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Bloomberg Law
April 15, 2024, 1:56 PM PDT
Roberts SCOTUS Advisor Pans Public Disclosure of Lawsuit Funding
By Emily R. Siegel

- Betting on lawsuits has grown to a \$15.2 billion industry
- Some states and federal courts require disclosures

Bloomberg Law News 2024-04-15T18:33:5400496968-04:00
Roberts SCOTUS Advisor Pans Public Disclosure of Lawsuit Funding

By Emily R. Siegel 2024-04-15T16:56:20000-04:00
Betting on lawsuits has grown to a \$15.2 billion industry
Some states and federal courts require disclosures

The federal judge that serves as a top advisor to Chief Justice John Roberts doesn't think courts should require outside funding behind lawsuits to be made public.

The biggest concern for courts is whether litigation funders are effectively taking over control of the cases in which they invest, Judge Robert M. Dow Jr. said Monday. Those concerns in most cases could likely be addressed by disclosing litigation finance agreements privately to judges and other parties involved in lawsuits.

"As long as the funder doesn't have control, I don't think it's gonna be a major issue for judges," Dow said, speaking at a conference in New York. Dow relinquished his seat on the federal district court in Chicago after being tapped in 2022 to serve as counselor to US Supreme Court Chief Justice John Roberts.

The \$15.2 billion litigation finance industry, in which investors fund lawsuits in exchange for portions of settlements and verdicts, has come under scrutiny from some judges, legislators, and the US Chamber of Commerce in recent years.

Some states and federal courts require parties to disclose outside funding. Efforts to require disclosures across the federal judiciary have so far stalled.

Dow considered the topic when he was part of a committee reviewing federal court rules. He said disclosures could give parties that don't use outside funding unfair insight into their opponents' strategies.

"The concern I had when we were looking at this at the rules committee was public disclosure of too much really gets into litigation strategy," he said. "That's really not fair to give one side the other side's litigation strategy unless it's mutual."

Dow was speaking at a conference a conference hosted by the International Legal Finance Association, a leading litigation funding industry group.

He was joined on a panel by former Miami federal judge Ursula Ungaro and Sam Sheldon, an ex-magistrate in federal court in Texas. Both are now partners at prominent litigation firms—Ungaro at Boies Schiller Flexner and Sheldon at **Robbins Geller Rudman & Dow**—that use outside funding in some cases.

"I'm still struggling with the idea that any of this should be disclosed," said Ungaro. "There are all kinds of things that go on in the world that have some influences on lawyers and clients and judge's cases, to think that disclosure is going to solve that problem is nonsense."

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Class Action
April 16, 2024, 6:49 AM PDT
Attorneys' Fees for Merger Disclosures to Get Objector's Attack
By Martina Barash
Documents

- Court Opinion
- 7th Cir. Docket

Bloomberg Law News 2024-04-16T13:07:35247987297-04:00
Attorneys' Fees for Merger Disclosures to Get Objector's Attack

By Martina Barash 2024-04-16T09:49:12000-04:00

Ted Frank, a frequent objector in class actions, may participate in two largely resolved suits for additional disclosures in drugmaker Akorn Inc.'s proxy documents for a merger with Fresenius Kabi AG so that he can seek the return of attorneys' fees.

Participation by Frank, an Akorn shareholder, is appropriate "since class counsel and Akorn are looking out for their own interests rather than those of the class," the US Court of Appeals for the Seventh Circuit said Monday.

Frank will be able to ask the lower court, the US District Court for the Northern District of Illinois, for sanctions or other remedies, the Seventh Circuit said.

The case is Alcarez v. Akorn, Inc. , N.D. Ill., No. 18-2220, 4/15/24 .

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Securities Law News

April 15, 2024, 11:36 AM PDT

Adidas Snatches SCOTUS Securities Decision for Same-Day Brief

By Martina Barash

Bloomberg Law News 2024-04-16T09:53:30210701142-04:00

Adidas Snatches SCOTUS Securities Decision for Same-Day Brief

By Martina Barash 2024-04-15T14:36:26000-04:00

A US Supreme Court decision disallowing liability to shareholders for “pure omissions” of adverse business trends in an SEC filing is gaining traction, with Adidas AG citing it in a brief seeking dismissal just hours after it was issued.

The filing comes in a securities case against Adidas in the US District Court for the District of Oregon over its partnership with controversial rapper and designer Kanye West, known as Ye. The lead investor “relies primarily on a purported duty to disclose under European Union disclosure guidelines—a theory that is entirely foreclosed by the Supreme Court’s decision” in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, the footwear and apparel maker said April 12.

- That’s one basis on which the proposed class suit should be dismissed, Adidas told the district court
- The investors may file a brief responding to that argument, Judge Karin J. Immergut said the same day
- Meanwhile, Amgen Inc. also pointed to the decision Monday in a suit, like *Macquarie*, over disclosures under the Securities and Exchange Commission’s Regulation S-K

The Rosen Law Firm PA is lead counsel for the investors. Markowitz Herbold PC and Debevoise & Plimpton LLP represent Adidas.

The case is HRSA-ILA Funds v. Adidas AG , D. Or., No. 3:23-cv-00629, brief 4/12/24 .

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/04/i-still-think-my-disclosure-advice-to-clients-is-the-same-after-macquarie.html

Monday, April 15, 2024

I Still Think My Disclosure Advice to Clients is the Same After Macquarie

By joanheminway

I appreciate Ann's super helpful post on omissions liability after the U.S. Supreme Court's decision in *Macquarie Infrastructure Corp. et al. v. Moab Partners, L. P., et al.* The hair splitting in that opinion is, in my view, dubious at best. The Court's creation of a legally significant concept of "pure omissions" in a public company disclosure context is doctrinally counterfactual. The omission to state a fact required to be disclosed under a mandatory disclosure rule like Item 303 of Regulation S-K necessarily occurs in a veritable river of disclosures in SEC filings and more generally and has the potential of making those disclosures misleading. If material, such an omission should be actionable as deceptive or manipulative conduct under Section 10(b) of and Rule 10b-5 under the Securities Exchange Act of 1934, as amended. Period.

Of course. civil liability would require proof of all elements of the claim, including (even for public enforcement officials) the requisite state of mind or scienter. Private class action plaintiffs also would have heightened pleading burdens. And a criminal prosecution can only be sustained if the predicate conduct is willful, as provided in Section 32(a) of the Exchange Act.

The point is that there is no such thing as a "pure omission." Investors logically rely on the interplay between and among public statements made in filings and elsewhere. If X exists for Public Company A, and Public Company A is required to disclose X in a public filing but does not do so, investors will view and assess all of the relevant public information about Public Company A assuming X does not exist for Public Company A. If the omission makes existing disclosures misleading, is material, is made with the action-appropriate state of mind, and deceives or manipulates, the basis for a Rule 10b-5 cause of action against Public Company A plainly exists based on the language of Section 10(b) and Rule 10b-5. Back in January, when I first wrote about *Macquarie* and an amicus brief I coauthored for the case (which you can find here), I stated as much. It seems Ann agrees when she says that "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." (Her further analysis follows.)

As Ann's post notes, much remains to be seen and said about the impact of *Macquarie*, and the Court has signaled that the true wisdom we can gain from its opinion in *Macquarie* may be constrained to actions brought under Rule 10b-5(b) and to certain factual contexts. As a result, I have determined it is still appropriate--and wise--to caution public company clients that their failure to comply with mandatory disclosure requirements may make them subject to, among other things, Section 10(b)/Rule 10b-5 litigation. One should, of course, note (among other things) that the omission would have to be material, make other disclosed facts misleading, and be made recklessly or willfully in order for liability to attach.

Do you disagree? Do you believe there are "pure omissions" in a public company disclosure context? Let me know.

Justices limit securities liability for omission of material facts

[Sb scotusblog.com/2024/04/justices-limit-securities-liability-for-omission-of-material-facts/](https://www.scotusblog.com/2024/04/justices-limit-securities-liability-for-omission-of-material-facts/)

April 16, 2024

ARGUMENT ANALYSIS



By Ronald Mann
on Apr 16, 2024 at 10:19 am



As securities cases go, *Macquarie Infrastructure Corp. v. Moab Partners* is a simple one. The case involves Rule 10b-5 of the Securities and Exchange Commission. Among other things, that rule creates a private cause of action whenever a company omits material facts in connection with a securities transaction, if that omission would render any “statements made” by the company misleading.

The issue in the case is what to do about an omission that does not make anything that the company has said misleading. Here, for example, the company (Macquarie Infrastructure) had an obligation under a different SEC regulation to disclose material information about the company in its periodic filings with the SEC. Specifically, one of Maquarie’s principal assets is storage terminals for fuel oil, and a United Nations rule related to climate change is phasing out fuel oil with a high-sulfur content, for which some of those terminals were designed. Because the other SEC rule (Item 303 of the SEC’s Regulation S-K) required the firm to disclose material information, investors (including Moab partners) sued Macquarie arguing that its failure to disclose information required by Item 303 violated Rule 10b-5. The lower court agreed, but Justice Sonia Sotomayor’s succinct opinion for a unanimous court disagreed.

Sotomayor starts by explaining that Rule 10b-5 “accomplishes two things.” First, “[i]t prohibits ... false statements or lies,” something not at issue here. Second, “[i]t also prohibits omitting a material fact necessary ‘to make statements made ... not misleading.’” Her analysis turns

on the distinction between a “pure omission” and a “half-truth.” For Sotomayor, a pure omission is “when a speaker says nothing, in circumstances that do not give any particular meaning to that silence.” By contrast, quoting an earlier decision on the topic, she explains that “[h]alf-truths ... are ‘representations that state the truth only so far as it goes, while omitting critical qualifying information.’” Trying to bring the distinction down to earth, she summarizes: “[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 then explains that Rule 10b-5 “does not proscribe pure omissions,” because it only “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).” Parsing the rule, she points out that “by its plain text, the Rule requires identifying affirmative assertions (i.e., ‘statements made’) before determining if other facts are needed to make those statements ‘not misleading.’” Looking more broadly, she observes that other provisions of the securities laws (Section 11 of the Securities Act in particular) do proscribe pure omissions, pointing to that section’s prohibition of any registration statement that “omit[s] to state a material fact required to be stated therein.” For Sotomayor the absence of any “similar language in ... Rule 10b-5 ... is telling.” Accordingly, she concludes, “[p]ure omissions are not actionable under Rule 10b-5(b).”

Although the decision did resolve a conflict among the federal courts of appeals, it is not entirely clear how important it will be. Here, for example, it is not clear that the plaintiffs could not revise their complaint to allege that the information in Macquarie’s periodic filings in fact was misleading without disclosure of the adverse UN rule. Only time, and the imagination of the lawyers who represent securities plaintiffs, will tell.

Posted in Featured, Merits Cases

Cases: Macquarie Infrastructure Corp. v. Moab Partners, L.P.

Recommended Citation: Ronald Mann, *Justices limit securities liability for omission of material facts*, SCOTUSblog (Apr. 16, 2024, 10:19 AM), <https://www.scotusblog.com/2024/04/justices-limit-securities-liability-for-omission-of-material-facts/>



SECURITIES LITIGATION AGAINST LIFE SCIENCES COMPANIES: 2023

SIDLEY

Securities class actions against life sciences companies are mostly second-order problems. The first-order problem is a business or regulatory setback that, when disclosed by the company or a third party, triggers a stock price decline. Following the decline, plaintiffs' class-action attorneys search the company's previous public statements and seek to identify inconsistencies between past positive comments and the current negative development. In most cases, plaintiffs' attorneys then seek to show that any arguable inconsistency amounts to fraud — that is, they will claim that the earlier statement was knowingly or recklessly false or misleading. When the challenged statement appears in a public offering document (that is, a registration statement or prospectus), plaintiffs need only show that the statement was materially false or misleading, not that it was made with scienter or caused their losses.

Under the Private Securities Litigation Reform Act of 1995, securities fraud plaintiffs must meet heightened pleading standards to survive a motion to dismiss, and they are not entitled to discovery while the motion is pending. As a result, securities defendants file motions to dismiss in virtually every case. These motions are generally lengthy and complex. For the most part, federal courts consider the motions carefully and hold plaintiffs to the demanding statutory pleading requirements. In 2023, life sciences companies succeeded in 56% of the motions to dismiss they filed.

5 Takeaways from New Complaints Filed in 2023

1. Plaintiffs filed 34 new class actions against publicly traded life sciences companies in 2023. This continues a downward trend that began last year. We saw 49 new class actions against life sciences companies in 2021, but only 37 in 2022, and only 34 in 2023.
2. The number of new filings related to COVID-19 products has unsurprisingly tailed off. In 2020 through 2022, we saw six or seven new filings per year, nearly all in the pre-approval (or pre-EUA) stage. In 2023, there were three new COVID-19 filings, one against a company developing a treatment for the disease and two against companies whose sales suffered as the demand for their COVID-19-related products dropped off.
3. Geographically, the cases are concentrated in four regions, corresponding to four federal appellate circuits:
 - 11 new cases in the Second Circuit, which includes New York
 - 9 new cases in the Ninth Circuit, which includes California
 - 5 new cases in the First Circuit, which includes Massachusetts
 - 5 new cases in the Third Circuit, which includes New Jersey

This reflects continuing concentration in these regions. New filings in other circuits were negligible.

4. More than 50% of the new cases (18) involve mature products. That is a departure from earlier years, and notable because companies with mature products have historically had less success in winning dismissal than companies with pre-approval products.
5. The majority of new filings against companies with mature products arise from setbacks not unique to life sciences companies, principally sales performance and financial reporting issues. In previous years, we have seen a greater concentration of cases arising from regulatory issues, particularly alleged improprieties in regulated areas of marketing and billing.

6 Takeaways from New Decisions Issued in 2023

THE NUMBERS: 2 TAKEAWAYS

1. **Success rate of 56% in the district courts, consistent with past trends.** District courts issued 25 new decisions on motions to dismiss or motions for summary judgment filed by life sciences companies. Defendants were successful in over half — 14 of 25, or 56%. That is consistent with the success rate in previous years, which has fluctuated within the 50%–60% range.
2. **The success rate in pre-approval cases was higher than that in post-approval cases.** As in most years, companies fared better in the pre-approval cases, winning dismissal 80% of the time. The success rate in post-approval cases was only 50%. This trend appears to reflect plaintiffs' challenges in establishing falsity and scienter in cases where the statements they attack concern inherently unknowable events — the outcome of clinical trials and the FDA approval process.

THE SUBSTANCE: 4 TAKEAWAYS

1. **High-profile setbacks in COVID-19 manufacturing and Alzheimer's disease drug development lead to challenging litigation.** Two unfavorable decisions in 2023 arose from high-profile setbacks. Emergent BioSolutions, a prominent manufacturer of COVID-19 vaccines, experienced various problems with contamination. This became the subject of a congressional investigation, which ultimately determined that the company had destroyed 400 million vaccine doses. The District of Maryland denied the company's bid for dismissal, holding that while plaintiffs failed to allege that the company's statements were false, they adequately pled that the statements were misleading in light of undisclosed manufacturing problems. A second litigation defeat was handed down by the First Circuit, which reversed in part a trial court dismissal of claims against Biogen in connection with its controversial Alzheimer's disease drug. The company couched its statements about a post hoc analysis of trial results as opinions, but the First Circuit held that even the favorable framework for analyzing opinions could not protect the statement that all data showed that the drug was effective at sufficiently high doses.
2. **Plaintiffs gain traction with claims that companies understated the risk that the FDA would not approve their products.** Companies have historically argued that fraud claims arising from drug development are nonsensical: A company would not devote years of clinical trials and hundreds of millions of dollars to drug candidates it knew were doomed. In 2023, as in the past several years, plaintiffs have defeated that argument with the claim that a company may not have known that its product would not succeed, but knew of significant risks of failure that it concealed from investors. These decisions can pose challenging disclosure problems. Companies surely cannot be expected to quantify risk, but the decisions suggest that companies may need to disclose more granular information about interim FDA feedback than the case law has historically required — or refrain from characterizing interim FDA developments altogether.
3. **Closing in on the end of the generic drug price-fixing saga.** 2023 marked the end, or close to the end, of an antitrust story we have been covering for the past seven years. In 2016, a consortium of state attorneys general alleged a broad price-fixing conspiracy in the generic drug industry. Dozens of manufacturers were eventually swept in, and the public companies inevitably became the targets of Section 10(b) litigation. Defendants fared poorly at the pleading stage, and litigation proceeded against at least a half-dozen companies. Several settled, some for hundreds of millions of dollars. Mylan and Perrigo stayed the course through summary judgment and were largely rewarded for doing so. The claims against Mylan were dismissed and the claims against Perrigo were dismissed in part, with only a very narrow channel left for plaintiffs to prevail.
4. **Courts continue to grapple with "claims within claims."** As the generic drug cases show, the securities plaintiffs' bar routinely seeks to piggyback on underlying regulatory activity when companies report scrutiny of sales, marketing, pricing, or billing practices. These cases can present difficult problems for courts. Should they require the securities plaintiffs to prove the underlying violations? Should they defer if the matter is being adjudicated elsewhere? The 2023 decisions reflect a range of approaches. The most helpful decision, Mylan, lays out a rigorous two-part structure for litigating "claims within claims." The plaintiffs essentially had the burden of prevailing in an antitrust action before they could assert a securities claim — and then additionally had to prove the elements of falsity, scienter, and causation. The Mylan plaintiffs could not carry that burden. In other cases, where courts took at face value plaintiffs' allegations of regulatory violations, plaintiffs fared better.



A Detailed Look at the 2023 Securities Litigation Against Life Sciences Companies

K [dandodiary.com/2024/04/articles/securities-litigation/a-detailed-look-at-the-2023-securities-litigation-against-life-sciences-companies](https://www.dandodiary.com/2024/04/articles/securities-litigation/a-detailed-look-at-the-2023-securities-litigation-against-life-sciences-companies)

April 16, 2024



By Kevin LaCroix on April 16, 2024
Posted in Securities Litigation



As readers of this blog well know, life sciences companies are frequent targets of securities class action lawsuits.

Interestingly, at least according to the latest annual report from the Sidley law

firm, in recent years the number of lawsuits filed against life sciences companies has declined, although the lawsuit frequency against life sciences companies still remains elevated by comparison to the frequency of litigation against the universe of public companies. Perhaps even more importantly, motions to dismiss in securities lawsuits filed against life sciences companies are granted more than half of the time. A copy of the law firm's April 2024 memo, entitled "Securities Class Actions in the Life Sciences Sector: 2023 Annual Survey," can be found [here](#). A two-page summary of the report can be found [here](#).

According to the report, there 34 new securities class action lawsuits filed against companies in the life sciences sector in 2023, compared to 37 in 2022, and to 49 filed in 2021. At least one factor contributing to the decline is the reduction in the number of COVID-related securities suits against life sciences companies. In the period 2020 through 2022, there were at least six or seven new securities suits against life sciences companies related to COVID-19. However, in 2023, there were only three new COVID-19-related securities suits filed against life sciences companies, one against a company developing a treatment for the disease and two against companies whose sales suffered as the demand for their coronavirus related product dropped off.

Interestingly, of the 34 new securities suits filed in 2023, more than 50% of the cases (18) involved companies with mature products (as opposed to companies whose products are still in development). The report notes that this "is a departure from earlier years, and notable because companies with mature products have historically had less success in winning dismissal than companies with pre-approval products."

With respect to the lawsuits filed in 2023 against companies with mature products, the majority arise from setbacks not unique to life sciences companies, such as sales performance and financial reporting issues.

According to the report, with respect to motions to dismiss in securities suits filed against life sciences companies, in more than half of the dismissal motion rulings issued during 2023, the defendants prevailed in over half. During 2023, district courts issued 25 rulings on motions to dismiss cases involving life sciences companies, with defendants successful in 17 of the 25 (68%). In recent prior years, the dismissal rate has ranged from 50-60%. In addition, the report notes, life sciences companies fared well in the appellate courts in 2023, with affirmance of dismissal in five of six cases. The sole reversal occurred in the Biogen case, which involved the controversial 2021 approval of an Alzheimer's disease treatment.

The report also notes that the defense motion to dismiss success rate was higher in cases involving pre-approval products; in cases involving pre-approval products, the defendants succeed on the motion to dismiss in 80% of cases, whereas the success rate in post-approval cases was only 50%. The trend in the pre-approval cases seems to reflect the difficulties for plaintiffs in establishing falsity and scienter in cases where they challenged statements concern "inherently unknowable events" – such as the outcome of clinical trials or the FDA approval process.

The report does note that certain classes of litigation, the motions to dismiss were less successful. In particular, in cases involving COVID-19 manufacturing and Alzheimer's disease drug development, defendants were less successful in their motions to dismiss. In both instances, courts proved willing to allow the plaintiffs' claims to go forward. The motion to dismiss record during the year also showed that plaintiffs were able to gain traction in claims in which they alleged that the defendants had understated the risk that the FDA would not approve their product.

Finally, the report notes that courts continue to struggle with what the report characterizes as "claims within claims." That is, in cases in which the plaintiffs are seeking to piggyback on underlying regulatory activities, when the defendant companies have reported regulatory scrutiny of sales, marketing, pricing, or billing activities. Courts struggle with how to regard these cases – for example, should the courts require the plaintiffs to prove the underlying regulatory violation? When should the courts defer if the regulatory questions are being adjudicated elsewhere? Where the plaintiffs are required to establish the underlying regulatory violation in order to proceed, the defendants fare better; where plaintiffs take the plaintiffs' regulatory violations at face value, the plaintiffs have fared better.

Judge dismisses some claims against Meta's Zuckerberg over social media harm

 [reuters.com/legal/judge-dismisses-some-claims-against-metas-zuckerberg-over-social-media-harm-2024-04-16](https://www.reuters.com/legal/judge-dismisses-some-claims-against-metas-zuckerberg-over-social-media-harm-2024-04-16)

Nate Raymond

Meta's CEO Mark Zuckerberg testifies during the Senate Judiciary Committee hearing on online child sexual exploitation at the U.S. Capitol, in Washington, U.S., January 31, 2024. REUTERS/Nathan Howard/File Photo Purchase Licensing Rights [↗](#), opens new tab

April 15 (Reuters) - Meta Platforms (META.O) [↗](#), opens new tab CEO Mark Zuckerberg on Monday won the dismissal of some claims in a dozen lawsuits accusing him of concealing from the public that Facebook and Instagram were harmful to children.

The ruling [↗](#), opens new tab by U.S. District Judge Yvonne Gonzalez Rogers in Oakland, California, came in the sprawling litigation by children pursuing hundreds of lawsuits accusing Meta and other social media companies of addicting them to their platforms.

Twenty-five of those cases sought to hold Zuckerberg personally liable, saying Meta's billionaire founder created a false impression about the platforms' safety despite repeated warnings they were unfit for children.

The plaintiffs argued that his public stature and outsized role as the "trusted voice on all things Meta" created a duty under several states' laws for Zuckerberg to speak fully and truthfully on the risks its products posed to children.

But Rogers said the plaintiffs could not rely on Zuckerberg's comparative knowledge about Meta's products to establish he personally owed such a duty to each plaintiff. Such a ruling, she said, would create "a duty to disclose for any individual recognizable to the public."

"The court will not countenance such a novel approach here," she said.

Meta, which remains a defendant, declined to comment. The company denies wrongdoing.

Hundreds of lawsuits are pending before Rogers filed on behalf of individual children against Meta and other social media companies, including Alphabet (GOOGL.O) [↗](#), opens new tab, which operates Google and YouTube; ByteDance, which operates TikTok; and Snap (SNAP.N) [↗](#), opens new tab, which operates Snapchat.

The lawsuits say the children suffered physical, mental and emotional harm from social media use, including anxiety, depression, and even suicide.

The litigation seeks damages and a halt to the practices the defendants say are harmful. Several states and school districts have also filed lawsuits against Meta, which remain pending.

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Reporting by Nate Raymond in Boston. Editing by Gerry Doyle

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April 16, 2024, 10:19 AM PDT

Forte Bio Board Ordered to Face White Squire, Poison Pill CaseBy [Mike Leonard](#)**Documents**📄 [Order](#)📄 [Docket](#)

- Hedge fund suit targets escalating array of defensive tactics
- Delaware judge declines to toss case, lets litigation advance

Bloomberg Law News 2024-04-16T13:25:3510999085-04:00

Forte Bio Board Ordered to Face White Squire, Poison Pill Case

By Mike Leonard 2024-04-16T13:19:47000-04:00

Hedge fund suit targets escalating array of defensive tactics

Delaware judge declines to toss case, lets litigation advance

Forte Biosciences Inc. directors lost their bid Monday to dodge allegations that they sought to keep their seats by adopting a corporate poison pill, expanding the company's board, and placing stock with friendly investors.

A judge let the case move forward Monday in Delaware's Chancery Court, where it's part of a wave of investor lawsuits taking aim at a new generation of defensive strategies deployed by corporate boards facing stockholder influence campaigns. The rising tide of activists is now colliding with allegedly weaponized nomination bylaws, repurposed poison pills, shareholder agreements that favor insiders, and other tactics.

Read More: [Activist Investors Confront 'Weaponized' Board Nomination Bylaws](#)

Vice Chancellor Morgan T. Zurn declined during a telephonic hearing to dismiss the lawsuit filed by Camac Fund LP, a hedge fund looking to win Forte directorships after a 2023 board election it has called "skewed." No transcript of Monday's proceedings was publicly available.

The Forte board enacted an escalating array of entrenchment measures to protect itself from stockholder unrest after a plunge in the company's stock price following a major clinical trial failure in September 2021, according to the suit filed in 2023.



Those moves allegedly culminated—after the poison pill failed to deter activists—with the effort to stack the board vote by selling stock at below-market rates to a group of friendly third parties, a maneuver known as a white squire defense. The original complaint named those outside investors as defendants, saying they got a windfall. But Camac dropped them from the case when it amended its claims after the 2023 board election.

Although Camac’s nominees had the backing of proxy advisers Institutional Shareholder Services and Glass Lewis & Co., Forte’s sitting directors had little trouble prevailing with the support of their white squires, which held 42% of the company’s stock, the lawsuit says. It seeks damages and an injunction blocking the participants in the stock placement from voting at the company’s 2024 meeting.

The board moved to dismiss the case late last year, calling Camac an “opportunistic activist hedge fund” seeking to “force a liquidation of the company and make a quick buck.” Rather than protect themselves, Forte’s directors engineered the private stock placement primarily to raise funds so the company could continue working to bring potentially lifesaving drugs to market, their court filing said.

Moreover, the “strained theory of wrongdoing” makes no sense on its face because only two sitting directors were up for reelection in 2023, so the incumbent board was never at risk of losing its majority in the first place, according to the Dec. 20 motion.

Camac is represented by Meluny Alleman & Spence LLC and Morris Kandinov LLP. The company and its board are represented by Wilson Sonsini Goodrich & Rosati PC.

The case is Camac Fund LP v. Wagner , Del. Ch., No. 2023-0817, 4/15/24 .

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[Securities Law News](#)

April 15, 2024, 6:54 AM PDT; Updated: April 15, 2024, 10:18 AM PDT

Silver Lake, Endeavor Face Bid to Block \$13 Billion Buyout (2)

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0391](#)

Bloomberg Law News 2024-04-16T09:54:10247983908-04:00

Silver Lake, Endeavor Face Bid to Block \$13 Billion Buyout (2)

By Mike Leonard 2024-04-15T09:54:12000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0391

A Swedish bank is suing Endeavor Group Holdings Inc. and Silver Lake affiliates, challenging the entertainment conglomerate's planned \$13 billion take-private buyout.

The private equity giant is wielding its 71% stake to squeeze out minority investors at an unfair price, \$27.50 a share, as part of a transaction that lets Endeavor insiders like CEO Ari Emanuel roll over their stakes on more favorable terms, according to the shareholder lawsuit filed in Delaware.

The deal's structure violates a clause in Endeavor's corporate charter requiring public stockholders to get the same treatment as insiders in any merger or acquisition, the suit says. The buyout "significantly undervalues Endeavor" and "diverts value to preferred insiders, providing an obvious motive for violating the equal-treatment provision," according to the complaint.

The proposed class action, filed April 12 in Delaware's Chancery Court, seeks an order blocking the deal unless it's redesigned to comply with the charter. It also targets Emanuel, Endeavor executive chairman Patrick Whitesell, Silver Lake co-CEO Egon Durban, and other board members at the talent and media behemoth, which controls TKO Group Holdings Inc., the parent company of WWE and UFC.

Silver Lake declined to comment through a spokesperson Monday. Endeavor didn't immediately respond to a request for comment.

'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 Silver Lake declining comment in fifth paragraph. A prior update added more reporting.)

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Health Law & Business

April 16, 2024, 8:59 AM PDT

TripAdvisor's Maffei May Proceed With Appeal Bid on Nevada Move

By Jennifer Kay

Documents

[Order](#)

- Chancery Court had declined to green-light an immediate appeal
- Benefits of reviewing standards outweigh the costs, justices said

Bloomberg Law News 2024-04-16T13:54:16879383785-04:00
TripAdvisor's Maffei May Proceed With Appeal Bid on Nevada Move

By Jennifer Kay 2024-04-16T11:59:38000-04:00
Chancery Court had declined to green-light an immediate appeal
Benefits of reviewing standards outweigh the costs, justices said

TripAdvisor Inc. corporate leaders may proceed with an appeal of a judge’s ruling that tentatively allowed shareholders to seek damages over the company’s move to Nevada from Delaware.

The Delaware Supreme Court on Tuesday agreed to hear an interlocutory appeal by Greg Maffei, TripAdvisor’s controlling stockholder, saying a review of the standards that apply to reincorporations would be helpful, particularly in a case that raised new questions for the court.

“We have concluded, in the exercise of our discretion, that the application for interlocutory review meets the strict standards for certification,” Justice Karen L. Valihura wrote in a five-page order.

The Delaware Court of Chancery in February refused to block TripAdvisor’s reincorporation, but also rejected Maffei’s attempt to immediately appeal portions of the decision that allowed fiduciary breach claims against him to move forward.

“Certainty regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial,” Valihura wrote. She added that the Chancery Court’s opinion “involves a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state,” and that the benefits of an interlocutory review outweighed any probable costs.

Chief Justice Collins J. Seitz Jr. and Justice Gary F. Traynor joined Valihura in signing the order.

Opening briefs in the appeal must be filed by May 21, the Supreme Court said in a separate order.

The Chancery Court's February ruling provided something of a roadmap for Elon Musk, who has threatened to move his electric car company, Tesla Inc., to Texas in response to a decision invalidating his \$55 billion pay package.

The case is Maffei v. Palkon , Del., No. 125,2024, order 4/16/24 .

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April 16, 2024, 7:27AM PDT
JPMorgan, CEO Dimon Exit Zelle Fraud Claims Lawsuit in Delaware
By [Jennifer Kay](#)
Documents

-  [Docket](#)
-  [Opinion](#)

- Lawsuit claimed board ignored red flags about fraud response
- Federal reports on Zelle fraud don't specify JPMorgan, judge said

Bloomberg Law News 2024-04-16T13:10:12735173322-04:00
JPMorgan, CEO Dimon Exit Zelle Fraud Claims Lawsuit in Delaware

By Jennifer Kay 2024-04-16T10:27:03000-04:00
Lawsuit claimed board ignored red flags about fraud response
Federal reports on Zelle fraud don't specify JPMorgan, judge said

A Delaware judge has dismissed with prejudice an investor’s lawsuit alleging that directors at JPMorgan Chase & Co., including CEO Jamie Dimon, ignored red flags about the bank’s response to fraud on the Zelle money-transfer platform.

Chancellor Kathaleen St. Jude McCormick, chief judge of the Court of Chancery, agreed with Dimon and JPMorgan’s other directors who had argued that the lawsuit cited only anecdotes in media reports about Chase Bank customers victimized by alleged fraud, but no evidence the bank violated the Electronic Funds Transfer Act and its implementing regulation.

“The anecdotes in the articles do not describe any failures by JPM to investigate or reimburse customers properly,” McCormick said in a 14-page opinion Tuesday. “Quite the opposite—the media reports reflect that JPM investigated and acted on the claims.”

Internal records provided to the investor before the lawsuit was filed showed that the bank’s board discussed efforts to address fraud and reimbursements on the Zelle platform, along with processes for dealing with unauthorized transfers, she said.

The lawsuit alleged the board turned a blind eye as the bank violated federal regulations governing electronic transfers, including requirements to reimburse customers for unauthorized electronic transfers. The complaint followed criticism from federal lawmakers who say banking executives need to do more to address fraud claims.

Reports cited by the plaintiff from Sen. Elizabeth Warren (D-Mass.) and the Consumer Financial Protection Bureau make general allegations about “the banking industry at large,” she said, but fail to show that JPMorgan violated federal regulations.

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An attorney for the investor argued in a Jan. 31 hearing there was “a reasonable inference that all might not be well” because there was no evidence indicating JPMorgan adhered to deadlines and other requirements under the federal statute.

Dimon and JPMorgan are represented by Potter Anderson & Corroon LLP. The other directors are represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP. The investor is represented by Billion Law.

The case is IMG Holding LLC v. Dimon , Del. Ch., No. 2023-0522, 4/16/24 .

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Eli Lilly's nationwide insulin pricing settlement called off

 [reuters.com/legal/litigation/eli-lillys-nationwide-insulin-pricing-settlement-called-off-2024-04-15](https://www.reuters.com/legal/litigation/eli-lillys-nationwide-insulin-pricing-settlement-called-off-2024-04-15)

Brendan Pierson

An Eli Lilly and Company pharmaceutical manufacturing plant is pictured at 50 ImClone Drive in Branchburg, New Jersey, March 5, 2021. REUTERS/Mike Segar/File Photo
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April 15 (Reuters) - A settlement between Eli Lilly (LLY.N) , opens new tab and purchasers of its insulin drugs that would have capped prices and provided \$13.5 million to resolve claims that the company inflated the drugs' cost has fallen apart, after an unfavorable ruling from the judge overseeing the case.

Lawyers for a proposed nationwide class of individuals who paid for Lilly's Humalog and other insulin drugs said in a filing in Newark, New Jersey, federal court on Friday that they and Lilly had decided not to go forward seeking approval for the deal, which they first proposed last May.

Steve Berman, one of the lawyers, said in an email that the decision to drop the deal came after U.S. District Judge Brian Martinotti in February refused to certify a class in the litigation, which also targets insulin drug makers Novo Nordisk and Sanofi. The plaintiffs have since filed an amended version of their complaint again seeking to proceed as a class action.

Nonetheless, Berman said that because of the February decision, in which Martinotti found that classwide issues did not predominate over individual ones, "we see no way for us to get a settlement class approved."

Berman called the demise of the settlement, which would have capped patients' out-of-pocket insulin costs at \$35 per month for four years, a "potentially big loss for consumers."

Lilly said in a statement that the plaintiffs' claims lacked merit and that it would continue to defend itself.

Lilly and the other companies are still facing lawsuits by states, some of which objected to the settlement with purchasers on the grounds that it could interfere with their lawsuits.

The company in February settled with Minnesota, agreeing to a price cap and to donate insulin to clinics in the state.

Plaintiffs in the cases allege that insulin drug makers set artificially high list prices for their products, while paying rebates to pharmacy benefit managers (PBMs) in exchange for their covering the drug on behalf of health plans.

Insulin is vital for patients with type 1 diabetes to control their blood sugar and for some patients with the more common type 2 diabetes.

Lilly said last March it would slash insulin prices and make it available to many patients for \$25 or \$35, following pressure from Democratic President Joe Biden, lawmakers and advocacy groups over skyrocketing costs.

A survey released last July by U.S. Senator Elizabeth Warren, a Democrat from Massachusetts, found that many patients nevertheless were still being charged hundreds of dollars for treatments.

Around 8.4 million of the 37 million people in the United States with diabetes use insulin, according to the American Diabetes Association.

The case is *In re Insulin Pricing Litigation*, U.S. District Court, District of New Jersey, No. 2:17-cv-00699.

For plaintiffs: Steve Berman of Hagens Berman Sobol Shapiro

For Lilly: James Hurst of Kirkland & Ellis

Read more:

Eli Lilly to offer low-cost insulin, donate to clinics in Minnesota settlement

States cry foul at Lilly's \$13.5 mln insulin class action settlement

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Reporting By Brendan Pierson in New York

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<https://www.law.com/2024/04/15/law-com-radar-antitrust-class-actions-climb-in-2023-then-skyrocket-in-march/>



NOT FOR REPRINT
NEWS

Law.com Radar: Antitrust Class Actions Climb in 2023, Then Skyrocket in March

In March, according to Law.com Radar's data, there were 42 antitrust class actions filed, 71% higher than the average monthly rate over the previous 12 months.

April 15, 2024 at 06:33 PM

Antitrust



Amanda Bronstad
staff reporter



What You Need to Know

- The rise in antitrust cases comes as the private plaintiffs bar and government regulators have pursued antitrust investigations simultaneously, often mirroring one another.
- Among the companies hit with antitrust class actions last month were Apple, tire manufacturers and sugar producers.
- Duplicate class actions and opt-out cases contributed to the rise, as did several high-profile antitrust cases involving Apple and real estate commissions.

From sugar prices to the cost of replacement tires to Apple’s business practices, antitrust class actions against numerous industries skyrocketed last month, according to data from Law.com Radar.

In March, according to that data, there were 42 such lawsuits, 71% higher than the average monthly rate over the previous 12 months. [Law.com Radar tracked antitrust class actions](#) in federal courts filed by the private plaintiffs bar.

The rise in antitrust cases comes as the private plaintiffs bar and government regulators have pursued antitrust investigations simultaneously, often mirroring one another. Although that’s not entirely new in the antitrust world, O’Melveny & Myers partner Anna Pletcher, who prosecuted anticompetitive conduct while at the Justice Department’s San Francisco office from 2006 to 2016, said the plaintiffs bar has been innovative in its approaches.

“You see that interplay between the two,” Pletcher said. “It’s always been there, but now it’s happening to an extent I’ve never seen before.”



In the past 15 months, the U.S. Judicial Department and the Federal Trade Commission have sued tech companies like [Google](#), [Amazon](#) and [Apple](#) while simultaneously filing statements of interest cases against real estate software management RealPage and [casino hotel Caesars Entertainment](#), all of which involve alleged antitrust violations based on algorithmic pricing structures.

“The fact that the DOJ has come out strongly in its statements, filed statements of interest in cases, the plaintiffs bar finds that encouraging, which leads them to maybe bring more cases,” said Ryan Phair, co-chairman of the antitrust and competition practice at Paul Hastings, in Washington D.C.

But it’s not just technology that’s driving the actions. The DOJ has stepped up enforcement of labor practices, joining a case this year against the National Collegiate Athletic Association that alleges college athletes are illegally barred from the number of times they transfer to other academic institutions.

And, in the past six months, the European Commission has conducted raids as part of inspections involving cement additives and replacement tires, prompting dozens of class actions in U.S. courts against Sika AG and The Goodyear Tire & Rubber Co.

Many plaintiffs firms haven’t waited for governments to act, striking out on their own.

“There are a lot of lawyers involved in this space who 10 years ago weren’t involved in this space, particularly as to private plaintiffs,” Pletcher said. “We’re seeing a convergence of an interest in the plaintiffs bar in bringing types of these cases as enforcers, and the enforcers are then also stepping up as well.”

“And that,” she said, “leads to just a much more robust and aggressive enforcement environment.”

‘It’s Going to Spike the Number of Cases’

According to Law.com Radar, antitrust class actions filed in the past year remained in the single digits each month until October, when attorneys filed 16. That stayed the same until February when they nearly doubled.

Law.com Radar’s data tracks that of Lex Machina’s Antitrust Litigation Report 2024, released this month, which found that there were 534 antitrust cases filed in federal courts last year, including class actions, regulatory actions and appeals. That’s up 19% from 2022, one of the few upticks in the past decade but well below the 2015 peak of 1,069 cases.

“Our data shows a pretty consistent decline over the past 10 years in filings of all types of antitrust cases,” said Ron Porter, legal data expert for Lex Machina, which is part of LexisNexis. “And it’s consistent on all different types of antitrust cases.”

Under the Biden administration, the Justice Department has focused more on cases targeting single, dominant companies accused of monopolizing a market. Those are harder for private plaintiffs firms to pursue as class actions, as opposed to investigations of alleged cartels, said Scott Martin, a New York partner at Hausfeld.

“You have competitors who agree to fix prices, or restrain output. Relatively straightforward allegations,” he said. “You’ll see a number of actions from different purchasers of the subject products, whereas the kinds of cases this administration has been more focused on, for example in high tech, tend to be much larger, more complicated actions, and there may only be a couple firms that will take those.”

So why are cases on the rise?

To be sure, many copycat class actions have been filed, bolstering the number of lawsuits. But there also are more cases brought by corporations that opted out of a class or settlement, lawyers say.

“More and more of those corporate interests are opting out,” Phair said. “With those types of cases, it’s going to spike the number of cases in that data, even though it’s still just one case.”

The proliferation of antitrust cases has resulted in many motions to move for coordination before the U.S. Judicial Panel on Multidistrict Litigation. This month, the panel rejected efforts to coordinate antitrust lawsuits over real estate commissions and college athlete compensation but sent 15 cases over cement and concrete additives to New York’s Southern District, before U.S. District Judge Lewis Liman.

Whether the trend continues is unclear. At least 20 antitrust class actions have been filed against sugar producers after the Justice Department last year lost an appeal in its 2021 case to stop U.S. Sugar Corp.’s planned acquisition of rival Imperial Sugar Co.

Porter suggested the uptick might be due to the effects of the COVID-19 pandemic, or the Biden administration’s emphasis on antitrust enforcement. But he also noted the number of high-profile antitrust actions in the past year, particularly involving Big Tech and real estate commissions.

“If more people are thinking about antitrust and seeing others succeed in antitrust claims,” Porter added, “it’s possible that’s what’s driving the increase in this data.”

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Real estate commission antitrust settlements face legal objections

 [reuters.com/legal/litigation/real-estate-commission-antitrust-settlements-face-legal-objections-2024-04-15](https://www.reuters.com/legal/litigation/real-estate-commission-antitrust-settlements-face-legal-objections-2024-04-15)

Mike Scarcella

REUTERS/Hyungwon Kang Purchase Licensing Rights , opens new tab

April 15 (Reuters) - One of the country's largest residential homebuilders has asked a U.S. judge not to approve \$208 million in settlements resolving claims that major home brokerages conspired to keep real estate commissions artificially high.

Atlanta-based homebuilder PulteGroup (PHM.N) , opens new tab in a filing , opens new tab on Friday questioned the adequacy of the proposed deals, which would resolve antitrust claims against brokerages RE/MAX, Keller Williams and Anywhere pending in Missouri federal court.

The brokerages are accused of unlawfully coercing homeowners into paying a commission to buyers' agents in order to list their homes for sale. The commission, which is shared between the buyer's and seller's agents, can run 5% to 6% of a home's sale price.

RE/MAX, Anywhere and Keller Williams denied any wrongdoing in agreeing to settle. They either declined to comment on the objections or had no immediate comment.

Michael Ketchmark, an attorney for the plaintiffs, said on Monday that they were "confident in the agreement that was reached and we look forward to presenting it to the court."

A judge on May 9 will weigh whether to grant final approval.

In its objection, PulteGroup said the settlements did not provide enough information — including how much the company might receive in compensation — for it to evaluate whether it should pursue its own separate lawsuit.

Home sellers in Pittsburgh , opens new tab and in South Carolina , opens new tab also filed objections, questioning the scope of the settlements and whether they would block their separate lawsuits. Attorneys for home buyers in other pending litigation also said they had filed , opens new tab an objection.

The lawyers who secured the settlements separately won a \$1.8 billion jury trial in October in a related Missouri federal court lawsuit accusing brokerages of conspiring to inflate commissions.

In that case, Berkshire Hathaway (BRKa.N) , opens new tab unit HomeServices is the sole remaining defendant. If the verdict stands, the company will be on the hook to pay \$4.7

billion, which accounts for the tripling of damages under antitrust law. It has denied wrongdoing.

The U.S. Supreme Court on Monday turned down a petition from HomeServices that challenged an order that allowed the case to proceed as a class action.

The settlements with Keller Williams, RE/MAX and Anywhere preceded a related proposed \$418 million settlement and changes to commission standards that the National Association of Realtors agreed to last month.

Potential class-members will also have an opportunity to object to that settlement.

Read more:

Home sellers say HomeServices owes \$4.7 bln in real estate commissions case

Realtors association must face US Justice Dept. probe, US appeals court says

Home buying costs could fall in big US real estate group settlement

Home brokerage Keller Williams to pay \$70 mln in antitrust settlement

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Reporting by Mike Scarcella

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Baltimore hires law firms to prepare for bridge collapse litigation, mayor says

 [reuters.com/legal/government/baltimore-hires-law-firms-prepare-bridge-collapse-litigation-mayor-says-2024-04-15](https://www.reuters.com/legal/government/baltimore-hires-law-firms-prepare-bridge-collapse-litigation-mayor-says-2024-04-15)

Diana Jones

Wreckage of the collapsed Francis Scott Key Bridge lies atop the container ship Dali as salvage work continues in Baltimore, Maryland, U.S., April 8, 2024. REUTERS/Julia Nikhinson Purchase Licensing Rights , opens new tab

April 15 (Reuters) - The city of Baltimore said on Monday that it has hired two law firms as it considers litigation against the owner, charterer and operator of the ship that caused the collapse of the Francis Scott Key Bridge last month.

Baltimore Mayor Brandon Scott said in a statement that the city had engaged DiCello Levitt, which has offices in six states and Washington D.C., and Saltz Mongeluzzi Bendesky Trial Lawyers, which has offices in Pennsylvania and New Jersey, to work with the Baltimore Law Department on litigation against the registered owner of the Singapore-flagged ship, Grace Ocean Pte Ltd, its manager Synergy Marine Group, its charterer Maersk and its manufacturer, the city said.

The city did not immediately respond to questions about when a lawsuit could be filed.

Adam Levitt of DiCello Levitt said in a statement the claims are likely to include both economic and environmental losses.

In the early morning of March 26, the container ship, named the Dali, lost power and crashed into a support pylon, sending the Francis Scott Key Bridge collapsing into the Patapsco River and killing six people who were working on the span at the time of the crash.

U.S. laws pertaining to open-water navigation and shipping, which are created through court decisions and by acts of Congress, could restrict the kinds of lawsuits filed against the ship's backers, experts have told Reuters.

U.S. courts have interpreted a 1927 U.S. Supreme Court ruling to mean that any purely economic damages from maritime incidents can't be recovered from the ship's owners and operators, so lawsuits against them would be limited to injuries, death and property damage or losses, such as claims from the people harmed by the collapse or claims over the damage to the bridge itself, likely brought by government entities.

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Grace Ocean and Synergy filed a petition on April 1 in Maryland federal court to limit their liability from the crash. If the court grants it, the companies' liability could be limited to the present value of the ship, which they estimated to be \$42,500,000, according to the petition.

Also Monday, the FBI said it has opened a federal criminal investigation into the collapse.

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Reporting by Diana Jones

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Diana Novak Jones

Thomson Reuters

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

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April 15, 2024, 1:57 PM PDT; Updated: April 16, 2024, 9:33 AM PDT
Monsanto Stuck Facing Suit Over PCBs in Vermont High School (1)
By [Shayna Greene](#)
Documents

-  [Opinion](#)
-  [Docket](#)

- Plaintiffs claim exposure caused health issues
- Vermont law covers injuries like physical harm

Bloomberg Law News 2024-04-16T13:11:25486454896-04:00
Monsanto Stuck Facing Suit Over PCBs in Vermont High School (1)

By Shayna Greene 2024-04-15T16:57:32000-04:00
Plaintiffs claim exposure caused health issues
Vermont law covers injuries like physical harm

Monsanto Co. and other companies must continue to face claims alleging that they knew of the health risks associated with PCBs but failed to warn customers, including students and teachers at a Vermont high school.

Burlington High School teachers, a former student, and other Vermont residents claimed they were exposed to polychlorinated biphenyls—chemicals that have been found to be toxic to humans and wildlife—when attending the school. The PCBs entered the school through paint, sealants, and other building materials, the plaintiffs alleged, causing reproductive issues, dizzy spells, and other health problems.

They claimed Monsanto was the only manufacturer of PCBs for commercial use between 1929 and 1977, and knew of the dangers they posed for decades before the chemicals were banned but didn't stop producing them.

Their negligent misrepresentation claim is based on Monsanto's alleged concealment of the risks of PCBs from consumers of its products. The company didn't make any attempt to warn the high school, parents of students, or teachers and staff, the complaint said.

Judge William K. Sessions III of the US District Court for the District of Vermont on April 12 denied the motion to dismiss the misrepresentation claim.

"We disagree with the court's decision, which is a preliminary ruling on one claim at an early stage of the case," the company said in a statement.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XRJC1P4000000?bc=W1siU2VhcmNoICYgQnJvd3NlIiwiaHR0cHM6Ly93d...> 1/3

"Monsanto continues to believe this case lacks merit as testing at BHS showed levels of PCBs were below the health protective levels that the" EPA "has determined do not pose increased risks to public health, with the exception of a few classrooms in one building on the former five-building campus."

The company added that hasn't produced PCBs for almost five decades, conducted hundreds of studies of PCB safety, and provided warnings to its customers based on the state-of-the-science at the time.

The state defines negligent misrepresentation to cover anyone who, through their business or any other transaction, provides false information to others who rely on that information. It also includes those who fail to exercise reasonable care or competence when communicating the information.

The companies argued that the plaintiffs' claim failed because the complaint doesn't allege a specific business transaction.

Sessions said that even though the initial transaction probably happened around the time of construction—before any of the plaintiffs were at the high school—state law "contemplates liability for negligent misrepresentation not only for parties directly involved in the transaction, but also to those persons who were meant to benefit from the duty to disclose accurate information."

The judge also declined to dismiss plaintiffs' negligent misrepresentation claims based on the personal health injuries due to the law's "explicit provisions" covering physical harm.

The state law addressing negligent misrepresentation extends liability where there's a "public duty" to provide accurate information, Sessions said. The companies argued that duty only applies to individuals or corporations that are required by statute to file information for the benefit of the public.

"The Vermont Supreme Court did not limit the duty to statutory mandates, and the Court will not impose such a limitation here," the judge said.

The plaintiffs are represented by Leckerling Law PLLC, Maley and Maley PLLC, Frazer PLC, and Onderlaw LLC. The companies are represented by Dinse PC.

The case is *Austin v. Monsanto Co.*, D. Vt., No. 2:23-cv-00272, 4/12/24 .

(Updates paragraphs six through eight of story originally published April 15 with Monsanto's statement.)

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New PFAS lawsuit cites EPA's 'forever chemicals' drinking water rules

 [reuters.com/legal/litigation/new-pfas-lawsuit-cites-epas-forever-chemicals-drinking-water-rules-2024-04-15](https://www.reuters.com/legal/litigation/new-pfas-lawsuit-cites-epas-forever-chemicals-drinking-water-rules-2024-04-15)

Clark Mindock

REUTERS/Yves Herman Purchase Licensing Rights  , opens new tab

April 15 (Reuters) - A new lawsuit filed by public drinking water systems in California against manufacturers of toxic "forever chemicals" is among the first to cite new Biden administration regulations that set strict limits for the chemicals in drinking water.

The Orange County Water District and more than a dozen other California water utilities filed the lawsuit in Los Angeles federal court on Friday against seven manufacturers of per- and polyfluoroalkyl substances, or PFAS, including Dynax America Corp. and Arkema Inc. The lawsuit accuses the manufacturers of negligence and of creating a nuisance by contaminating water with PFAS, and seeks money to remediate that contamination.

PFAS are a class of chemicals used in thousands of consumer and commercial products including firefighting foams, nonstick pans and stain resistant fabrics. They are often called forever chemicals because they do not easily break down in nature or the human body.

While the U.S. Environmental Protection Agency standards finalized on April 10 only apply to drinking water systems and do not directly regulate manufacturers, the lawsuit could be an example of how drinking water systems could use the regulations in court to their benefit.

Legal experts say that's because the rules create an unambiguous standard for what levels of PFAS in drinking water are acceptable, and so could make it easier for water systems to prove they have been harmed by the pollution.

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

The lawsuit is likely to be transferred to a federal court in South Carolina where hundreds of similar cases have been centralized. A trial against many of the defendants named in Orange County's lawsuit by water systems across the U.S. is expected in September.

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

The South Carolina litigation has already resulted in several major settlements worth over \$11 billion between water systems and chemical companies like 3M, DuPont de Nemours Inc., Chemours, Corteva and Johnson Controls subsidiary Tyco Fire Products.

The case is Orange County Water District et al. v. AGC Chemicals Americas Inc. et al, in the U.S. District Court for the Central District of California, case NO. 8:24-cv-00820.

For the plaintiffs: Kenneth Sansone of SL Environmental Law Group and Daniel Robinson of Robinson Calcagnie

For the defendants: Not immediately available

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Reporting by Clark Mindock

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United Nations says US slacking on combating forever chemicals in North Carolina drinking water

[courthousenews.com/united-nations-says-us-slacking-on-combating-forever-chemicals-in-north-carolina-drinking-water](https://www.courthousenews.com/united-nations-says-us-slacking-on-combating-forever-chemicals-in-north-carolina-drinking-water)

Sydney Haulenbeek

Chemical companies spent decades dumping forever chemicals in a North Carolina river, contaminating drinking water for over 500,000 people. Now, the United Nations says U.S. companies have created a global environmental crisis.



Gerald Generette, left, and Maurice Miller look onto the Cape Fear River as it continues to rise in the aftermath of Florence in Fayetteville, N.C., Monday, Sept. 17, 2018. (AP Photo/David Goldman)

RALEIGH, N.C. (CN) — Not enough is being done to protect the health of residents impacted by contaminated drinking water, advocacy group Clean Cape Fear said Monday, following the United Nations' declaration that the United States has fallen short in resolving human rights violations in North Carolina.

In North Carolina, chemical company DuPont and its spin-off Chemours, have been releasing toxic chemicals linked to cancer and birth defects from its Fayetteville plant into the lower Cape Fear River for decades, polluting residents' drinking water.

DuPont and Chemours have been criticized by the United Nations for "business-related human rights abuses," including importing per- and polyfluorinated substance, or PFAS, waste from the Netherlands to North Carolina in violation of international law.

On Monday, Marcos Orellana, United Nations Special Rapporteur on toxics and human rights, said that while DuPont, Chemours and the Netherlands have all since participated in a process to correct the human rights violations, the United States has not replied to a letter of allegation with a corrective plan.

"PFAS has become a global problem," said Orellana. "We're seeing this situation replicated in places like Japan and Italy, in South Africa and other places. And so, a few companies, many of them headquartered here in the United States, have become responsible for causing a global environmental crisis."

The plant, which produces fluoropolymers used in making lithium ion batteries, also contaminated the local area through air emissions, which made their way into the soil and groundwater.

PFAs are used to make heat- and water-resistant coatings and products, including non-stick pans, clothing, paint, cleaning products and shampoo. They can cause birth defects, liver damage and cancer, and are called "forever chemicals" because they don't break down and can remain in the environment for decades, and build up in the human body.

Emily Donovan, the co-founder of Clean Cape Fear, lives outside of Wilmington, North Carolina, one of the cities that receives their drinking water primarily from the Cape Fear River. The river supplies drinking water for millions of North Carolina residents.

"For me, for my family, for the children that are raised on this drinking water, it is past due time to be able to turn on a tap and be guaranteed a health-protective quality in our tap water," she said.

Donavan said that though they're still working to fully determine the scope of Chemours' contamination, they estimate it has impacted over 500,000 residents in over eight counties.

The organization has seen illnesses related to the pollution, and in many regions, residents still are without access to clean, safe drinking water.

"What makes this situation so unique is that it definitely is the ground zero for PFAS in ... the United States related to DuPont and Chemours," said Donovan, who said residents have discovered high levels of PFAS in their blood. "And we are tired of being a sacrifice zone."

The Environmental Protection Agency announced legally enforceable limits last Wednesday on the amount of PFAS occurring individually and in drinking water. Under their new guidelines, NC Newsline reported, over 300 water systems in North Carolina have elevated levels of PFAS, including systems that service mobile home parks and daycares.

Public water systems have five years to comply with the regulations. Nearly \$1 billion in federal funding was allocated to addressing the contamination, but Clean Cape Fear says that won't be enough to cover the expenses, and that many impacted communities have been forced to sue Chemours to help cover cleanup costs.

Donovan says that while Clean Cape Fear is supportive of the new drinking water standards, there need to be more protections for residents, as the three major water suppliers impacted by the contamination have had to “shoulder the burden” to pay for filtration upgrades.

Donovan pointed out that if industrial releases of PFAS are reduced, the reduction in contamination will ease the burden on the water systems filtering the water, and reduce the cost for the local community.

“We're really supportive of the new drinking water standards,” she said. “That does not mean that the problem is solved. It also doesn't mean that the work is done.”

Categories / Environment, Health, International

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ANALYSIS: Investors Wield Proposals Amid Climate Rule Lawsuits

By Abigail Gampher Takacs

Bloomberg Law News 2024-04-16T09:54:58003919706-04:00

ANALYSIS: Investors Wield Proposals Amid Climate Rule Lawsuits

By Abigail Gampher Takacs 2024-04-15T05:00:16000-04:00

Some investors consider a company's material environmental risks when deciding how to vote on their proxy ballot—a major reason why the SEC created the climate rule.

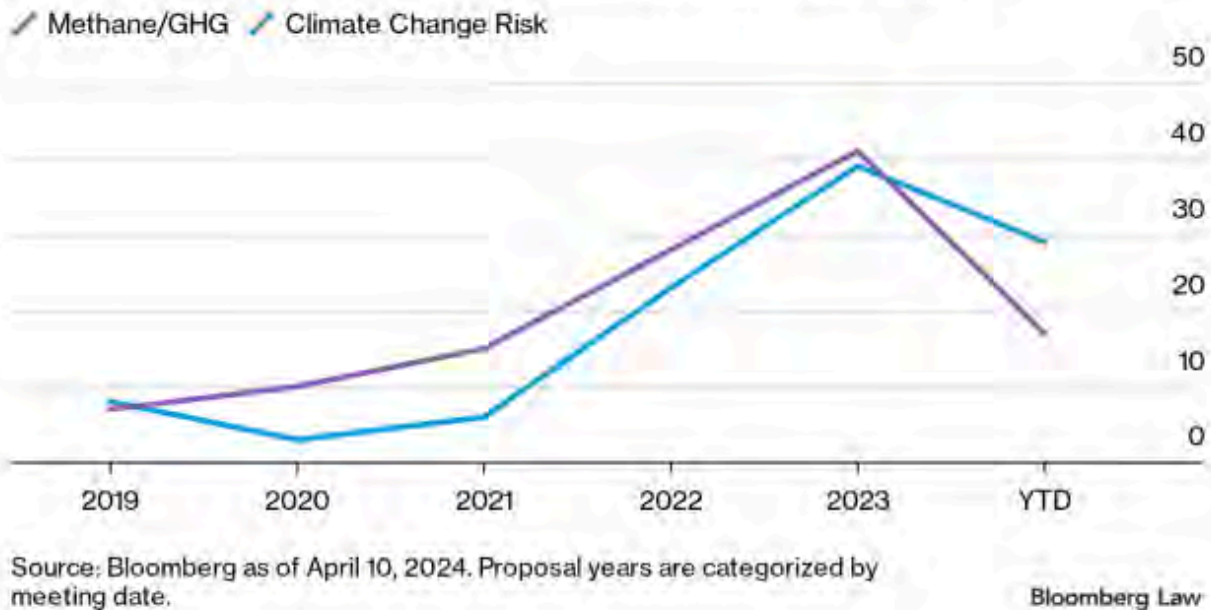
But the rule is currently facing a number of challenges in the Eighth Circuit, and its future is unclear.

Still, even if the Eighth Circuit ultimately strikes down the rule—nothing is clear at this point—companies aren't off the hook for providing information on their environmental impacts. Shareholders are increasingly requesting companies to produce reports detailing their climate change impacts and emissions.

The number of shareholder proposals on climate change risks and methane/greenhouse gas (GHG) emissions included in definitive proxy statements rose from 21 proposals in 2021 to 80 proposals in 2023, according to Bloomberg data.

GHG & Climate Risk Proposals Increase Despite Rule Uncertainty

Shareholder proposals included in definitive proxy statements



And shareholder interest in these topics doesn't show signs of slowing down. Companies have already included 46 shareholder proposals on climate change risk and methane/GHG emissions in their definitive proxy statements filed this year.

Given this high number of proposals so early in proxy season and the fact that May and June are the most popular months for annual meetings, it's highly likely that 2024 will rival, if not surpass, 2023's numbers.

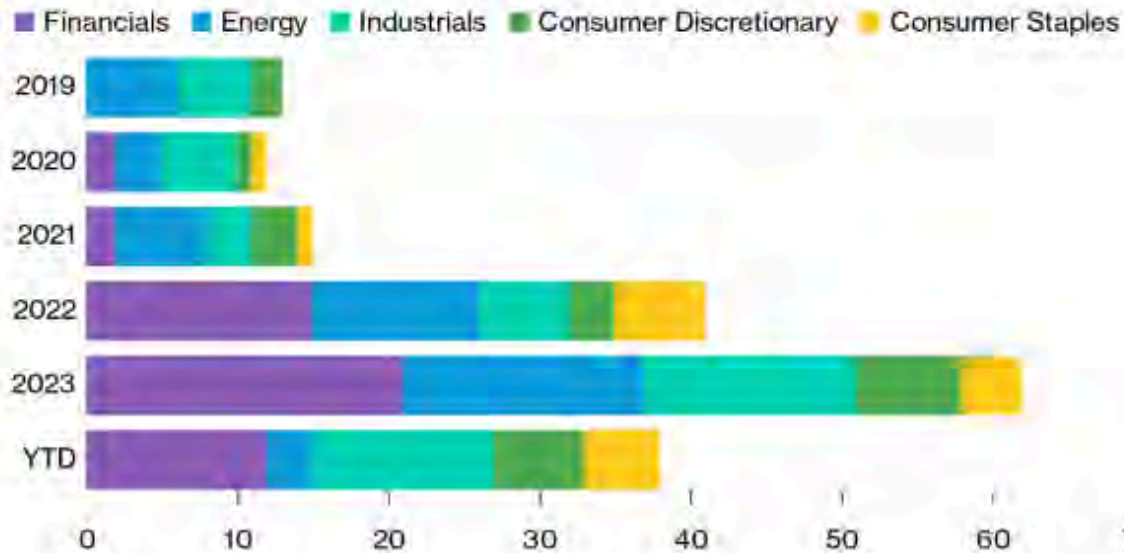
Shareholders Target Familiar Sectors

With the increase in these shareholder proposals, how are they spread across sectors?

From 2019 to 2023, companies in five sectors accounted for at least 70% of the climate change risk and methane/GHG proposals included in definitive proxy statements: financials, energy, industrials, consumer discretionary, and consumer staples.

Early Shareholder Proposals Reinforce Sector-Specific Emphasis

GHG & climate risk shareholder proposals in definitive proxy statements



Source: Bloomberg as of April 10, 2024. Proposal years are categorized by meeting date.

Bloomberg Law

And year-to-date data suggests that shareholders are continuing to target these sectors, which currently account for 83% of the companies that have included these types shareholder proposals in their definitive proxy statements.

Some shareholders are likely looking for additional information on the environmental impacts of companies in these sectors due to their investment practices, carbon-intensive operations, and complex supply chains (as applicable).

Ultimately, shareholders aren't waiting for the Eighth Circuit to reach a decision on the SEC's climate rule to get information on their investments' environmental impacts. And the usual sectors are likely to be particularly vulnerable to shareholder action.

Bloomberg Law subscribers can find related content on our ESG Practice page, as well as our Practical Guidance: Shareholders and Practical Guidance: Proxy Regulation pages. Data accessible at [BI PROXY <GO>](#).

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Quinn Emanuel Proposes Using Time Travel To Avoid Sanctions Motion

A abovethelaw.com/2024/04/quinn-emanuel-proposes-using-time-travel-to-avoid-sanctions-motion

Joe Patrice

April 16, 2024

Biglaw

'Can we just go back and pretend we didn't commit the unauthorized practice of law?'

By Joe Patrice

on April 16, 2024 at 12:16 PM



Elon Musk's companies create robot cars (that unexpectedly blow up) and spaceships (that unexpectedly blow up), but now his attorneys are proposing a time machine to get out of — part of — a sanctions motion filed last week.

Feel free to guess what comes next.

Most of the coverage surrounding the sanctions motion (including Above the Law's) focused on Musk's disastrous deposition, defended by Quinn Emanuel's Alex Spiro despite not being admitted in Texas — either outright or *pro hac vice*. Spiro, who told the New Yorker last year that his photographic memory is the source of his legal prowess, apparently failed to turn that memory toward the Texas rules as the transcript is littered with warnings from plaintiff Benjamin Brody's attorney, Mark Bankston of Farrar & Ball, that Spiro kept breaching local rules.

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From Pilot and Above The Law

But aside from the deposition, the sanctions motion also noted that Spiro is the sole signatory on the motion to dismiss the case without being admitted. That's generally frowned upon as the unauthorized practice of law in most jurisdictions. It's also a bizarre unforced error since Musk *has local counsel in this case*. Specifically, Quinn Emanuel's John Bash, the former US Attorney who Rod Rosenstein notably ordered to push ahead with Trump's child kidnapping plot who could've signed the motion way back in January and avoided this whole ethical kerfuffle.

But the past is the past... OR IS IT?



J.J.

@jdotj.bsky.social

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Elon's latest defamation case filing is....something.

My name is literally on the cover of a Texas Rules of Civil Procedure practice guide and I've....never seen something like this.

		Travis Cou D-1-GN-23-00 Irene
CAUSE NO. D-1-GN-23-006883		
BENJAMIN BRODY, <i>Plaintiff.</i>	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
ELON MUSK, <i>Defendant.</i>	§	459th DISTRICT COURT
	§	

**NOTICE BY DEFENDANT ELON MUSK PURSUANT TO RULES 8 AND 13 OF THE
TEXAS RULES OF CIVIL PROCEDURE**

I, John F. Bash, am designated by Defendant Elon Musk as attorney in charge responsible for this suit on his behalf pursuant to Rule 8 of the Texas Rules of Civil Procedure, and hereby sign, through my signature below, Defendant Elon Musk's Motion Dismiss Plaintiff's Original Petition Under The Texas Citizens Participation Act, filed on January 5, 2024 (the "Motion," attached hereto as Exhibit A), pursuant to Rule 13 of the Texas Rules of Civil Procedure, with the same effect as if the Motion bore my signature on the date of its filing, January 5, 2024|

Dated: April 12, 2024

Respectfully submitted,

By: /s/ John Bash
QUINN EMANUEL URQUHART & SULLIVAN, LLP

Apr 15, 2024 at 4:38 PM

Bash, a Scalia and Kavanaugh clerk, takes the originalist penchant for rewriting history to new heights with this "Motion for a Mulligan," asking the court to ignore Spiro's signature and just assume Bash had signed it all along. On the one hand, you can argue that it's Quinn

Emanuel either way, so no harm no foul, right? On the other hand, it's Quinn Emanuel either way so the firm should be held to an even higher standard since this is the most avoidable cock up ever.

Can Musk's lawyers just wave their hands and pretend those past legal documents just don't exist? Wait... it feels like we've done all this before. Remember Musk joking about buying Twitter and waiving due diligence and then trying to back out by saying the agreement he signed shouldn't count?

How did that work out?

Earlier: Is Elon Musk About To Get Quinn Emanuel Sanctioned?



Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

Alex Spiro, Elon Musk, John Bash, Legal Ethics, Mark Bankston, Quinn Emanuel



FTX Controversy Derails Top Law Firm's Bid for Binance Role

By Sabrina Willmer and Ava Benny-Morrison

- Sullivan & Cromwell had been on cusp of being picked by DOJ
- Firm's work for failed Binance rival has long been criticized

Bloomberg Law News 2024-04-16T09:52:17893039115-04:00

FTX Controversy Derails Top Law Firm's Bid for Binance Role

By Sabrina Willmer and Ava Benny-Morrison2024-04-15T15:25:42468-04:00

- Sullivan & Cromwell had been on cusp of being picked by DOJ
- Firm's work for failed Binance rival has long been criticized

The Department of Justice is retreating from picking an elite New York law firm for a key assignment overseeing cryptocurrency exchange Binance Holdings Ltd. because of its work for FTX, according to people with knowledge of the matter.

Sullivan & Cromwell was close to winning approval to serve as independent monitor for Binance on behalf of both the Justice Department and the Treasury Department's Financial Crimes Enforcement Network, Bloomberg reported in February. The monitorships were a condition of the \$4.3 billion deal by which Binance pleaded guilty to violating US money-laundering regulations and trade sanctions.

But Justice Department officials have since expressed concern about the criticism the firm has faced over its work for FTX, a onetime major rival of Binance. The department is now reviewing other options for the lucrative monitorship, said the people, who asked not be identified because the discussions are not public. FinCEN still intends to use Sullivan & Cromwell, the people said.

The Justice Department declined to comment. A spokesperson for FinCEN declined to comment. Sullivan & Cromwell didn't immediately respond to a request for comment.

Read More: FTX Probe to Test Whether Law Giant Is Tainted by Conflicts

Sullivan & Cromwell represented FTX both before and after its November 2022 bankruptcy. The firm has billed more than \$170 million in the latter proceeding, in which its work has included tracking down billions of dollars in assets spread across real estate portfolios, crypto wallets and executives' bank accounts to aid in creditors' recoveries. An FTX lawyer told the bankruptcy court in January that creditors and former customers were in line to get all of their money back.

But Sullivan & Cromwell has long been subject to criticism for its work for FTX prior to the exchange's collapse and its alleged failure to detect the fraud being perpetrated by co-founder Sam Bankman-Fried. The law firm is being sued by FTX customers and its work for the exchange is also being probed by an independent bankruptcy examiner.

Bankman-Fried — who was last month sentenced to 25 years in prison for stealing billions of dollars from FTX customers — also tried to cast blame on Sullivan & Cromwell and other outside lawyers as part of his defense strategy. The law firm has said its work for FTX was limited, and the exchange's new management has defended Sullivan & Cromwell against what it calls a "false narrative" pushed by Bankman-Fried and others.

The debate over the firm has slowed down the process to get a monitor in place for Binance. Both the US government and the company had said they would "use their best efforts" to choose a monitor within a soft deadline of 60 business days following the Nov. 21 plea agreement.

Tasked with ensuring that Binance complies with its plea agreement, the monitor will gain access to internal records, facilities and employees to report on the company's activities to the government. Binance has been asked to identify and report tens of thousands of suspicious activity transactions the Treasury Department accused the company of ignoring in the past.

As part of Binance's settlement, the Justice Department monitorship is set to last for three years and the FinCEN one for five.

--With assistance from **Chris Strohm**.

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Trump Media stock slides again to bring it more than 66% below its peak as euphoria fades

[courthousenews.com/trump-media-stock-slides-again-to-bring-it-more-than-66-below-its-peak-as-euphoria-fades](https://www.courthousenews.com/trump-media-stock-slides-again-to-bring-it-more-than-66-below-its-peak-as-euphoria-fades)

Associated Press

On Monday, Trump arrived at a New York court for the start of jury selection in his hush-money trial. It's the first trial of any former U.S. president.



The Truth Social account for former President Donald Trump is seen on a mobile device, Wednesday, March 20, 2024, in New York. (AP Photo/John Minchillo)

NEW YORK (AP) — The stock price for Donald Trump's social media company slid again Monday, pushing it more than 66% below its peak set late last month.

Trump Media & Technology Group closed down 18.4% at \$26.61 as more of the euphoria that surrounded the stock fades. It's a sharp comedown since nearing \$80 after the owner of Truth Social merged with a shell company to get its stock trading on the Nasdaq under the symbol "DJT," for Trump's initials.

Part of the decline may be due to criticism that the stock price had zoomed way past what skeptics said the money-losing company is worth, particularly one with tough odds for success. But another part is also likely because of action Trump Media took Monday.

The company filed documents with the U.S. Securities and Exchange Commission that open the door for the future potential sale of millions of shares. The document, called an S-1, relates to warrants held by investors that can be transformed into shares of stock, as well as shares held by company insiders.

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Courthouse News' podcast Sidebar tackles the stories you need to know from the legal world. Join our hosts as they take you in and out of courtrooms in the U.S. and beyond.

The filing also includes all the shares held by the former president. Trump, though, remains under a "lock-up" deal that largely restricts him from selling his shares for another roughly five months. His son, Donald Trump Jr., who is a director on the board, and CEO Devin Nunes, are also bound by the lock-up.

Typically, all shares of stock held by insiders subject to lock-up deals are included in such filings, according to Jay Ritter, an expert on initial public offerings of stock at the University of Florida's Warrington College of Business.

The filing does not necessarily mean any investors are planning to sell their shares, Sarasota, Florida-based Trump Media & Technology Group said in a statement.

Trump Media got its place on the Nasdaq after merging with a company called Digital World Acquisition Corp., which was essentially a pile of cash looking for a target to merge with. It's an example of what's called a special purpose acquisition company, or SPAC, which can give young companies quicker and easier routes to getting their shares trading publicly.

S-1 filings are typically filed quickly after a SPAC deal closes, usually within 15 or 30 days, said Kristi Marvin, founder of SPACInsider.com, which specializes in SPAC deals.

The exercise of warrants referenced in Trump Media's S-1 filing would increase the number of shares outstanding for the company. That in turn could put downward pressure on the stock price. When something becomes more available, it tends to fall in price unless demand for it picks up accordingly.

The drop in Trump Media's stock price over the last few weeks hurts its shareholders, who experts say are mostly smaller-pocketed investors rather than big institutions. Several users of Truth Social have said they bought shares to show their support of the former president.

The drop also puts a huge hit on Trump's finances directly. He could personally own nearly 114.8 million shares, depending on the company's performance. That would be worth \$3.15 billion at its current price. On March 27, that was worth nearly \$7.6 billion.

On Monday, Trump arrived at a New York court for the start of jury selection in his hush-money trial. It's the first trial of any former U.S. commander-in-chief.

Categories / Business, Media, Politics, Securities, Technology

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<https://www.wsj.com/business/autos/tesla-cybertruck-delayed-deliveries-23d22af1>

BUSINESS | AUTOS

Tesla Delays Cybertruck Deliveries, Leaving Buyers Confused

The pause is the latest issue for the carmaker, which recently announced job cuts

By [Alyssa Lukpat](#) [Follow](#) and [Joseph De Avila](#) [Follow](#)

April 16, 2024 12:59 pm ET



A 2025 Cybertruck on display at an auto show in Chicago earlier this year. PHOTO: ALEX WROBLEWSKI/SHUTTERSTOCK

Tesla **TSLA -3.33% ▼** has delayed deliveries of its Cybertruck in recent days, according to buyers, the latest stumble for the automaker facing weakening demand for its electric vehicles.

Buyers say Tesla pushed back the scheduled delivery date for the stainless steel pickup truck without giving a reason. It couldn't be determined how many buyers were affected.

Tesla didn't immediately return a request for comment Tuesday.

The Cybertruck, Tesla's newest electric vehicle, hit the market in November. Elon Musk, the company's chief executive, has warned the model is unlikely to generate significant cash flow before the end of the year. The unusual-looking pickup turns heads when it's seen on the street. It isn't nearly as ubiquitous as other Tesla models but has been driven by celebrities including Kim Kardashian.

Tesla, the world's most valuable automaker, has used the Cybertruck to try to renew interest in electric vehicles, which has broadly waned in recent years. Tesla stock dropped to its lowest level in nearly a year Tuesday, a day after the company said it planned to lay off more than 10% of its global workforce. Two of Musk's top deputies also said they were leaving Tesla.

One Cybertruck buyer, Max Pyko of Birmingham, Ala., said he was supposed to pick up his Cybertruck on April 13 but received a text message alerting him that the delivery had been canceled. He was given a tentative new delivery date of April 20.



The Cybertruck, Tesla's newest electric vehicle, hit the market in November. PHOTO: RICHARD B. LEVINE/ZUMA PRESS

In a text message Pyko received from Tesla, which was reviewed by The Wall Street Journal, the carmaker said, "We have just been informed of an unexpected delay regarding the preparation of your vehicle. We need to cancel your delivery appointment for tomorrow and we will reach out again when we're able to get you back on the schedule."

The carmaker said in a second message to Pyko, "It appears they need at least until April 20th to correct the issue, but it could be potentially longer than that. Tesla is working on getting improved parts to all affected locations asap."

Pyko, 41, said he received “absolutely zero” communication from Tesla explaining the delay.

At least one Cybertruck owner reported on social media that his accelerator pedal got stuck when a panel came off the top of the pedal.

The National Highway Traffic Safety Administration, which issues vehicle recalls, said Tuesday it was aware of the issue and “in contact with the manufacturer to gather additional information.”

The agency in January issued a recall for the 2024 Cybertruck and other Tesla models. The NHTSA said when the vehicles flashed warning lights, the font size was small and difficult to read, which raised the risk of a crash.

The cheapest Cybertruck model sells for around \$76,000, and a more expensive version, called the Cyberbeast, starts at about \$96,000, according to Tesla’s website. By comparison, the cheapest Model 3 sells for less than a third of the price of the Cyberbeast.

Currently the Cybertruck can be ordered on Tesla’s website for delivery next year. The automaker said a less expensive Cybertruck model would be available next year. Tesla said the model can be driven off-road and used to tow cargo.

Tesla said its global vehicle deliveries were down 8.5% in the first three months of this year compared with a year earlier. The company has faced growing competition from Chinese carmakers. Tesla has been competing with Chinese electric-vehicle maker BYD, which reported a jump in sales last month.

Write to Alyssa Lukpat at alyssa.lukpat@wsj.com and Joseph De Avila at joseph.deavila@wsj.com

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BUSINESS | AUTOS | HEARD ON THE STREET

Tesla Is Running Out of Time to Deliver on Self-Driving Promises

Electric-vehicle pioneer seems to be shifting its growth hopes to the unproven technology of automated driving

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

April 16, 2024 7:52 am ET



Tesla could be looking to an alternative growth strategy previously overshadowed by the success of vehicle sales.

PHOTO: PEERAPON BOONYAKIAT/ZUMA PRESS

If Tesla **TSLA -3.32% ▼** wants to be seen as an artificial-intelligence company rather than just a carmaker, it needs to come up with hard data to back its claims.

The electric-vehicle pioneer is cutting a 10th of its workforce, The Wall Street Journal and other outlets reported on Monday. Its top executive in charge of powertrain and energy engineering, Drew Baglino, also said he was leaving after 18 years at the company.

This latest news, which sent the shares down more than 5%, fits a recent pattern pointing to a strategic shift. Tesla seems to be giving priority to its efforts to

make cars autonomous over its previous pursuit of the most rapid possible sales growth.

Chief Executive Elon Musk tweeted earlier this month that the company would unveil a long-awaited driverless Tesla or “robotaxi” on August 8. Employees have been told that the robotaxi is now a higher priority than the cheaper Tesla model that previously underpinned expectations for growth, The Wall Street Journal has reported.

Tesla’s current driver-automation software can perform most driving tasks but still requires human drivers to keep their eyes on the road and intervene where necessary. The company has promoted its capabilities more aggressively since the release of an update late last year that replaced some human-written code with artificial intelligence. On Friday Tesla halved the price of a subscription to \$99 a month for its most advanced package, called “Full Self-Driving” or FSD.

A pivot from vehicle to software sales could be a reason for Baglino’s departure as the company’s top hardware engineer. A recognition that the company won’t sell as many cars as it hoped might also explain the job cuts, which will affect factory workers too. In 2022, the last time Tesla announced layoffs, they only affected salaried employees and the company’s overall head count grew.

Why would Tesla shift focus? The most obvious reason is that its current strategy isn’t working: Price cuts haven’t succeeded in keeping its targeted sales growth on track in a slowing EV market. Their most noticeable effect has instead been to trim Tesla’s margins, reducing profit expectations and the share price.

Still, this was precisely the problem the next-generation Tesla was supposed to address. If the project is being delayed, it could be that Musk is losing confidence in the company’s capacity to master the engineering challenge of making an EV that is cheap, attractive and profitable. Compact cars have been a tough business for the car industry for years, even without the addition of expensive EV batteries and the recent arrival of new competitors from China.

A more generous interpretation is that Musk is gaining confidence in the company’s software capabilities, allowing Tesla to re-emphasize an alternative growth strategy that was previously overshadowed by the success of the Models 3 and Y. Selling software has long been a more lucrative business than selling

cars—not to mention the only thing that could justify Tesla’s outsize valuation. So if the company actually has sight of a workable driver-automation product, giving it priority is a strategic no-brainer.

The problem is this “if”: Musk has a long record of promising that autonomy is just around the corner. He is “the boy who cried FSD,” as he himself said last year. So why should investors believe him now?

Shareholders will look for clarity on the company’s strategy next week, when it will hold a call to discuss its first-quarter results. But if a pivot from hardware to software is indeed under way, Tesla needs to give investors reasons to believe the latest talk of FSD and robotaxis amounts to more than just the same old promises.

The current evidence is overwhelmingly anecdotal, as Tesla drivers air their opinions of the latest version of FSD on social media. Just about the only hard data investors have to go on is a lengthening bill: Tesla boosted spending on research and development last year even as growth slowed, adding to the margin squeeze from vehicle price cuts.

Giving the number of Tesla owners who have bought FSD or subscribe to it would be a start. More fundamentally, though, the company needs to define, disclose and target metrics for the product’s performance, such as how far it goes on average before human drivers need to intervene and how that has changed over time. This isn’t just for investors; regulators and the public also need to be brought on board.

Only with detailed, trustworthy disclosures on FSD’s performance will it become clear when Tesla might think about taking legal responsibility for driving functions, paving the way for a genuinely autonomous “robotaxi.” The August reveal could prove to be a red herring, given the delay between past product unveils and actual road-ready output: Production of Tesla’s Cybertruck only started four years after its unveiling, and has been extremely slow to increase.

Investors could get behind Tesla’s plans for a compact EV because of its record with the Model 3 and Y. With autonomy, the company still has everything to prove.

EY

German watchdog finds EY's Wirecard audits grossly negligent

Apas stops short of establishing criminal intent in Big Four firm's conduct

Olaf Storbeck in Frankfurt YESTERDAY



EY's audits of collapsed payments group Wirecard were "at the very least" negligent and in some cases grossly negligent, according to people with direct knowledge of the details of an investigation by the German audit watchdog.

Apas, however, did not establish criminal intent in the Big Four firm's conduct and while its assessment is unflattering, it has been greeted with relief inside [EY](#) for this reason, said people familiar with the firm's internal discussions.

Criminal misconduct, such as an auditor knowingly and deliberately issuing factually wrong audits, can be punished with up to three years in jail under German law. EY could also have faced unlimited liability for claims of damages from Wirecard's administrator and former shareholders.

Without a finding of criminal intent, in any civil case EY's liability would be capped at €4mn. According to one of the people familiar with discussions at the firm, EY was "rather pleased" with the ruling.

The people said this relatively favourable conclusion was a key reason why EY last month [dropped its appeal](#) against a €500,000 penalty and a two-year ban on taking on listed audit clients in Germany, which had been imposed by Apas last year.

When it dropped the appeal, EY said it did not agree with all of the regulator's findings but was accepting the sanctions to "bring a conclusion to these proceedings". Over the past four years, it has lost significant market share among German blue-chips, which it hopes to regain from 2026 when the ban expires.

[Wirecard](#) was one of Germany's most successful tech start-ups and at its peak in 2018 was worth €24bn, but it crashed into insolvency in June 2020 after disclosing that half of its revenue as well as most of its profits did not exist. In the years before the insolvency, it had received unqualified audit opinions from EY for close to a decade.

A review on behalf of the German parliament concluded in 2021 that EY had [failed to spot signs of fraud risk](#), did not follow professional guidelines and relied on verbal assurances from executives on several key questions.

Over several years, the firm also failed to request crucial account information from a Singapore bank where Wirecard claimed it had large amounts of corporate cash.

Markus Födisch, the presiding judge in the criminal trial of former Wirecard boss Markus Braun and two other former managers has [criticised the firm's actions](#) in court, saying: "[EY] could have handled it differently, and then the whole issue would have been uncovered more than a year earlier."

Wirecard's administrator and former shareholders have accused EY of failing in its professional duties, and have filed lawsuits claiming billions of euros in compensation.

EY has previously said that it "deeply regrets that we didn't find the fraud sooner".

At an early stage of its investigation of EY's Wirecard audits in late 2020, Apas informed prosecutors in Munich that it had found evidence pointing to potentially criminal conduct by EY.

The prosecutors subsequently opened investigations of current and former EY partners who were in charge of the audits. At the time, Apas stressed its view was a "preliminary assessment" and "does not signify a conclusion or confirmation of any offences".

Munich prosecutors told the Financial Times last week that their investigation was ongoing, and declined to comment further.

While criminal prosecutors and the civil courts are not formally bound by the Apas ruling and are required to take an independent view, people familiar with the case argued it was an important benchmark, noting that the threshold for establishing criminal intent is very high under German law.

EY and Apas declined to comment.

Indian Auditor Fined Over Work for Financial Firm That PwC Quit

By Michael Kapoor

- Pathak sanctioned over 'grossly negligent' Reliance Capital audit
- Former joint auditor PwC warned of possible fraud at investing firm

Bloomberg Law News 2024-04-16T09:56:09511535068-04:00

Indian Auditor Fined Over Work for Financial Firm That PwC Quit

By Michael Kapoor 2024-04-15T15:42:56000-04:00

- Pathak sanctioned over 'grossly negligent' Reliance Capital audit
- Former joint auditor PwC warned of possible fraud at investing firm

An Indian accounting firm has been hit with a regulatory fine over its audit of Reliance Capital, a financial services company that a local PwC firm had flagged for possible fraud.

India's National Financial Reporting Authority issued a fine of 30 million rupees (\$359,000) on Pathak HD & Associates over its audit of Reliance Capital's financial statements in fiscal year 2019, the watchdog said in a ruling published Saturday. The regulator called Pathak's auditing work "grossly negligent."

Pathak had acted as joint auditor of Reliance Capital alongside a local affiliate of accounting giant PwC, also known as PricewaterhouseCoopers. The PwC affiliate resigned as Reliance Capital's auditor in 2020 without signing off on the company's 2019 accounts, citing concerns about possible fraud.

Reliance Capital, once controlled by former billionaire Anil Ambani, has been undergoing insolvency proceedings. The Indian central bank took control of the company in 2021 following a series of defaults.

PwC found suspected fraud in Reliance Capital loans and investments, according to the National Financial Reporting Authority's order concerning Pathak. This wasn't mentioned in Pathak's audit opinion, the regulator said.

Reliance Capital's accounts contained material errors over provisioning and loan valuations, the regulator said. PwC identified several of these problems to Pathak, according to the ruling.

"The Auditor was grossly negligent and failed to obtain sufficient appropriate audit evidence to support their opinion, failed to maintain professional skepticism and due diligence, failed to sufficiently and adequately challenge the management assertions and thus failed to identify and report material misstatements in the financial statements," the ruling said of Pathak.

Pathak has denied the charges.

Pathak partners Parimal Kumar Jha and Vishal Shah were fined 10 million rupees and 5 million rupees respectively. Jha was barred from auditing for 10 years and Shah for five years.

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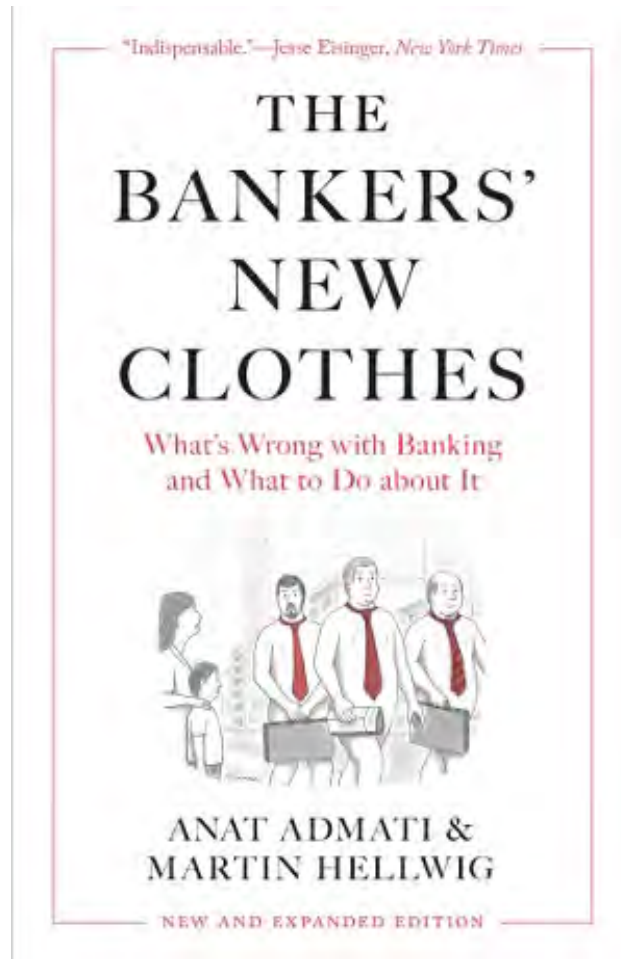
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Stanford Finance Professor Anat Admati Is Making Jamie Dimon Very Nervous – Again Calling His Bank “Dangerous”

 wallstreetonparade.com/2024/04/stanford-finance-professor-anat-admati-is-making-jamie-dimon-very-nervous-again-calling-his-bank-dangerous

By Pam Martens and Russ Martens: April 16, 2024 ~



Stanford Finance and Economics Professor Anat Admati has been valiantly attempting to save the American financial system from the corrupting influence and disinformation campaigns of men like JPMorgan Chase’s Jamie Dimon for more than a decade. Her voice is gaining traction and that’s making Dimon very nervous.

Dimon has admitted in his recent letter to shareholders that his federal banking regulators want the bank to raise 25 percent more capital. Making banks hold more equity capital (as opposed to debt) is an issue that Admati has made a central focus of her arguments for years.

Dimon's bank would have a lot more equity capital if Dimon had retained the bank's earnings each year instead of tapping those earnings to boost the bank's stock price by using \$117 billion of the bank's earnings for share buybacks over the past decade. (Retained earnings add to a bank's equity capital.) Dimon became a billionaire as a result of the bank's inflated share price, because his Board gave him the bulk of his annual compensation in shares of stock. (In February of this year, Dimon cashed out \$150 million of that stock.)

In 2011, one year before Dimon called a growing financial crisis at JPMorgan Chase “a tempest in a teapot,” Admati penned an open letter to the bank's Board of Directors and published it at *Huffington Post*. In the letter, she wrote:

“Mr. Dimon claims that higher capital requirements would increase JPM's cost, but his reasoning is flawed.

“It is critical first to distinguish capital and liquidity requirements. Capital requirements are not about what banks ‘hold.’ They do not mandate that banks passively ‘set aside,’ or ‘hold in reserve’ funds, not putting them to productive uses. Banks’ investments are not constrained by capital requirements. Capital requirements refer only to how banks fund themselves. It is investors, not the banks, who hold the debt and equity (so-called ‘capital’) claims that banks issue. Liquidity requirements, by contrast, do constrain the types of assets banks hold, and they can be costly. Capital and liquidity requirements refer to different sides of the balance sheet.”



Stanford Finance and
Economics Professor
Anat Admati

Less than two years after Admati had penned her warning about how Dimon was running JPMorgan Chase, the U.S. Senate's Permanent Subcommittee on Investigations had concluded a nine-month investigation into how JPMorgan Chase was using deposits from its federally-insured bank to make high-risk gambles in derivatives in London. The scandal became known as the “London Whale.” The Subcommittee released a scathing 300-page report on the matter, which contained this opening paragraph:

“JPMorgan Chase & Company is the largest financial holding company in the United States, with \$2.4 trillion in assets. It is also the largest derivatives dealer in the world and the largest single participant in world credit derivatives markets. Its principal bank subsidiary, JPMorgan Chase Bank, is the largest U.S. bank. JPMorgan Chase has consistently portrayed itself as an expert in risk management with a ‘fortress balance sheet’ that ensures taxpayers have nothing to fear from its banking activities, including its extensive dealing in derivatives. But in early 2012, the bank's Chief Investment Office (CIO), which is charged with managing \$350 billion in excess deposits, placed a massive bet on a complex set of synthetic credit derivatives that, in 2012, lost at least \$6.2 billion.”

Let that sink in for a moment. Less than four years *after* Wall Street banks had crashed the U.S. economy in the worst financial crisis since the Great Depression of the 1930s, and just two years *after* the Obama administration had passed and signed into law the Dodd-Frank financial “reform” legislation, JPMorgan Chase was using deposits from its federally-insured bank to gamble in risky derivatives and lose \$6.2 billion of *its depositors’ money*.

In a rational banking system, Dimon would have been immediately sacked and JPMorgan Chase’s ability to use deposits at its federally-insured bank to make high-risk bets would have been curtailed and fiercely policed by regulators. Instead, the federal regulator of national banks, the Office of the Comptroller of the Currency, released a report on March 27 *of this year* indicating that at year end 2023, JPMorgan Chase’s federally-insured bank held \$49.68 *trillion* (yes, *trillion*) in notional (face amount) derivatives. That included \$3.89 trillion in stock (equity) derivatives; \$880 billion in commodity derivatives; \$1.05 trillion in credit derivatives, of which \$238.6 billion were junk-rated; \$246.8 billion in precious metals derivatives and so forth.

Dimon’s Board of Directors, who the last time we looked were deeply conflicted themselves, not only kept Dimon in place as Chairman and CEO through the London Whale scandal, but also through the bank admitting to five outrageous felony counts and a rap sheet that rivals an organized crime family.

Now, at the worst time possible for Dimon, as he attempts to bully regulators into scrapping their demands for higher capital at JPMorgan Chase, out comes Admati with an updated and expanded version of the highly readable, pristinely documented, seminal book on bank capital and the bankers’ disinformation campaign around it: *The Bankers’ New Clothes: What’s Wrong with Banking and What to Do about It*. The book is co-authored with German economist Martin Hellwig. In it, Admati and Hellwig write this:

“The term ‘fortress balance sheet’ that Mr. Dimon loves to use conveys a sense of safety and security, the opposite of vulnerability and fragility. But if one examines the actual risks lurking around the size and type of the bank’s investments and debts, the strength of the fortress can be called into question. A closer look suggests that JPMorgan Chase is highly vulnerable and is imposing significant risk on the global financial system.

“Some of the risks that make JPMorgan Chase dangerous cannot actually be seen by looking at its balance sheet because the positions that give rise to them are not included there. These are risks from business units that JPMorgan Chase might own in part or that it sponsors, and to which it has provided guarantees to serve as a backstop if they should have funding problems. These units might be full-blown subsidiaries, or they might be mere ‘letterhead firms,’ vehicles without any drivers, that are established for legal or tax reasons

only. The bank’s commitments to these units amount to almost a trillion dollars, but these potential liabilities of the bank are left off the bank’s balance sheet. Yet they are quite relevant to the financial health of JPMorgan Chase.”

The authors note that these same kind of off-balance sheet exposures bankrupted Enron in 2001 and required bailouts of mega banks in 2007 and 2008 from their off-balance sheet exposures to subprime mortgage debt. (See our 2008 article on the Rise and Fall of Citigroup.)

Senator Elizabeth Warren said last month in a Senate Banking Committee hearing that Fed Chair Jerome Powell has become “weak-kneed” and is now “driving efforts inside the Fed to weaken the capital rule.”

That leaves the Fed Vice Chair for Supervision, Michael Barr; FDIC Chair Martin Gruenberg; and Acting Comptroller of the Office of the Comptroller of the Currency, Michael Hsu, on the frontlines of the regulators’ battle to stand firm on higher capital for the mega banks on Wall Street. The future financial health of the U.S. economy and the U.S. financial system depends on these regulators not also becoming weak-kneed.

Not only do these regulators need to stick to their proposed higher capital rules, but they need to immediately push for the restoration of the Glass-Steagall Act to separate federally-insured banks from the trading casinos on Wall Street.



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Justices Leave Lower Courts To Parse Corporate 'Half-Truths'

By **Jessica Corso**

Law360 (April 15, 2024, 10:04 PM EDT) -- A recent U.S. Supreme Court ruling that corporate silence isn't enough to form the basis of a securities fraud suit pointedly declined to wade into the question of what counts as a "half-truth," leaving it to lower courts to wrestle with which corporate statements are blurry enough to sustain a shareholder class action.

The high court **issued a unanimous decision** Friday vacating and remanding a Second Circuit ruling in favor of shareholder Moab Partners LP, which hopes to lead a class of Macquarie Infrastructure Corp. investors who were allegedly left in the dark about the impact that an anticipated global ban on high-sulfur fuels would have on its fuel storage business.

The justices ruled that the omission of information a business must disclose could not alone form the basis of a lawsuit under the anti-fraud regulation known as U.S. Securities and Exchange Commission Rule 10b-5(b). Instead, such an omission would have to be coupled with an affirmative statement that converts the silence into a "half-truth," the justices said.

"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," the court said in an opinion written by Justice Sonia Sotomayor.

The decision could curtail some shareholder fraud suits, although just how far the decision will go in limiting investors' options may depend on how lower courts define "half-truth."

Laura Posner of investor-side law firm Cohen Milstein Sellers & Toll PLLC said that corporations might try to use the Macquarie opinion to get shareholder lawsuits thrown out, but she doesn't think they'll be successful.

"I think from a practical standpoint, the decision is going to be very limited," Posner said. "It is extremely rare for us to bring a claim that doesn't allege in some way a half-truth or just straight misstatements."

She said she believes corporations that use the Macquarie defense will run into the same problems they've faced trying to combat shareholder class actions by referencing the high court's 2021 decision in [Goldman Sachs v. Arkansas Teacher Retirement System](#).

That decision requires courts to examine whether allegedly misleading statements are too generic to form the basis of class certification, but few courts have applied the ruling thus far.

The only circuit court to apply the Goldman decision to date is the Second Circuit, which last year **decertified** the very same Goldman class at the center of the Supreme Court challenge.

"Goldman has been almost uniformly, if not uniformly, unsuccessful for defendants," Posner said. "They're just not getting the wide interpretation of the rule that they were hoping for, and they're not getting the language by the Supreme Court that would allow them to do so."

The court could have, for example, waded into the half-truth debate, but noted in a footnote to Friday's opinion that it wasn't going to go there, Posner pointed out.

"Moab and the United States spill much ink fighting the question presented, insisting that this case is about half-truths rather than pure omissions," Justice Sotomayor wrote in the footnote, highlighting the government's decision to participate in the case. "The court granted certiorari to address the Second Circuit's pure omission analysis, not its half-truth analysis."

In fact, Moab Partners has argued that Macquarie did make statements that amounted to half-truths because they made it appear that demand for stored products was not decreasing.

The business plans to press ahead with its lawsuit on that and other theories, Moab attorney Salvatore Graziano of Bernstein Litowitz Berger & Grossmann LLP told Law360 Friday.

Defense attorney Michael Hines of Skadden Arps Slate Meagher & Flom LLP worried that plaintiffs would attempt to bypass the Macquarie ruling via "creative pleadings."

"Courts ought to be wary of plaintiffs attempting to get around this decision by dressing up an omissions case as one alleging a half-truth," Hines told Law360. "I think we're likely to see that."

Most of the attorneys Law360 spoke to also agreed that it's likely that the ruling will be applied beyond Item 303, the disclosure obligation that the Supreme Court discussed in Macquarie. Item 303 requires management to disclose known trends or uncertainties reasonably believed to have a material impact on corporate income.

Baker McKenzie partner Perrie Weiner said in a written statement to Law360 that the justices' reasoning could apply to securities suits alleging a failure to disclose risks associated with corporate environmental, social and governance policies, the use of artificial intelligence, or cybersecurity breaches.

"Of course, as noted by the court the SEC could still pursue enforcement actions in these contexts," Weiner wrote. "And, I would anticipate that, given the SEC's penchant for requiring full transparency."

Hilgers Graben PLLC partner Scott Mascianica said he wasn't so sure that the SEC would completely escape the impact of Friday's ruling.

Mascianica, a former SEC enforcement attorney, said the agency would also have to be wary about bringing fraud claims purely based on omissions post-Macquarie.

"The court really did not put a finer point on what the SEC could or could not do," he said. Justice Sotomayor wrote that the agency "retains authority to prosecute violations of its own rules and regulations" but there are ways for it to do so outside Rule 10b-5(b), Mascianica said.

The ruling spoke broadly about 10b-5(b), including addressing "what it says, and more importantly, what it doesn't say," Mascianica said. "I see that as absolutely having an impact on the SEC and what it will be required to plead and what I think courts are going to expect going forward."

--Editing by Jay Jackson Jr. and Kelly Duncan.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (April 15, 2024, 4:57 PM EDT) -- Last week, Delaware justices mulled whether one Chancery Court vice chancellor properly voided four company bylaws — just as another vice chancellor voided one more. Fights among Truth Social investors continued, and shareholders launched new cases involving Macy's, United Airlines, and Clayton Dubilier & Rice LLC and Stone Point Capital LLC.

In case you missed it, here's the wrap-up of the news from Delaware's Chancery Court.

In the Courtroom

Delaware's Supreme Court **heard appeal arguments** of Vice Chancellor Lori W. Will's decision to invalidate four advance notice bylaws that AIM ImmunoTech Inc. established in response to a proxy contest, focusing their questions on whether the case presented a facial or an as-applied challenge.

Decisions

Chancellor Kathaleen St. J. McCormick **preserved derivative claims** of insider trading, securities fraud and merger-related breaches in a consolidated shareholder class action against the leaders of electric-truck maker Nikola Corp. and VectoIQ Acquisition Corp., the special purpose acquisition company that took it public.

Vice Chancellor Morgan T. Zurn **invalidated a bylaw** that allowed the board of homebuilder KB Home to unilaterally shift an acting board director into a non-functioning "emeritus" role, siding with a shareholder who challenged the rule.

Delaware's Supreme Court **upheld** Vice Chancellor Paul A. Fioravanti Jr.'s rejection of a mid-case appeal attempt by billionaire investor Carl Icahn in his suit against the board of Illumina Inc. in connection with the biotech's decision to reacquire cancer-testing firm Grail Inc.

New Cases

Investors of clinical-stage pharmaceutical company Taysha Gene Therapies Inc. **sued** the company's directors and officers to recover more than \$200 million in damages on behalf of the company after its insiders allegedly wrongfully profited from a public equity sale.

A Macy's Inc. stockholder **sought a court order** that would prevent the retailer from stopping a proxy contest that Arkhouse Management Co. and Brigade Capital Management launched after Macy's refused to accept their buyout offer.

A United Airlines Holdings Inc. stockholder **sued the carrier** and its directors, accusing them of justifying a vote to extend a prohibited, board-entrenching poison pill by publicly linking it to allowable protection of certain tax advantages.

Paragon Technologies Inc., an investor that has been trying for nearly a year to nominate an alternative slate of directors for the board of offshore renewable energy company Ocean Power Technologies Inc., **alleged** in a new complaint that the company and its management have been scheming to prevent a fair stockholder vote.

Investors in the blank check company that took biotech firm Ginkgo Bioworks Inc. public in September 2021 **sued** the venture's founders and insiders for unjust enrichment, alleging that the

deal was propped up by false and misleading claims.

A New York hedge fund that invested in a special purpose acquisition company that failed to buy a casino in the Philippines **launched a new lawsuit** seeking to prevent the SPAC from redeeming its outstanding shares, arguing it would violate Delaware law because the SPAC is insolvent.

Another shareholder of web analytics firm New Relic Inc. **sought corporate records** related to the company's \$6.5 billion, \$87-per-share buyout by private equity firms Francisco Partners and TPG, the latest in a string of shareholder suits seeking records on the deal.

Two pension fund stockholders sued multiple parties involved in the \$7 billion take-private acquisition of Focus Financial Partners by interests of Clayton Dubilier & Rice LLC and Stone Point Capital LLC last year. The suit follows up on separate books and records cases that the same two funds **filed last year**, shortly before the deal closed in August. The new case is Anchorage Police & Fire Retirement System, et al. v. Rudy Adolf, et al., case number 2024-0354

Ongoing Disputes

Two former "Apprentice" contestants who co-founded Donald Trump's social media company Truth Social **won the go-ahead** to expand their complaint against the former president, Trump Media & Technology Group, and its insiders for post-deal maneuvering to dilute and claw back their shares.

Attorneys for Trump Media **objected** to fast-tracking the amended suit, saying that it added new claims and new defendants, and could require a re-alignment of counsel.

In a separate case, 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, declaring that its managing member Patrick Orlando shall continue to function as the sole manager and/or managing member.

The investors behind the SPAC sued in March, seeking a court declaration that they had validly removed Orlando from his post.

Still Under Seal

A shareholder filed a derivative suit on behalf of RTX Corporation against its outgoing chief executive officer and chairman Gregory J. Hayes, incoming CEO and current President and Chief Operating Officer Christopher T. Calio, and 18 other current and former company directors and executives. The case is Gerald Joseph Lovoi v. Gregory J. Hayes, et al., case number 2024-0383, in the Court of Chancery of the State of Delaware.

Settlements

Sirius XM Holding Inc. stockholders who sued over an alleged ongoing squeeze-out by Liberty Media Corp. **won court approval** of a \$36 million settlement to end their litigation, along with a \$9.6 million payout for their attorneys and \$50,000 for the lead plaintiff.

Class attorneys **sought approval** of a \$100 million settlement to end state and federal court litigation over Pattern Energy Group Inc.'s \$6.1 billion go-private sale in 2020 and urged the court to award them \$26 million in fees for a deal they say is the largest of its kind in Chancery's history.

Get It Together

Chancellor Kathaleen St. J. McCormick **designated** Prickett Jones & Elliot, Grant & Eisenhofer PA, and Kessler Topaz Meltzer & Check as co-lead counsel in a consolidated, proposed shareholder class action over a \$3.7 billion squeeze-out acquisition of grill maker Weber Inc. by private equity firm BDT Capital Partners LLC.

Quotable

"I think peace might have broken out ... It sounds like what you are both saying is, we don't need to

deal with the facial challenge here: Everybody is focused on how these are applied." — Delaware Supreme Court Chief Justice Collins J. Seitz Jr., during **appeal arguments** in **Kellner v. AIM ImmunoTech Inc.** 

--Additional reporting by Emilie Ruscoe, Sydney Price, Jeff Montgomery, Rose Krebs. Editing by Kelly Duncan.

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Chancery Denies Forte Biosciences' Bid To Toss Investor Suit

By **Leslie A. Pappas**

Law360 (April 15, 2024, 9:26 PM EDT) -- Board members of a struggling clinical-stage biopharmaceutical company who allegedly took defensive measures to stay in power after activist investors pushed the company to liquidate must face a stockholder's Delaware Chancery Court derivative suit that they breached their fiduciary duties to shareholders, a vice chancellor said Monday.

In her bench ruling, Vice Chancellor Morgan T. Zurn said that the shareholder, Camac Fund LP, had raised "reasonable inferences" that Dallas-based Forte Biosciences Inc. engaged in a "pattern of defensive conduct" to entrench its leadership in response to some shareholders' demands for change.

A two-seat board expansion, a three-month delay of an annual meeting and a vote-diluting 15.2 million-share private offering were among the details in Camac's complaint that allowed it to survive Forte's motions to dismiss, the vice chancellor said.

"We are pleased with the court's ruling, which protects the rights of public stockholders who overwhelmingly voted in favor of change at Forte," Aaron T. Morris of Morris Kandinov LLP, counsel for Camac, told Law360 after the ruling. "It is never best practice for a board of directors to entrench and suppress rather than address the legitimate concerns of its constituents."

Camac sued Forte and its board in August, alleging that the directors **entrenched themselves** and undermined stockholders' ability to vote for a slate of new directors who were not aligned with the incumbents' regime.

The complaint names Forte's founder, CEO and Chairman Paul A. Wagner, as well as board members Lawrence Eichenfield, Barbara K. Finck, Donald A. Williams, Stephen K. Doberstein, Steven Kornfeld, Scott Brun and David Gryska.

The lawsuit came about two years after Forte announced that its primary drug candidate to treat inflammatory skin disease had failed in Phase 2 of its clinical trials, and the company's stock price collapsed.

By 2022, the company's market capitalization was less than \$20 million even though it had \$45 million cash on hand and no meaningful debt, the complaint says.

When Forte announced in May 2022 that it would pivot to developing a new treatment for autoimmune-related diseases, several large investors, including BML Investment Partners, Funicular, ATG Capital Management and Camac, began pressuring the company to return capital to shareholders instead.

Camac began purchasing shares and launched a campaign for new board leadership, calling for the removal of Wagner.

The board then turned to defense measures, implementing a "poison pill" with a 10% threshold, adding two board seats and approving severance agreements with large payouts in the event of a change of control.

In June 2023, the board announced that its annual meeting would not be held until September, three

months after it should have been held.

Then on Aug. 1, shareholders learned that the board had authorized a private sale of securities known as a PIPE transaction — a private investment in public equity — sending out 15.2 million shares of the company's common stock to a restricted group of private investors, including four incumbent board members.

The PIPE made it more likely that incumbents would be elected because they held 42% of the eligible voting shares, diluting the opposing shareholders' vote, the vice chancellor said Monday in recounting the complaint's allegations.

At the annual meeting, Wagner and Eichenfield were reelected to the board, buoyed by the new PIPE votes.

Camac sued, seeking a court order to compel Forte to scrap the 2023 election results, set a 2024 annual meeting and exclude all PIPE votes from future director elections.

Camac has sufficiently claimed that the PIPE votes "flipped the outcome" of the annual meeting and "had an entrenching effect," the vice chancellor said.

"Defendants say the PIPE was to raise needed capital," Vice Chancellor Zurn said, "but this argument offers an inference I cannot accept at this stage."

Counsel for Forte and the director defendants did not immediately respond to a request for comment Monday.

Camac is represented by Aaron T. Morris, Andrew W. Robertson, Jonathan R. Voegele and William Spruance of Morris Kandinov LLP and William M. Alleman Jr. and Matthew D. Beebe of Meluney Alleman & Spence LLC.

Forte and the director defendants are represented by Brad D. Sorrels, Shannon E. German, Kaitlin E. Maloney, Nora M. Crawford and Jeremy W. Gagas of Wilson Sonsini Goodrich & Rosati PC.

The case is Camac Fund LP v. Wagner et al., case number 2023-0817, in the Court of Chancery of the State of Delaware.

--Additional reporting by Gina Kim. Editing by Adam LoBelia.



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Years After Args, 7th Circ. Continues Mootness Fee Attack

By **Lauraann Wood**

Law360 (April 15, 2024, 8:36 PM EDT) -- A Seventh Circuit panel said Monday that a Chicago federal judge improperly barred a class action objector from intervening in a suit involving controversial "mootness fees" the appellate court has long criticized, saying he failed to articulate a valid legal reason for doing so.

A district court was likely correct to order Akorn Inc. investors' counsel at Monteverde & Associates and Geyser PC to return \$322,500 in attorney fees they negotiated after securing additional disclosures about Akorn's planned merger with Fresenius Kabi AG for their clients, who had otherwise opposed the merger, the court said after hearing oral argument four years ago.

However, the lower court should have allowed Center for Class Action Fairness founder Theodore Frank to intervene as an objector to challenge the so-called mootness fees at issue, the court said, remanding the case with orders to give Frank his day in court.

U.S. District Judge Thomas Durkin told Frank, "I'm planning to reject your proposed remedies, so your request is moot," according to the opinion. But that is not an actual legal doctrine, the panel said.

"A case becomes moot only when it is impossible to grant effective relief," it said. "If 'you are going to lose, so your claim is moot' were a proper approach, unsuccessful suits would be dismissed as moot rather than on the merits. That's not how things are supposed to work."

The ruling resolves six appeals that challenged the controversial mootness fee practice, dismissing two for lack of jurisdiction. U.S. Circuit Judges Diane Wood, Michael Kanne and Frank Easterbrook heard oral arguments in April 2020, but Judge Kanne died in 2022, which led Judges Easterbrook and Wood to decide the issue by quorum, according to the opinion.

The plaintiffs argued the lower court attempted to "rewrite the federal rules on the fly" when it ordered them to return the fees. They asserted the order was an overreach since the allegations that prompted the additional merger disclosures had already been voluntarily dismissed. But the Seventh Circuit said they lacked standing because they would not get any money either way; it was only their attorneys who had a stake in whether or not the fees were returned.

"Their lack of interest in the outcome is so clear that we dismiss their appeals," the panel said.

Mootness fees have generated controversy in recent years, and the Seventh Circuit is believed to be **the first** federal appellate court to review them.

Law professors, defense attorneys and even other plaintiffs attorneys contend that everyone but the lawyers filing the complaint lose, because courts become more skeptical of legitimate allegations and defendants have to address frivolous lawsuits. The significance of the disclosures is up for debate and, unlike in past resolutions, defendants aren't protected against the possibility of future claims, **experts have told Law360.**

The investors launched their complaints seeking accounting information to reconcile Akorn's projections for the Fresenius merger in its proxy statement. As with many similar cases, the defendants' made disclosures that "mooted" the investors' allegations, prompting the plaintiffs to

then voluntarily dismiss their claims and negotiate fees with the defendants without the need for a judge's approval.

Judge Durkin, however, called the Akorn defendants' disclosures "**worthless**" when he ordered the mootness fees repaid in 2019. He said at the time that the investors' counsel had secured settlements that provided Akorn's shareholders nothing of value, and instead caused a company in which they hold an interest to lose money.

Judge Durkin's ruling echoed complaints former Seventh Circuit Judge Richard Posner had previously aired in stockholder litigation against Walgreens as he was endorsing a standard the Delaware Chancery Court established in 2016 requiring that additional disclosures be "plainly material" and not just potentially significant.

In that case, Judge Posner called for an end to the "racket" of insufficient disclosure-only settlements and asserted such cases "should be dismissed out of hand." In ordering the Akorn investor counsel's mootness fee repayment, Judge Durkin said "this is the racket described in Walgreen," and similarly called for an end to the practice.

U.S. Circuit Judges Diane Wood, Michael Kanne and Frank Easterbrook sat on the panel for the Seventh Circuit during oral argument. The opinion was decided by Judges Wood and Easterbrook.

The investors, Shaun House and Demetrios Pullos, are represented by Juan Monteverde of Monteverde & Associates PC and Daniel Geyser of Geyser PC.

Frank is represented by M. Frank Bednarz of the Hamilton Lincoln Law Institute's Center for Class Action Fairness.

The cases are House v. Akorn Inc. et al. and Pullos v. Akorn Inc. et al., case numbers 18-3307, 19-2408 and 19-2401, in the U.S. Court of Appeals for the Seventh Circuit.

--Additional reporting by Celeste Bott. Editing by Alex Hubbard.



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Taro Inks \$36M Investor Deal Over Generics Price-Fixing

By **Lauren Berg**

Law360 (April 15, 2024, 11:10 PM EDT) -- Taro Pharmaceutical Industries shareholders asked a New York federal judge Monday to greenlight a \$36 million settlement resolving proposed class claims that the company misled investors about alleged generic drug price-fixing that led to a drop in stock price upon news of a U.S. Department of Justice antitrust investigation.

In a **motion for preliminary approval**, the shareholders — led by the City of Atlanta Firefighters' Pension Fund — said the proposed settlement provides \$36 million in cash, which represents just under 30% of the lead plaintiff's maximum damages that were estimated by its expert, which the shareholders called "an excellent result for the class."

The pension fund said it has adequately represented its fellow shareholders, arguing that "there is no antagonism or conflict between [it] and the proposed class."

"Lead plaintiff, like the other class members, purchased Taro common stock during the class period [from July 2, 2014, through Nov. 3, 2016] and was injured by the same alleged misstatements," the motion states.

"Lead plaintiff suffered substantial losses as a result of defendants' allegedly wrongful conduct, and its interest in obtaining the largest possible recovery is, therefore, aligned with the other settlement class members," it states, adding that the fund's counsel at Bernstein Liebhard LLP has also adequately represented all the shareholders.

The lawsuit was first filed by Christopher Speakes in October 2016 before Atlanta Firefighters in December 2016 competed to serve as lead plaintiff under the Private Securities Litigation Reform Act, which was designed to limit frivolous securities actions by upping the pleading standard for plaintiffs alleging fraud.

The pension fund then filed the operative amended complaint in June 2017 — which also targeted Taro's former Chief Financial Officer Michael Kalb and its former CEO Kalyanasundaram Subramanian — alleging that the company claimed to compete with other manufacturers to generate revenue and sales growth, while it was actually engaged in a price-fixing conspiracy with other generic drug companies.

That led to Taro stock trading at artificially inflated prices, but it all came crashing down when it was revealed that the Justice Department was investigating the company as part of its **sprawling probe** of the generic drug industry, according to the suit.

The shareholders said Taro conspired with Sandoz, Perrigo, Actavis and other companies to fix prices on at least seven of its drugs: clobetasol, desonide, econazole, fluocinonide, clomipramine, acetazolamide and enalapril, the complaint states.

"The conspirators coordinated, increasing the drugs' prices," the shareholders said. "The drugs' steep price increases each followed closely after meetings between Taro and various conspirators."

"An economic expert has found that there is no non-collusive explanation for the drugs' synchronized price increases — there was no supply shortage, production problem, or sudden increase in demand for these drugs during this period, and no competitor left the market," they added.

Throughout the alleged scheme, Taro "reaped enormous profits," earning about \$1.54 billion in collusive revenues, or about 47% of its total revenues of \$3.24 billion from mid-2013 through 2016, according to the complaint.

To account for these soaring profits, Taro told shareholders it was attributable to "upward price adjustments and a prudent lifecycle management" of the company's products, the suit states.

But once the allegations of price-fixing and the subsequent DOJ investigation were made public, the shareholders said Taro's stock fell to \$119.42 per share on Sept. 12, 2016, from \$124.36 on Sept. 9, 2016, a decline of about 4%, according to the suit. The shares then fell from \$101.05 per share on Nov. 2, 2016, to \$93.68 on Nov. 3, 2016, the suit states.

Along with the regulatory enforcement action, Taro was included in numerous **civil suits**, the shareholders said.

In their motion for settlement approval on Monday, the shareholders said initial settlement talks took place in late 2020 but didn't lead anywhere, so discovery continued, and the parties later agreed to try again in 2023. It wasn't until September 2023 that the parties reached an agreement in principle, the shareholders said.

The shareholders said the settlement is reasonable and is a "much higher recovery than the average \$8.3 million median securities class action settlement for a case at this stage of proceedings in 2023."

Class counsel anticipates asking for \$10.8 million, or 30%, of the settlement fund for attorney fees and no more than \$395,000 for litigation expenses, according to the motion.

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

Back in October 2021, Taro was one of three pharmaceutical companies accused of fixing generic drug prices to agree in a deal with the DOJ to **pay a total of \$447.2 million** over payments government programs made for drugs allegedly impacted by the conspiracies.

Taro, Sandoz and Apotex also previously agreed to settle criminal price-fixing charges as a result of the investigation, with Taro agreeing to pay a **\$205.7 million penalty** in July 2020.

The City of Atlanta Firefighters' Pension Fund and the proposed class are represented by Stanley D. Bernstein, Michael S. Bigin, Joseph R. Seidman Jr. and Adam Federer of Bernstein Liebhard LLP.

Taro is represented by Jeff Hoschander and Joshua Ebersole of Shearman & Sterling LLP.

The case is Christopher Speakes v. Taro Pharmaceutical Industries Ltd. et al., case number 1:16-cv-08318, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Matthew Perlman and Hailey Konnath. Editing by Rich Mills.



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Apple Faces Two Suits Over iPhone Market Dominance

By **Katryna Perera**

Law360 (April 15, 2024, 6:56 PM EDT) -- Apple has been hit with a pair of suits alleging it has unfairly stifled competition in the smartphone market and that its practices and iPhone sales have violated federal securities and antitrust laws.

Different plaintiffs filed two suits in California federal court on Friday. The first focuses on Apple's alleged violations of antitrust laws, with plaintiffs Anali Herrerias and Mariah Nayeri alleging Apple is illegally monopolizing the smartphone market by "locking" consumers into its products.

"Through various anticompetitive and exclusionary practices, Apple has built a walled-off iPhone ecosystem that has made Apple fantastically profitable," the **complaint** states. "Indeed, thanks to Apple's monopolistic practices, the U.S. is the world's third-biggest smartphone market after China and India, but also by far its least competitive. And Apple has roughly 70% of that U.S. market."

Herrerias and Nayeri claim that Apple stifles competition through various means, such as controlling cloud streaming apps like Spotify and Netflix, limiting "super apps" that perform a variety of daily functions, including social media, payments and video messaging, and controlling how smartwatches and competitors operate on its platform.

The complaint also states that one of the main ways Apple stifles competition is through contract restrictions, fees and taxes on app development and distribution. According to the complaint, app developers can only distribute iPhone apps through Apple's App Store. This, in turn, enables Apple to exert control and monopoly power.

The plaintiffs claim that the company also controls app innovation by deciding which application programming interfaces developers can use when creating third-party apps.

"For example, developers cannot provide apps on the iPhone unless they enter into Apple's non-negotiable Developer Program License Agreement. That agreement requires developers to use public APIs only in the manner prescribed by Apple," the complaint states. "Apple's control over both app distribution and creation gives Apple tremendous power, along with the ability to extract supra-competitive profits from iPhone sales."

Herrerias and Nayeri say that Apple knows that new and innovative technologies could threaten its dominance. However, instead of responding to competition by lowering prices for its products or allowing better monetization for developers, the company imposes "byzantine rules and restrictions ... that allow Apple to extract higher fees, thwart innovation, offer a lesser user experience, and throttle competitive alternatives."

The **second lawsuit** filed on Friday by Lisa Johnston Kane is a class action on behalf of all individuals and entities residing in the U.S. who purchased an iPhone or Apple Watch from March 27, 2020, through the present.

Kane says that through Apple's alleged anti-competitive conduct, the company has prevented customers from leaving "to the detriment of both Apple's customers and non-Apple customers who use non-Apple phones."

According to Kane, Apple has deterred competition by designing iPhones to block cross-platform

technologies between iPhone and Android smartphones to solidify and increase its monopoly.

"Apple has blocked features and innovation on its iPhone resulting in Apple making the iPhone worse for consumers to prevent competition from emerging, which has the effect of unlawfully inflating the price of the iPhone," the complaint states. "While Apple claims that it has prohibited the design and installation of cross-platform technologies on its smartphone platform for purposes of 'security' and 'privacy' interests, this is mere pretext."

Additionally, the complaint states that because of these cross-platform barriers, Apple has been able to dominate the smartwatch market and charge high prices for its own Apple Watch.

Both suits seek damages, attorney fees and a jury trial. Representatives for the parties did not immediately respond to requests for comment on Monday.

Herrerias and Nayeri are represented by David S. Casey Jr., Gayle M. Blatt, Jeremy Robinson, P. Camille Guerra and Howard D. Bruno of Casey Gerry Schenk Francavilla Blatt & Penfield LLP.

Kane is represented by Francis A. Bottini Jr., Albert Y. Chang and Aaron P. Arnzen of Bottini & Bottini Inc.

Counsel information for Apple was not immediately available.

The cases are *Herrerias et al. v. Apple Inc.*, case number 5:24-cv-02199, and *Kane v. Apple Inc.*, case number 5:24-cv-02193, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.



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Tesla Workers' Atty Rips Claim Of Influence Over State Agency

By **Dorothy Atkins**

Law360 (April 15, 2024, 9:31 PM EDT) -- Counsel representing a putative class of roughly 6,000 Black Tesla workers alleging the automaker has allowed racism to run rampant at its California factory fired back during a class certification hearing Monday, calling Tesla's suggestion that plaintiffs counsel are driving the state's civil-rights litigation "beyond preposterous."



Lawsuits from Black Tesla workers generally seek to hold the company liable for not allegedly doing enough to prevent racism from running rampant at its Fremont, California, factory since at least 2015. (AP Photo/Aaron M. Sprecher)

Bryan Schwartz of Bryan Schwartz Law PC's comments came at the end of an hourslong hearing before Alameda County Superior Court Judge Noël Wise on a motion for class certification in hotly contested **litigation initially filed in 2017** by contract worker Marcus Vaughn.

Schwartz disputed Tesla's arguments that only state and federal government enforcement agencies, like the California Civil Rights Department, have the legal authority to show Tesla has a pattern or practice of fostering discrimination. Schwartz argued that for two decades legal precedent has allowed workers to pursue such claims.

The attorney also disputed Tesla's argument that the CRD has an obligation to be neutral, noting that such an obligation doesn't exist when the agency in scenarios such as this one in which the agency has filed its

own race bias complaint against Tesla.

"Counsel is trying to create a strawman that I'm responsible for the CRD. I'm not," Schwartz told Judge Wise. "It's so beyond preposterous I can't even begin telling you. I wish that were true your honor, but [the CRD attorneys] don't listen to me. I wish that they listen to me more than they do."

The workers' case is one legal front in multiple race bias actions proceeding in parallel — including the CRD's February 2022 lawsuit launched in state court and a lawsuit that the U.S. Equal Employment Opportunity Commission filed in federal court in **September 2023**.

The litigation follows a recently settled lawsuit brought by former Tesla worker Owen Diaz who scored a **nearly \$137 million judgment** against Tesla, which was later reduced to a **\$3.2 million verdict**.

The lawsuits generally seek to hold Tesla liable for not doing enough to prevent racism from allegedly running rampant at its Fremont, California, factory since at least 2015, with managers allegedly regularly using racial slurs, racial epithets and racial stereotypes at the workplace, and allegedly ignoring racially offensive graffiti.

The hearing on Monday was the second hearing held on the motion since the plaintiffs filed their bid to certify the class **request in June**. During the first hearing **held in March**, Judge Wise indicated she's prepared to certify certain common class issues, but she cautioned that she's still "exploring a range of options" on how to best adjudicate the case.

Following that hearing, the parties submitted responses to more than a dozen questions regarding certification, and on Monday, the judge indicated that she's inclined to hold a "first phase" trial in which a jury would be asked to decide common issues among the workers, but she indicated that each worker would likely have to individually sue for damages.

In response to the judge's comments, parties argued over what those common questions could be, and they agreed to meet and confer and submit a joint stipulation to the court on any potential agreements.

However, Tesla's counsel, Raymond A. Cardozo and Tyree Jones of Reed Smith LLP, argued that only the state and federal government have the authority to pursue allegations that Tesla has a pattern or practice of fostering discrimination, and there are too many individual issues for the allegations to be resolved on a classwide basis.

Tesla's attorneys also argued that the parallel proceedings are duplicative and should be limited. They also asserted that the company's policies defeat the claims. Tesla's counsel additionally suggested that class counsel hid certain discovery in the CRD litigation to purportedly benefit the workers, and the CRD should be a neutral party.

However, Schwartz disputed Tesla's allegations, and although he acknowledged that there has been some "obvious confusion" regarding certain discovery produced in the workers litigation and the CRD case, he said the confusion has since been rectified and noted that there's no advantage for the workers to foster such confusion.

He also argued Tesla never raised its discovery complaints before, called it "outrageous" that defense counsel waited until this month to make its "gotcha"-type argument, improperly suggesting he might have breached his legal duties in hiding discovery. He added that the allegation is "incredibly disrespectful."

At the end of the hearing, the parties agreed to submit any joint stipulations by April 23, and the next hearing in the case is set for May 8.

This isn't the first time class counsel have taken issue with Tesla's litigation arguments. In January, attorneys for both the CRD and a putative class of Black workers **accused Tesla** of "obfuscation," "scorched earth litigation" and intentionally delaying litigation with **purportedly unfounded arbitration arguments** in their years-old race bias cases while Tesla's counsel argued that the allegations are bogus, and any delays are of the plaintiffs' own making.

The class certification fight comes weeks after U.S. District Judge Jacqueline Scott Corley **denied** Tesla's **bid to stay or dismiss** the EEOC case, finding **after a hearing** that parallel state court cases can't resolve the federal agency's claims.

The proposed class is represented by Bryan Schwartz of Bryan Schwartz Law PC.

Tesla is represented by Raymond A. Cardozo and Tyree Jones of Reed Smith LLP.

The state enforcement action is the California Department of Fair Employment and Housing v. Tesla Inc. et al., case number 22CV006830, the putative class action is Marcus Vaughn v. Tesla Inc. et al., case number RG17882082, and the lead case of the related individual actions is Jessica Barraza v. Tesla Inc. et al., case number 21CV002714, all in the Superior Court of the State of California, County of Alameda.

The federal case is Equal Employment Opportunity Commission v. Tesla Inc., case number 3:23-cv-04984, in the U.S. District Court for the Northern District of California. The settled case is Owen Diaz et al. v. Tesla Inc. et al., case number 3:17-cv-06748, in the U.S. District Court for the Northern District of California.

--Editing by Kristen Becker.

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Baltimore Taps DiCello Levitt, Saltz Mongeluzzi For Key Bridge

By **Lauren Berg**

Law360 (April 15, 2024, 7:48 PM EDT) -- The city of Baltimore announced Monday it has hired DiCello Levitt and Saltz Mongeluzzi Bendesky PC as it plans legal action against those responsible for a container ship destroying the Francis Scott Key Bridge last month, the same day FBI agents boarded the ship as part of a criminal investigation.

In its statement, the city indicated it plans to launch litigation to "hold the wrongdoers responsible and to mitigate the immediate and long-term harm caused to Baltimore city residents" following the Dali cargo ship's **collision** late last month that destroyed the landmark Key Bridge and killed six construction workers.

"This unthinkable tragedy has taken Marylanders from their loved ones, and risked the livelihoods of thousands of Baltimoreans who rely on the Port of Baltimore," Mayor Brandon M. Scott said in a statement Monday. "We are continuing to do everything in our power to support everyone impacted here and will continue to recognize the human impact this event has had."

"Part of that work needs to be seeking recourse from those who may potentially be responsible, and with the ship's owner filing a petition to limit its liability mere days after the incident, we need to act equally as quickly to protect the city's interests," he added.

The city's legal action will target the 985-foot ship's owner, charterer, manager and operator, and manufacturer, as well as other "potentially liable third parties," according to the statement.

DiCello Levitt co-founder Adam Levitt said his firm and Saltz Mongeluzzi plan to bring economic and environmental loss claims on behalf of the city against those responsible for "one of the largest inner-city maritime disasters in U.S. history."

"We need to hold these entities accountable for the emotional toll and the substantial financial losses that the city of Baltimore and its residents are facing," he said in a statement Monday.

The two firms told Law360 on Monday that they were retained following a competitive selection process that found they were "the team best-suited to lead this important litigation — one of the largest maritime cases in U.S. history. We're looking forward to aggressively prosecuting this case in close partnership with the city of Baltimore and obtaining economic justice for the city and its corporate and individual citizens."

In addition to DiCello Levitt and Saltz Mongeluzzi, the city said it will be represented by the Baltimore City Law Department's chief of affirmative litigation, Sara Gross.

Also on Monday, the FBI confirmed to Law360 that its agents are aboard the Dali "conducting court authorized law enforcement activity" but declined to comment further.

The Washington Post on Monday reported that at least some of the investigation will look into whether the crew left port knowing the ship had system problems.

The Singapore-flagged vessel struck a main pillar of the 50-year-old harbor bridge around 1:30 a.m. ET on March 26, causing sections of the 1.6-mile span to collapse and sending people and vehicles plunging into the water below.

The Dali container vessel was chartered by shipping giant Maersk and operated by Synergy Group. It is **insured** by Britannia, a marine underwriter based in London.

Marine insurance experts said the incident is likely to be as costly as the Costa Concordia, an Italian cruise ship that sank in 2012 after running aground, killing 33 people. That episode cost the insurance sector around \$2 billion.

Britannia is part of the International Group of P&I Clubs. Each of its 12 members takes a \$10 million dollar hit when there is a major loss within the group, and losses above that level are covered by a pooled fund of up to \$100 million.

The National Transportation Safety Board is leading a sprawling investigation into the incident with the help of the U.S. Coast Guard, Army Corps of Engineers, U.S. Department of Transportation, Maryland Department of Transportation and other state and local agencies.

President Joe Biden **visited Baltimore** on April 5, pledging a whole-of-government approach to the Key Bridge's reconstruction and the region's economic recovery.

As the Corps announced plans to open a limited-access channel to the port by the end of April and restore the port to normal capacity by the end of May, experts say the Key Bridge's collapse has raised daunting questions over U.S. supply chain vulnerabilities, vessel operating standards, and bridge and port infrastructure resiliency and security.

At the same time, the owner and operator of the ship sought to limit its liability from the wreck by filing a petition in Maryland federal court that sets the stage for what will be a complex and long legal battle.

Singapore-based Grace Ocean Pte. Ltd. and Synergy Marine Pte. Ltd. filed their joint petition on April 1 seeking to be exonerated from liability or to have damages capped at \$43.7 million, an amount that includes the value of the vessel at the end of the voyage, plus pending freight.

Experts told Law360 that limitation of liability petitions are somewhat common in major maritime industry incidents, and they invoke arcane, centuries-old admiralty laws that differ from standard tort laws that apply to aviation or rail, for example.

"From a shipowner's perspective, ships are worth tens of millions of dollars and the cargo is worth a lot, and you can do a hell of a lot of damage with a 900-foot-long ship," Holland & Knight LLP litigation partner Benjamin Allen told Law360 earlier this month. "It makes sense from their perspective that they'd want to try and limit that [exposure to damages] because otherwise, they'd be facing claims for years from this kind of event."

--Additional reporting by Linda Chiem and Martin Croucher. Editing by Adam LoBelia.



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Coinbase Wants 2nd Circ. To Weigh Crypto's Howey Question

By **Aislinn Keely**

Law360 (April 15, 2024, 8:16 PM EDT) -- Crypto exchange Coinbase has asked a Manhattan federal judge to send the question of whether digital assets meet the definition of investment contracts to the Second Circuit, challenging a March order that found the U.S. Securities and Exchange Commission had adequately pled that the platform offered securities.

Coinbase requested late Friday to file an immediate appeal of a **March 28 order** that allowed the majority of the SEC's claims that the platform operated as an unregistered securities exchange, broker and clearing agency to move to the discovery stage. After being denied an early win over the registration suit, Coinbase argued that the order is the latest in a series of disparate decisions from federal courts over how the term "investment contract" should apply to crypto assets and transactions, making the need for appellate review "unusually and increasingly acute."

According to Coinbase, whether an asset sale can create an investment contract without any post-sale obligations is a pure question of law ripe for the Second Circuit, since no appeals court has addressed how the high court precedent laying out the characteristics for an investment contract, known as the Howey test, should apply to digital assets.

The Howey test established that investment contracts are an investment of money in a common enterprise made with the reasonable expectation of profits derived from the efforts of others. The SEC has held that this framework is flexible and maps neatly onto crypto transactions, but many crypto firms facing enforcement cases, including Coinbase, have argued that the crypto assets they list aren't securities because they don't carry post-sale obligations or create any contract between buyers and sellers.

Some district courts have handed down **conflicting** decisions so far. Judge Analisa Torres in the Southern District of New York found that secondary transactions of Ripple Labs' token didn't satisfy Howey, but in the same district, Judge Jed Rakoff **rejected** Judge Torres' reasoning in his own decision in the SEC's case against crypto project Terraform Labs.

"The consequence of these conflicting authorities is that even similarly situated defendants face different outcomes in different courts within the District," Coinbase said in its Friday memorandum.

Coinbase argued that the SEC itself is seeking appellate clarity on the question, since the agency unsuccessfully sought an **immediate appeal** of a similar question in the Ripple case.

"As the SEC argued in seeking review of the Ripple decision, there is a stark inconsistency in the way courts even within this District are applying Howey to crypto transactions," Coinbase said. "The same token transaction may be an investment contract in one courtroom but not in another."

Coinbase had argued in its earlier motion for judgment on the pleadings that the SEC shouldn't be able to bring its enforcement suit since the assets on Coinbase's platform aren't securities, though U.S. District Judge Katherine Polk Failla found the SEC had adequately shown that the platform offered investment contracts to move to the discovery stage. Settling whether assets without post-sale obligations are investment contracts early on could cut through most of the SEC's claims early on, Coinbase argued.

The order had already tossed the SEC's claim that Coinbase's wallet application operated as an

unregistered broker. If the other registration claims related to the assets were to fall, that would leave only the SEC's claims that the firm's staking service is an unregistered offering of investment contracts.

The question of how digital assets comport with Howey is also central to other SEC crypto suits, including cases **against** crypto **exchanges** Binance and Kraken. According to Coinbase, sending the question to the Second Circuit could create some clarity for others facing SEC suits.

"The need for authoritative appellate guidance could not be more pressing," the appeal request said. "How Howey applies to secondary-market crypto transactions is being litigated in numerous cases pending in this courthouse and across the country."

In a series of posts on social media site X, Coinbase legal chief Paul Grewal distilled the firm's question as "whether an 'investment contract' requires something contractual — we think it does, the SEC disagrees."

"We're asking to take this up on appeal earlier than normal because it's critical to our industry," Grewal wrote. "The SEC's action against us and other digital asset companies goes way beyond the legal authority granted by Congress and puts an unjust cloud over US digital asset innovation."

The SEC said in a statement to Law360 that any response to Coinbase's request will be made in public filings to the court.

The SEC is represented in-house by Peter Mancuso, Jorge Gerardo Tenreiro, Patrick Costello and Nick Margida.

Coinbase is represented by William Savit, Kevin S. Schwartz, Sarah K. Eddy, Adam M. Gogolak, David P.T. Webb and Emily R. Barreca of Wachtell Lipton Rosen & Katz, as well as Steven R. Peikin, Kathleen S. McArthur, James M. McDonald, Julia A. Malkina and Olivia G. Chalos of Sullivan & Cromwell LLP.

The case is Securities and Exchange Commission v. Coinbase, Inc. et al, case number 1:23-cv-04738, in the U.S. District Court for the Southern District of New York.

--Editing by Alanna Weissman.



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Ex-Autonomy Exec Testifies To Handshake Deals, Backdating

By **Bonnie Eslinger**

Law360 (April 16, 2024, 12:32 AM EDT) -- Autonomy's former U.S. head of sales testified for the prosecution Monday in the criminal fraud trial of founder Michael Lynch, saying he boosted sales figures via "quid pro quo" handshake deals with customers, created pretextual emails to cover his tracks and even backdated a deal to meet revenue targets.

Lynch is on trial, alongside Autonomy's former vice president of finance, Stephen Chamberlain, for felony counts of conspiracy and fraud that could put them behind bars for more than 20 years. Lynch, who reaped about \$804 million from the sale of Autonomy, is also charged with an additional count of securities fraud. The high-profile trial began **on March 18** and is slated to possibly run into June.

On Monday, the former head of Autonomy's sales in the United States took the stand as a cooperating witness for the government. Stouffer Egan told jurors that while his title was CEO of Autonomy in the Americas, it was an "overstated role" with no operational responsibilities that just gave him credibility when doing sales calls. He held that title, he said, from about 2004 through 2011, and when the company was sold to HP, he made more than \$10 million pretax.

Prosecutor Robert Leach of the U.S. Attorney's Office for the Northern District of California had Egan confirm that he had entered into a deferred prosecution agreement with the government and agreed to cooperate with the government.

Egan told jurors he made "quid pro quo deals" that involved Autonomy purchasing from a company that would then purchase something from Autonomy, and wrote "pretextual" emails that created the false impression that Autonomy had a genuine need for the products or services it had bought. Other Autonomy management did it, too, he added.

Egan testified that he made such deals at the direction of Autonomy's then Chief Financial Officer Sushovan Hussain.

Hussain also pushed him to strike deals in which certain companies acted as resellers for Autonomy products, arrangements in which revenue was posted for the initial sale even without an end-user being secured.

Did Mr. Hussain instruct or coach you on what you could say to the resellers when negotiating these deals?" Leach asked. "Did Mr. Hussain instruct or coach you on what you can say orally but not put in writing?"

Egan said yes, later adding that he personally worked to make sure that an end user was eventually found.

Leach asked Egan about a deal he arranged in early 2009 that involved software company Capax buying Autonomy software in exchange for electronic discovery services that were never provided. Egan described the deal with Capax founder John Baiocco as an oral, "handshake" agreement.

The prosecutor later put up on a courtroom screen a document showing Autonomy had paid Capax more than \$4 million at one point.

"Is this an example of the quid pro quo deal with Capex?" Leach asked. "At this point in time, was

Capax performing any EDD services for Autonomy?"

Not to his knowledge, Egan replied.

He also admitted to arranging a deal in April 2011 with the head of another company, Discover Technologies CEO David Truitt, that was backdated to the preceding quarter to make up for a revenue target shortfall.

"Generally, I asked him to do a deal after the quarter ended. So, whether it was the next day or two days, I can't remember, but it was unusual and after the fact," Egan said.

Leach showed the court a copy of the agreement — dated March 31, 2010 — and pointed out it was sent to Egan's personal email address.

"If it had gone to the company email address, it would have been marked with the late date," Egan said.

Leach asked the witness if he thought he was doing something wrong.

"I knew I was doing something wrong," Egan replied.

During Egan's cross-examination, Christopher Morvillo of Clifford Chance LLP, who is representing Lynch, asked if Egan had ever told Autonomy's CEO about the backdated deal.

"You never told Mike Lynch that you asked Mr. Truitt to backdate ... the deal," Morvillo said. "And so, you simply cannot say whether Mike Lynch knew that you ask Mr. Truitt to backdate that deal."

Egan also confirmed he never told Lynch that he was sending pretextual emails.

"And so again, you simply cannot say that Mike Lynch knew that you sent any pretextual emails to support the quid pro quo deals," Morvillo said.

Egan said Lynch might have been copied on some of the emails.

Morvillo also swung back to Leach's question about whether others in Autonomy's management had sent such emails.

"Are you aware of Mike Lynch ever sending a pretextual email?" the lawyer asked. Egan said he didn't think so.

Morvillo also asked Egan if he felt he had done something wrong with some of the other transactions discussed.

"With respect to the quid pro quo deals, as you call them, deals where you purchase and sell to the same counterparty, you didn't think there was anything inherently wrong with those deals did you?" Morvillo asked. Egan said, in general, he did not.

Morvillo later asked Egan how involved Lynch was in Autonomy's sales.

"From a sales perspective, Mike Lynch wasn't a micromanager was he?" Morvillo asked. "He wasn't nearly as involved in the deals as Mr. Hussein right?"

Egan agreed.

Later, Morvillo noted that Lynch has served as an adviser to the British prime minister's office and was a fellow of the Royal Society in England, a scientific society that counts Charles Darwin and Albert Einstein among its historical members.

Lynch was also awarded an Order of the British Empire.

"It's a step in the way to becoming a knight," Morvillo said. "And Mike Lynch was awarded that by the

queen."

After the jury had left for the day, U.S. District Judge Charles Breyer quipped that Lynch's lawyer had taken a chance with that point about his client's connection to the monarchy.

"You were banking on the fact that there aren't too many antiroyalists," the judge said to courtroom chuckles.

The trial continues on Tuesday.

When HP snapped up Autonomy in August 2011, the tech giant touted Autonomy's financial performance. The government's case is that Lynch and Chamberlain used a variety of accounting tricks to make Autonomy's revenue growth look better than it was, including backdated contracts and increasing hardware sales padding its revenue.

The government also brought charges against Hussain, who **was convicted** on related charges in 2018 and subsequently sentenced to five years in prison.

In addition to the criminal cases in the United States, parallel civil proceedings brought by HP have been **ongoing in London** since 2015, with a London judge ruling in 2022 that Lynch and Hussain had used dishonest accounting techniques to "induce" HP to buy the firm. Earlier this year, at the start of a second-phase damages trial in the **U.K. civil case**, HP asked the court to order Lynch and Hussain to pay more than \$4 billion to make up the difference between what it paid for Autonomy and the true price of the British company.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California and Zachary Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Dooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Richard Crump and Christopher Crosby. Editing by Kristen Becker.



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Trump Media Files To Register More Shares For Potential Sale

By **Tom Zanki**

Law360 (April 15, 2024, 10:47 PM EDT) -- The owner of former President Trump's newly public social media platform Truth Social filed paperwork on Monday to issue an additional 21.5 million shares and register for resale about 146 million existing shares, including a large stake owned by Trump.

Trump Media Technology Media Corp., advised by Nelson Mullins Riley & Scarborough LLP, told the U.S. Securities and Exchange Commission that all shares being registered are either held by current investors or underlie securities held by its investors.

Sarasota, Florida-based Trump Media **went public** last month by merging with a special-purpose acquisition company. Companies that go public through SPAC mergers typically file registration statements, or S-1 filings, with the SEC within a few weeks after their acquisition.

The company registered 14.375 million shares that could be sold upon the exercise of warrants offered with the 2021 initial public offering raised by Digital World Acquisition Corp., the SPAC that acquired and took Trump's vehicle public. More than 7 million additional shares could be issued pending the exercise of other warrants, the filing shows.

Trump Media expects to receive \$247.1 million from the exercise of warrants, assuming all holders sell their warrants for cash, which the company expects will happen as long as its stock price remains above \$11.50. Warrants provide investors the right to buy additional shares, assuming stock remains above a preset price. SPAC deals typically involve warrants.

"We will receive the proceeds from any exercise of the warrants for cash," Trump Media told the SEC in its registration statement filed Monday.

The company also registered 146.1 million common shares for resale, subject to the expiration of a six-month lockup that was negotiated as part of the merger agreement with Digital World. Trump Media will not receive any proceeds raised by the sale of those shares.

The filing indicates that most of those shares, totaling 114.75 million, belong to Trump, also the presumptive Republican nominee for the 2024 election.

Trump's stake includes 78.75 million shares he already owns, plus potentially 36 million additional shares that he could earn if certain stock performance targets are met.

Various hedge funds and other investors including Trump Media CEO Devin Nunes, a former Republican congressman and a Trump ally, are listed among investors whose shares were registered for sale. Trump Media, however, said in a statement that the filing does not mean any individual listed as a "selling securityholder" plans to sell their shares.

Trump Media shares plummeted on Monday, continuing a roller-coaster for the stock since it **began trading** on March 26, following the company's merger with Digital World.

Shares of Trump Media fell 18% or \$5.98, to close at \$26.61 in Nasdaq trading on Monday. The stock has fallen by more than half since closing at \$68.50 on March 27.

Public company share prices often drop following announcements that a company may issue

additional stock, which can dilute the value of existing shares. Based on Monday's closing price, Trump's stake of 78.75 million shares is worth about \$2.1 billion.

Trump Media's latest stock drop also coincided with the **beginning of a criminal trial** in New York City on Monday involving allegations that Trump violated campaign finance laws in a hush-money case that included payments to adult film actress Stormy Daniels.

The registration of additional shares could raise capital for the cash-hungry but unprofitable Trump Media business, which warned regulators that its chief product, Truth Social, may never generate enough operating revenue to turn a profit. The company disclosed that its former accountant has indicated that Trump Media's history of negative cash flows and recurring losses raise "substantial doubt as to its ability to continue as a going concern."

Trump Media told regulators it intends to spend proceeds to execute its business plan, while maintaining broad discretion over how such proceeds are spent.

Trump Media also disclosed that it will not rely on key performance indicators, such as average revenue per user, used by competitors. Instead, the company said it will seek to build the Truth Social site by enhancing various features, including user interaction.

Monday's filing indicates that Trump Media had about \$310.6 million held in trust as of Dec. 31, mostly from Digital World's IPO that was **completed in September 2021**.

Trump Media's path to becoming public followed a merger with the Digital World SPAC rather than a traditional IPO.

SPACs, also known as blank-check companies, conduct IPOs in order to acquire a private business and take it public within a given period. If the acquisition is approved, the target business inherits the SPAC's stock listing and related proceeds.

Trump Media's merger with Digital World and subsequent public listing came after more than two years of various business, legal and regulatory setbacks. The Truth Social platform, which has far fewer users than competitors like X, previously known as Twitter, has served as Trump's personal platform since its inception in 2022.

--Editing by Peter Rozovsky.