have **cut their own deals** with the credit companies as the case has dragged on.

7-Eleven, Home Depot and Target are represented by Vorys Sater Seymour and Pease LLP, Quinn Emanuel Urquhart & Sullivan LLP, Bondurant Mixson & Elmore LLP and Constantine Cannon LLP.

The equitable-relief plaintiffs are represented by Hilliard Shadowen LLP, Grant & Eisenhofer PA, Freed Kanner London & Millen LLC and Nussbaum Law Group PC.

Visa is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Matthew Perlman. Editing by Brian Baresch.

Correction: A previous version of this story incorrectly characterized certain plaintiffs' involvement in a class action settlement. The error has been corrected.



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Tyco Reaches \$750M PFAS Deal In Foam Co. MDL

By **Juan-Carlos Rodriguez**

Law360 (April 12, 2024, 7:09 PM EDT) -- Johnson Controls International PLC subsidiary Tyco Fire Products LP on Friday agreed to pay \$750 million to settle public water systems' federal claims that some "forever chemicals" they detected in their supplies came from firefighting foam it made.

The deal resolves claims against Tyco and Chemguard Inc., also a Johnson Controls unit, related to contamination from their aqueous film-forming foam, or AFFF, products that contain per- and polyfluoroalkyl substances, or PFAS, also known as forever chemicals because of their longevity in the human body and the environment.

Two other major settlements have already been reached, with 3M Co. **settling for \$12.5 billion** and DuPont, Chemours and Corteva **settling for \$1.2 billion**.

The lead class counsel for the multidistrict litigation — Michael A. London of Douglas & London PC, Scott Summy of Baron & Budd PC, Paul J. Napoli of Napoli Shkolnik PLLC and Joe Rice of Motley Rice LLC — said Friday the settlement will help create cleaner drinking water across the country.

"The current condition of our public water systems cries out for immediate attention," the attorneys said in a statement. "It is our belief that this infusion of funds, in addition to the previously approved settlements, will provide much needed resources swiftly for our public water providers. Through collaboration with the defendant, we have achieved a critical next step in the ongoing pursuit of cleaner drinking water across the country."

Trent Perrotto, vice president for external communications at Johnson Controls, also spoke positively of the deal.

"We are pleased to have reached this broad settlement with a nationwide class of public water systems," Perrotto said in a statement.

The class of public water systems included in the settlement broadly includes those that have detected PFAS in their drinking water sources as of May 15 this year, with a variety of exclusions.

And the deal does not affect the other categories of cases that remain at issue in the AFFF litigation, such as personal injury, property damage, other types of class actions, claims brought by state or territory attorneys general, or other types of damages alleged to be related to the historic use of AFFF manufactured and sold by Tyco and Chemguard, according to an 8-K filing released by Johnson Controls on Friday.

The company said in its filing that it has "a significant amount" of insurance through a number of insurers and that "a substantial portion" of the settlement payment would be covered by those policies, although it said it wasn't sure exactly how much.

The MDL has more than 10,000 cases concerning damages due to PFAS.

There are five categories of claims: public water provider plaintiffs seeking drinking water testing and remediation costs, individuals caused harm from PFAS exposure, those seeking medical monitoring, various types of property damage cases related to contamination to property and related remediation and cleanup costs, and claims on behalf of states for harm to natural resources.

The U.S. Environmental Protection Agency on Wednesday announced **the final version** of its first-

ever regulatory limits on forever chemicals in drinking water, a move the EPA said will be accompanied by nearly \$1 billion in new funding for implementation.

The lead class counsel for the MDL are Michael A. London of Douglas & London PC, Scott Summy of Baron & Budd PC, Paul J. Napoli of Napoli Shkolnik PLLC and Joe Rice of Motley Rice LLC.

Tyco and Chemguard are represented by David E. Dukes and Amanda S. Kitts of Nelson Mullins Riley & Scarborough LLP and Joseph G. Petrosinelli, Liam J. Montgomery, Jessica L. Pahl and Jean Ralph Fleurmont of Williams & Connolly LLP.

The multidistrict litigation is In Re: Aqueous Film-Forming Foams Products Liability Litigation, case number 2:18-mn-02873, in the U.S. District Court for the District of South Carolina.

--Editing by Brian Baresch.

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Gerber, Others Must Face Calif. MDL Over Baby Food Toxins

By **Lauren Berg**

Law360 (April 11, 2024, 11:00 PM EDT) -- A group of baby food manufacturers, including Gerber Products Co., Hain Celestial Group Inc. and Beech-Nut Nutrition Co., must face consolidated lawsuits alleging that heavy metals in their products cause autism spectrum disorder and other conditions in California federal court, the Judicial Panel on Multidistrict Litigation ruled Thursday.

In a four-page **transfer order**, the panel granted a request by plaintiffs in California and Washington to consolidate the sprawling litigation, ordering cases filed in Arizona, California, Missouri, Nevada and Washington to be centralized in San Francisco federal court before U.S. District Judge Jacqueline Scott Corley.

The panel said the Northern District of California is an appropriate transferee district, noting that several actions are already pending there, and it "provides a convenient and accessible location for this nationwide litigation." Transfer to that district will also facilitate coordination with ongoing baby food litigation in California state court, the order stated.

The lawsuits stem from a **congressional report** issued three years ago that found that seven baby food manufacturers had allowed high levels of arsenic, lead, cadmium and mercury to make it into finished foods, and the current litigation blames autism spectrum disorder, attention-deficit/hyperactivity disorder and other conditions on the heavy metals.

While plaintiffs wanted the litigation centralized — suggesting the District of Nevada, the Northern or Central Districts of California, the Eastern District of Louisiana or the Western District of Missouri — the baby food makers **fought against consolidation**. The companies argue the JPML should follow its own example from **three years ago**, when it decided the companies' marketing and manufacturing were too different to warrant consolidation.

The manufacturers, who maintain there are no scientific studies supporting the claim that heavy metals lead to ASD, ADHD or other such conditions, argue that many of the same factors that led the JPML to reject consolidation before still apply. They say centralization won't prompt efficient conduct of the litigation because pre-suit discovery is already 98% completed for them, and there are already agreements to share evidence between the suits.

The companies further argue that the plaintiffs don't point to any specific product or products, but instead base their claims on trace levels of heavy metals that may be found in dozens of different formulas from seven different companies' products.

But in its order Thursday, the JPML determined that the cases identified for centralization involve common questions of fact regarding exposure to elevated quantities of toxic heavy metals and that the Northern District of California will be convenient for the parties and witnesses.

"All actions share common issues of fact regarding the presence of heavy metals in defendants' products, their knowledge of and testing for heavy metals in their products, whether the presence of these heavy metals could have caused plaintiffs' alleged injuries, and whether defendants adequately warned of the presence of heavy metals in their products," the panel said.

"Plaintiffs allege that defendants to date have presented a unified defense of these actions, including overlapping defenses and motion practice," it added. "Centralization will eliminate duplicative

discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary."

Acknowledging its past decision not to centralize economic loss class actions involving similar claims over baby foods, the panel noted that most of those suits named just one defendant, and most were filed in or were transferred to the district where the defendant was headquartered.

In this case, all the actions present personal injury claims and target multiple manufacturers, according to the motion, which states there are now 25 related actions pending in 11 districts with multiple different plaintiffs' attorneys.

"We do not discount the case management-related complexities that a multi-product and multi-defendant MDL such as this may entail," the panel said. "But in the circumstances presented here, centralization ... is the best course for all the actions."

Plaintiffs' attorney R. Brent Wisner of Wisner Baum LLP applauded the panel's decision, saying in a statement Thursday that the Northern District of California is the correct venue for the litigation.

"The next step is to get this MDL organized and get the new judge up to speed on the two years of litigation we have already done," Wisner said. "This mass tort is going to end up being one of the most important litigations in recent history."

"Baby food must be safe, and these defendants not only know that some of their products aren't, but they refused to be honest with parents about it," he added. "It's difficult to fathom the scope of brain injury that has been inflicted on babies in this country. This MDL is the first step in taking account of the full scope of that damage and, hopefully, finding some justice for the children whose lives have been forever disadvantaged."

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

The plaintiffs who sought consolidation are represented by R. Brent Wisner and Pedram Esfandiary of Wisner Baum LLP.

Beech-Nut is represented by Livia M. Kiser of King & Spalding LLP.

Hain Celestial is represented by Michael X. Imbroscio of Covington & Burling LLP.

Gerber is represented by Bryan A. Merryman of White & Case LLP.

The case is In Re: Baby Food Products Liability Litigation, MDL number 3101, in the U.S. District Court for the Northern District of California.

--Additional reporting by Mike Curley and Emily Field. Editing by Kristen Becker.



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Odebrecht Exec Details Bribes To Ex-Ecuador Comptroller

By **Carolina Bolado**

Law360, Miami (April 11, 2024, 6:22 PM EDT) -- The former director of Odebrecht SA's operations in Ecuador told jurors Thursday that he paid millions in bribes to "Miami" — a code name for Ecuador's former comptroller — related to various infrastructure projects the Brazilian conglomerate was building in the country.

Former Odebrecht executive Geraldo De Souza took the stand in Miami Thursday, explaining how the company would over-invoice a third-party contractor, who would return the overcharges to the company in cash that would then be funneled to public officials, including ex-comptroller Carlos Ramón Pólit Faggioni.

De Souza testified that he was the one responsible for receiving the cash from the contractor, and detailed how he would remove the wrappers around the bills so the bank that issued the cash could not be identified. He said he would then wrap the money in rubber bands and keep it in a safe in the office before distributing it once he was told where it needed to go.

Jurors saw spreadsheets that were prepared by De Souza detailing the amounts paid, the construction projects associated with the bribes, and the code name for the public official it was sent to. Among the projects for which Odebrecht allegedly paid bribes to Pólit were an oil refinery and the Daule-Vinces Transbasin System, which is a project to divert water from the Daule River to control its flow and water levels.

Pólit is facing trial on conspiracy charges accusing him of concealing bribes through a series of intermediaries and spending the illicit proceeds on expensive South Florida real estate. Prosecutors say Pólit accepted bribes between 2010 and 2016, while he was Ecuador's comptroller.

De Souza took the stand after the all-day testimony on Wednesday of his superior at Odebrecht, José Conceição Santos, who told jurors that he paid about \$12 million in bribes to Pólit.

On cross-examination Thursday, Pólit's attorney Howard Srebnick grilled De Souza on his lack of a personal relationship with Pólit. De Souza admitted that he had never met Pólit, and he just knew that the code name "Miami" referred to Pólit because Santos had told him as much.

"So you're relying on the truthfulness of José Santos when you implicated Carlos Pólit today?" Srebnick asked, to which De Souza responded in the affirmative.

Srebnick noted that Santos had cut a deal with federal prosecutors that allowed him to avoid prosecution in exchange for his help.

Srebnick also questioned De Souza about two wire transfers made in July 2010 totaling \$600,000 under the code name "Miami" that were sent to a company owned by attorney Carlos Pareja. De Souza said he did not know about these transfers.

Santos told jurors Wednesday that Pareja's company was used to pay a former legal secretary of ex-President Rafael Correa and Petroecuador officials.

In **opening statements** Tuesday, prosecutor Michael Berger told the jury that the bribe money was routed from Odebrecht to several holding accounts in Panama before making its way to a company

named Venture Overseas. The company was registered in the name of the father-in-law of Pólit's son, John Pólit, but it was the son who controlled the company from Miami, according to Berger.

John Pólit has not been charged with any crimes.

Berger said that as Ecuador's comptroller, Pólit had the power to investigate public financial deals and fine companies. One such company was Odebrecht, which was hit with more than \$100 million in sanctions after the company built a defective hydroelectric plant, known as the San Francisco project.

Santos, who worked for Odebrecht for 38 years, testified that he knew Pólit had the power to fix the fines. During cross-examination, Srebnick argued that after Santos was caught, he cut nonprosecution deals with the U.S., Ecuador and Brazil in exchange for testifying. Srebnick called Santos an unindicted co-conspirator who has "dedicated his life to committing crimes."

Santos testified that he has yet to serve any jail time, but that the deal he made with Brazil included two years of house arrest.

Olivio Rodrigues, who worked for Odebrecht's Division of Structured Operations, also took the stand Thursday to tell jurors how he set up shell companies in various foreign countries and opened bank accounts for these companies through which money for bribes was funneled. The Division of Structured Operations was primarily dedicated to disbursing bribes to foreign officials, according to Rodrigues.

Rodrigues said he created more than 100 companies, none of which served any real purpose other than to shield Odebrecht from being linked to the bribes.

Rodrigues said he pled guilty to money laundering charges in Brazil, where he served nine months in prison followed by three years under house arrest. Rodrigues also agreed to cooperate with the U.S. under a nonprosecution agreement.

Pólit, who fled to the U.S. in 2018 and has not returned to Ecuador, was sentenced in December 2020 to six years in prison in Ecuador and ordered to pay \$40 million in reparations.

The trial is expected to last three weeks.

Odebrecht and affiliate Braskem SA were the targets of one of the largest corruption cases in Latin America that led to a record **\$3.6 billion foreign bribery settlement** with U.S., Brazilian and Swiss authorities in December 2016. U.S. prosecutors said Odebrecht paid around \$788 million in bribes to officials around the globe beginning in 2001 via its Division of Structured Operations.

The federal government is represented by Alexander J. Kramer and Jill Simon of the U.S. Department of Justice's Foreign Corrupt Practices Act Unit and Michael N. Berger of the U.S. Attorney's Office for the Southern District of Florida.

Pólit is represented by Howard M. Srebnick and Jacqueline Perczek of Black Srebnick PA and Fernando L. Tamayo of Coffey Burlington.

The case is U.S. v. Carlos Ramon Pólit Faggioni, case number 1:22-cr-20114, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by David Minsky. Editing by Jay Jackson Jr.



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Trump Media Attys Flag Co-Founders' Del. Suit Expansion

By **Jeff Montgomery**

Law360 (April 12, 2024, 4:21 PM EDT) -- Attorneys for Trump Media & Technology Group and its insiders have objected to what they say is an attempt by two co-founders to secure fast-tracking of an expanded but still-sealed Chancery Court lawsuit initially focused on share-dilution claims against company insiders.

Challenged was an amended version of a suit filed by United Atlantic Ventures LLC, which held a pre-merger, 8.6% equity stake in TMTG — the company that owns former President Donald Trump's Truth Social. The original suit, filed in March, alleged UAV and its principals were wrongly diluted by a massive increase in TMTG's stock in January, diminishing UAV's holdings from 8.6% to 1%.

The sealed, second-amended lawsuit filed Wednesday was described by Delaware Vice Chancellor Sam Glasscock III in a court transcript on April 9 as changing, "fundamentally, the nature of this action from one that sought injunctive relief in way of a merger that was imminent to an action for breach of fiduciary duty on various grounds."

Four additional insiders, including TMTG board members and Trump allies Linda McMahon and Robert Lighthizer, are also parties to the suit. McMahon was the Small Business Administration's director under Trump, and Lighthizer was Trump's U.S. trade representative.

Also expected to be part of the second amended complaint are contempt and sanctions motions targeting TMTG's decision to launch a suit in Florida state court against United Atlantic Ventures LLC directors Wes Moss and Andrew Litinsky after the Chancery Court case was well underway. Both men are former contestants on Trump's "The Apprentice" television series.

In a letter to Vice Chancellor Morgan T. Zurn — who this week took on the TMTG case as Vice Chancellor Glasscock approaches retirement — Theodore A. Kittila of Halloran Farkas + Kittila LLP, counsel to those initially sued, said the second amended complaint seeks an anti-suit injunction against the Trump camp and the lifting of a share lockup approved by stockholders of the pre-merger company.

"While plaintiff correctly notes that the case is currently expedited, that expedition was granted prior to plaintiff completely changing the basis for its claims" in the original suit, Kittila wrote. He noted that the new claims and defendants could lead to a "realignment" of counsel and law firm assignments.

"New counsel should not be hamstrung by plaintiff bootstrapping the expedition order to what is a totally new complaint," Kittila wrote, noting Vice Chancellor Glasscock had described the new version as departing "significantly from the first amended complaint."

Vice Chancellor Glasscock was quoted in a transcript of a hearing on April 9 as saying the "new counts and relief sought are related to the founders' alleged discovery that the defendants were using the Florida litigation to frustrate the order of this court regarding their equity and the faithless imposition of retaliatory stock restrictions by the company."

The Florida suit referred to by the vice chancellor was filed on March 24, two days after Digital World shareholders approved the take-public deal between blank-check company Digital World Acquisition Corp. and TMTG. In it, TMTG sued UAV, Moss and Litinsky, accusing them of multiple breaches of

fiduciary duty leading up to the deal and seeking to claw back the value of their TMTG shares.

In the April 9 transcript, Vice Chancellor Glasscock said he found "sufficient relation to the first amended complaint to allow the amendment here." He added that if an anti-suit injunction sought in the revised action is also approved, "I suspect that the [Trump-aligned] defendants may bring some of the allegations of breach of duty from the Sarasota action into this court."

Kittila said parties for those named in the UAV suit would contest expedition of the suit and that UAV was seeking an emergency hearing overbroad discovery.

"First, it is clear that plaintiff has wanted to take the depositions of former President Trump, his son [Don Jr.] and others in this case from the outset," Kittila wrote.

"However, the basis for taking such discovery is premised on plaintiff's placeholder preliminary injunction motion. These claims, if not outright dismissed following briefing on a motion to dismiss are, to reiterate, remediable through a damages award," Kittila wrote.

Separately on Thursday, Vice Chancellor Lori W. Will issued an order to maintain the status quo at ARC Global Investments II LLC, the sponsor of special-purpose acquisition company Digital World Acquisition Corp. that took Truth Social public.

The investors behind the SPAC sued in March, seeking a Chancery Court declaration that they had validly removed its managing member, Patrick Orlando, from his post and that he has no authority to act on their behalf.

The court's status quo declared that Orlando shall be the sole manager and/or managing member of ARC with full authority to act on ARC's behalf and that plaintiffs, including Gregg Alper, shall not attempt to act on behalf of ARC. The order also lays out rules about the transfer of Trump Media & Technology Group Corp. securities issued to ARC.

In the UAV litigation, UAV is represented by Richard I.G. Jones Jr., David B. Anthony and Harry W. Shenton IV of Berger McDermott LLP and Christopher Clark and Benjamin Dozier of Clark Smith Villazor LLP.

TMTG is represented by Theodore A. Kittila and William E. Green Jr. of Halloran Farkas & Kittila LLP.

The case is United Atlantic Ventures LLC v. Trump Media & Technology Group Corp. et al., case number No 2024-0184, in the Court of Chancery of the State of Delaware.

In the ARC Global Investments II LLC case, Aaron Leon and others named in the suit are represented by Thomas Eubler, Brian Demott and Adam J. Waskie of McCollom D'Emilio Smith Uebler LLC.

Patrick Orlando and nominal defendant ARC Global Investments II LLC are represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Rae Ra of Richards Layton & Finger PA.

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

--Additional reporting by Leslie Pappas and Tom Zanki. Editing by Philip Shea.



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Crypto-Friendly Atty Reveals Backers In Bid To Unseat Warren

By Aislinn Keely

Law360 (April 12, 2024, 9:14 PM EDT) -- The cryptocurrency-boosting attorney running in Massachusetts to unseat crypto critic Sen. Elizabeth Warren has garnered the support of notable digital asset industry leaders, according to his quarterly report to the Federal Election Commission.

Republican John Deaton reported more than \$1.3 million in receipts, consisting of \$1 million he loaned to his campaign and \$360,000 raised from others, including Gemini Trust Co. LLC co-founders Tyler and Cameron Winklevoss, Skybridge Capital's Anthony Scaramucci and executives of Ripple Labs Inc.

Warren, a Democrat, has repeatedly raised concerns about crypto's use in illicit finance and supports legislation that would **impose anti-money laundering standards** that crypto advocates have said would be unworkable for blockchain infrastructure.

She recently **reiterated the need** for strong anti-money laundering protections during a Senate Banking Committee hearing, saying digital assets are used by terrorist groups, drug traffickers, distributors of child sexual abuse materials and beyond.

"Name your bad guy and crypto is the way they can move money around," she said.

Warren reported \$1.1 million in receipts to the FEC for the first quarter, all of it coming from contributions and none from loans.

Deaton, for his part, has risen to prominence for his support for crypto and commentary about federal agency actions against cryptocurrency companies, particularly the U.S. Securities and Exchange Commission's landmark **registration suit** against blockchain company Ripple Labs. Deaton represented holders of the firm's XRP token as amicus counsel in the case.

Among his larger donors are Ripple's executives. Chief Legal Officer Stuart Alderoty made the maximum contribution of \$3,300 to the primary campaign, and CEO Brad Garlinghouse and Chairman Chris Larsen each made the maximum contribution of \$6,600 split between the primary and the general election. Ripple declined to comment on Friday.

Ripple-focused YouTuber Bradley Kimes also donated the maximum \$3,300 to the primary campaign.

The founders of crypto exchange Gemini, Tyler and Cameron Winklevoss, also each donated \$6,600 to the Deaton campaign, listing their affiliation as Winklevoss Capital Management.

The Winklevosses and Ripple have been spending on crypto-friendly political candidates in this election cycle, backing the connected political action committees Fairshake, Protect Progress and Defend American Jobs.

Charles Hoskinson, co-founder of blockchain networks Ethereum and Cardano, donated \$3,300 for the primary, as did Jameson Lopp, co-founder and chief technology officer of self-custody crypto firm Casa.

Anthony Scaramucci, owner of hedge fund Skybridge Capital and former White House communications director under the Trump administration, donated \$6,600.

Eleven attorneys who said they work as in-house counsel, work at small law firms or are self-employed contributed to Deaton's campaign, totaling about \$7,000.

Deaton moved to Massachusetts this year from Rhode Island to challenge Warren. In the lead-up to announcing his campaign, he made posts online criticizing Warren and her views on crypto. One said, "I'm not suggesting I would win, but how I would love to confront her."

Deaton's campaign manager, Michael Gorecki, who was New Hampshire state director for Florida Gov. Ron Desantis' presidential campaign, told Law360 in a statement Deaton's camp is pleased with the turnout thus far.

Warren's office did not immediately respond to a request for comment on Friday.

--Editing by Brian Baresch.

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