

- On Friday, a U.S. judge in Virginia is set to weigh which lawyers to appoint as lead counsel in a securities class action by **Boeing** shareholders [accusing the airplane maker of prioritizing profit](#) over safety and misleading them about its commitment to making safe aircraft, prior to the Jan. 5 mid-air cabin panel blowout on an **Alaskan Airlines 737 MAX 9**. Attorneys from plaintiffs' firms **Labaton** and **Robbins Geller** have [proposed](#) they share the class leadership role.

US judge considers potential bellwether cases in social media addiction litigation

DJ [dailyjournal.com/articles/378125-us-judge-considers-potential-bellwether-cases-in-social-media-addiction-litigation](https://www.dailyjournal.com/articles/378125-us-judge-considers-potential-bellwether-cases-in-social-media-addiction-litigation)

Consumer Protection Law,

Civil Procedure,

Civil Litigation

Apr. 19, 2024

The first trial of dozens of lawsuits is scheduled for October 2025. The companies argue that the plaintiffs' claims are barred by the First Amendment and Section 230 of the Communications Decency Act.

The federal judge in Oakland overseeing multidistrict litigation against social media companies accused of getting minors addicted to their platforms discussed potential bellwether cases with the parties on Friday and heard the companies' motion to dismiss several claims.

"The sands have shifted underneath us considerably in the last 48 hours ... one of the bellwether plaintiff's counsel has informed us of their intent to dismiss and two [plaintiffs] have informed us of their refusal to waive Lexecon and have their cases tried in this court," Andrea R. Pierson of Faegre Drinker Biddle & Reath LLP told U.S. District Judge Yvonne Gonzalez Rogers. Pierson, who defends Tiktok Inc., asked the court to foreclose any changes to the parties' bellwether picks and to require opposing counsel to confirm that each plaintiff wanted to continue to trial.

Gonzalez Rogers agreed with the defendants that some form of relief was required, saying each plaintiff should notify counsel within 30 days if they have any issue with the trial procedure. "The reality is that games get played in MDLs. All I've done is advance the gameplaying," said the judge, who threw out personal liability claims against Meta Platforms CEO Mark Zuckerberg earlier this month.

The first trial of dozens of lawsuits brought by private plaintiffs, school districts, and states is scheduled for October 2025. The plaintiffs' firms are led by Lief Cabraser Heimann & Bernstein LLP. *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 4:22-md-03047-YGR (N.D. Cal., filed Oct. 6, 2022).

"We agree with the sense and efficiency of having these issues arise now rather than later," said Lief Cabraser partner Lexi J. Hazam, adding that these concerns were typical in extensive consolidated litigation and did not merit "extraordinary" relief. The plaintiffs will work with the social media companies to quickly find replacement cases, the attorney told Gonzalez Rogers.

In February, the judge denied the social media platforms' bid to certify the case for interlocutory appeal, saying the motion was premature and would give a partial record to the appellate court. The companies argued that there was a question of law as to whether the plaintiffs' claims were barred by the First Amendment and Section 230 of the Communications Decency Act, which protects internet companies from third-party material posted on their platforms.

During Friday's hearing, Bianca Miyata with the Colorado Attorney General's office said Meta and the other defendants were trying to shield themselves with Section 230, "but the state [plaintiffs] are not aiming to impose any derivative liability based on third party content. Instead, we're targeting Meta's strategic business practices which harm children."

Covington & Burling LLP partner Timothy C. Hester said the plaintiffs were unlawfully seeking to hold the Menlo Park company responsible for content posted by others. "There's no distinction between challenging that type of publishing activity in the context of a consumer protection claim and challenging it as a design defect claim [and] challenging it as a failure to warn claim," said Hester.

#378125

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Once again, social media companies attempt to avoid trial over claims they harmed child users

 [courthousenews.com/once-again-social-media-companies-attempt-to-avoid-trial-over-claims-they-harmed-child-users](https://www.courthousenews.com/once-again-social-media-companies-attempt-to-avoid-trial-over-claims-they-harmed-child-users)

Natalie Hanson

OAKLAND, Calif. (CN) — Meta, TikTok and other social media companies returned to court on Friday in another effort to avoid trial over class-action claims that they are liable for the harmful effects their apps have on young users.

Ahead of a trial set for October 2025, the companies are seeking to iron out how many plaintiffs are advancing claims in the California class action. The social media giants also sought to dismiss some claims in the case after they previously tried to convince U.S. District Judge Yvonne Gonzalez Rogers to throw them out in February. The companies say they do not knowingly design their apps to be addictive to children.

The plaintiffs, including children and parents, claim Meta, Google and others make it impossible for parents to intervene to ensure that children do not engage with harmful or dangerous content.

Their arguments echo those made by California Attorney General Rob Bonta and other state attorneys general that Meta deliberately made its social media platforms addictive to children and teens and breached its duty to prevent harm. Rogers, an Obama appointee, considered both sides' arguments on Friday but did not indicate how she might rule.

Representing Meta, which owns Instagram and Facebook, attorney Paul Schmidt said that the plaintiffs have not properly pleaded a claim for violating the Children's Online Privacy Protection Act, which regulates operators of websites or online services directed to children under 13 years old. Meta does not consider third-party content directed at children as part of its own service, Schmidt said — a view he said was grounded in American legal precedent.

Schmidt also argued against claims the company violated Section 230 of the Communications Decency Act, which largely gives social media companies immunity for content published by third parties, and the failure to warn standard, which concerns whether manufacturers adequately warn consumers about the risks of their products.

The plaintiffs in the case argue that the harms caused by social media companies include depression, eating disorders, thoughts of self-harm and suicide. Representing Meta, attorney Timothy Hester pushed back, saying consumer protections do not cover “subjective examples of harm such as emotional stress.”

Rogers asked how Meta could classify some social media impacts on children as subjective.

"It costs school districts money to deal with the fact that children have experienced these effects," she said. "How can you ignore that?"

In response, Hester said the negative effects claimed by the plaintiffs are more subjective than a measurable evidence of harm.

"It may be new technology, but the kinds of harms being alleged here need jurisdictional prudence," he said. "There's not an allegation of documented economic harm."

Also representing Meta, attorney Ashley Simonsen expanded on this argument, arguing that the plaintiffs' claims about the safety of the platforms are not specific enough or measurable to show negligence.

"It's clear that 20 or so statements plaintiffs submitted before Congress are in the heartland of First Amendment protection," she said, referring to statements some plaintiffs have made to legislators in favor of stricter regulation of social media companies.

Anna Smith, assistant attorney general for South Carolina, cited Ninth Circuit Judge Lucy Koh's ruling in an Arizona case, in which Koh determined that location data is valuable.

Social media companies offer free services in exchange for "tremendous amounts of a young person's valuable data," Smith continued. The plaintiffs say this is evidence of the financial damages they are entitled to.

Judge Rogers grew frustrated with both sides throughout the five-hour hearing, cautioning them: "No interruption and no hyperbole."

"If something extraordinary happens, you can bring a motion — but the bar is very high. And it may have ripple effects that you don't appreciate," she said.

The judge already dismissed claims naming Meta CEO Mark Zuckerberg as a defendant earlier this week. Although he is one of the world's most recognizable corporate leaders — someone knowledgeable about the workings of Meta services like Facebook and Instagram — Rogers said she was not convinced he can be found personally liable for misrepresenting his company or causing emotional harm to children.

Representing ByteDance, which owns TikTok, attorney Andrea Pierson said that some plaintiffs indicated they could back off of their claims.

She asked that within the next week, each plaintiff confirm whether they plan to move forward with their claims. Judge Rogers agreed to this request.

Rogers dismissed claims brought under the First Amendment and under Section 230 in November 2023. The parties in October said the law covers content platforms for liability over content from third parties. But Rogers said the defendants know that young users are core to their platforms and found that Section 230 does not grant immunity from a negligence per se claim.

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<https://www.wsj.com/health/healthcare/opioid-settlement-money-struggles-remain-174613fc>

They Hoped Opioid Settlement Money Would Heal Their Community. It's Just Not Enough.

By *Arian Campo-Flores* [Follow](#) and *Jon Kamp* [Follow](#) | Photographs by Jon Cherry for *The Wall Street Journal*

April 22, 2024 10:00 am ET

A detox center. Aid for an overflowing jail. An extra detective's salary. These are a few of the things people in Whitley County, Ky., would like to fund with their small share of billions of dollars in settlement money from companies accused of fueling the opioid crisis.

But county leaders are confronting a dispiriting reality: The funds cover a fraction of their wish list. Some of their projects likely aren't even eligible because of confusion over restrictions on how the money can be used. As a result, Whitley County's funds are sitting unspent.

"This community has been so damaged over the years, the money is not going to come close to completely healing all the problems that were created," said Pat White Jr., the county's judge-executive, a position akin to mayor.

Officials around Appalachia are reaching similarly underwhelmed assessments of the potential for settlement funds to help their constituents. Meanwhile, the opioid crisis—which started with pain pills and is now fueled by fentanyl—continues killing at a record pace.

National settlements with companies including Johnson & Johnson, Teva and Cardinal Health are slated to pay more than \$50 billion over many years. The money is divided among thousands of jurisdictions, and locals say the portions trickling down to some of the hardest-hit communities—including poor, rural areas in the eastern U.S.—are a feeble match for the scale of the problem.



Whitley County, Ky., has no inpatient recovery program, few outpatient ones and a smattering of sober-living homes.

In 2017, when fatalities were significantly lower, costs nationwide topped \$1 trillion, according to a Centers for Disease Control and Prevention analysis. In Kentucky, the estimated cost from deaths and lives undermined by addiction that year exceeded \$24 billion. Per-capita costs there were among the nation's highest.

Kentucky is expected to receive about \$900 million in settlement funds, with half administered by the state and half going to local governments. State law specifies a long list of permissible expenditures, many aimed at treatment and recovery. Some areas are more restricted—such as law enforcement, which is eligible for funding aimed at education and emergency response, but not, say, narcotics investigations.

Floyd County, Ky., which has one of the nation's highest fatal-overdose rates, has received roughly \$1 million so far in settlement money—"a drop in the bucket" compared with what the opioid crisis has cost the community, said Robbie Williams, the judge-executive.

"We have so many unmet needs, we really don't know where to start," he said.

Some organizations want funding for mental-health services, but Williams worries giving to one group will raise expectations from others. He wants to devote funds to drug courts and inmate training programs at the jail, yet isn't sure such projects qualify for settlement money.



Whitney Wynn, a director at the Horizon Health outpatient facility in Whitley County, Ky., wants to establish the area's first detox facility.

JON CHERRY FOR THE WALL STREET JOURNAL

The county has allocated one-fifth of the funds to an opioid-awareness program. It isn't spending more until Williams and his colleagues figure out what expenditures are allowed.

Some counties are trying to extend the reach of their settlement funds by pooling them with neighbors for bigger regional projects. Others are supplementing settlement money with other funding sources.

In Dickenson County, Va., officials are allocating \$250,000 of roughly \$330,000 in settlement funds received thus far for the rural area's first residential treatment facility. The project's price tag is \$7.7 million, so the remainder is coming from sources including a loan from a regional economic development authority.

Whitley County, with a fatal-overdose rate among Kentucky's highest, has no inpatient recovery program, few outpatient ones and a smattering of sober-living homes.

Whitney Wynn, a director at the Horizon Health outpatient facility, wants to establish the area's first detox facility. Ideally, she said, such a center could send patients to a residential treatment site. But the settlement money wouldn't cover both projects.

"We're doing our best to fill the gap," Wynn said.

A wall in the lobby of Horizon's Williamsburg, Ky., location displays photographs of six residents who have died of overdoses since January. "More than just a number," the caption reads.

Three were relatives of Ashley Vanover, 35 years old, a patient there who has battled opioid addiction for half her life. "The main problem here is, where can you get the help?" she said.



Ashley Vanover has battled opioid addiction for half of her life. PHOTO: JON CHERRY FOR THE WALL STREET JOURNAL



Kentucky is expected to receive about \$900 million in settlement funds, with half administered by the state and half going to local governments.

White, the judge-executive, said he and colleagues have discussed using a chunk of the \$867,000 in settlement funds the county has gotten so far to help establish the area's first residential treatment center. But at a recent training on the funds, White said, he heard the money couldn't be used for a facility that receives Medicaid money. County officials paused the plan, he said.

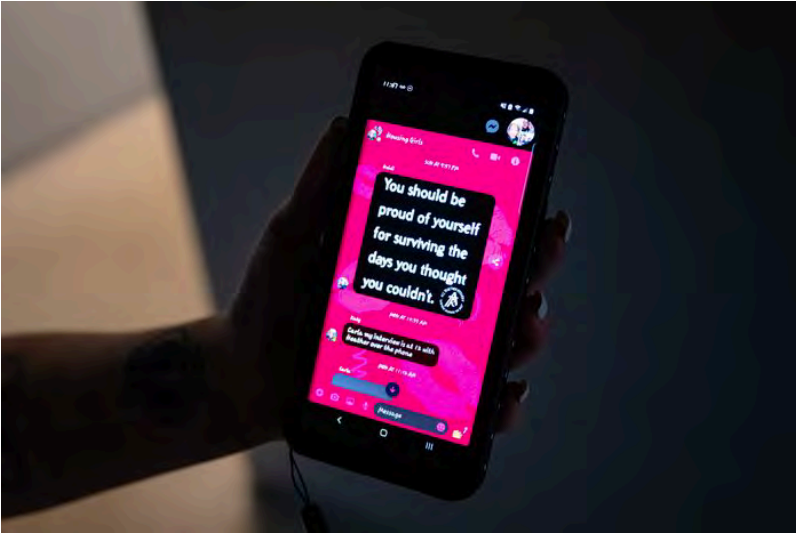
Other ideas have stalled, too. Whitley County Sheriff William Elliott, whose 10-person force regularly handles drug-related calls, said he discussed with county leaders the possibility of hiring a new detective, but they concluded the proposal would run afoul of the law.

Jason Wilson, the county jailer, said his 184-bed detention center is usually overflowing with about 300 inmates, largely because of the drug crisis, but that his understanding is that

settlement money can't be used to address the crunch.

White favors putting off action. He wants to get advice on how the funds are meant to be spent and see how other communities spend their share. Whatever the county ends up doing, he said, it won't compensate for the damage drugs have inflicted.

"I don't think we'll ever fully recover," White said.



The portions of the settlement money trickling down to the hardest-hit communities are a feeble match for the scale of the problem.

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Intel Defeats Investor Appeal Over Missed Moore's Law Benchmark

By Martina Barash

- Industry formula predicts rapidly shrinking microchip size
- 'On track' timeline statement forward-looking, 9th Cir. says

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Intel Defeats Investor Appeal Over Missed Moore's Law Benchmark

By Martina Barash 2024-04-19T15:22:26000-04:00

- Industry formula predicts rapidly shrinking microchip size
- 'On track' timeline statement forward-looking, 9th Cir. says

A suit by Intel Corp. shareholders over statements about the company's progress toward achieving a smaller microchip was properly dismissed, the Ninth Circuit affirmed Friday.

The proposed class action alleged Intel fell behind in its quest to meet an industry assumption about the pace of innovation—called Moore's Law—without telling shareholders.

Investors KBC Asset Management NV and SEB Investment Management AB didn't say that Intel specified "intermediate checkpoints" for achieving its next chip, the appeals court said in an unsigned, unpublished opinion. So executives' statements that the launch date timeline for Intel's 7-nanometer chip was "unchanged" and "on track" constituted forward-looking comments protected under the Private Securities Litigation Reform Act, the court said.

The investment funds also didn't adequately show deceptive intent, according to the panel.

"They rely largely on anonymous sources, but have not provided sufficient factual allegations as to the sources' reliability or personal knowledge," the court said.

Moore's Law, formulated by Intel co-founder Gordon Moore in the 1960s, posits "that every two years, the number of transistors that could be fabricated in a given area of silicon wafer would double," according to the March 2023 opinion of the US District Court for the Northern District of California dismissing the case.

Thus, chips would rapidly shrink. Intel kept pace with that progression through 2011, according to the investors. But during its development of the next two chips, or “process nodes,” it allegedly faced challenges and its competitors began to take some of its market share.

Next Chip

Executives allegedly made public statements that the 7 nanometer process node—its next chip—was “on track” for a 2021 launch. Yet it had already fallen behind when they made those statements, the investors said.

They also said Intel misrepresented that it was using “lessons learned” from previous challenges to improve its development of the 7nm node; that it remained an integrated device manufacturer, with both design and fabrication functions; and that a key engineer left the company for personal reasons as opposed to disagreements with others about delays in the process.

The lower court dismissed the claims on several grounds.

The US Court of Appeals for the Ninth Circuit said the lower court properly dismissed claims over the other categories of statements as well as the “on track” remarks. The investors didn’t allege falsity or intent with enough specificity, it said.

The panel was composed of Judges Andrew D. Hurwitz and Anthony D. Johnstone, along with Chief Judge Brian M. Morris of the District of Montana, who sat by designation.

Motley Rice LLC represented KBC. Bernstein Litowitz Berger & Grossmann LLP represented SEB. Munger, Tolles & Olson, LLP represented Intel.

The case is KBC Asset Mgmt. NV v. Intel Corp. , 9th Cir., No. 23-15695, unpublished 4/19/24 .

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J2 Global Lacked Securities Fraud Intent, 9th Cir. Says (1)

By Martina Barash

- Acquisition, large investment allegedly had insider ties
- Intent to deceive, loss causation not adequately shown

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J2 Global Lacked Securities Fraud Intent, 9th Cir. Says (1)

By Martina Barash 2024-04-19T13:22:08000-04:00

- Acquisition, large investment allegedly had insider ties
- Intent to deceive, loss causation not adequately shown

A J2 Global Inc. shareholder failed to adequately allege that the media and cloud services company intended to deceive investors about an acquisition, a \$200 million investment in another company, and its accounting practices, the Ninth Circuit affirmed Friday.

Investor Jonathan Espy, who sued on behalf of a proposed class, also failed to show a causal connection between the alleged corrective disclosures in short-sellers' reports and his stock losses, Judge M. Margaret McKeown said for the appeals court.

"Dissatisfaction with a company's strategy, management, and approach to accounting, coupled with a stock drop, make for interesting reading but not an actionable securities fraud claim," McKeown said.

The media company is now known as Ziff Davis Inc.

Espy alleged that J2, which expanded by acquiring 186 businesses since it was founded in 1995, concealed details of its purchase of the personal consulting business of one of its own executives. And in another transaction with alleged conflicts of interest, it invested \$200 million in a fund run by Orchard Capital Ventures, which was run by J2 executives and other insiders, Espy said.

J2 also allegedly misled investors about underperforming acquisitions by using "consolidated," or division-wide, accounting.

But accounts by two former employees about the consulting business acquisition in the complaint “fail to establish reliability or personal knowledge, or simply amount to criticisms of J2’s management practices and compensation structures,” the US Court of Appeals for the Ninth Circuit said.

And J2 disclosed a great deal of detail about the Orchard deal, McKeown said.

Espy didn’t show fraudulent intent about the accounting structure for several reasons, including that “even analysts within J2 had difficulty assessing how well individual acquisitions were performing,” she said.

Labaton Keller Sucharow, LLP and Freedman Normand Friedland LLP represented Espy. O’Melveny & Myers LLP represented J2.

The case is Espy v. J2 Global, Inc. , 9th Cir., No. 22-55829, 4/19/24 .

(An earlier version of this story was corrected to reflect the actual sum said to have been invested, in paragraph one.)

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April 22, 2024, 8:01AM PDT
Rivian Shareholder Sues EV Maker Over Production Expectations
By [Matthew Bultman](#)
Documents

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

- COURT:** C.D. Cal.
- TRACK DOCKET:** [No. 2:24-cv-03269](#)

Bloomberg Law News 2024-04-22T13:27:46402476466-04:00
Rivian Shareholder Sues EV Maker Over Production Expectations

By Matthew Bultman 2024-04-22T11:01:48000-04:00

- COURT:** C.D. Cal.
- TRACK DOCKET:** [No. 2:24-cv-03269](#)

Rivian Automotive Inc. has been sued by a shareholder who accused the electric vehicle maker of misleading investors by overstating the demand for its vehicles.

The proposed class action, filed Friday, comes after Rivian’s forecasted 2024 production failed to meet analyst expectations. The Irvine, California-based EV maker has cited high borrowing costs as a factor.

EV companies stocks have faced rough periods in recent months, with companies like Tesla Inc. and General Motors Co. predicting slower growth in EV sales. Other auto and part makers have cited weakened demand.

“The true value of Rivian securities was substantially lower than the prices paid by Plaintiff and other members of the Class,” the shareholder said in the complaint, which was brought in the US District Court for the Central District of California.

Rivian’s guidance, released in late February, said the automaker expected to produce 57,000 vehicles in 2024, lower than analysts’ estimate of 80,000, according to the complaint. Rivian also said that it planned to cut 10% of its salaried staff.

Rivian’s CEO, Robert Scaringe, at the time said high-interest rates had “negatively impacted demand.”

The disappointing guidance caused its share prices to fall over 25%, the suit said.

<https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XB7PIRQK000000?bc=W1siU2VhcmNoICYgQnJvd3NIliwiaHR0cHM6Ly93...> 1/3

The complaint identified several allegedly misleading statements in the months before the guidance. It noted Rivian's 2022 annual filing with the SEC said the company was "well-positioned for international expansion in light of healthy global demand for EVs."

Rivian didn't tell investors there was reduced demand and more customer cancellations because of high interest rates, the complaint alleges.

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

The investor is represented by Pomerantz LLP.

The case is Dietel v. Rivian Automotive, Inc. , C.D. Cal., No. 24-cv-03269, complaint filed 4/19/24 .

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FTX Investors Settle With Bankman-Fried to Pursue Promoters (1)

By Ava Benny-Morrison and Jef Feeley

- Pact would release crypto exchange co-founder from claims
- In return he would help them pursue celebrities who pushed FTX

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FTX Investors Settle With Bankman-Fried to Pursue Promoters (1)

By Ava Benny-Morrison and Jef Feeley2024-04-19T16:38:12355-04:00

- Pact would release crypto exchange co-founder from claims
- In return he would help them pursue celebrities who pushed FTX

A group of FTX investors and customers has agreed to drop their claims against co-founder Sam Bankman-Fried in exchange for his cooperation against other defendants in a sprawling set of lawsuits over the cryptocurrency exchange's collapse.

The agreement, if approved by a judge, would free Bankman-Fried from civil liability only weeks after he was sentenced to 25 years in prison for fraud for stealing billions of dollars from FTX. According to the settlement, filed Friday in federal court in Miami, plaintiffs in the multi-district litigation would resolve all claims against him now and in the future.



Sam Bankman-Fried

Photographer: Stephanie Keith/Bloomberg

Other FTX insiders, including the former executives Gary Wang, **Caroline Ellison** and Nishad Singh who testified against Bankman-Fried, were also sued by investors, but they too have agreed to settle. They have already begun handing over information to help the plaintiffs' case, according to the court filing. That leaves the high-profile celebrities, sport stars and social media influencers who promoted FTX to investors and customers.

In return for dropping him from the lawsuit, Bankman-Fried agreed to help plaintiffs' lawyers go after the remaining FTX endorsers. As part of the proposed settlement, Bankman-Fried would hand over all nonprivileged documents detailing his assets and his investment in artificial intelligence start-up Anthropic, an affidavit certifying his net worth as negative, and documents about other defendants in the wide-ranging civil litigation.

Read More: FTX Investors Boosted by Guilty SBF in Bid to Blame Promoters

That list of defendants is long after several lawsuits filed in the wake of the FTX meltdown were consolidated into one case in Miami. Financiers and celebrity endorsers, including sports stars **Tom Brady** and **Shaquille O'Neal** and model **Gisele Bundchen**, were accused of promoting the exchange's unregistered securities and enticing investors into a Ponzi scheme. As part of his agreement, Bankman-Fried will also provide any information he can about venture capital firms that invested in FTX and accountants and lawyers that worked with the exchange.

And, if they prevail, the plaintiffs could win far more than they appear to be giving up. The settlements with promoters in the pact are valued at about \$1.3 million, according to a filing in the case.

A lawyer for Bundchen, O'Neal and Brady didn't immediately respond to a request for comment on the settlement.



Trevor Lawrence

Photographer: Mike Carlson/Getty Images

Superstar Endorsements

When FTX was flush, Bankman-Fried spent heavily on endorsements to elevate the profile of his crypto empire using the fame of athletes and other stars. For example, an FTX affiliate said in a bankruptcy filing that pro football quarterback Trevor Lawrence received a \$500,000 payment in September 2022.

The settlement includes a deal with Lawrence, according to the filings. Lawrence, who plays for the Jacksonville Jaguars, was selected first by the Jaguars in the 2021 National Football League draft and signed on as an FTX endorser that year. His lawyer David A. Rothstein said he couldn't immediately comment on the settlement.

Read More: Bankman-Fried Sentenced to 25 Years in Prison for FTX Fraud

Mark Botnick, a spokesman for Bankman-Fried, said his client wants to set things right.

"Since the collapse of FTX, Mr Bankman-Fried has been singularly focused on returning the estate's assets to customers, who could and should be made whole as of current prices," Botnick said. Referring to a lawyer for the plaintiffs, Botnick added: "He looks forward to continuing to work with Adam Moskowitz and his team to do so."

Risk/Benefit

In asking the judge overseeing the case to approve the settlement, the plaintiffs' attorneys said they accounted for the uncertain outcome and risk of litigation against Bankman-Fried and decided he would be "valuable" to the remaining litigation, according to the filing.

Bankman-Fried was convicted at trial late last year and sentenced in late March. Prosecutors showed that the 32-year-old siphoned customer funds from FTX to its sister hedge fund Alameda Research to spend on political donations, luxury real estate and speculative investments.

Bankman-Fried is in custody at the Metropolitan Detention Center in Brooklyn, New York, before he is transferred to the prison where he will serve his term. He plans to appeal his sentence and conviction.

The civil litigation is FTX Cryptocurrency Exchange Collapse Litigation, 23-md-03076, US District Court, Southern District of Florida (Miami).

(Updates with other defendants who have settled.)

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Kia, Hyundai anti-theft case approaching settlement

DJ [dailyjournal.com/articles/378131](https://www.dailyjournal.com/articles/378131)

Civil Litigation

Share

Apr. 19, 2024

Lawyers representing consumer plaintiffs in the case accusing the manufacturers of selling cars with substandard anti-theft features moved to finalize a \$145 million settlement.

Lawyers representing nationwide consumer plaintiffs moved to finalize a \$145 million proposed settlement Friday in a multidistrict vehicle anti-theft device litigation against Kia America Inc. and Hyundai Motor America.

The case is among several filed in 2022 by governmental entities, consumer and subrogation plaintiffs in several states who sued the California-based car companies, accusing them of manufacturing and selling millions of cars with substandard anti-theft features that led to a nationwide wave of vehicle burglaries and thefts. In Re: Kia Hyundai Vehicle Theft Litigation, 8:22-ml-03052 (C.D. Cal., filed Dec. 22, 2022).

"This fair, reasonable, and adequate settlement ensures that class members receive comprehensive benefits that address their interests now, by bypassing the uncertainties and risks associated with prolonged litigation that might not yield any relief in years to come," the plaintiffs' motion stated.

Separately, the class counsel at Hagens Berman Sobol Shapiro LLP, Humphrey Farrington & McClain PC, FeganScott LLC and Baron & Budd PC filed an additional motion for approximately \$13.4 million in attorneys' fees and \$250,000 in litigation expenses after what they said was "more than eight months of arms'-length negotiations," the motion stated.

Both unopposed motions are scheduled to be brought before U.S. District Judge James V. Selna in Santa Ana on June 15. Last October, Selna certified a consumer class upon preliminary approval and ordered the dissemination of approximately 18 million class notices.

The car company defendants are represented by Quinn Emanuel Urquhart & Sullivan LLP, Jenner & Block LLP, Belin McCormick PC, Greene Espel PLLP and Callahan & Blaine APLC. Last month, Selna granted the defense's motion to dismiss one of the complaints filed by the

City of Chicago on grounds the city's claims were not required under federal regulations. The city had alleged Kia and Hyundai violated federal law because the companies failed to manufacture all of its vehicle models with engine immobilizers.

According to the consolidated complaint, the consumer plaintiffs alleged Kia and Hyundai knowingly sold approximately 9 million vehicles nationwide that suffered from a series of design flaws, such as a lack of engine immobilizers in some models, that allowed thieves to easily break in. The proposed settlement would cover any individual who bought or leased a Kia or Hyundai from 2011 to 2022.

"The settlement offers significant relief to class members who will receive virtually all the relief that plaintiffs originally sought in this first-of-its-kind action. It provides a non-reversionary common fund of up to \$145,000,000, but no less than \$80,000,000, to compensate class members (subject to reasonable caps based on litigation risk) for losses stemming from the thefts and attempted thefts of their class vehicles....," the motion stated.

Eligible class vehicles in the proposed settlement would also receive a free anti-theft software upgrade with a lifetime warranty. For vehicles not eligible for the upgrade, the proposed settlement would provide individuals with up to \$300 in cash payments for their purchase of equivalent anti-theft features.

#378131

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April 20, 2024, 10:32 AM PDT

J&J, Kenvue Told to Pay \$45 Million to Baby Powder User's Family

By Jef Feeley

- Chicago jury's talc verdict is first against spinoff Kenvue
- J&J won talc separate talc trial heard by jury in Florida

Bloomberg Law News 2024-04-22T13:29:00763321051-04:00

J&J, Kenvue Told to Pay \$45 Million to Baby Powder User's Family

By Jef Feeley2024-04-20T13:32:48019-04:00

- Chicago jury's talc verdict is first against spinoff Kenvue
- J&J won talc separate talc trial heard by jury in Florida

Johnson & Johnson and Kenvue Inc. were ordered to pay \$45 million to the family of an Illinois woman who blamed the companies' baby powders for giving her a fatal cancer in what was the first verdict against the J&J spinoff in a decade-long litigation over the product.

Jurors hearing the case in Chicago late Friday concluded Kenvue was 70% responsible for the death of Theresa Garcia, a mother of six and a grandmother, who died in 2020 after developing mesothelioma, a type of cancer linked to asbestos exposure. Her family alleged J&J and Kenvue's predecessor firm sold their talcum-based baby powder knowing it was tainted with asbestos, according to court filings.

The panel found J&J and one of its units were responsible for the remaining 30% of the verdict, one of the first wins by a talc plaintiff since a judge last year threw out the [bankruptcy filing](#) of a J&J unit aimed at forcing a settlement of the talc cases. A Florida jury rejected similar claims against the company on Thursday.

J&J has maintained that its talc-based products don't cause cancer and that it has marketed its baby powder appropriately for more than a century.

Officials of Kenvue, which now sells baby powder, confirmed earlier this month it no longer makes or sells a talc-based version of the product. Prior to the spinoff, J&J said it would take talc off the [North American market](#) by 2020 and worldwide by December 2023 and switch to a cornstarch replacement. It cited sliding sales for the move.

Melissa Witt, a Kenvue spokeswoman, didn't immediately respond to an email Saturday seeking comment on the verdict. Erik Haas, the head of J&J's in-house litigation section, said the company would appeal the jury's finding. "We expect to prevail as we typically do with aberrant adverse verdicts that have no basis in the law or science and are predicated on clearly erroneous rulings by the trial court," Haas said in an emailed statement.

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J&J is among a host of big drugmakers that divested or are planning to divest themselves of lower-margin, yet dependably profitable, consumer units in order to focus on the high-stakes business of making new medicines. J&J generated **\$13.2 billion** in cash via the offering of Kenvue debt and sale of its shares. Kenvue is now home to popular J&J products such as its Tylenol painkiller, Listerine mouthwash and the new cornstarch-based version of baby powder.

Read more: [J&J to Pay \\$75 Million to Settle \\$6 Billion Baby Powder Suit](#)

As part of the spinoff, Kenvue secured an indemnity agreement from J&J to cover any talc liability that arises in North America, according to securities filings. Kenvue must deal with talc verdicts generated by courts outside that area, the filings show.

Garcia's family had been ready to go to trial in 2021 when J&J's LTL Management unit filed its first Chapter 11 case seeking to foster a settlement of all current and future talc cases, said Jessica Dean, the family's lawyer. Its only after that case – along with a second attempt to use the bankruptcy courts to corral the talc litigation – was thrown out that the family was able to have a jury hear its case, Dean said.

"After years of delay caused by Johnson & Johnson's bad faith abuse of the bankruptcy system," the family is grateful jurors saw through the 'deceptions' put forth by J&J and Kenvue about whether talc can cause cancer, Dean said in a release. "The defendants knew that talc contains asbestos impurities that were mined and put in the bottles of baby powder J&J sold," she added.

In the Florida case, a state court jury rejected claims by Patricia Matthey's family that her 2016 ovarian cancer was caused by using baby powder tainted with asbestos. After the verdict, Haas said the company was vindicated by the panel's ruling. "The jury appropriately found that talc is safe, does not contain asbestos and does not cause cancer, which is the same outcome the company achieved in 16 of 17 ovarian cases tried to date," Haas said in an emailed statement.

In Garcia's Chicago case, her family contends the plaintiff was a long-time user of J&J's talc-based baby powder and used the product on her children and grandchildren. The family contends J&J was aware of concerns about asbestos in its talc and failed to warn consumers. Stephanie Salcedo, Garcia's daughter, filed the case on behalf of her family.

"J&J knew that asbestos exposure, including asbestos exposure from inhaling asbestos-containing talc, can and does cause fatal diseases such as mesothelioma," the family said in its lawsuit against the companies.

J&J **reported** earnings this week, beating estimates in a step towards boosting profitability after the spinoff of Kenvue.

The Chicago case is Salcedo v. Cyprus Amax Minerals, No.020L004505, Calendar, J1 24067608, Cook County Circuit Court (Chicago).

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Feds cannot delay youth-led climate change case longer, Oregon judge rules

 [courthousenews.com/feds-cannot-delay-youth-led-climate-change-case-longer-oregon-judge-rules](https://www.courthousenews.com/feds-cannot-delay-youth-led-climate-change-case-longer-oregon-judge-rules)

Alanna Mayham

The judge denied the United States' attempt to delay a 2015 climate change lawsuit while recommending that the Ninth Circuit also deny the feds' arguments for dismissal.

PORTLAND, Ore. (CN) — A federal judge in Oregon refused to pause a prominent children's climate change lawsuit on Friday as the Ninth Circuit decides on the federal government's attempt to dismiss the case before it heads to trial.

The 2015 lawsuit — filed by 21 young climate activists initially between the ages of 8 and 19 — accuses the federal government of contributing to climate change through fossil fuel production, thus harming them and violating their constitutional rights to life, liberty and property while failing to protect public trust resources.

The case represents one of several landmark cases launched by young activists hoping to hold the government responsible for allowing activities that perpetuate climate change and, more notably, raise questions about the survivability of the future.

But while some cases have successfully moved through federal courts, the Oregon lawsuit has struggled to reach a trial due to government pushback.

In 2023, the lawsuit narrowly escaped dismissal after U.S. District Judge Ann Aiken, a Bill Clinton appointee, allowed the plaintiffs to file a second amended complaint. That decision followed a divided ruling from the Ninth Circuit in 2020 with instructions to dismiss the case for lack of standing.

Then, on Dec. 29, 2023, Aiken denied the government's motion to dismiss again — prompting the federal government to request a stay on proceedings as the Ninth Circuit decides whether to grant its writ of mandamus seeking the case's dismissal.

"The court should hold that the district court violated the rule of mandate by granting leave to file the amended complaint," the federal government wrote in its petition on Feb. 2. "In the alternative, the court should order the district court to dismiss the case without leave to amend either for lack of Article III standing or for failure to state claims for relief."

The government also requested the Ninth Circuit issue an administrative stay and pause the federal court's proceedings while the appeals court decides on the petition, which it agreed to do on Feb. 29.

Aiken had other thoughts on the government's requests.

On Friday, the judge denied the government's Jan. 18 motion for a stay, explaining that the government defendants "have repeatedly delayed the case from reaching the evidentiary phase for nearly ten years.

"Staying this case will only add to this delay," Aiken wrote in the order. "This court cannot discern any public interest in such delay."

In a separate supplemental order — also issued on Friday — Aiken recommended that the appeals court deny the writ of mandamus in favor of a trial.

"This court has great regard for the judicial process," Aiken wrote. "It has deliberately considered all motions the parties brought, and its decisions are accessible for appellate scrutiny in the due course of litigation. Trial courts across the country address complex cases involving similar jurisdictional, evidentiary and legal questions as those presented here without resorting to interlocutory appeal or petitioning for a writ of mandamus."

Aiken then emphasized that the proper venue for the case is in the trial court, not with the Ninth Circuit.

"Defendants therefore have other means, such as a direct appeal, to obtain the desired relief," Aiken wrote. "This court recommends denying defendants' petition for writ of mandamus."

The plaintiffs did not immediately respond to a request for comment or an interview following the orders. They did, however, file a strongly worded response to the government's motion to stay on Feb. 1.

"The solicitor general of the United States and the Department of Justice have singled out these 21 youth plaintiffs, eleven of whom are Black, Brown and Indigenous, to use the most aggressive and discriminatory legal tactics to stop these youth — with physical, emotional, cultural, property and other tangible and deeply personal injuries — from having their trial against the United States federal government for its role in causing their injuries," the plaintiffs write in the filing.

The plaintiffs note how the case is unique in how the federal government seeks to prevent an evidentiary record at trial for the sake of saving money.

The government's goal, the plaintiff say, is to hide incriminating evidence.

"The only emergency in this case is the climate emergency that defendants created, and the Department of Justice prolongs with further delays," the plaintiffs write. "Indeed, the only issue of public importance is the ongoing constitutional violations facing plaintiffs with each additional day of delay."

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NEWS

Kraft Heinz's Lunchables Hit With Consumer Class Actions Over Alleged Metals in Lunchtime Staple

These cases were first surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in federal and state courts. Law.com Radar now offers state court coverage nationwide.

April 22, 2024 at 10:14 AM

Food and Beverage



Allison Dunn



Kraft Heinz, the company behind the popular “Lunchables” kids food kits, was hit with at least two consumer class action lawsuits in New York federal courts last week by parents following a report revealing the prepackaged food products are contaminated with heavy metals such as lead and cadmium.

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

The suits were filed in the U.S. district courts for the Southern and Eastern districts of New York on April 15 and 17, respectively. According to one plaintiff, Laura LaSpisa, Kraft Heinz neglected to disclose the presence of harmful metals such as lead, cadmium and phthalates, which was uncovered by a recent analysis from Consumer Reports.

The [report](#), released April 9, documents testing conducted on three varieties of Lunchables products, Turkey and Cheddar Cracker Stackers, Pizza with Pepperoni and Easy Cheese Pizza. Consumer Reports also tested 12 store-bought versions of Lunchables and found similar “relatively high levels” of heavy metals.

In response, the group launched a petition to the U.S. Department of Agriculture to remove Lunchables from the National School Lunch Program. Lunchables, introduced in the 1980s, have been a lunchtime staple for students.

In her Southern District of New York [complaint](#), LaSpisa asserted Kraft Heinz lead her and other class members to believe that Lunchables was perfectly safe despite containing metals “that no reasonable parent would want their children to eat in a single meal.”

Jeffrey I. Carton and Catherine H. Friesen of Denlea & Carton in White Plains, New York, filed the complaint on behalf of LaSpisa and the class, asserting violations of Section 350 of New York General Business Law for false advertising.

Plaintiffs in the Eastern District case are represented by Nick Suciu III of Milberg Coleman Bryson Phillips Grossman in Bloomfield Hills, Michigan, and Philip J. Furia of Sultz & Lipari in Poughkeepsie, New York.

The complaint, filed by Vincent Palmeri, asserted similar claims of false representation of ingredients contained in Lunchables.

Palmeri also noted that the specific amount of lead reported to be in the Lunchables products is “more than 69% of the maximum allowable daily dose level for lead established based on California regulations.”

None of the attorneys returned a request for comment. Counsel has not yet appeared for Kraft Heinz.

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<https://www.law.com/2024/04/22/soaring-sugar-prices-not-so-sweet-antitrust-class-actions-surge/>



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NEWS

Soaring Sugar Prices Not So Sweet: Antitrust Class Actions Surge

Two years after the U.S. Department of Justice failed to block a \$315 million merger between United States Sugar Corp. and Imperial Sugar Co., antitrust lawyers have lodged nearly two dozen class actions at the sugar industry.

April 22, 2024 at 02:04 PM

Class Actions



Amanda Bronstad
staff reporter



What You Need to Know

- The lawsuits allege that several sugar producers, which together control 70% of the market, conspired to fix prices by sharing competitively sensitive information through an industry analyst.
- The lawsuits cite testimony and discovery from a 2022 bench trial in the DOJ's failed case, though the defendants insisted they only provided public information.
- Lawyers have sought multidistrict litigation in Minnesota, New York and Florida, home to 50% of the nation's sugar cane production.

Two years after the U.S. Department of Justice failed to block a \$315 million merger between United States Sugar Corp. and Imperial Sugar Co., antitrust lawyers have lodged nearly two dozen class actions at the sugar industry.

“The allegation is essentially that these sugar defendants were using a middleman to communicate,” said Dayron Silverio at Miami’s Podhurst Orseck, which filed two sugar antitrust actions this month in Florida. “This was the person who was sharing price information between the defendants and in a coordinated effort to maintain granulated sugar prices at a certain level.”

The lawsuits, primarily filed in Minnesota, New York and Florida, allege that several sugar producers—including what is now United Sugar Producers & Refiners, which together control 70% of the market—conspired to fix prices by sharing competitively sensitive information through industry analyst Richard Wistisen and his firm, Commodity Information Inc., both of which are named as defendants.

The lawsuits cite testimony and discovery from a 2022 bench trial in the DOJ’s failed case, though the defendants insisted they only provided public information to ensure Wistisen’s data was accurate.

And while the DOJ's case was limited to a single merger's impact on the Southeastern U.S., the antitrust class actions detail a nationwide conspiracy to dominate a market valued at \$13.2 billion last year.

In addition, the lawsuits all cite testimony and internal emails presented at trial that the sugar producers colluded since 2019 to fix prices. On Sept. 22, 2020, for example, Wistisen provided two sugar producers with information from each other's executives in emails less than a minute apart.

"One of the things that came out in that lawsuit is internal communications, which are always critical in establishing a conspiracy," said Peter Prieto, of Podhurst Orseck. "Conspiracies are very difficult to prove, but to the extent you can get your hands on the communications of defendants, that's key."

Lawyers for the sugar producers did not respond to requests for comment. They are Latham & Watkins partner Lawrence Buterman, in New York, for United Sugar Producers & Refiners Cooperative; Vanessa Jacobsen, of Eimer Stahl in Chicago, for Michigan Sugar Co.; Shearman & Sterling's Djordje Petkowski, in Washington, D.C., for ASR Group International, American Sugar Refining Inc. and Domino Foods Inc.; and Chad Blumenfield, of Greene Espel in Minneapolis, for Cargill Inc.

Allegations 'Mirror the Government's'

Sugar is one of several industries hit by a rising tide of antitrust class actions, particularly in the past month. After years of declines, antitrust class actions rose in 2023, then [skyrocketed in March](#), according to data from Law.com Radar.

Other lawsuits have targeted replacement tires and real estate commissions. Many have tracked governmental actions brought by the DOJ and the Federal Trade Commission, particularly involving pricing algorithms and Big Tech companies like Apple and Google, or the European Commission.

The first lawsuit targeting sugar producers was filed last month by Hausfeld, Roberts Law Firm and Kohn, Swift & Graf. Those lawyers, as well as attorneys in another class action that followed, filed a motion before the U.S. Judicial Panel on Multidistrict Litigation to transfer all the lawsuits to the Southern District of New York, where five cases are now pending.

Other lawyers have argued for the District of Minnesota, where United Sugars and Cargill are based, or the Southern District of Florida, where 50% of the nation's sugar cane is produced and three other defendants, ASR Group, ASR and Domino, have headquarters.

"This district, the Southern District of Florida, has a very strong connection to the product at the root of this MDL, and that's historic," Prieto said.

The sugar producers insist the cases should go to the District of Delaware and, specifically, U.S. District Judge Maryellen Noreika, who oversaw the DOJ's four-day bench trial. She concluded that the government hadn't provided an adequate market to allege the merger of U.S. Sugar and Imperial Sugar would leave two players in control of 75% of the industry in the Southeastern U.S.

"The government has failed to identify the proper relevant market because its product market and geographic markets ignore the commercial realities of sugar supply in the U.S.," she wrote in her 2022 opinion, which was upheld in 2023 by the U.S. Court of Appeals for the Third Circuit.

"Judge Noreika is already deeply familiar with plaintiffs' allegations, competition and pricing in the sugar industry," the defendants wrote in their response to the motion for multidistrict litigation in the antitrust class actions, "and the extensive federal regulation of the industry, all of which will be key issues in these cases."

“Plaintiffs’ allegations regarding the alleged conspiracy—including all of the communications purportedly excerpted in the various complaints—mirror the government’s and are admittedly based on the government’s proposed findings of fact from the *Sugar* litigation,” they added. “Indeed, plaintiffs concede that these proceedings are based on, and stem from, the *Sugar* litigation.”

Cargill, who hasn’t been named in all the lawsuits, called the move for multidistrict litigation “premature and unwarranted.”

The U.S. Judicial Panel on Multidistrict Litigation plans to hear the cases next month in Salt Lake City.

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April 19, 2024, 10:27 AM PDT; Updated: April 19, 2024, 12:09 PM PDT
Judges Mull Defining 'Moving Target' AI in Evidence Rules (1)
By [Suzanne Monyak](#)

- Judiciary committee weighed how to authenticate AI evidence
- Judges worried rule could be too broad, or quickly outdated

Bloomberg Law News 2024-04-22T09:39:05497429321-04:00
Judges Mull Defining 'Moving Target' AI in Evidence Rules (1)

By Suzanne Monyak 2024-04-19T13:27:29000-04:00

- Judiciary committee weighed how to authenticate AI evidence
- Judges worried rule could be too broad, or quickly outdated

Federal judges are wrestling with how to define artificial intelligence when dealing with evidence presented in trials, with some raising concerns that too broad a definition could sweep in items as common as receipts and thermometers.

The judiciary's advisory committee on evidence rules heard testimony Friday from a panel of experts in computer science and the intersection between law and technology about how—and if—the judiciary should revise its rules to respond to the rise of generative artificial intelligence services.

Committee Chair Patrick Schiltz, chief judge of the Minnesota federal trial court, raised concerns that any AI policy crafted by the judiciary—and subject to its slow-moving rules process – would be swiftly rendered outdated by fast moving technological advancements.

"It's very hard when the target is moving so quickly," and with "old, slow people making the decisions," Schiltz said.

Friday's meeting comes as the federal judiciary grapples with how to respond to the increased use of generative AI services, like ChatGPT.

Use of AI by lawyers has led to publicized incidents of errors submitted to courts, including a case in a Manhattan federal court when a lawyer submitted an AI-created brief with fake case citations in litigation against an airline.

It's also an issue prioritized by Chief Justice John Roberts, who made the rise of AI a key feature of his year-end report released Dec. 31, where he predicted that judicial work "will be significantly affected by AI."

Some judges and courts have handed down orders asking parties to disclose if they used artificial intelligence if any materials submitted to the courts. These orders have prompted concerns that they would discourage use of helpful AI tools, including spellcheck and legal research databases.

Members of the AI panel encouraged the judges to stick to non-specific terms, given how fast technology can be changed and systems updated.

Andrea Roth, a criminal law professor at the University of California Berkeley School of Law who spoke before the committee, submitted a proposal to add requirements on evidence that is the "output of a process or system." Her proposal would add the requirements to a rule on expert witness testimony, in acknowledgment that machine-generated evidence cannot be cross-examined.

But Schiltz noted that trials are "inundated" with machine-created items, such as receipts. Other committee members floated other technological instruments, including a thermometer or a radar gun.

Schiltz raised the example of a white collar case where the defense team objects to every piece of evidence that could be considered an output.

"It would overwhelm us," Schiltz said.

Judge Richard Sullivan of the US Court of Appeals for the Second Circuit, a member of the committee, was skeptical that the committee even should revise its evidence rules.

He said he would be "inclined to wait" before moving forward with a new evidence rule about AI and questioned if judges do not already have the tools when handling evidence to handle AI as well.

"I'm not sure that this is the crisis this has been painted as," Sullivan said.

Witness impeachment

The committee members also debated whether to scrap, or revise, a rule allowing prosecutors to tell the jury if a testifying witness, including a criminal defendant, has a prior criminal conviction that's unrelated to dishonesty.

Melody Brannon, federal public defender in Kansas and chair of the Defender Services Advisory Group, said this evidentiary rule discourages clients from going to trial if they think their prior convictions will hurt the jury's perception of them.

She said it has a significant impact on her clients' constitutional rights, and a "disproportionate impact" on her clients of color who are more likely to have prior convictions because of overpolicing and other factors.

"I'm not sure why it still exists," Brannon said.

The Justice Department opposes efforts to eliminate this part of the rule. DOJ official Marshall Miller submitted a comment ahead of the meeting that said scrapping the rule would be a "blunt and heavy-handed solution."

Judge Valerie Caproni of the US District Court for the Southern District of New York, a committee member, expressed concerns that eliminating the rule would amount to "throwing the baby out with the bath water."

But some judges on the committee said they have seen their colleagues take different approaches to which prior convictions are considered probative, and the panel discussed whether the rule could be narrowed or clarified instead of eliminated. Sullivan said it was "troubling" to hear there are such "wildly different applications" of the evidence rule.

Several said they were interested in adding clarifying language to help judges conduct a balancing test on when prior convictions should be allowed in.

"It is well-worth serious consideration, but I think it needs a little bit more consideration," said Judge John Bates of the DC federal trial court, chair of the standing committee who was also present.

(Updates with witness impeachment rule.)

Lawyer seeking sanctions 'descended into schoolyard antics' at deposition, Quinn Emanuel says

 [abajournal.com/news/article/lawyer-seeking-sanctions-descended-into-school-yard-antics-at-deposition-quinn-emanuel-partner-says](https://www.abajournal.com/news/article/lawyer-seeking-sanctions-descended-into-school-yard-antics-at-deposition-quinn-emanuel-partner-says)

Law Firms

By Debra Cassens Weiss

April 22, 2024, 11:09 am CDT

Attorney Alex Spiro emerges from a courtroom at the Palm Beach County Courthouse in April 2019 in West Palm Beach, Florida. (Photo by Patrick Dove/TCPalm.com via the Associated Press)

Alex Spiro, a partner with Quinn Emanuel Urquhart & Sullivan, may have given some responses that "were pointed at times" during a deposition of his client Tesla CEO Elon Musk. But it was in response to the opposing lawyer's "insults, shouting, interruptions and violations" of a court order, according to the law firm's opposition to a sanctions motion.

Sanctions against Spiro are unwarranted, and his client should be granted fees and costs for fighting the motion, according to the April 18 document filed by Quinn Emanuel in Travis County, Texas.

The opposing lawyer who sought sanctions, Mark Bankston, was also acting badly at the deposition, the motion says.

Bankston "descended into schoolyard antics, like yelling, interrupting the witness and insulting opposing counsel in exceedingly personal terms—a tactic he deploys again in his motion for sanctions, calling Mr. Spiro, an accomplished trial lawyer, a 'celebrity attorney,'" the motion for Spiro says.

Law360, Reuters and Bloomberg Law have coverage.

Bankston was one of the lawyers who successfully sued Infowars host Alex Jones for his false claims that the December 2012 mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut, was a "giant hoax." Bankston obtained a verdict of nearly \$50 million in the case.

Bankston represents plaintiff Benjamin Brody, who has filed a defamation lawsuit against Musk, the CEO of Tesla who bought Twitter and renamed it X. Brody had alleged that Spiro appeared at the March 27 deposition, even though he did not yet have pro hac vice status to participate in the case in Texas, where he is not licensed.

Bankston had claimed in his April 8 motion that Spiro was “astonishingly unprofessional, as he continually interrupted the deposition with commentary, gave numerous improper instructions not to answer, berated opposing counsel, insulted plaintiff’s claims, mocked counsel’s questions, and generally acted in the most obnoxious manner one could contemplate without crossing into parody.”

Quinn Emanuel alleges in its motion that a Texas judge had limited the subject matter of the deposition, but Bankston “apparently decided that the court’s order was optional.” Bankston questioned Musk “about a range of other controversial matters in a manner unabashedly designed to generate headlines,” according to the document filed on behalf of Spiro.

According to the Quinn Emanuel motion, Bankston’s claim that Spiro engaged in the unauthorized practice of law ignores a controlling decision “and fails to discuss persuasive guidance of the American Bar Association permitting an attorney to defend a deposition and otherwise represent a client in this jurisdiction where he or she reasonably expects a pending pro hac vice motion to be granted.”

Spiro had sought pro hac vice permission to defend Musk in Texas in January.

Brody alleges that posts on X wrongly claimed that he was an undercover agent posing as a member of a neo-Nazi group in a brawl. Brody claims that Musk amplified the false claim in a post.

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Elon Musk's lawyer Spiro blasts sanctions bid in defamation case

 [reuters.com/legal/litigation/elon-musks-lawyer-spiro-blasts-sanctions-bid-defamation-case-2024-04-19](https://www.reuters.com/legal/litigation/elon-musks-lawyer-spiro-blasts-sanctions-bid-defamation-case-2024-04-19)

Mike Scarcella

Alex Spiro, attorney for Elon Musk arrives to attend a securities-fraud trial brought by shareholders at federal court in San Francisco, California, U.S. January 20, 2023.

REUTERS/Peter DaSilva Purchase Licensing Rights , opens new tab

April 19 (Reuters) - Elon Musk has slammed a bid for court sanctions against his longtime attorney Alex Spiro calling it a stunt to drum up publicity and salvage unfounded defamation claims against the billionaire entrepreneur.

Musk's Thursday filing , opens new tab came in a case that plaintiff Benjamin Brody had lodged against him in a Texas state court last year. According to the lawsuit, Musk falsely implied in a post on his social media platform X that Brody participated in a right-wing street brawl in Oregon.

Musk, who has denied defaming Brody, sat for a virtual deposition in the case last month, with Spiro appearing as his lawyer. New York-based Spiro is not licensed to practice law in Texas, however, and lacked the court's explicit approval to serve as Musk's lawyer in the case.

Brody's lawyer Mark Bankston this month asked the Texas court to punish Spiro, a high-profile litigator at law firm Quinn Emanuel Urquhart & Sullivan, by barring him from the case for "unauthorized practice of law" and declaring some facts "admitted" by Musk.

Musk and his other Quinn Emanuel lawyers on Thursday denied that Spiro violated any court rules. Musk called the sanctions bid "gamesmanship" that was based on "unfounded accusations and publicity-minded barbs."

Bankston, according to Musk, "descended into school-yard antics like yelling, interrupting the witness, and insulting opposing counsel."

Quinn Emanuel's filing asked the court to award legal fees to Musk for fighting what it called a "meritless" sanctions request.

Bankston, who had himself criticized Spiro's conduct at the deposition as "astonishingly unprofessional," did not immediately respond to a request for comment.

A spokesperson for Quinn Emanuel on Friday said Spiro and the firm declined to comment.

Spiro has long been a top lawyer for Musk, representing him in court cases involving the U.S. Securities and Exchange Commission and other matters.

Musk's Thursday filing said Spiro had "reasonably" expected that his pending request to appear in the case would be approved, even if the firm "should have been more diligent" about seeking a ruling on the submission.

The filing also argued that an "unadmitted attorney" can still participate at a deposition in a Texas case.

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

For plaintiff: Mark Bankston of Farrar & Ball

For defendant: John Bash of Quinn Emanuel Urquhart & Sullivan

Read more:

Musk lawyer Alex Spiro faces sanctions bid in Texas defamation fight

Musk questioned in defamation lawsuit over X post about street brawl

Elon Musk asks Texas court to bar deposition in defamation lawsuit

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

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Reporting by Mike Scarcella

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Tesla shares tumble on price cuts in run-up to earnings

 [reuters.com/business/autos-transportation/tesla-shares-drop-price-cuts-run-up-earnings-2024-04-22](https://www.reuters.com/business/autos-transportation/tesla-shares-drop-price-cuts-run-up-earnings-2024-04-22)

Reuters

A Tesla Model X is shown at a Tesla service center in Costa Mesa, California, U.S., October 20, 2020. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

April 22 (Reuters) - Tesla (TSLA.O) , opens new tab tumbled 4% on Monday, as its latest global price cuts fanned Wall Street concerns about dwindling margins at the electric-vehicle maker in the run-up to its earnings report later this week.

The company slashed prices by up to \$2,000 on its vehicles such as the Model 3 and Model Y in several markets including the U.S., China and Germany over the weekend, in its latest effort to boost demand slowed by high interest rates.

The cuts come ahead of its quarterly earnings on Tuesday, with the world's most valuable automaker expected to post its first revenue drop and lowest gross margin in nearly four years, according to LSEG data.

Investors are awaiting clarity from CEO Elon Musk on Tesla's strategy after he cut 10% of the company's staff last week and said focusing on autonomous driving was a "blindingly obvious" move.

Musk had earlier this month announced an event in August to unveil its "Robotaxi", after a Reuters report on April 5 said Tesla had scrapped its plan to develop its long-awaited affordable EV in favor of robotaxis. Musk said after the report that "Reuters is lying", without citing any inaccuracies.

Wedbush Securities analyst Dan Ives wrote in a preview note last week that the earnings would be a "moment of truth" and "one of the most important moments in the company's history".

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

Tesla shares were down at \$141.1 on Monday. The shares have lost about 41% of their value so far this year with surveys and experts saying Musk's tilt toward right-wing politics and polarizing public statements turned away some prospective buyers of its cars.

Monday's drop was set to erase about nearly \$20 billion from its market value of \$468 billion, based on its total outstanding shares.

While Tesla remains the world's most valuable automaker, Toyota (7203.T) , opens new tab has slowly been narrowing the gap on the back of a boom in demand for its hybrid vehicles.

The Japanese automaker had a market capitalization of \$306 billion, as of its last close.

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<https://www.wsj.com/finance/stocks/tesla-stock-fans-not-selling-f45fec37>

Meet the Tesla Diehards Sticking With the Stock Despite Its Disastrous Year

Stakes are high for the electric-vehicle maker going into Tuesday's quarterly earnings report

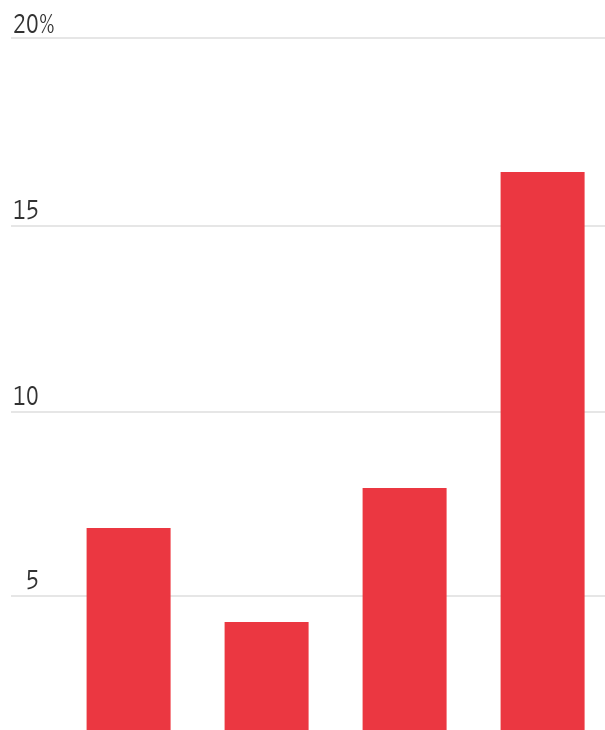
By [Hardika Singh](#) [Follow](#)

April 22, 2024 5:30 am ET

Gabriel Bartash picked up extra shifts for seven months to make his first investment in Tesla TSLA **-3.01%** ▼ in 2016. He says the electric vehicle maker's technology makes the stock a no-brainer investment. Despite its stumble this year, he never plans to sell any of his shares.

Bartash, a 44-year-old behavioral health specialist in Harrisburg, Pa., initially poured \$7,000 into Tesla stock. In 2022, he took advantage of the dip in shares to invest an additional \$26,000. Today, his six-figure investment makes up about 80% of his portfolio.

Retail participation



“In the long term, I trust Elon Musk,” Bartash said. “He’s Steve Jobs but multiplied by an order of magnitude. I’m not a cultist, but it’s like biblical proportions when he talks about wanting to democratize space and going to Mars.”

Bartash isn’t alone. Scores of individual investors have piled into Tesla shares in recent years, lured by the company’s technology, visionary chief executive and mammoth stock market gains. Through the end of last



Source: Nasdaq Data Link, which uses publicly available information to track about half of all individual-investor trading activity in U.S. equities.

year, the stock was one of the top 10 wealth-creating companies for investors over the past decade, according to Morningstar, rising from about \$10, on a split-adjusted

basis, to \$250.

But the shares have since hit a rough patch, down almost 40% in 2024. Tesla is the second-worst performer in the S&P 500 and off more than 60% from its peak in November 2021. The company's market value fell below \$500 billion last week for the first time in nearly a year, after climbing as high as \$1.235 trillion.



Gabriel Bartash says his portfolio consists mostly of Tesla stock. PHOTO: GABRIEL BARTASH

The stakes are high for Tesla going into its quarterly report Tuesday. The market for its battery-powered cars has weakened, and profit margins have narrowed. The company has also delayed deliveries of its much-awaited Cybertruck and is recalling 3,878 of them to repair or replace faulty accelerator pedals. It also recently unveiled plans to slash more than 10% of its global workforce.

Individual investors, for the most part, have been undeterred. According to estimates from Vanda Research, they have poured a net \$5.9 billion into Tesla shares this year, more than any of the other big

tech stocks in the Magnificent Seven. Individual investors also account for a higher share of Tesla's total trading volume than any of the other big tech stocks, according to Nasdaq Data Link.

Richard Virgilio, a 50-year-old marketing executive in Asbury Park, N.J., first bought a Tesla Model Y in early 2020 and later plopped \$50,000 into Tesla

shares. Although that investment is down 50% on paper, the stock still makes up about two-thirds of his total equity portfolio.

Tesla's recent stumble has made its valuation look more attractive, though it remains well above the multiples of the other popular tech stocks. Tesla trades at about 50 times expected earnings over the next 12 months, below its three-year average of about 70. The S&P 500's multiple is 20.

"Every time I go onto my Fidelity account and look and see it's lower and lower, it's really a killer," he said.

Virgilio says he hasn't sold because many of the things that first attracted him to the "laptop on wheels" still hold true. Among the features he likes are Tesla's dog mode climate controls, self-driving application and mileage.

But he says he has been frustrated by the stock declines, the company's design choices and Musk's foray into politics. For those reasons, he is considering selling shares for harvesting tax losses.

"When we bought the Model Y, we waited four months for it," Virgilio said. "At that time, it was kind of like owning a Birkin [bag]. It's not like that anymore."



Richard Virgilio likes his Tesla Model Y's dog mode for his pal Cooper. PHOTO: RICHARD VIRGILIO

Other investors are betting against the stock outright.

Tesla has long been among the most shorted U.S. stocks. Short sellers borrow shares and sell them with the hope of profiting by buying the stock back at a lower price later. The rapid increase in the shares during the pandemic was exacerbated in part by the many short sellers who were forced to buy back shares to close their losing positions.

This year, they are sitting on collective gains of \$8.33 billion, after losing \$12.25 billion in 2023, according to data from S3 Partners. Roughly 4.2% of the stock's free float is currently sold short, up from an average of 3.3% at this point last year, but down from an average of 10% in 2020.

In the options market, traders are also positioning for further declines in Tesla shares. Some of the most actively traded Tesla contracts in recent sessions have been puts tied to the shares' slipping to \$145 or \$148, Cboe Global Markets data show. Puts give traders the right to sell shares at a specific price, by a stated date. They are often used to hedge positions or bet on a steeper decline.

Tesla remains a contentious stock among the analysts on Wall Street. Of the 53 who cover the stock, 18 rate the shares a buy, 25 a hold. The remainder have a negative rating. Their average price target is \$189.11, or about 30% above Friday's closing price of \$147.05, according to data compiled by FactSet.

Steven Medeiros, a 20-year-old student living in Wayne, N.J., considers himself among the Tesla faithful.

He started investing in Tesla in early 2023 with the money he received from an injury lawsuit and later sold about half of his \$100,000 position to pay off his Tesla Model 3 Long Range.

"It does kind of stink watching it fall down, but I'm relatively comfortable still holding it," Medeiros said. "I practically paid for my entire Tesla with just the gains that I made with the Tesla shares. I always think about it as if I got a free car out of it."

He plans to sell more if shares go back above \$200 and buy if shares dip below \$120. His car is staying put.

"Never would I sell my car," Medeiros said.

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<https://www.wsj.com/business/autos/elon-musk-turned-democrats-off-tesla-when-he-needed-them-most-176023af>

Elon Musk Lost Democrats on Tesla When He Needed Them Most

Some potential Tesla buyers couldn't stomach a purchase amid the CEO's fall outbursts, data suggest



By *Tim Higgins* [Follow](#)

April 20, 2024 5:30 am ET

For years, the biggest cohort of Tesla TSLA **-3.37%** ▼ buyers, politically speaking, has been Democrats. But when Elon Musk took a hard turn last fall, they didn't follow him.

The proportion of Democrats buying Tesla vehicles fell by more than 60%, according to car buyers surveyed in October and November by researcher Strategic Vision.

Tesla has since made up ground with blue buyers, the research shows. But the dramatic drop highlights the risk hanging over Tesla with an increasingly political chief executive, at a time when electric-car makers are already struggling to appeal to many Republican buyers.

The fall contraction coincided with Musk's being increasingly vocal about illegal immigration, amplifying a tweet promoting antisemitic vitriol and publicly attacking Disney over his contention that the entertainment company had become too woke. (Musk has called the troublesome tweet foolish, and the Mouse House CEO has defended its positions while saying it needs to stay focused on entertainment.)

In many ways, Musk was sounding a lot like Donald Trump, embracing billionaire populism, and less like the green hero he was once celebrated as.

Those controversies, it seems, have put the electric-vehicle maker in an even tougher position this year as the overall market for EVs has slowed. It doesn't help EV makers that U.S. politics has polarized the technology, which some Republicans have denigrated in their campaigns.

Globally, Tesla sales fell in the first quarter, the first year-over-year drop since the troubled early days of the pandemic in 2020. Musk this past week rolled out widespread layoffs, and

shares have fallen 41% this year through Friday as investors worry Tesla's dramatic growth story is in trouble.

Some investors are pining for the old Tesla-obsessed Elon, worried he has been distracted with his political posturing and commitments at his other companies, including an artificial-intelligence startup called xAI and social-media platform X.

Other surveys have captured a pullback in consumers' consideration of Tesla vehicles since Musk acquired the social-media platform in late 2022 and held court on contentious social issues.

But the mix of Democrats, who have been core constituents for the Tesla brand, had remained mostly steady—until last fall.

Among 2022 model-year buyers, Democrats made up 40% of Tesla customers and 39% in 2023, according to Strategic Vision's surveys. Things began to change in the 2024 model year survey, which began in October. The makeup of Democrats fell to 15% while Republicans jumped to 32% and independents swelled to 44%.

Those results show Tesla was losing sales among Democrats, Alexander Edwards, president of Strategic Vision, said of the fall findings.



Tesla has fallen in popularity among Democrats while electric vehicles in general are struggling to appeal to Republicans. PHOTO: MARIO TAMA/GETTY IMAGES

In California, a solid-blue state, registrations of new Tesla vehicles fell almost 10% in the fourth quarter. That was a stunning reversal from the third quarter when registrations rose 43%, and perhaps a sign of things to come nationally.

Tesla doesn't release U.S.-specific sales results. But Motor Intelligence estimates Tesla's U.S. sales growth turned negative this year. Model 3 sedan sales fell 44% in the period that ended in March compared with a year ago, according to the research firm. Model Y sport-utility vehicles rose just 1.4%.

EV ownership has long been politically divisive.

Early electric cars, with dramatically higher prices than comparable gas-powered ones, were cast by critics as playthings for the rich and coastal elites. For every five Democrats owning an EV, there have been two Republicans, according to Strategic Vision's survey last year.

Those differences were further highlighted in the past year amid a contentious Republican primary season where candidates took aim at President Biden, the presumptive Democratic nominee seeking a second term, and his work to support development and adoption of EVs in the U.S.

Former President Trump, the presumptive Republican nominee for the White House, has made attacks on electric cars a regular talking point during his campaign, even as he and Musk appear to have a bromance in the works ahead of November.

Trump has conceded the two men have a schism on one topic. "We obviously have opposing views on a minor subject called electric cars," Trump said during a CNBC interview last month. "I'm all for electric cars, but you have to have all of the alternatives."

Musk has said he is against Biden but has stopped short of saying he will back Trump. "There is either a red wave this November or America is doomed," Musk tweeted in March.

As for how his comments might affect his businesses, Musk has essentially shrugged off the suggestion that they could affect things.

"With respect to Tesla, we make the best cars—whether you hate me, like me or are indifferent," Musk said in November. "Do you want the best car, or do you not want the best car?"

And he might be right—if he can just keep from rocking the boat too much.

While Democrats' ranks fell at the end of the year, some came back in subsequent surveys by Strategic Vision, rising to 35% of the mix of buyers through late February—still not what they traditionally had been, but better than last fall when their share was weakening.

“Elon hasn’t been in the press as much as he has previously,” Strategic Vision’s Edwards said. “This lack of negative press and antics, combined with EV [shoppers] today...shopping various EVs and they find that the Model 3 and Y are still, in their opinion, the best decision based on value.”

Write to Tim Higgins at tim.higgins@wsj.com

Appeared in the April 22, 2024, print edition as ‘Musk’s Talk Sours Democrats on Tesla’.

FirstEnergy donated \$2.5M to GOP gov's' group backing DeWine in '18

 [dispatch.com/story/news/politics/2024/04/19/firstenergy-donated-2-5m-to-gop-govs-group-backing-dewine-in-18/73383380007](https://www.dispatch.com/story/news/politics/2024/04/19/firstenergy-donated-2-5m-to-gop-govs-group-backing-dewine-in-18/73383380007)

POLITICS

FirstEnergy gave \$2.5M to GOP governors' dark money group backing DeWine's 2018 bid



Jessie Balmert

Cincinnati Enquirer

0:12

SKIP



In 2018, Akron-based FirstEnergy donated \$2.5 million to a Republican Governors Association-affiliated dark money group backing GOP nominee Mike DeWine in a competitive race for governor.

The previously undisclosed money reveals how invested FirstEnergy was in the outcome of the Ohio governor's race between DeWine and Democratic challenger Rich Cordray. At the time, FirstEnergy wanted to bail out two nuclear plants then owned by a subsidiary but faced

opposition from Ohio leaders like then-Gov. John Kasich.

Both DeWine and Cordray promised to save two northern Ohio nuclear plants if they became governor, and the company chipped in publicly disclosed money to both the Republican Governors Association and Democratic Governors Association.

But newly released records show FirstEnergy donated \$2.5 million in three installments to State Solutions, a 501(c)(4) nonprofit affiliated with the Republican Governors Association that is not required to disclose its donors. One installment of \$500,000 is labeled "DeWine;" the other two are listed as "RGA," according to records released by the Public Utilities Commission of Ohio to the USA TODAY Network Ohio Bureau, Floodlight, Ohio Capital Journal and the Energy News Network.

DeWine met with FirstEnergy executives at an RGA fundraiser in downtown Columbus on Oct. 10, 2018, the Dayton Daily News first reported. Shortly after, FirstEnergy Solutions donated \$500,000 to RGA, according to tax records.

FirstEnergy also donated \$200,000 to the Citizens Policy Institute, which blasted Cordray for being "Republican Lite," according to released records. Cleveland restaurateur Tony George, a close FirstEnergy ally, was behind the group, BuzzFeed News reported at the time.

In November 2018, DeWine defeated Cordray, 50.4% to 46.7%, as Democrats swept elections across the country. In 2019, FirstEnergy helped Republican lawmakers craft House Bill 6, an energy overhaul measure that included \$1 billion for the two nuclear plants. DeWine signed House Bill 6 within hours of it hitting his desk.

When asked if the donations influenced DeWine's support of nuclear energy, DeWine spokesman Dan Tierney said: "Gov. DeWine's support for nuclear energy is documented well prior to 2018, including during his tenure as United States senator."

FirstEnergy spokeswoman Jennifer Young said the company was unable to comment on pending litigation. Shareholders sued FirstEnergy after federal investigators revealed an extensive pay-to-play scandal bankrolled by the Ohio utility.

That federal investigation led to a 20-year prison sentence for former Ohio House Speaker Larry Householder, a five-year sentence for ex-Ohio Republican Party Chairman Matt Borges and the firing of several FirstEnergy executives. Attorneys in the shareholder lawsuit have sought to subpoena records from DeWine and depose Husted, but neither faces any criminal accusations.

FirstEnergy donated \$1 million through a dark money group to back Husted's bid for governor in 2017, according to previously released records. Husted and DeWine were competitors until they merged campaigns in November 2017.

Concerns raised

In 2018, the nuclear plants' owner FirstEnergy Solutions was in bankruptcy. So creditors raised concerns about a \$1 million payment earmarked to help DeWine's campaign, according to emails exchanged on Aug. 11, 2018. "They cited it is very large compared to DeWine's current fundraising."

FirstEnergy Senior Vice President of External Affairs Michael Dowling tried to allay concerns by explaining that donors can back DeWine's bid in several ways, including giving to DeWine's campaign fund, the Republican Governors Association, State Solutions and the Ohio Republican Party's state candidate fund.

"Theoretically, DeWine/Husted could have a balance of \$10M in their campaign account and the RGA could spend \$40M in support of DeWine in Ohio," Dowling explained in an email. "My point is that comparing the size of a contribution to the RGA to what the DeWine campaign has raised or what the DeWine Campaign's current balance is can be done, but I'm not sure is logical."

Republican fundraiser Brooke Bodney, who worked with the RGA, confirmed: "All factually accurate."

Meanwhile, FirstEnergy Solutions' David Griffing reassured Akin Gump's Rick Burdick that there was no connection between State Solutions and DeWine's campaign. Akin Gump Strauss Hauer & Feld is a powerful law firm that represented FirstEnergy Solutions during its bankruptcy and lobbied for House Bill 6.

The issue was important because exchanging a political favor for a campaign donation would be illegal, a quid pro quo.

"Thanks," Burdick wrote. "Just to confirm there is also no understanding with the DeWine campaign re his position on regulatory relief for nuclear plants related to this contribution."

"Correct," Griffing replied.

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



David Pepper @DavidPepper · 1h

More than the details of Randazzo's deal with First Energy, THESE are the most relevant \$\$ when it comes to why DeWine agreed to First Energy's request to name Randazzo PUCO Chair.

Same pay to play going back years:

He sold the regulation of First Energy to First Energy



David Pepper @DavidPepper · 1h



FirstEnergy donated \$2.5M to GOP gov's group backing DeWine in '18
[dispatch.com/story/news/pol...](https://dispatch.com/story/news/politics/2018/11/15/first-energy-donated-2-5-million-to-gop-governors-group-backing-dewine-in-18/1150000000)



1



25



49



4.1K



Marty Schladen @martyschladen · 1h

Another \$2.5M in dark \$ that FirstEnergy gave to support @MikeDeWine 's 2018 campaign. Gov then nominated a regulator who'd just gotten an alleged \$4.3M bribe from FE. Regulator pushed a \$1.3B bailout that FE paid \$60M in dark \$ for. Gov signed bailout within hours of passage.



David DeWitt @DC_DeWitt · 1h

"FirstEnergy gave \$2.5M to GOP governors' dark money group backing DeWine's 2018 bid."

By @jbalmert

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1



6



12



866



Jessie Balmert @jbalmert · 1h

New records: FirstEnergy gave \$2.5M to GOP governors' dark money group backing DeWine's 2018 bid [dispatch.com/story/news/pol...](https://dispatch.com/story/news/politics/2018/11/15/first-energy-donated-2-5-million-to-gop-governors-group-backing-dewine-in-18/1150000000) via [@DispatchAlerts](#)



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April 19, 2024, 10:17 AM PDT

Trump Media Suggests Illegal Shorts Are Cratering Its Stock (1)

By Katherine Doherty

- It's asking Nasdaq to check on 'potential market manipulation'
- Shares backing Truth Social trade at about half of recent high

Bloomberg Law News 2024-04-22T09:33:25397520436-04:00

Trump Media Suggests Illegal Shorts Are Cratering Its Stock (1)

By Katherine Doherty2024-04-19T13:17:27103-04:00

- It's asking Nasdaq to check on 'potential market manipulation'
- Shares backing Truth Social trade at about half of recent high

Trump Media & Technology Group Corp. says an illegal form of short selling might be behind the battering of its stock and it's asking regulators at Nasdaq Inc. to step in.

The company backing former president Donald Trump's Truth Social network penned a letter to Nasdaq Chair **Adena Friedman** asking her to ensure market makers are following rules that prevent "naked" short sales. Trump Media pointed to data that it claims is an indication of "potential market manipulation."



Former US President Donald Trump at his Manhattan trial.

Photographer: Jabin Botsford/The Washington Post/Bloomberg

Trump Media's stock has lost about half its value after topping \$66 a share in the days following a merger that turned it into a publicly traded firm. Among the explanations for the stock's swoon in recent days has been the company's scarce revenue and lack of any profit. Skepticism about Trump Media's business prospects is widespread, as the firm reported just \$4 million in revenue last year and a loss of more than \$50 million.

That and a valuation north of \$8 billion sparked a wave of bets against the stock, including short sales. Investors also have to mull the impact of Trump's legal woes, which include an ongoing criminal trial in Manhattan.

Short sellers can make a legal profit by borrowing shares from current owners for a fee, selling the stock and then buying the shares back if the price falls. The short seller then returns the borrowed shares to their owner and pockets the price difference.

But selling the stock without actually borrowing any shares — a naked short sale — isn't allowed. Trump Media says it wants Nasdaq to ensure market makers are following rules that require brokers to disclose their "net short" positions, and prevent the lending of shares that don't actually exist.

"This is particularly troubling given that 'naked' short selling often entails sophisticated market participants profiting at the expense of retail investors," Trump Media Chief Executive Officer Devin Nunes said in the letter.

Read More: Trump Media Advises 'Long-Term' Investors on Thwarting Shorts

The stock rose 1.7% to \$33.74 at midday in New York.

Trump Media said its stock was reportedly "the most expensive U.S. stock to short," which gives brokers "a significant financial incentive to lend non-existent shares." It cited four market participants that it says were responsible for over 60% of the extraordinary volume of the shares traded, including Citadel Securities, Virtu Americas, G1 Execution Services and Jane Street Capital.

The data cited by Trump Media don't necessarily reflect any unusual activity or indicate any wrongdoing. A Citadel Securities representative rejected Trump Media's claim and criticized Nunes for trying to "blame 'naked short selling' for his falling stock price." A representative for Virtu declined to comment; the other firms didn't immediately respond to messages.

"Nasdaq is committed to the principles of liquidity, transparency, and integrity in all our markets," a representative for Nasdaq said in an emailed statement. "We have long been an advocate of transparency in short selling and have been an active supporter of the Securities & Exchange Commission's rules and enforcement efforts designed to monitor and prohibit naked short selling."

Image Problem

Short sellers have long had a dark image in the popular mind — not always justified — that paints Wall Street actors as out for profit at the expense of American companies and their employees, as well as retail traders. Practitioners of short selling argue that they expose weak companies and serve as a check on managers who exaggerate their prospects.

Why Activist Short Sellers Stir Up Controversy: QuickTake

Trump Media tapped into the negative image in a Thursday regulatory filing that offered advice on how stockholders can shield their shares from being lent to short sellers. The filing suggested the practice was a tussle between the "retail investor" and "sophisticated and institutional investors." Friday's letter to Nasdaq similarly suggests big market makers are profiting at the expense of retail traders, attempting to pit Wall Street against mom and pop.

Keeping the stock price up would also bolster the next round of shares that Trump Media might hand out. If the stock trades above \$17.50 for 20 of 30 days, Trump Media holders would be entitled to receive as many as 40 million additional shares — with the majority earmarked for Trump himself.

The company's listing in March also restricts certain insiders from selling shares for six months, a lockup period that carries into October. The new shares and the end of the lockup could hurt ordinary shareholders by diluting their stakes, and perhaps drive down the market price if the insiders decide to cash out large portions of their holdings.

(Updates with short-seller background, prospect of future dilution starting with 'Image Problem' headline.)

--With assistance from **Carmen Reinicke**.

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April 22, 2024, 2:00 AM PDT

This Week in Chancery Court: Trump SPAC, Amazon, Prince's Estate

By Jennifer Kay

Bloomberg Law News 2024-04-22T09:34:44667919999-04:00

This Week in Chancery Court: Trump SPAC, Amazon, Prince's Estate

By Jennifer Kay 2024-04-22T05:00:37000-04:00

Amazon.com Inc. shareholders say the e-commerce giant is making an unusual forum demand in a books-and-records trial before Delaware's Court of Chancery this week.

Here's a look at more from the court's calendar:

Monday: Activant Ventures Advisors II LLC v. Breslow, Del. Ch., No. 2023-0721, hearing 4/22/24.

At issue: Vice Chancellor Nathan A. Cook will hear oral arguments on motions to expedite and stay discovery in a private equity firm's lawsuit against Bolt Financial Inc. founder Ryan Breslow. The lawsuit filed last July claims the former fintech "golden boy" stacked Bolt's board with loyalists to shield himself from accountability over a scheme to siphon \$30 million from the payments startup. Breslow became one of the world's youngest billionaires when Bolt was valued at \$11 billion in early 2022, but he fell off the Forbes 2024 World's Billionaires list amid the company's legal and internal troubles. Breslow and Bolt each have filed motions to dismiss the Chancery Court lawsuit.

Court action: A hearing on the pending motions will be heard via videoconferencing.

Bolt Founder Sued by Private Equity Firm for Alleged Loan Scheme

Monday: State of Delaware v. Publicis Health LLC, Del. Ch., No. 2024-0087, teleconference 4/22/24.

At issue: Chancellor Kathaleen St. Jude McCormick will hold a hearing on Delaware's portion of a national \$350 million settlement over advertising firm Publicis Health LLC's role in helping Purdue Pharma LP boost sales of OxyContin even as the country's opioid addiction crisis expanded. Delaware's portion of the settlement totals over \$1.5 million, according to a consent judgment filed with the court. Publicis Health is a unit of French media conglomerate Publicis Groupe SA. Delaware Attorney General Kathy Jennings (D) said the money will go into a state fund to help address the opioid epidemic, according to a statement.

Court action: The hearing will be held via teleconference.

States Strike Two Opioid Deals Raising \$500 Million for Crisis

Tuesday: United Atl. Ventures LLC v. TMTG Sub Inc., Del. Ch., No. 2024-0184, teleconference 4/23/24.

At issue: Vice Chancellor Morgan T. Zurn, who oversaw meme stock investors' unusually unruly litigation last year challenging AMC Entertainment Holdings Inc.'s bid to recapitalize, is now in charge of one of four Chancery Court lawsuits over a merger between former President Donald Trump's social media platform and a publicly traded shell entity. Two co-founders of Trump Media have asked the court to reschedule a hearing on injunction motions, as well as address a motion to stay discovery. They've also filed a second amended complaint.

Court action: Teleconference.

Trump SPAC Litigation Heads to Judge With Meme Stock Experience

Friday: McMillan v. Nelson, Del. Ch., No. 2024-0016, oral arguments 4/26/24.

At issue: McCormick previously fast-tracked litigation over the management structure of Prince Legacy LLC, the company composed of the late pop icon Prince's family and friends who manage the musician's estate. Two of Prince's longtime friends, entertainment lawyer L. Londell McMillan and music producer Charles Spicer Jr., and one of Prince's nephews allege the other relatives breached the operating agreement by trying to oust McMillan and Spicer. Now the relatives targeted by the lawsuit, who want to retain control of the company, want the case dismissed. McMillan and Spicer, meanwhile, seek a partial summary judgment declaring they remain managing members of Prince Legacy and that the other relatives' amendments to its operating agreement are invalid.

Court action: Oral arguments on the plaintiffs' motion for partial summary judgment and the defendants' motion to dismiss will be heard in Wilmington, Del.

Musician Prince's Estate Management Case Expedited by Chancery

Friday: Roberta Ann K.W. Wong Leung Revocable Tr. v. Amazon.com Inc., Del. Ch., No. 2023-1251, trial 4/26/24.

At issue: Amazon will go to trial to fend off a stockholder's demand for internal files and documents. Any release of internal records should be subject to conditions requiring the confidentiality of inspection materials as well as "restricting the litigation use of inspection materials to a suit in a Delaware forum," Amazon's attorney said in a pre-trial brief. The plaintiffs, who cited an investigation and ongoing litigation led by the Federal Trade Commission as the basis for the books-and-records demand, argues Amazon's insistence on a Delaware forum is unusual, according to their opening pre-trial brief.

Court action: A one-day trial will be held in Dover, Del., before Magistrate Bonnie David.

Amazon's Antitrust Scandals Targeted by Shareholder Lawsuit

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Securities Law
April 19, 2024, 10:49 AM PDT
Matt Levine's Money Stuff: Money Stuff: The Podcast, Week 2
By Matt Levine

Bloomberg Law News 2024-04-22T13:53:02171428654-04:00
Matt Levine's Money Stuff: Money Stuff: The Podcast, Week 2

By Matt Levine 2024-04-19T13:49:18841-04:00

More podcast

As I may have mentioned, there is a new Money Stuff podcast. Our second episode is out now. This week, we discuss how important Elon Musk is to Tesla Inc., Tesla's possible move to Texas, Jane Street's lawsuit against Millennium, the enjoyment or non-enjoyment of gardening leave, what Hunterbrook is up to and doping in dressage. You can listen to the episode here:



Money Stuff: The Podcast

[Beeeeeep] \$: Elon, Jane Street, Hunterbrook

00:00 / 31:27

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Also, programming note, I probably won't send emails like this every week, so subscribe to the podcast if you'd like to get every episode. Thanks!

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News from Bloomberg Terminal

April 22, 2024, 11:00 AM PDT

The Secret Trade Was Options in India

By Matt Levine

(Bloomberg Opinion) --

Programming note: *Money Stuff* will be off tomorrow, back on Wednesday.

Oops

The story is: Jane Street Group, the proprietary trading firm, found some clever and counterintuitive trading strategy and made a lot of money doing it. Then some of the guys who did the trade left Jane Street for Millennium Management, where Jane Street thinks they are doing the same trade. Now Jane Street is making less money doing the trade, and is unhappy about this. So it sued the guys, and Millennium, for theft of trade secrets. We discussed the lawsuit last week.

One obvious problem with Jane Street’s approach is that, if you are an extraordinarily profitable and somewhat secretive proprietary trading firm, and you file a public lawsuit saying “someone stole our extraordinarily profitable and secret proprietary trading strategy,” people are going to be *very interested*. Everyone is going to try to figure out what the strategy is. Of course, if you are Jane Street, people are always trying to figure out what your strategies are, but filing the lawsuit – even if you redact all the details of the trading strategy – is going to give them an extra incentive, and some clues.

For instance here is a hilarious clue:

The allegedly secret trading strategy over which Jane Street Group is suing two former traders and Millennium Management involves options trading in India, lawyers inadvertently revealed at a court hearing.

Jane Street, which sued Millennium as well as former employees Douglas Schadewald and Daniel Spottiswood last week, had sought to close the Friday hearing before US District Judge Paul Engelmayer in Manhattan. The judge denied that request but urged the parties to avoid mentioning any trade secrets. ...

At Friday’s hearing, a Jane Street lawyer said the strategy was one of the firm’s most profitable and expressed fear that even identifying the country involved would lead to others “picking apart” the details. ...

But lawyers for Millennium, Schadewald and Spottiswood identified the nation as India during their arguments, at multiple points apologizing to the judge for doing so.

In theory I suppose that Millennium *also* has incentives to keep the trade secret: Supposedly Millennium is also making money with this trade, and it’s better for Millennium if the trade is known only to it and Jane Street than if it is known to everyone. On the other hand, it is extremely funny for Millennium to be like “oh the India trade? We thought everyone knew about the India trade” and further blow up Jane Street’s spot.

Everyone, I suppose, is playing a long game here. The India options trade cannot be long for this world; really, as soon as Schadewald and Spottiswood left Jane Street for Millennium, its days were numbered. Secret lucrative market anomalies cannot stay secret and lucrative forever; the market for traders, and trading strategies, is *somewhat* efficient. Jane Street is not really suing to get its India strategy back; that’s a lost cause. Jane Street is suing to scare its *other* employees, to deter them from taking *other* clever trades to competitors – and to scare those competitors, to deter them from *hiring* Jane Street employees to replicate their Jane Street trades.

And Millennium is, among other things, playing a game of counter-deterrence. One could take the message from the hearing, “if you sue us for copying your secret trades, we will go tell everyone about them.”

Otherwise, the defense seems to be roughly what we discussed last week: Whatever Schadewald and Spottiswood took with them from Jane Street was not its confidential intellectual property but just general knowledge of how to make money trading options. Their lawyer wrote that they “have not used any even arguable trading secret of Jane Street in their trading at Millennium,” and “are simply practicing their profession.” And:

Millennium lawyer Andrew Levander ... compared the two traders to gold miners who “really know how to use a pickax,” saying they are using basic option trading strategies that have long been discussed in textbooks and articles. He said they “absolutely deny” using any data they took from Jane Street.

“There’s no secret sauce,” Levander said. “They can guess and take the risk based on the experience in their head of seeing a discrepancy between a stock and an option, for example, and they are willing to make a bet.”

From Jane Street's complaint, I suppose you could conclude that they first spotted discrepancies between Indian stocks and options at Jane Street, didn't believe the discrepancies, did a bunch of test trades to make sure they were real, realized that they were, and then gleefully started betting on those discrepancies and making lots of money. And then they left for Millennium and hey, guess what, there are still discrepancies between Indian stocks and options, just where they left them. Being an experienced options trader means knowing where the discrepancies are and how to find them. If you found them for one firm and then moved to another, does that mean you have to forget the ones you already found?

DJT

This is one of the most cynical things I have ever seen:

I write to bring your attention to potential market manipulation of the stock of Trump Media & Technology Group Corp. ("TMTG"), which operates the Truth Social platform and has traded on the Nasdaq Stock Market under the ticker "DJT" since March 26, 2024.

As you know, "naked" short selling—selling shares of a stock without first borrowing the shares of stock deemed difficult to locate—is generally illegal pursuant to Securities and Exchange Commission ("SEC") Regulation SHO. As of April 17, 2024, DJT appears on Nasdaq's "Reg SHO threshold list," which is indicative of unlawful trading activity. This is particularly troubling given that "naked" short selling often entails sophisticated market participants profiting at the expense of retail investors.

Reports indicate that, as of April 3, 2024, DJT was "by far" "the most expensive U.S. stock to short," meaning that brokers have a significant financial incentive to lend non-existent shares. Data made available to us indicate that just four market participants have been responsible for over 60% of the extraordinary volume of DJT shares traded: Citadel Securities, VIRTU Americas, G1 Execution Services, and Jane Street Capital.

In light of the foregoing, and Nasdaq's obligation and commitment to protect the interests of retail investors, please advise what steps you can take to foster transparency and compliance by ensuring market makers are adhering to Reg SHO, requiring brokers to disclose their "Net Short" positions, and preventing the lending of shares that do not exist.

That is a letter from Devin Nunes, the ex-politician and current chief executive officer of Trump Media, to the Nasdaq, the exchange that lists Trump Media's stock; the company publicized the letter on Friday morning. The premise of this letter is that "sophisticated market participants" are "profiting at the expense of retail investors" by creating new shares of Trump Media stock and selling it to them. Which might be true! Except the "sophisticated market participants" are Trump Media's promoters, who took the company public by merging it with a special purpose acquisition company (SPAC) and who will be allowed to sell their personal stakes when their lockups expire in September. Trump Media is deeply unprofitable and has very little revenue, but trades at a market value of almost \$5 billion, because its ticker symbol is Donald Trump's initials, because its retail investors love Donald Trump, and because it is, as Nunes points out, basically impossible to short.

What can Nunes do to talk up the stock price? It seems hard for him to argue that Trump Media is *undervalued*. In 2023, it lost about \$58 million on \$4.1 million of revenue.¹ When Trump Media went public, it put out a prospectus, which described the SPAC's thought process in valuing Trump Media at between \$875 million and \$1.7 billion.² The prospectus compares Trump Media to Meta, X/Twitter, Snapchat and Pinterest, and notes that the comparable companies had an average revenue multiple of about 26.8x in their first year after product launch.³ That would imply a value for Trump Media of about \$110 million. Again, it's trading at a market capitalization of almost \$5 billion.

So it is hard for its CEO to make a *business* argument that it is undervalued. "Nunes also faces the difficulty of running a tiny, money-losing, slow-growing social-media company in the public markets," notes the Wall Street Journal. But you can always try conspiracy theories about naked short sellers! Retail investors love that, and it is more pleasant to blame the company's declining stock price on a shadowy enemy than it is to be like "oh right I mean obviously the price was too high."

Are evil short-selling hedge funds profiting at the expense of retail investors by naked shorting Trump Media? No? Because that is illegal, but also because it is risky. Short sellers can't actually force the stock down to its fundamental value, and retail investors *can* force the stock way up. If you thought the stock was overvalued a month ago at \$36.94, you, uh, had some good reasons for thinking that, but the stock got to \$66.22 within a week. If you were short, you got crushed. Even if you *could* short the stock without paying to borrow it — "naked shorting" — it's a big risk.

Also though you can't, not really. There's no real evidence of naked shorting in Trump Media. The stock *is* on the "Reg SHO Threshold List," which means that a lot of trades in Trump Media stock fail to settle. ("A lot" means more than 0.5% of the stock.) But that basically means it's hard to borrow. It's not that conspiratorial hedge funds are rubbing their hands together and cackling "hahahaha let's short Trump Media stock without borrowing it." It's that, for instance, hedge funds (or retail investors) are lending out the stock to legitimate short sellers (often ones who want to hedge their Trump Media warrants), and then trying to sell the stock, and then recalling the stock from those short sellers, who then have to go out and borrow it elsewhere, which takes time when the stock is hard to borrow.⁴

Also, the way you know there isn't a ton of naked short selling in Trump Media is exactly that it is "by far the most expensive U.S. stock to short": If all the big evil hedge funds were going around naked shorting, they wouldn't be paying 500% to borrow the stock.

Also, I mean, the way you know there isn't a ton of naked short selling to *manipulate the price of Trump Media* is that it trades at 1,200 times revenue. If shadowy short sellers could *force the price of the stock down below its fundamental value*, then, uh, the price would be different.

Is there anything suspicious about the fact that four huge market makers are making 60% of the market in Trump Media stock? No? Who else would do it? Broadly speaking, the way retail trading works is that you put in an order to buy stock on your phone, and your broker sends the order to one of a few big market making firms, and those firms sell you the stock. It is no more suspicious that 60% of Trump Media stock trades involve Citadel Securities, Virtu, G1 or Jane Street than it is that 60% of milk purchases involve one of the 10 biggest grocery chains. If you buy stock, you buy it from the stock store, and those are the big stock stores.

Ugh, why am I even typing this. This is conspiracy theorizing. It's not even theorizing; it is just waving vaguely in the direction of well-known conspiracy theories and hoping that your base will be distracted by it. It's grim cynical politics, but for stocks.

It basically worked? The stock was up 9.6% on Friday, and the Financial Times reports:

Citadel Securities, whose founder [Ken] Griffin is a mega donor to Republican candidates, including Nikki Haley, who ran and lost against Trump in the 2024 primary election, offered a blistering response.

"Devin Nunes is the proverbial loser who tries to blame 'naked short selling' for his falling stock price," the Miami-based market maker said. "Nunes is exactly the type of person Donald Trump would have fired on The Apprentice. If he worked for Citadel Securities, we would fire him, as ability and integrity are at the centre of everything we do."

TMTG replied: "Citadel Securities, a corporate behemoth that has been fined and censured for an incredibly wide range of offenses including issues related to naked short selling, and is world famous for screwing over everyday retail investors at the behest of other corporations, is the last company on earth that should lecture anyone on 'integrity.'"

"Devin Nunes trades insults with Citadel Securities" probably is a better news cycle for Trump Media than talking about its business.

The Mango guy

I've become increasingly convinced that the right regulatory approach to crypto might be "let them scam each other as much as possible, and laugh at the results," but the US Department of Justice disagrees, and their position seems to be more popular with juries:

A Manhattan jury has found crypto trader Avi Eisenberg guilty of fraud and market manipulation for his \$110 million heist from decentralized finance protocol Mango Markets in October 2022.

Eisenberg was arrested in Puerto Rico in December 2022 and charged with commodities fraud, commodities manipulation, and wire fraud for the scheme. He will be sentenced on July 29 by New York District Court Judge Arun Subramanian. Eisenberg faces up to 20 years in federal prison for his crimes.

He definitely did "market manipulation," in the traditional sense; whether or not he did a crime depends on whether you think "market manipulation," in the traditional sense, is illegal when the market is crypto. He did not. The Justice Department does:

"The FBI and its partners will not stand by when criminals engage in illicit activity at the expense of the American people and our financial institutions," said Executive Assistant Director Timothy Langan of the FBI's Criminal, Cyber, Response, and Services Branch. "If you engage in fraudulent activity, whether that be in the cryptocurrency space or through other forms of market manipulation, you will be held accountable for your ill-gotten gains."

That seems to be accurate; the Justice Department really has been prosecuting a lot of crypto crimes. Still it seems weird to say that manipulation of the Mango Markets token comes "at the expense of the American people and our financial institutions." If you run a financial institution and you had exposure to the Mango Markets token, that's a bigger problem than Avi Eisenberg.

Gambling

At Business Insider last week, Emily Stewart had a good meta-explanation for Trump Media, Avi Eisenberg, and honestly most of the stuff we talk about around here.⁵ The explanation is that young men like to gamble, and being the casino is generally a good business:

If you want to gamble in America these days, you have more ways to put your money on the line than ever. You've got the real-life casino, the casino on your phone, sports betting, crypto, meme stocks – even complex financial products like zero-day options can give you a quick hit of risk. For young men in particular, it's an enticing, if a bit troubling, prospect. But for a variety of companies, from sportsbooks to investing apps, an increased willingness to make some kind of gamble means business is booming. The boys-who-like-to-bet bank is open, and companies are making as many withdrawals as they can.

The level at which gambling has become normalized in the United States in recent years is stunning. ... And while not explicitly gambling, free trading apps such as Robinhood have gotten an increasing number of ordinary people into investing – for fun, to alleviate boredom, to try to make some extra cash. While many people have used the apps to build a stable portfolio, a good chunk of people are doing high-risk day trading or piling into meme stocks like GameStop, AMC, or, as Donald Trump's people are hoping, his newly public social-media company. Crypto is back again, and this time around, almost nobody is pretending the endeavor is about anything other than "number go up."

Well, everyone is *pretending*. (Except the literal online sports betting sites, who are, refreshingly, not.⁶) That's what's so weird about all of this. If you are a meme-stock executive or a crypto venture capitalist or Robinhood, you can't just go on TV and say "yes gambling is fun and legal and we are probabilistically charging people a market-clearing price for entertainment." You have to talk about how your meme stock is the future of free speech or how crypto is the future of ownership or how retail options trading is the future of retirement savings. "This is all legitimate economic activity," you have to say, because people are still not entirely used to the idea that gambling is legitimate economic activity.

Rates went up

In some sense the main story of finance in the 2020s is "interest rates were very low for a very long time, everyone got used to them, and then they went up rapidly and everyone's intuitions were messed up." This is of course the main story of the 2023 US regional banking crisis, and it is arguably a crucial part of the story of tech startups, or crypto, or environmental, social and governance investing, or private equity, or private credit hurdle rates, or any number of other things. Or here's Bloomberg's Justina Lee on risk parity:

"It's been disappointing for a long time," said Eileen Neill, managing director at Verus Investments, an adviser to New Mexico's roughly \$17 billion public employee pension, which axed its risk-parity allocation in December. "The only time risk parity was really successful was at the time of the Great Financial Crisis and that was really its heyday."

The lackluster run through the post-pandemic booms and busts has rattled faith in an allocation method pioneered by [Ray] Dalio, who built Bridgewater into the world's largest hedge fund. The strategy focuses on diversification across assets based on how volatile each is, and often uses leverage to optimize returns relative to the risks taken.

It flourished after the 2008 financial crisis as investors sought a way to protect themselves from the next big cataclysm. But as investors went on to plow back into stocks, they lagged in the up years. Then when markets cracked in 2022 – pummeling safe assets like US Treasuries – they were hit even harder.

Intuitively the way risk parity works is that you invest some of your portfolio in stocks and some of it in bonds, with the goal that each part contributes the same amount of volatility to the portfolio. So if stocks have 30% volatility and bonds have 10% volatility, you put three-quarters of your money in bonds and one quarter in stocks, crudely speaking. The more volatile an asset has been, the less money you allocate to it. When bonds have been very stable for a long period, you put a lot of your money in bonds. When stocks then go up a lot for years, you underperform a more-stock-weighted portfolio. When interest rates suddenly go up a lot – and bonds crash before you update your historical volatility measures – you lose money.

Costco gold

The general form of consumer financial arbitrage is:

1. If you buy stuff at a store with a credit card, the store will pay your credit card company a fee of, say, 1.4% of the price.⁷
2. If you have a rewards credit card, your credit card company will pass some of that fee back to you, often 1% of the price. If you have a nice card and do things just right, you could get 2% or even more.
3. If the stuff you buy has a stable market price with a bid/ask spread tighter than 1% (or whatever rebate you're getting), you can resell it and keep the 1%.

The problem is that there are not many consumer goods like that. There is not a deep liquid resale market, with tight bid/ask spreads, for, like, the milk you just got at the supermarket. If you could go to a store and buy *hundred-dollar bills* with a credit card, then you'd go buy 100 hundred-dollar bills on your credit card for \$10,000, use the bills to pay your \$10,000 credit card bill, collect \$100 of cash-back rewards, and do that again and again. But you can't. Most of the time buying cash substitutes with a credit card will run into restrictions or fees that make the arbitrage not work.

What about buying gold bars? Intuitively it seems like the answer would be "the price of gold is volatile, and the bid/ask in retail gold transactions is higher than 1%, so don't do this, come on." Here is a Wall Street Journal article about that:

Costco made buying a gold bar as simple as tossing it in a shopping cart. Selling it is a lot more complicated.

Adam Xi, 33 years old, called five different dealers to get a price he could accept for the gold bar he bought at Costco in October.

One dealer offered him \$200 less than the \$2,000 he had paid. Taking such a loss would thwart his plan to rack up credit-card points buying the gold and quickly reselling it.

I mean? Yes? I tremble to think of the number of TikToks and subreddits there must be about buying gold at Costco for credit-card points.

Ticker typo

This month, Medigus Ltd., a Nasdaq-listed, Israel-based \$4 million-ish market capitalization technology company, changed its name to Xylo Technologies Inc., "to embody its corporate vision and core values," why not. It announced that it would begin trading on Nasdaq under the ticker symbol XYLO on April 18. It did not. It began trading on Nasdaq under the ticker symbol XLYO on April 18. You probably didn't notice the difference either. Eventually someone did. Here is a memo from the Options Clearing Corp., dated April 18, saying that "Xylo Technologies Ltd. (XLYO) will change its trading symbol to XYLO effective April 19, 2024." Here is Bloomberg's list of corporate actions:

	Effective	Action Type	Ticker / ID
1)	04/19/24	Tkr Symbol Chg	XYLO US
2)	04/18/24	Name Change	XYLO US
3)	04/18/24	Tkr Symbol Chg	XYLO US

There are a lot of stocks, and they all have tickers, and you cannot expect *all* of them to be correct. I cannot think of a way that this could matter, but someone sent it to me, and it feels like the sort of thing I have to share with you.

Things happen

Move Aside, Big Banks: Giant Funds Now Rule Wall Street. New York Stock Exchange tests views on round-the-clock trading. Global banking regulator sounds out investors on suitability of ATIs. Wall Street Bonus Rules Return to Regulatory Agenda in Third Try. TikTok Vows Legal Battle as the US Presses for App's Sale or Ban. Diversity Goals Are Disappearing From Companies' Annual Report. Sam Altman Invests in Energy Startup Focused on AI Data Centers. Consulting firms step up efforts to push out their low performers. WeWork Eyes Exit From Chapter 11 Without Additional Bankruptcy Loans. Salesforce's Talks to Buy Informatica Fizzle. FTX Investors Settle With Bankman-Fried to Pursue Promoters. Wall Street Has Abandoned Wall Street. The Coney Island Apartment Complex That Nearly Sparked a Banking Panic. BlackRock steps up security for Larry Fink after 'anti-woke' backlash. Consider the Onion. The Cloud Under the Sea. "Whitcomb says he initially turned to ketamine to treat depression and found it helped him think more expansively about work problems." Tesla Recalls Almost 3,900 Cybertrucks to Fix Faulty Pedals. Elon Musk's Robotaxi Dreams Plunge Tesla Into Chaos. Tesla shareholders braced for worst results in 7 years. "In the long term, I trust Elon Musk," Bartash said. 'He's Steve Jobs but multiplied by an order of magnitude. I'm not a cultist, but it's like biblical proportions when he talks about wanting to democratize space and going to Mars.'"

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1. Depends how you count. The pro forma financials on page 70 of its recent S-1 show a loss from operations for Trump Media of \$16 million and a net loss of \$58.2 million. But the pro forma combination of Trump Media and the special purpose acquisition company that bought it had a net loss of \$100.7 million, counting things like the legal bills of the SPAC.
2. Page 199: "Digital World's management concluded that an initial valuation of \$875 million, with the potential for an additional earnout of \$825 million, was a reasonable assessment for TMTG's enterprise valuation in the Business Combination transaction."
3. Page 202. Also they average "monthly active user growth of 58.3%" in the first year. But the prospectus noted: "This information has inherent limitations because it required an estimation of MAUs and MAU% to align with other comparable companies. However, TMTG has neither currently nor previously tracked such metrics as a Key Performance Indicator ('KPI'). As a result, these estimations lack any historical trends and were based solely on DWAC's management estimations, which utilized public data of the comparable companies mentioned above." That is: The board valued Trump Media in part by comparing its MAUs to those of other social media companies, but Trump Media doesn't *track* MAUs?
4. The US Securities and Exchange Commission says: "The appearance of a security on a threshold list does not necessarily mean that there has been abusive 'naked' short selling or any impermissible trading in the stock. Delivery failures can be caused by both long and short sales."
5. Maybe not "Jane Street vs. Millennium" per se, but who knows. "Big market-making firm finds easy picking in Indian options markets" does sound a *little* like "young men love gambling." "Retail investors make up about 35% of option trades in India," notes Bloomberg, in a story about that Jane Street trade, "with the market regulator estimating that 90% of active retail traders lose money on derivatives."
6. And except Avi Eisenberg, but look where that got him.
7. The numbers here are drawn loosely from this Patrick McKenzie post on the "Anatomy of a credit card rewards program," and are not meant to be particularly exact.

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Jane Street's 'Secret' Strategy Concerns Options in India (1)

By Chris Dolmetsch

- Judge didn't bar ex-traders, Millennium from using strategy
- Trial in Jane Street suit is set for July in NY federal court

Bloomberg Law News 2024-04-22T09:37:05845864972-04:00

Jane Street's 'Secret' Strategy Concerns Options in India (1)

By Chris Dolmetsch2024-04-19T18:18:30197-04:00

- Judge didn't bar ex-traders, Millennium from using strategy
- Trial in Jane Street suit is set for July in NY federal court

The allegedly secret trading strategy over which Jane Street Group is suing two former traders and Millennium Management involves options trading in India, lawyers inadvertently revealed at a court hearing.

Jane Street, which sued Millennium as well as former employees **Douglas Schadewald** and **Daniel Spottiswood** last week, had sought to close the Friday hearing before US District Judge Paul Engelmayer in Manhattan. The judge denied that request but urged the parties to avoid mentioning any trade secrets.

According to Jane Street's suit, Schadewald and Spottiswood stole a confidential and "immensely valuable" proprietary trading strategy to use in their new jobs at Millennium. At Friday's hearing, a Jane Street lawyer said the strategy was one of the firm's most lucrative and expressed fear that even identifying the country involved would lead to others "picking apart" the details.

"We define this as, you can imagine, Jane Street's most profitable strategy," the lawyer, Deborah K. Brown, said.

Jane Street claimed it earned about \$1 billion from the strategy last year, the judge said during Friday's hearing. The company reeled in more than \$10 billion in net trading revenue last year, Bloomberg reported in January.

Not So Secret

But lawyers for Millennium, Schadewald and Spottiswood identified the nation as India during their arguments, at multiple points apologizing to the judge for doing so. However, they downplayed the idea that there was anything secret about Jane Street's strategy.

Rollo Baker, a lawyer for the traders, pointed to media reports on how lucrative trading options in India can be. Millennium lawyer **Andrew Levander** likewise said the Indian government has promoted opportunities for traders there.

Brown told the judge there were other aspects to the strategy besides the country. In the complaint, Jane Street said the "counterintuitive" strategy built "upon the years-long effort and findings of the algorithmic team."

The judge denied Jane Street's request for an order barring Millennium and the two traders from using the strategy, saying the firm could be compensated if it's found to have suffered any harm. Engelmayer put the case on an expedited schedule, setting a trial date in July.

"Other tools were available to Jane Street that had the capacity to guard more greatly against mischief like this, but Jane Street appears to have passed those up," including non-compete agreements, the judge said.

Textbook Strategies

Even as they suggested Jane Street's strategy wasn't so secret, defense lawyers argued that Schadewald and Spottiswood weren't using it.

Levander compared the two traders to gold miners who "really know how to use a pickax," saying they are using basic option trading strategies that have long been discussed in textbooks and articles. He said they "absolutely deny" using any data they took from Jane Street.

"There's no secret sauce," Levander said. "They can guess and take the risk based on the experience in their head of seeing a discrepancy between a stock and an option, for example, and they are willing to make a bet."

Jane Street said in its suit that its profits from using the strategy fell 50% in March, which it said could only be attributable to "the entrance of a competitor using the same strategy."

Brown said Jane Street relies heavily on its intellectual property and confidentiality agreements rather than non-competition pacts because "people should be able to go somewhere else and compete, just not with their confidential information because that's not fair."

"They should go to another place, use their own skills, whatever they've developed, and come up with a different strategy, come up with their own way, not Jane Street's strategy that they've invested millions of dollars into," Brown said.

If Jane Street's investment of tens of millions of dollars in a particular strategy can't be protected, "that has an impact on their overall business," Brown said. "This is the core, absolute core of what they're doing."

The case is Jane Street Group LLC v Millennium Management LLC, 24 cv 02783, US District Court, Southern District of New York (Manhattan).

(Updates with excerpts from hearing.)

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Bank Raider Quits Over Lack of Backing for Cum-Ex Crackdown (1)

By Karin Matussek

- Brorhilker says German system lets 'big fish' avoid punishment
- German law enforcement is too weak and lacks backing, she says

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Bank Raider Quits Over Lack of Backing for Cum-Ex Crackdown (1)

By Karin Matussek2024-04-22T09:36:35046-04:00

- Brorhilkler says German system lets 'big fish' avoid punishment
- German law enforcement is too weak and lacks backing, she says

The German prosecutor who led tax raids on some of Wall Street's biggest banks quit her role probing the €10 billion (\$10.7 billion) Cum-Ex tax scandal – citing a lack of political backing for the fight against financial crimes.

Anne Brorhilker told public broadcaster WDR that Germany makes it too easy for the most powerful players to escape punishment.

"This is often perpetrators with a lot of money and good contacts, and they come up against a weak law enforcement system," Brorhiller said. "Defendants can often simply buy their way out of prosecution. We execute the small fry and let the big fish go."



Anne Brorhilker

Photographer: picture alliance/Getty Images

Brorhilker has become the [face](#) of efforts to bring to justice those responsible for the tax scandal. Her team has targeted several international investment banks including Merrill Lynch, Morgan Stanley and Barclays Plc. However, she was also criticized from within and last year had to [struggle](#) against her own state justice minister. While she [won](#) , that fight didn't leave her unscathed.

"Brorhilker's decision to leave came as a complete surprise to us," the Cologne Prosecutors' Office said in a statement. "We deeply regret her departure, as she is not only a prosecutor with heart and soul, but has been key in the Cum-Ex investigations in Germany."

Cum-Ex crimes will continue to be the focus of the agency's work, the Cologne Prosecutors Office said. Brorhilker led the Cologne Cum-Ex unit. She will leave the office at the end of May.

Since an individual public prosecutor can do little to change the system, Brorhilker said she decided to join the leadership of Finanzwende, a political action group monitoring the financial industry. She likened her move to a doctor who decides to stop treating patients and instead do research into how to treat the root of the problem.

The North Rhine-Westphalia Justice Ministry, which oversees the Cologne office, said in a statement that Brorhilker rendered outstanding services to the investigation of Cum-Ex, and it's regrettable that she wishes to leave.

Efforts to probe these crimes and staff have recently been beefed up, also due to Brorhilker's input, it said.

Cum-Ex was a controversial tax-driven trading strategy in use for more than a decade. The tactic, which originated with traders in London, exploited the way dividend tax was collected so that multiple investors could claim refunds on a tax that was only paid once.

Brorhilker will refocus her successful fight against financial crimes, said Gerhard Schick, the founder of Finanzwende. Instead of investigating individual offenders, she will now use her knowledge and experience in the political campaign for justice, he added.

"The big difference to others who leave public service: Brorhilker doesn't turn her knowledge into money by joining a law firm or a consultancy and thus our adversaries," said Schick. "Anne Brorhilker is concerned with the cause, the rule of law and justice."

(Updates with Cologne Prosecutors' Office statement in fifth paragraph.)

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Attacks on Corporate DEI Intensify With Boeing Supplier Probe

By Riddhi Setty and Clara Hudson

Deep Dive

- Texas attorney general asks for Spirit diversity information
- Request fits with broader conservative anti-DEI tactics

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Attacks on Corporate DEI Intensify With Boeing Supplier Probe

By Riddhi Setty and Clara Hudson 2024-04-19T10:58:18000-04:00

- Texas attorney general asks for Spirit diversity information
- Request fits with broader conservative anti-DEI tactics

Texas Attorney General Ken Paxton's recent request for Spirit AeroSystems Holdings Inc.'s diversity, equity, and inclusion documents after serious defects were found in airplane parts it manufactured for Boeing Co. nods to a newer strategy to challenge corporate DEI policies.

Spirit, which manufactures the fuselages for Boeing's 737 series jets, had until April 17 to provide documents for the investigation Paxton announced in late March. Boeing's safety record has been under intense scrutiny since the National Transportation Safety Board found that four bolts were missing from the door panel that blew off an Alaska Airlines jet mid-flight in January.

The Republican attorney general, who was recently acquitted in an impeachment trial over corruption allegations, instructed Spirit to release documents on its DEI commitments for an investigation that will examine "whether those commitments are unlawful or are compromising the company's manufacturing processes."

Paxton's foray into investigating Spirit's DEI program is part of a bigger conservative movement to question corporate DEI practices and discourage companies from continuing them. Such attacks on DEI efforts in settings from universities to corporations have gathered speed since the US Supreme Court's June 2023 decision curtailing affirmative action in college admissions.

The conservative organization America First Legal sent the US Equal Employment Opportunity Commission a barrage of letters requesting probes into DEI practices at more than 30 major companies. The attacks have also taken the form of litigation that has prompted changes in eligibility requirements for DEI fellowships and programs, including those at pharmaceutical giant Pfizer Inc. and law firm Morrison & Foerster LLP.

The Paxton investigation and some of the other recent attempts to dismantle corporate diversity programs rely on the belief that DEI results in lower quality of workers which in turn negatively impacts a company's performance. It marks "a higher level of aggressive action against DEI," said Douglas Chia, president at Soundboard Governance.

"I think it is largely theater," Chia continued. "But it's not theater that they can just ignore. I think it definitely would raise the issue in the boardroom of 'could we be next?'"

Paxton's office didn't respond to queries on whether Spirit met the attorney general's deadline to provide documents. Spirit spokesperson Joe Buccino declined to comment on the ongoing investigation, but said the supplier is "wholly focused on providing the highest quality products to all our customers, to include the Boeing Company."

Employee Performance

Paxton's investigation fits into a broader anti-ESG strategy by Republican attorneys general to "intimidate, threaten, and otherwise impact corporate behavior even if they have no legal basis" to do so, said Karl Racine, a former attorney general in the District of Columbia who now works at Hogan Lovells.

While attorneys general have very broad authority to conduct investigations, Paxton's queries about diversity "appear to have zero merit," Racine said.

Paxton asked Spirit to produce any documents it relies on to substantiate claims that a diverse workforce improves product quality or enhances performance, as well as demographic information of employees before and after Spirit enacted its DEI policy.

Paxton said he has the authority to conduct this investigation under Texas law, including the Texas Business and Organizations Code Section.

"Part of this trend of challenges to DEI programs was kind of the background assumption that DEI used by employers or colleges and the like involves hiring unqualified people," said Michael Selmi, a professor at the Sandra Day O'Connor College of Law at Arizona State University.

In response to the Silicon Valley Bank collapse in March 2023, Florida Governor Ron DeSantis (R) said on Fox News that the bank's focus on DEI diverted its attention away from its core mission. Former Trump advisor Stephen Miller posted on X, formerly known as Twitter, that House Republicans should subpoena SVB to learn "how many hours & dollars were spent on equity/DEI/ESG/climate scams." ESG refers to companies' environmental, social and governance initiatives.

More recently some Republicans blamed diversity, equity, and inclusion efforts for the March 26 collapse of the Francis Scott Key Bridge in Baltimore, implying that prioritizing DEI distracts from other priorities like safety.

Michael Foreman, a professor at Penn State Law, said that in order for Paxton's investigation to be meaningful, it would require a very detailed analysis that shows either the company's production or its work as a whole has suffered because of its DEI initiatives.

"There's been a lot of studies on diversity programs across the board," Foreman said. "There is absolutely no analytical data out there that in any way supports requiring people to produce this information to prove that it's enhancing performance or not enhancing performance. That data doesn't exist, so it's a bit of a witch hunt on that front."

Terrill Wilkins, an employee-focused attorney at Abrahamson, Rdzanek & Wilkins LLC, said he's seen an uptick in minority employees that have told him they are feeling an increased pressure to perform, and feel unsupported because corporate DEI has become such a hot button issue.

"I've had people tell me, for example, 'I feel like ever since I got that promotion, ever since I got that raise, that there's been a target on my back because there are people I work with that don't think I deserve it and they don't like it and I know that my company is starting to worry about this DEI program because of this outside noise,'" he said.

Pressure Points

America First Legal—headed by Miller—has sent over 30 requests to the EEOC to investigate DEI policies at companies like Southwest Airlines Co, Major League Baseball, and Macy's Inc. Some companies, including Pfizer Inc., have altered the eligibility language of their DEI programs following lawsuits claiming the practices and policies are illegal and discriminatory against White men.

Several companies, including JetBlue Airways Corp., Molson Coors Beverage Co., and Leidos Holdings, Inc., have also listed DEI as a "risk factor" in their securities filings, citing company potential vulnerability for taking too much or too little action on diversity.

DEI Risk

Here is a recent sample of companies listing diversity risk in 2024 10-K filings

Company	DEI Risk Factor Highlights	Date
Jet Blue	Possible negative perception	February 12
Leidos	Possible negative perception	February 13
Blue Owl	Risk to brand value	February 23
KKR	Risk from Supreme Court decision	February 29
DuoLingo	Litigation and recruitment risks	February 29

Source: securities filings on Bloomberg Law

Bloomberg Law

“From the company’s perspective, I assume, having 50 different states start looking at what you’re doing, including your hiring practices, that just seems to be unprecedented,” said Selmi, the Arizona State University law professor, referring to the potential for additional states to ramp up anti-DEI efforts.

Attorneys say it remains unclear if Spirit will release the information requested by Paxton, and there is a possibility that the matter will need to be settled by Texas state courts.

Foreman said that either way, the Texas attorney general’s efforts serve as a warning shot for other corporations who “don’t want to be spending time and money responding to Paxton’s requests for all this data.”

“The forces at play politically that are in these various legal efforts to tamp down DEI, they’re starting to figure out where the pressure points are,” Wilkins said. “This is just one more example of another strategy that’s being used to essentially whittle down or potentially altogether eliminate these types of policies.”

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Boeing to face questions on potential CEO candidates, Spirit talks

By **Abhijith Ganapavaram** and **Allison Lampert**

April 22, 2024 8:16 AM PDT · Updated 3 hours ago



The Boeing logo is seen on the side of a Boeing 737 MAX at the Farnborough International Airshow, in Farnborough, Britain, July 20, 2022. REUTERS/Peter Cziborra/File Photo [Purchase Licensing Rights](#)

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April 22 (Reuters) - Tough questions await Boeing ([BA.N](#)) when it announces its results on Wednesday, including on potential CEO candidates, talks with Spirit AeroSystems and slumping 737 MAX jet output, while its quarterly report is expected to show a surge in cash-burn rate.

The U.S. planemaker, which is reeling from a safety crisis sparked by a Jan. 5 mid-air door plug blowout on a 737 MAX 9 jet, is also expected to report its first revenue fall in seven quarters, according to LSEG data.

Boeing's stock has slipped 34% this year, underperforming the benchmark S&P 500 index, while shares of European rival Airbus ([AIR.PA](#)) are up about 15% over the same period.

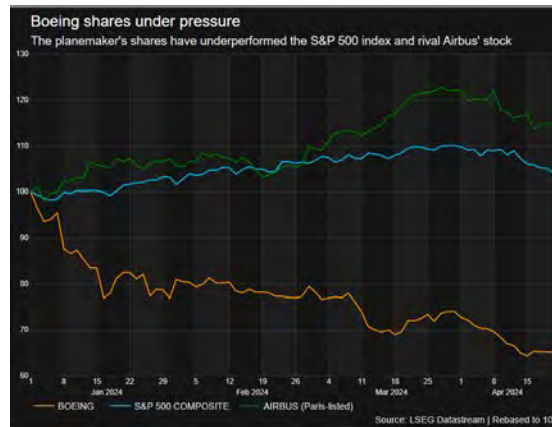
"I don't think anyone's going to be shocked by pretty bad (results)," said Tony Bancroft, portfolio manager at Gabelli Funds which owns 260,709 shares in Boeing. He expects the company to reiterate messages stressing safety.

The Federal Aviation Administration (FAA) has imposed a cap of 38 jets a month following the blowout, blamed on an assembly error. But the monthly output rate is fluctuating [well below this level](#) and in late March fell as low as single digits, Reuters had previously reported.

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Feedback

Boeing declined to comment ahead of earnings.



Boeing shares under pressure

Analysts have warned the slow pace of deliveries risks delaying Boeing's financial and production goals.

"The longer the FAA's oversight pressures monthly aircraft deliveries on production, the more challenging it would be for Boeing to meet its 2025/2026 aircraft production and \$10 billion free cash flow targets," Morgan Stanley analyst Kristine Liwag wrote in a note.

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Feedback

Boeing is aiming to produce 50 737s and 10 787s per month in that timeframe, which it sees as key milestones as it works to accelerate its recovery from an earlier crisis after two MAX jets crashed in 2018 and 2019.

The door plug blowout has led to a management shakeup with investors keen to see who will take over after outgoing CEO Dave Calhoun leaves at the year end.

Bancroft said he remains a buyer of Boeing stock in the long term as he believes the new CEO could "throw the kitchen sink" at the planemaker's problems.

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Spirit CEO Patrick Shanahan, along with GE Aerospace (GE.N) CEO Larry Culp have been floated, among others, as possible successors to Calhoun. None have said they are pursuing the job.

"The most pressing question among Aerospace investors today is who will be the next Boeing CEO," RBC Capital Markets analyst Ken Herbert wrote in a note.

Calhoun's successor will likely be tasked with integrating Spirit, if a deal to acquire the 737 fuselage supplier is completed.

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Price remains an obstacle to a deal, a source familiar with the matter told Reuters last week. Spirit's Belfast plant which makes the wings for the Airbus A220 jet, for example, is losing money.

Analysts are expected to quiz Boeing executives about the progress and structure of the proposed deal, which Reuters has reported might lead to Spirit Aero's breakup, with both planemakers taking over plants that support their top jet programs.

Spirit had a market value of about \$3 billion before reports of the talks emerged. Boeing has said it expects to fund the deal with cash and debt.

The planemaker had consolidated debt of \$52.3 billion and cash and cash-equivalents of \$12.69 billion at the end of 2023. It had \$10 billion of unused borrowing capacity on revolving credit line agreements.

Analysts polled by LSEG expect Boeing to report a first-quarter adjusted loss of \$1.76 per share and a \$4.5 billion cash burn.



Vape maker Chill Brands suspends CEO

 [reuters.com/business/retail-consumer/vape-maker-chill-brands-suspends-ceo-2024-04-22](https://www.reuters.com/business/retail-consumer/vape-maker-chill-brands-suspends-ceo-2024-04-22)

Reuters

April 22 (Reuters) - Vape maker Chill Brands (CHLL.L) , opens new tab said on Monday Callum Sommerton had been suspended as its CEO after allegations were raised around the company's use of inside information.

The company said law firm Fieldfisher had been appointed to conduct an investigation into the allegations, but added that Sommerton's suspension did not imply that he was guilty of misconduct.

Sommerton said he was surprised and disappointed by the allegations in response to a message sent via LinkedIn.

"I am confident that I will be vindicated and will avoid further comment at this time to allow the process to run its course," he said.

Chill Brands said vendors, customers and shareholders should be assured the company continues to operate as normal and the process of appointing an interim chief executive was underway.

It will be engaging with the relevant authorities, including the Financial Conduct Authority, and the investigation's findings will be reported in due course, it continued.

The company, whose strategy is centred on a nicotine-free vape product, saw its share price collapse earlier this year when the UK government announced plans to ban disposable vapes. It has since recovered lost ground.

Sommerton is a former intellectual property lawyer who previously worked as Chill Brands international brand director before being appointed chief executive in 2022, according to the company's website and his LinkedIn.

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Reporting by Eva Mathews in Bengaluru and Emma Rumney in London

Crypto Trader's Fraud Conviction Undercuts Exchange Code Defense

By Matthew Bultman

Deep Dive

- 28-year-old convicted of fraud over DeFi trading scheme
- Prosecutors called it old-fashioned fraud, manipulation

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Crypto Trader's Fraud Conviction Undercuts Exchange Code Defense

By Matthew Bultman 2024-04-22T05:10:43000-04:00

- 28-year-old convicted of fraud over DeFi trading scheme
- Prosecutors called it old-fashioned fraud, manipulation

A crypto trader's fraud conviction for exploiting cryptocurrency exchange rules to steal \$110 million is a strike against the "code is law" argument championed by some decentralized finance proponents.

But Avraham Eisenberg's conviction last week also raises questions about the reach of US wire fraud laws, which target using electronic communications to defraud people and have increasingly been used in crypto cases.

"He didn't lie to anybody," Polsinelli PC attorney Jonathan Schmalfeld said, noting Eisenberg's alleged fraud was carried out against an algorithm that runs Mango Markets. "He didn't even lie to the machine."

Along with wire fraud, Eisenberg was convicted of commodities fraud and commodities manipulation following a trial in the US District Court for the Southern District of New York. It was the first criminal case involving manipulation of crypto through open-market trades, prosecutors said.

During closing arguments, Eisenberg's lawyer, Waymaker LLP's Brian Klein, emphasized the 28-year-old's trades were "fully compliant with Mango Markets contracts," tapping into a theory in crypto that something is legal if a smart contract code permits it.

But the defense's embrace of "code is law" didn't persuade the New York jury.

The case took on the theory “head-on, and the attacker’s intent to deceive and manipulate with his trade is what carried the day,” Jessica Stansfield, an attorney at WeirFoulds LLP in Toronto, said in an email.

‘Tenuous’ Argument

Mango Markets is run by smart contracts: digital agreements that self-execute when certain conditions are met. And it’s overseen by a decentralized autonomous organization, or DAO.

Prosecutors said Eisenberg in October 2022 used two Mango Markets accounts to buy and sell futures contracts, which were based on the value of Mango’s token. Eisenberg was accused of pumping the token’s price by quickly buying large amounts of it on other exchanges.

He walked away with almost \$50 million after negotiating a deal with Mango Markets to return a chunk of the money. Eisenberg on social media said he’d been part of a “highly profitable trading strategy.” Prosecutors called it a con.

“His deception may have been on a cryptocurrency platform,” Assistant US Attorney Peter Davis said during closing arguments last week. “But make no mistake—this was old-fashioned manipulation and fraud.”

Croke Fairchild Duarte & Beres LLC attorney Andrew Gilbert said the “code is law” argument was “tenuous at best.”

“The law is the law; code is the code,” Gilbert said.

Line-Drawing

Wire fraud has been a powerful tool for prosecutors in crypto cases.

FTX co-founder Sam Bankman-Fried was convicted of wire fraud after the exchange collapsed. Nathaniel Chastain, a former employee of non-fungible token marketplace OpenSea, was convicted of the same charge last year in a first-of-its kind prosecution for an insider trading scheme tied to digital assets.

Prosecutors used the wire fraud statute more than 1,300 times in 2023, up from about 900 in 2016, Bloomberg News reported, citing Justice Department data compiled by Syracuse University’s Transactional Records Access Clearinghouse. The uptick coincided with a swell of crypto cases.

Klein, Eisenberg’s attorney, said he plans to file a number of post-trial motions. Some observers expect any appeal to test the bounds of wire fraud, an admittedly broad statute.

The interesting issue “is when you can commit fraud against a protocol, not under the Computer Fraud and Abuse Act, but rather under a wire fraud claim,” said Schmalfeld, who works with blockchain technology clients.

Where to draw that line “is something that I think will be at issue on appeal,” he said.

'Utopia Can Become Dystopian'

Eisenberg has other legal issues to contend with.

He also faces civil lawsuits from the Securities and Exchange Commission and the Commodity Futures Trading Commission, and he's been sued by Mango Labs, which wants to recover \$47 million for the exchange's users.

Prosecutors at trial also noted that Eisenberg in July 2022, a few months before the Mango trades, sued the founder of the Waves blockchain protocol in federal court in Puerto Rico, alleging price manipulation of Waves' token, among other things.

Eisenberg, who wants over \$14 million in damages, said in a recent court filing that he "intends to resume prosecuting this matter aggressively" after his criminal trial.

Decentralized finance has a certain appeal, allowing parties to interact directly without intermediaries or burdensome contracts.

But WeirFoulds attorney Benjamin Bathgate said the trading exploitation of Mango Markets and Eisenberg's criminal conviction are a reminder of "how quickly utopia can become dystopian when smart people with 'winning trading strategies' intersect with fallible smart contract code."

Read More: Why 'DeFi' Utopia Would Be Finance Without Financiers: QuickTake

Bathgate and Stansfield of WeirFoulds represent a Delaware-registered company, Cicada 137 LLC, in a civil lawsuit in Canada against a teenager accused of exploiting a weakness in the Indexed Finance crypto platform to take millions of dollars worth of crypto.

"In the DeFi ecosystem, the very thing that makes financial trades so attractive and liberating to the crypto community—instantaneous, automated transactions on the blockchain—is what breaks their heart when the code performs in a way users did not intend," Bathgate said. "Trading based on pure code at the frontier of finance is perfection, until someone loses their shirt."

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Netflix Joins Apple, Meta in Withholding Key Data From Investors

By Molly Schuetz

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Netflix Joins Apple, Meta in Withholding Key Data From Investors

By Molly Schuetz2024-04-19T13:16:39826-04:00

Netflix Inc. shares fell the most in nine months Friday, taking the shine off stellar first-quarter financial results following management's decision to stop reporting quarterly subscriber data.

This metric has long been the primary way Wall Street evaluated the company's performance, but executives at Netflix, which now has almost 270 million subscribers, have tried to shift the focus to measures like sales and profit. Other tech giants like Apple Inc. and Meta Platforms Inc. have taken similar steps in recent years.

In the past, subscriber numbers have been wildly unpredictable, and the company has struggled to forecast them accurately. In 2022, Los Gatos, California-based Netflix said it would stop projecting quarterly customer data. The stock typically sees big swings the day after earnings reports.



On Thursday, Netflix reported better-than-expected first-quarter results, including 9.33 million new subscribers. But the shares slumped after the company said user growth this quarter would slow and that it will stop reporting customer numbers.

"Eliminating regular reporting of membership data raises questions around management's confidence to further grow the base, though it is not implausible that the change is intended to reduce quarterly sentiment volatility around relatively small changes in true economic drivers," **Michael Morris**, an analyst at Guggenheim Securities, wrote in a note to investors.

Netflix isn't the only big tech company to pull back on disclosing some metrics in order to steer investors' focus elsewhere.

In 2018, Apple said it would no longer report the number of iPhones, Macs and iPads sold each quarter, as it attempted to focus on its growing services unit. While some pundits praised the move as a way to highlight a potent new business model, others complained it was an attempt to hide the pain of a stagnant smartphone market. The shares had their worst day in four years.

Last quarter, Meta said it will no longer report the number of subscribers to its family of apps, which now total almost 4 billion people who use Instagram, Facebook and WhatsApp each month. The San Francisco-based company said it also won't provide daily and monthly user numbers for its flagship Facebook app.

Beginning this quarter, Meta will report year-over-year changes in ad impressions and the average price per ad at the regional level, while continuing to report only daily active users across its family of apps.

"Fewer disclosures is a rite of passage for large tech companies namely Apple, Google, and Meta," analysts at Bernstein wrote in a note. "On the other hand, removing growth disclosures signals a maturing business, and gives shareholders even fewer data points to underwrite forecasts. Time will tell how investors digest the change."

The good news for Netflix is that its decision, while angering some investors, is unlikely to have any impact on customers — its primary focus.

In 2011, the company was forced to backtrack on plans to split its mail-order DVD and internet streaming services. Customers were outraged over plans to create a separate DVD offering called Qwikster, and to pay for each service separately. The company reversed the decision three weeks later.

Netflix's growth in the latest quarter was aided by a crackdown on account sharing, which pushes viewers using someone else's password to sign up on their own at a discounted rate. The company attracted new customers from all over the world, thanks to a strong slate of original programs, showing particular strength in the US and Canada. Those new subscribers helped the company beat forecasts for sales and earnings as well.

In explaining the decision to stop reporting subscriber numbers and average revenue per user, co-Chief Executive Officer **Greg Peters** said initiatives like the crackdown and a new ad-supported tier make those metrics less relevant.

"All of that means that historical simple math that we all did, number of members times the monthly price is increasingly less accurate in capturing the state of the business," he said in a video interview Thursday.

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Walgreens Inks \$110M Deal To End Philly Opioid Crisis Suit

By **Matthew Santoni**

Law360 (April 19, 2024, 8:07 PM EDT) -- Walgreens will pay the city of Philadelphia \$110 million over the next five years to settle claims that it contributed to the opioid epidemic by ignoring suspicious prescriptions for addictive opioid painkillers, city officials announced Friday.



Walgreens' \$110 million settlement with the city of Philadelphia comprises at least \$88.3 million for "compensatory remediation" and \$21.7 million to reimburse the city for its investigation and litigation. (AP Photo/Ben Margot, File)

The deal will drop Walgreens from litigation that the city started in 2021 against multiple pharmacy chains, which also included Acme Markets, Albertson's, Walmart, CVS and Rite Aid. The city said the settlement funds will be steered to mitigate the harms caused by opioid addiction, including "substance use education, treatment, prevention, and community engagement efforts," according to a statement announcing the deal.

"Through this settlement, the city of Philadelphia has successfully held Walgreens accountable for oversupplying powerful drugs to people in our communities — with little consideration for the risk of addiction or harm posed by opioids," said Mayor Cherelle L. Parker in a statement Friday. "The \$110 million in funds from this settlement will support our Kensington Community Revitalization Plan and other efforts across Philadelphia to reinforce public health and safety in neighborhoods that have been hit the hardest by the opioid crisis."

Walgreens did not admit to wrongdoing as part of the deal, but will be released from the city's lawsuit, the **settlement** said.

The city's lawsuit, filed in the Court of Common Pleas in late September 2021, claimed that Walgreens and others violated the law by failing to recognize, report and abstain from fulfilling large orders for opioid medications from Walgreens' stores that were moving many of the pills. The pharmacies were also accused of not doing enough to verify that the opioid prescriptions they were filling were legitimate or being used correctly, the suit had said.

For its part, Walgreens "denies that the city or any person or entity in Philadelphia was harmed by any conduct of Walgreens alleged in this action or any similar action," the settlement said.

"We remain committed to being a part of the solution, and this settlement will allow us to keep our focus on the health and well-being of our customers and patients in the community, while making positive contributions to address the opioid crisis," a Walgreens spokesperson told Law360 on Friday.

The pharmacies had filed their preliminary objections to the city's lawsuit April 8, with the city's response and the pharmacies' reply coming soon thereafter. On April 15, Judge Linda Carpenter paused the claims against Rite Aid while that pharmacy undergoes **Chapter 11 reorganization** in a New Jersey bankruptcy court, the docket showed.

According to the settlement with Walgreens, at least \$88.3 million will be "compensatory remediation" to directly address the harms allegedly caused by the pharmacies' conduct in the case. The other \$21.7 million will reimburse the city for its investigation and litigation, the settlement said.

"It is the intent of the parties that the entire compensatory remediation amount be used for opioid remediation," the settlement said. "While disfavored by the parties, the city may use monies from the compensatory remediation amount for purposes that do not qualify as opioid remediation."

Last year, Philadelphia announced plans for how it would distribute the proceeds from various opioid-related settlements, including a multistate, **\$26 billion settlement** with multiple drug manufacturers and distributors — though that deal had been **unsuccessfully opposed** by Philadelphia District Attorney Larry Krasner on the grounds that it didn't go far enough and undercut the city's own litigation.

According to the prior announcement, the city had been due to get about \$200 million over 18 years before the Walgreens deal was announced.

"The settlement announced today is a testament to the city's commitment to fighting on behalf of residents to hold those perpetuating harm in our communities accountable. Through its predatory business practices, Walgreens has played a significant role in the creation and continuation of the opioid epidemic that has claimed the lives of too many Philadelphians and caused immense harm to our communities," said City Solicitor Renee Garcia in a statement.

The City of Philadelphia is represented by Jerry R. Desiderato, Timothy James Ford, Silvio A. Trentalange and Stanford B. Ponson of Dilworth Paxson LLP, Gregory B. Heller of Feldman Shepherd Wohlgerlenter Tanner Weinstock Dodig LLP, and Daniel Alberstone, Mark Pifko and William G. Powers of Baron Budd.

Walgreen Co., Walgreen Eastern Co. and Walgreens Boots Alliance Inc. are represented by Eli Granek of Eckert Seamans Cherin & Mellott LLC, Michael A. Burns of Hilgers Graben PLLC, and Lester C. Houtz and Kaspar J. Stoffelmayr of Bartlit Beck LLP.

The case is City of Philadelphia v. CVS of Indiana LLC et al., case number 210902183, in the Court of Common Pleas for Philadelphia, Pennsylvania.

--Editing by Emily Kokoll.



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Meta Faces Uphill Fight To Nix AG Claims In Addiction MDL

By **Dorothy Atkins**

Law360, Oakland, Calif. (April 19, 2024, 10:50 PM EDT) -- A California judge expressed skepticism Friday over Meta's bid to ax the claims of 34 state attorneys general from multidistrict litigation over social media platforms' allegedly addictive design, saying Meta and its co-defendants haven't been transparent about how their platforms work, and it's plausible the states can obtain psychiatric treatment receipts to show economic injuries.

U.S. District Judge Yvonne Gonzalez Rogers' comments came during a nearly five-hour hearing in Oakland, California, on wide-ranging topics and Meta Platforms Inc.'s motion to dismiss lawsuits filed by dozens of state attorneys general.

Meta's co-defendants — Google LLC, Snap Inc., TikTok Inc. and their related entities — joined Meta's motion, which also seeks to cut three personal injury claims asserted by consumers from the sprawling consolidated litigation **initially launched** in 2022.

The MDL involves hundreds of claims by school districts, parents of minors and dozens of state attorneys general who allege that the social media companies, whose platforms draw in billions of dollars annually in ad revenues, are designed to be addictive to the detriment of minors' mental health and livelihood.

During the hearing, defense counsel argued that the court should throw out all claims asserted by the states, including claims under the Children's Online Privacy Protection Act, the Federal Trade Commission Act and dozens of state consumer protection laws.

Meta's counsel argued that the companies are shielded from liability under Section 230 of the Communications Decency Act. On many of the claims, Meta's counsel, Paul William Schmidt of Covington & Burling LLP, also argued that the states haven't sufficiently claimed that its products, Instagram and Facebook, are "child-directed," or that Meta had "actual knowledge" that it was collecting the personal information of under-13 users to state viable COPPA claims.

However, throughout the hearing, Judge Gonzalez Rogers cautioned attorneys against gamesmanship and using hyperbole in their arguments. The judge generally appeared skeptical of the defense arguments, saying repeatedly that she's only deciding whether the claims are plausible enough to proceed past a motion to dismiss.

She also repeatedly said the litigation doesn't allege securities law violations, so she doesn't have to evaluate each statement made by the defendants and tech executives in deciding whether the claims are plausible.

"I will not do that here, and your arguments in that regard are denied," the judge told Meta's counsel.

Judge Gonzalez Rogers also expressed concerns regarding the social media companies' transparency, and she observed that "one of the problems" with some cases cited by the defendants is that "there hasn't been much transparency ... in terms of how these platforms were operating and what they were doing."

In light of the purported transparency issues, the decision-makers in some of those cases were ruling

blindly, and "that's not lost on me," she said.

Judge Gonzalez Rogers doubted that the COPPA and FTC claims could be dismissed at the pleading stage.

But another Meta attorney, Timothy Channing Hester of Covington, argued that harm caused by eating disorders and other alleged injuries in the complaint are too "subjective" to state a viable claim of economic harm as required under Section 5 of the FTC Act prohibiting unfair or deceptive acts or practices.

But the judge was skeptical.

"How is it a subjective harm if there is a medical classification for [eating disorders]?" she asked.

Hester responded that "the nature of an eating disorder can vary person by person."

"So do heart conditions," the judge retorted.

Judge Gonzalez Rogers pointed out that the states allege social media use has contributed to eating disorders, insomnia, anxiety and a host of other conditions, and treatment for those conditions costs money.

"What does one do with the fact that it costs money to have psychiatrists?" the judge asked Hester. "It costs money to have psychologists. It costs money to go to the doctors to deal with eating disorders. All of that costs money. All of that is real harm. It costs school districts money to have more counselors to deal with the fact that these children have these effects. How could you deal with that in these arguments?"

Hester repeatedly said Meta isn't trying to "diminish" the experience of consumers, but he argued the allegations in the complaint "don't fit" the FTC statute, which he again argued requires that the economic or financial harm is "something more measurable."

Hester added that the FTC Act hasn't been applied to such conditions before, but the judge replied, "Well, it's new technology." The discussion reminded the judge of the Ninth Circuit's 2010 decision in **FTC v. Neovi** , which held that a small harm to a large number of people can be substantial under the FTC Act.

"Doesn't that get them over the [pleading] hump?" the judge asked.

Judge Gonzalez Rogers added that "it's plausible" that the state attorneys general can get "thousands and thousands and thousands of medical bills" from psychiatric treatments to show economic injuries.

The attorney acknowledged that he wasn't familiar with the Neovi case. Hester agreed that he and his co-counsel would look up the case, but he again emphasized Meta is "trying to focus on the allegations" in the complaint.

"You're trying to represent your client," Judge Gonzalez Rogers quipped in response, adding: "There is no transparency, there is manipulation."

Judge Gonzalez Rogers didn't rule from the bench on the COPPA or FTC Act claims, but she floated the possibility of certifying to the Ninth Circuit a narrow issue of whether certain features on social media platforms are shielded under Section 230 without staying the MDL. Defense counsel agreed she should, but the states disagreed that it would be necessary.

Judge Gonzalez Rogers only ruled from the bench on one issue — tossing Florida's individual complaint against the companies, but she gave the state 10 days to refile.

At the end of the hearing, the judge took the arguments under consideration. The next discovery hearing in the case is set for Monday before U.S. Magistrate Judge Peter Kang.

Earlier this month, Judge Gonzalez Rogers **tossed** certain fraud-by-omission claims seeking to hold Meta CEO Mark Zuckerberg personally liable. However, she allowed the plaintiffs to amend their allegations to assert a new theory of corporate officer liability against Zuckerberg. On Friday, the plaintiffs informed the judge they plan to file amended allegations against Zuckerberg by April 26.

The personal injury plaintiffs were represented during the hearing by Lexi Joy Hazam and Gabriel August Panek of Lief Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC.

The state attorneys general were represented during the hearing by Bianca Miyata of Colorado Department of Law, Daniel Edelstein of the Illinois Attorney General's Office, Lauren Bidra of Connecticut Office of the Attorney General, Megan O'Neill of the California Department of Justice, Anna Catherine Smith of Office of the South Carolina Attorney General and Donna Cecilia Valin of the Florida Office of the Attorney General.

The cities and school districts were represented during the hearing by Melissa L. Yeates of Kessler Topaz Meltzer & Check LLP and Michael M. Weinkowitz of Levin Sedran & Berman LLP.

The Meta entities were represented during the hearing by Gregory Lawrence Halperin, Ashley Margaret Simonsen, Timothy Channing Hester, Isaac D. Chaput and Paul William Schmidt of Covington & Burling LLP.

The Snap entities were represented during the hearing by Jonathan Hugh Blavin of Munger Tolles & Olson LLP.

TikTok was represented during the hearing by Andrea Pierson of Faegre Drinker Biddle & Reath LLP and Geoffrey Drake of King & Spalding LLP.

YouTube was represented during the hearing by Ashley Wall Hardin of Williams & Connolly LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California.

The parallel Judicial Council Coordination Proceeding is Social Media Cases, case number 5255, in the Superior Court of the State of California, County of Los Angeles.

--Editing by Michael Watanabe.



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5th Circ. Revives Six Flags Investor Suit Again

By **Sydney Price**

Law360 (April 19, 2024, 9:23 PM EDT) -- The Fifth Circuit has once again restored a securities fraud class action against Six Flags over the amusement corporation's botched plans to expand in China, saying the lower court inappropriately decided the lead plaintiff lacked standing and wrongly denied another plaintiff a chance to lead the suit.

This appeal is the second in the class action initially filed in 2020. The suit was first dismissed in Texas federal court in March 2021 and revived by the Fifth Circuit in January 2023 when the appeals court reversed the decision. A subsequent dismissal came last summer.

The suit was dismissed a second time after Six Flags Entertainment Corp. filed a motion for judgment on the pleadings, alleging lead plaintiff, Oklahoma Firefighters Pension and Retirement System, purchased all of its stock between Oct. 29, 2019 and Dec. 2, 2019, days after the company said it had run into issues with real estate developers in China.

The suit alleges Six Flags exaggerated the success of its partnership with a Chinese real estate developer to build nearly a dozen new theme parks overseas, which caused the company's stock to trade at artificially inflated prices before tanking nearly 44% when word got out that the projects were shaky.

In June 2023, U.S. District Judge Mark T. Pittman granted Six Flags' motion and denied the Oklahoma firefighters' motion to file an amended complaint, which sought to add a new lead plaintiff, the Key West Police & Fire Pension Fund, to continue the proposed class action. The Oklahoma firefighters and the Key West pension fund appealed.

Judge Pittman also said that the Oklahoma firefighters lacked standing because they bought stock after Six Flags' leadership began to cast doubt on its ability to expand in China during earnings calls in October 2019.

However, the Fifth Circuit said Thursday that the district court made the wrong call when it concluded the Oklahoma firefighters lacked standing, saying its prior opinion "very clearly" did not hold that the alleged fraud was fully disclosed by October 2019.

"Despite receiving our prior opinion, the district court misapplied the very doctrine it sought to adhere to, parsing our prior opinion like the 'language of a statute' to reach an incorrect outcome when context and common sense suggested otherwise," the opinion said.

To resolve what Judge Pittman determined was a lack of standing, the Oklahoma firefighters wanted to amend the complaint and add Key West as lead plaintiff instead, Six Flags alleged. Key West purchased stocks before Oct. 23, 2019, according to court documents.

Judge Pittman said allowing Key West, "an unnamed, independent third party — to assert its 'class membership' now to keep this case alive would be like allowing plaintiff and movant to 'amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action.'"

However, the Fifth Circuit said Thursday that there is no question Key West bought stock before the alleged fraud was revealed, and is a proper party to intervene.

"Oklahoma Firefighters shall remain in the case and Key West shall be allowed to intervene," the

opinion said. "The district court shall then consider the amendment motion on its merits."

Counsel for the investors declined to comment Friday. Counsel for Six Flags did not immediately respond to requests for comment.

U.S. Circuit Judges Jacques L. Wiener Jr., Catharina Haynes and Stephen A. Higginson sat on the panel for the Fifth Circuit.

The investors are represented by Hannah Ross, Jesse L. Jensen, John J. Esmay, Brandon A. Slotkin, Katherine M. Sinderson and John Rizio-Hamilton of Bernstein Litowitz Berger & Grossmann LLP, Lewis T. LeClair of McKool Smith and Robert Klausner of Klausner Kaufman Jensen & Levinson PA.

Six Flags is represented by Ralph H. Duggins, Scott A. Fredricks and Michael Ackerman of Cantey Hanger LLP, Jay B. Kasner, Scott D. Musoff, Mark R.S. Foster and Jessie K. Liu of Skadden Arps Slate Meagher & Flom LLP.

The case is OK Firefighters Pension v. Six Flags Entertainment Corp. et al., case number 21-10865, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Drashti Mehta.

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9th Circ. Won't Revive J2 Investor's Suit Alleging Insider Deals

By **Gina Kim**

Law360 (April 19, 2024, 6:38 PM EDT) -- The Ninth Circuit declined Friday to revive a proposed securities fraud class action alleging that J2 Global Inc. hid underperforming acquisitions and dubious investments that benefited company insiders, finding the plaintiff investor did not sufficiently plead scienter as to alleged nondisclosures or that purported misstatements caused his losses.

In a 23-page published ruling, a three-judge panel with the Ninth Circuit unanimously upheld a district court's order dismissing plaintiff Jonathan Espy's securities action accusing the digital media business and its executives of violating sections 10(b) and 20(a) of the Exchange Act.

"This is a case in which neither individual allegations of securities fraud nor various acts of alleged corporate misfeasance over many years satisfies the heightened and demanding standard required in a securities case," Friday's opinion, penned by U.S. Circuit Judge M. Margaret McKeown, reads. "Dissatisfaction with a company's strategy, management and approach to accounting, coupled with a stock drop, make for interesting reading, but not an actionable securities fraud claim."

According to the ruling, Espy accused J2 of hiding key facts regarding its 2015 acquisition of a consulting company, VDW, which was operated by its former vice president of corporate development, Jeroen van der Weijden. Espy claimed van der Weijden pushed J2 to acquire his company as a "bonus" to the executive.

Espy also took issue with J2's \$200 million investment into Orchard Capital in 2017, as J2's former CEOs Richard Ressler and Nehemiah Zucker had significant stakes in Orchard. Espy also alleged that J2 would pay millions of dollars in management fees to Orchard but did not disclose how much.

Orchard, just like J2, invests in and acquires companies, which meant J2's investment agreement lacked financial justification and was intended to "provide an untraceable 'slush fund' for J2 insiders" to enrich themselves, Espy claimed.

Espy alleged J2 also employed consolidated accounting practices to hide deals that were not doing well, and that J2 was engaged in a scheme of enriching corporate insiders by acquiring companies, the majority of which were handled by van der Weijden, whose incentive was to execute as many deals as possible, regardless of suitability or quality.

In Aug. 2022, U.S. District Judge Fernando Aenlle-Rocha of the Central District of California dismissed Espy's second amended complaint for good, finding he did not adequately demonstrate scienter, despite referencing statements from former J2 employees who claimed J2 wanted van der Weijden to close deals irrespective of whether they made good business sense.

Judge Aenlle-Rocha noted it is unclear whether the former employees' hearsay allegations stemmed from their personal knowledge, and that none of them were indicative of scienter since they do not speak to the defendants' mental states.

Essentially, many of the confidential employees' statements are simply critiques and negative opinions of J2's business practices, the district court concluded.

On Friday, the Ninth Circuit sided with the district court, finding the majority of the former employees' statements "simply amount to criticisms of J2's management practices and compensation

structures," the panel wrote.

Nor does the suit sufficiently plead scienter as to the 2017 Orchard investment disclosures, the Ninth Circuit added, pointing out that J2 did indeed provide substantial details in its proxy statement, including the \$200 million figure that is being invested, as well as a calculation of yearly management fees paid to Orchard.

Furthermore, J2 also said Ressler had major equity in Orchard, and that Zucker was stepping down as J2's CEO to help manage the Orchard fund, the opinion said. Nor does Espy allege why the information that J2 disclosed, as well as links between Orchard and other J2 board members and employees, demonstrate scienter, the panel said.

Although the district court did not discuss loss causation in its dismissal order, the Ninth Circuit addressed it in their Friday ruling, finding Espy fails to show that J2's misstatements foreseeably caused his losses.

Espy relied on short-seller reports in 2016 and 2020 issued by Citron Research and Hindenburg, respectively, which claimed J2's acquisition model prompted the enrichment of corporate insiders, arguing both served as corrective disclosures revealing J2's misstatements that caused stock prices to dip.

Both reports were compiled by relying on publicly available information, did not require the expertise of skills "beyond what a typical market participant would possess," and accordingly, do not qualify as corrective disclosures, the panel concluded.

The district court was also correct to deny Espy leave to amend, since he was given two shots already but still failed to state a claim, Friday's opinion said. Although he does cite two potential sources of new information — information from former employees and **a settlement resolving a derivative action in Delaware** brought against J2 and Orchard alleging fiduciary duty breach related to the \$200 million investment — Espy does not show how a settlement in a different court resolving a completely different cause of action would fix the problems in the instant case.

Representatives for the investors and appellees did not immediately respond to inquiries seeking comment Friday.

U.S. Circuit Judges M. Margaret McKeown, Consuelo M. Callahan and Kenneth K. Lee sat on the panel for the Ninth Circuit.

The appellant is represented by Ivy T. Ngo and Velvel Freedman of Freedman Normand Friedland LLP, Thomas G. Hoffman, Jr., Michael P. Canty and David J. Schwartz of Labaton Sucharow LLP and Brian Schall of The Schall Law Firm.

The appellees are represented by Matthew W. Close, Aaron D. Henson, Elizabeth A. Arias, and Abby F. Rudzin of O'Melveny & Myers LLP.

The case is Jonathan Espy v. J2 Global Inc. et al., case number 22-55829, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Vaqas Asghar.



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Investor Suit Over Intel's Chip Production Won't Be Rebooted

By **Katryna Perera**

Law360 (April 19, 2024, 8:43 PM EDT) -- The Ninth Circuit on Friday upheld a federal district court's dismissal of a proposed class action against Intel that alleged the tech giant hid problems with the production of its highly anticipated new computer processors, ruling the suit fails to show the defendants knew the company would miss the projected product release date.

The three-judge panel **said in the memo** that the plaintiff investors have failed to adequately allege materially false or misleading statements or omissions made by Intel or its top brass about the company's 7-nanometer product launch timeline.

All the challenged statements were forward-looking, the panel said, and the investors also failed to plead that the timeline "required intermediate checkpoints to be met, let alone that such checkpoints were missed before the statements at issue."

Therefore, the suit fails to establish that any of the defendants had "actual knowledge" when making the challenged statement that Intel would miss the projected product release dates, the panel said.

The panel further stated the investors failed to properly plead scienter since they primarily relied on anonymous sources to support their claims, but have not provided "sufficient factual allegations as to the sources' reliability or personal knowledge."

The suit also challenged statements about purported lessons Intel learned from its 10-nanometer process that it applied to its 7-nanometer process, the company's status as an integrated device manufacturer, and the departure of one of Intel's microprocessor architects.

The panel said the suit does not sufficiently plead that any of the statements were false or misleading when made and also failed to plead a strong inference of scienter relating to the statements.

The panel's decision comes just a few weeks after the judges heard **oral arguments** in the appeal, during which they expressed doubts about whether Intel's statements about its production timeline were actionable and not forward-looking statements shielded from liability by the safe harbor rule.

The suit **was filed** in 2020 and tossed by the district court in March 2023.

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

U.S. Circuit Judges Andrew D. Hurwitz and Anthony D. Johnstone, and U.S. District Judge Brian M. Morris sat on the panel for the Ninth Circuit.

The investors are represented by William S. Norton, Max N. Gruetzmacher and Christopher F. Moriarty of Motley Rice LLC, and Jonathan D. Uslaner and Lauren M. Cruz of Bernstein Litowitz Berger & Grossmann LLP.

Intel is represented by Gregory P. Stone, John M. Gildersleeve and Lorraine L. Abdulahad of Munger Tolles & Olson LLP.

The case is KBC Asset Management NV et al. v. Intel Corp. et al., case number 23-15695, in the U.S. Court of Appeals for the Ninth Circuit.



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AI Health Data Co. Faces Investor Suit Over Accounting Issues

By **Emilie Ruscoe**

Law360 (April 19, 2024, 9:35 PM EDT) -- Atlanta-based health data platform company Sharecare and two of its executives face accusations that they failed to disclose certain accounting issues to investors, leading to stock price declines when the issues became public, according to a shareholder suit filed Friday in California federal court.

In his complaint, Sharecare investor Victor Buqueras accused the company, its CEO Jeffrey T. Arnold and its Chief Financial Officer Justin Ferrero of violating federal securities laws after the company said in March that it had identified a weakness in its financial reporting controls during its 2023 fiscal year.

Specifically, the company said, it had found an issue in with how it recognized revenue, which it said was a result of "a change in services provided to a customer." Sharecare blamed the problem on "untimely communication" between teams.

Buqueras claimed investors saw trading prices for their company stock slide by more than 28% in a single trading day on the heels of the announcement, from about 77 cents to about 55 cents.

Sharecare launched in 2010 and went public in 2021 via a merger with a special purpose acquisition company. Since then, it has traded on the Nasdaq Stock Market.

Sharecare says on its website that it uses artificial intelligence to let its users "collect, own and train their own health data to generate models to help themselves" by tracking their own health trends, storing health-related records and serving up content such as healthy recipes and meditation videos.

The company's 2021 SPAC merger generated proceeds for the company exceeding \$571 million, and around the time the merger was announced, market records show that the SPAC saw trading prices peak at more than \$12.

But its trading prices have trended down since the merger closed, and on Friday, Sharecare stock closed out the day trading at 66 cents.

When the company announced its 2023 financial results in March, it said that it made \$445.3 million last year and increased profits by 1% during 2023, citing "a \$14.2 million negative impact to revenue due to the elimination of non-performing disputed contracts with a client in the fourth quarter of 2023."

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

Buqueras is represented by Laurence M. Rosen of the Rosen Law Firm PA.

Counsel information for the defendants wasn't immediately available Friday.

The case is Buqueras v. Sharecare Inc et al., case number 2:24-cv-03225, in the U.S. District Court for the Central District of Los Angeles.

--Editing by Adam LoBelia.



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SBF Inks Deal To Help FTX Investors Go After Promoters

By **Lauren Berg**

Law360 (April 19, 2024, 11:02 PM EDT) -- Investors who launched multidistrict litigation over cryptocurrency exchange FTX's collapse asked a Florida federal judge Friday to bless their settlement with founder Sam Bankman-Fried, who has agreed to assist in their case against celebrities who promoted the platform and other defendants alleged to be part of the fraud scheme.

Under the proposed **settlement**, Bankman-Fried will "reasonably cooperate with class counsel in providing information to assist class representatives and class members in prosecuting the FTX MDL and to aid in victim recovery to the extent that he is able to do so under the circumstances."

The **FTX founder** was **sentenced to 25 years** in prison for **stealing more than \$11 billion** from customers, investors and lenders of his now-collapsed cryptocurrency empire. But he is appealing the conviction and sentence to the Second Circuit.

The Florida MDL was brought by a class of FTX customers who wanted to recoup funds they lost during the exchange's epic collapse in 2022 from the exchange's executives and celebrities who endorsed FTX.

As part of the proposed settlement filed Friday, Bankman-Fried will provide testimony and documents, including nonprivileged documents he produced to federal prosecutors as part of their criminal investigation, to the investors' counsel at the Moskowitz Law Firm PLLC and Boies Schiller Flexner LLP.

Bankman-Fried also agreed to provide "a financial statement demonstrating all assets that he currently holds," along with an affidavit listing all of his financial assets, the settlement states.

In addition, under the settlement, the former crypto king will provide any information he possesses regarding other defendants in the case, including former Boston Red Sox player David Ortiz, former basketball star Shaquille O'Neal, former football quarterback Tom Brady and his ex-wife fashion model Gisele Bündchen, Japanese tennis player Naomi Osaka, and a host of other celebrities who endorsed and promoted FTX.

In exchange for Bankman-Fried's cooperation and assistance, the investors agreed to release him from their claims, according to the settlement.

Mark Botnick, a spokesman for Bankman-Fried, told Law360 in a statement on Friday, "Since the collapse of FTX, Mr. Bankman-Fried has been singularly focused on returning the estate's assets to customers, who could and should be made whole as of current prices."

"He looks forward to continuing to work with Adam Moskowitz and his team do so," Botnick said.

The investors' attorney, Adam M. Moskowitz, told Law360 in a statement Friday that their "main job" is "to obtain the largest possible recovery for FTX victims, and as we told Judge [Lewis] Kaplan, we are appreciative to Sam and his family for their help. We are also appreciative to the other FTX insiders, who are also helping the victims."

"The only way the full picture of the massive FTX fraud will ever be told, is the help and cooperation of others," he added, noting that there are now 73 defendants in the MDL.

Last month, the investors **reached a set of deals** with Bankman-Fried's former inner circle, as well as seven promoters who, together, agreed to pay more than \$1.3 million.

Caroline Ellison, who led FTX affiliate Alameda Research, ex-FTX Chief Technology Officer Zixiao "Gary" Wang and former FTX engineering head Nishad Singh agreed to voluntarily provide information and testimony in the investors' lawsuit, the parties said.

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

The investors also reached settlements with NFL quarterback William Trevor Lawrence, finance influencer Kevin Paffrath and YouTube finance personality Tom Nash, as well as **influencers** Brian Jung, Graham Stephan, Andrei Jikh and Jeremy LeFebvre.

The investors are represented by Adam M. Moskowitz and Joseph M. Kaye of the Moskowitz Law Firm PLLC and David Boies, Alexander Boies and Brook A. Alexander of Boies Schiller Flexner LLP.

Bankman-Fried is represented by Richard M. Simins and Jeremy D. Mishkin of Montgomery McCracken Walker & Rhoads LLP.

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

--Additional reporting by Alex Wittenberg, Rachel Scharf, Pete Brush and Aislinn Keely. Editing by Michael Watanabe.

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Casino SPAC Can Return Money, Not Shares, Chancery Rules

By **Leslie A. Pappas**

Law360 (April 19, 2024, 7:18 PM EDT) -- Stockholders in a blank-check company that failed to merge with a Philippines-based casino are entitled to a distribution from \$37.5 million sitting in trust, but the company may not redeem any shares until an investor's Delaware lawsuit plays out, a Chancery Court vice chancellor said Friday.

In a telephonic bench ruling, Vice Chancellor J. Travis Laster granted New York hedge fund Zama Capital Master Fund LP's request for a temporary restraining order to prevent 26 Capital Acquisition Corp., a now-defunct special-purpose acquisition company that had tried to take the Okada Manila Resort & Casino public, from dissolving and redeeming investors' shares.

Zama Capital has made a "colorable claim" that 26 Capital is insolvent, and the redemption of shares poses "a sufficient threat of irreparable harm," the vice chancellor said.

However, the TRO does not impose any restrictions on Continental Stock Transfer & Trust Company — which is holding about \$37.5 million left over from the SPAC's \$275 million initial public offering in 2021 — from distributing those funds in accordance with an investment agreement, the vice chancellor said in his bench ruling and a **two-page order issued afterward**.

"A distribution is like a dividend. You get your stuff, but you get to keep your shares," the vice chancellor said at the hearing. "The money from the trust account can go out the door, and we can take that issue off the table."

The ongoing Chancery Court litigation stems from what would have been a \$2.6 billion deal for the Japanese-owned, 993-room gaming resort. The deal called for 26 Capital to merge with Universal Entertainment Corp., the parent company of the casino's operator, Tiger Resort Leisure and Entertainment Inc. The SPAC eventually **sued the casino's operators** in Delaware's Chancery Court to force the deal to close.

After Vice Chancellor Laster in September **refused** to force the deal to close, the SPAC **said it would liquidate**.

Zama then **sued** 26 Capital, arguing a share redemption would violate Section 160 of Delaware's General Corporation Law — which governs stock rights and redemption — because the SPAC's liabilities exceed its assets.

The TRO could jeopardize an \$11 million settlement that the SPAC reached with the casino's operators to end its Chancery Court lawsuit.

The hedge fund has **challenged** the \$11 million settlement that 26 Capital reached with the casino operators, arguing there are potentially "billions" of outstanding claims against various parties in the collapsed deal that, if litigated, could bring money back to the company and its investors.

Austin, Texas-based investment adviser Fifth Lane Capital LP, another 26 Capital shareholder, intervened in Zama's lawsuit, arguing that while it may be "unlawful" for the SPAC to redeem its Class A shares, the company's charter and trust agreement required that money in the trust account be distributed to investors within two years of the SPAC's IPO.

In the hearing Friday, Vice Chancellor Laster said he found a "weird disconnect" between the trust agreement and the company's charter. The trust agreement seems to contemplate a "distribution without a redemption," he said.

By allowing the trust to distribute funds without a share redemption, shareholders like Fifth Capital will get their cash back, and shareholders like Zama Capital can keep their shares, "and if the litigation lottery ticket comes home," they may recoup more later, the vice chancellor said.

"Our client appreciates the court's thoughtful analysis in a complicated matter and is pleased to have successfully disentangled the trust funds belonging solely to Class A stockholders from the pending litigations," Aaron T. Morris of Morris Kandinov LLP, an attorney for Fifth Lane, told Law360 shortly after the hearing, referring to the two ongoing Chancery Court lawsuits.

Thomas A. Uebler of McCollom D'Emilio Smith Uebler LLC, an attorney for 26 Capital, told the court at the end of the hearing Friday that the SPAC "just can't afford to litigate these questions," and he may need to seek court approval to tap into the \$11 million settlement funds that are sitting in escrow.

"I appreciate the heads-up," the vice chancellor said. "If the company doesn't have money and the company has to seek protection of the federal bankruptcy laws, that's reality. It's something that happens to companies on my docket all the time."

None of the other parties immediately responded on Thursday to Law360's requests for comment.

26 Capital Acquisition Corp. is represented by Thomas A. Uebler of McCollom D'Emilio Smith Uebler LLC.

Zama Capital Master Fund LP is represented by John H. Chun of Herrick Feinstein LLP and Matthew D. Perri, Andrew L. Milam, Elizabeth J. Freud and Alfred P. Dillione of Richards Layton & Finger PA.

Tiger Resort Leisure and Entertainment Inc. and the affiliated defendants are represented by T. Brad Davey, Matthew A. Golden, Daniel M. Rusk IV, Abraham C. Schneider and Hayden J. Driscoll of Potter Anderson & Corroon LLP and Daniel M. Perry, Grant R. Mainland, Jed M. Schwartz, Andrew L. Porter, Christopher Almon, Alison S. Markowitz, Ashley A. Satterlee and Alexander B. Cogut of Milbank LLP.

Fifth Lane Partners Fund LP is represented by Aaron T. Morris, Andrew W. Robertson and William H. Spruance of Morris Kandinov LLP and William M. Alleman Jr. of Meluney Alleman & Spence LLC.

The cases are 26 Capital Acquisition Corp. et al. v. Tiger Resorts Asia Ltd., Zama Capital Master Fund LP v. 26 Capital Acquisition Corp. et al., case number 2023-0128; and Zama Capital Master Fund LP (plaintiff) and Fifth Lane Partners Fund LP (intervenor plaintiff) v. 26 Capital Acquisition Corp., case number 2024-0370, both in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.



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Hatteras Fund Investors Sue In Chancery After 95% Drop

By **Leslie A. Pappas**

Law360 (April 19, 2024, 3:50 PM EDT) -- Stockholders in a series of funds managed by alternative investment boutique Hatteras Investment Partners LP have launched a proposed class action against the company's board in Delaware's Court of Chancery, alleging breaches of fiduciary duty in conjunction with the funds' liquidation.

In a complaint filed Wednesday, John David Miley III and Dr. Steven Richard Smith alleged directors of the Raleigh, North Carolina, investment adviser sold the funds to The Beneficient Company in 2021 without informing investors, and the value of their investments have since dropped by 95%.

"Plaintiffs and the investors they seek to represent have lost essentially their entire investments in the Hatteras funds as a result of defendants' actions," the complaint says.

Defendants named in the complaint are Hatteras CEO and board chairman David B. Perkins and audit committee members and directors H. Alexander Holmes, Steve E. Moss, Gregory S. Sellers and Thomas Mann.

Hatteras is a 100% employee-owned investment adviser that was founded in 2003 and has been registered with the U.S. Securities and Exchange Commission since 2014, according to the complaint.

The funds, all closed-end investment companies registered as Delaware limited partnerships, include the Hatteras Core Alternatives Fund, Hatteras Core Alternatives TEI Fund, Hatteras Institutional Fund and Hatteras Core Alternatives TEI Institutional Fund.

The Hatteras funds had as much as \$1.5 billion in assets under management in 2014, but by 2021, this amount had shrunk to about \$400 million due to quarterly tender offers to investors, the complaint says.

In 2021, having grown weary of managing the funds, the board sought a way to wind them down and approved a plan for their liquidation on Dec. 7, 2021, the complaint says.

Under the 2021 liquidation plan, the board agreed to exchange the Hatteras funds' \$400 million of underlying investments for an "equivalent" amount of Beneficient preferred shares that were valued at \$10 per share, the complaint says.

Hatteras shareholders had no say in the exchange, did not have a chance to vote on the transaction and had no opportunity to redeem their investments prior to the deal, according to the complaint.

Directors have since admitted they didn't do enough due diligence on Beneficient and failed to uncover "illicit business practices" by the company and its founder Brad Heppner that had already prompted SEC investigations into the company.

The board was also under the impression that Beneficient would go public through an initial public offering, but instead it went public in June 2023 by merging with a special-purpose acquisition company called Avalon Acquisition Inc.

The board was opposed to the business combination but had waived their rights in the 2021 share exchange and could not prevent the deal, the complaint says.

The SPAC merger, which was **estimated to be worth \$3.5 billion** at the time, converted the Hatteras funds' preferred units to Beneficient Class A common stock at \$8 per share.

About a month after the merger, the Wall Street Journal published an article about Heppner and Beneficient's alleged fraudulent business practices. Beneficient's stock has since dropped to \$0.078 per share, according to the complaint.

Since Dec. 7, 2021, when their shares were exchanged, the value of Smith's investment in Hatteras funds has dropped from \$95,082.44 to \$5,438.64; Miley's investment has dropped from approximately \$100,000 to \$5,000, the complaint says.

Counsel for the shareholders declined to comment on Friday. Hatteras did not immediately respond to Law360's request for comment.

Miley and Smith are represented by A. Lee Parks and M. Travis Foust of Parks Chesin & Walbert PC and Thomas A. Uebler, Brian V. DeMott and Adam J. Waskie of McCollum D'Emilio Smith Uebler LLC.

Counsel information for the defendant was not immediately available on Friday.

The case is John David Miley III, et al., v. David B. Perkins et al., case number 2024-0405, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Binance Ruling Spotlights Muddled Post-Morrison Landscape

By **Andrew Rhys Davies and Jessica Lewis** (April 19, 2024, 4:03 PM EDT)

The **March decision** in *Williams v. Binance* from the U.S. Court of Appeals for the Second Circuit[1] marks the latest chapter in the judiciary's struggle to apply the U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.* to nontraditional transactions or nontraditional assets — in this case, digital assets.

The plaintiffs in *Williams v. Binance* sued under the federal securities laws to rescind secondary-market purchases of allegedly worthless tokens they made on the Binance trading platform. They asserted that the tokens were unregistered securities and that Binance was operating as an unregistered securities exchange and broker-dealer.

Binance moved to dismiss, arguing that, even assuming the tokens are securities, the claims exceeded the territorial limitations that *Morrison* imposed on the federal securities laws.[2]

In *Morrison*, the Supreme Court held that the anti-fraud provisions of the federal securities laws, including Section 10(b) of the Securities Exchange Act of 1934, do not provide a cause of action to investors who are injured in securities transactions outside the U.S.[3] In other words, those suing under the federal securities laws must have entered into domestic transactions.[4]

Morrison tried to draw a bright line between foreign and domestic transactions to replace the unpredictable conduct-and-effects test that previously dictated when the federal securities laws might apply to transactions with a foreign component.[5] But if the promise of *Morrison* was a predictable way to determine the geographical reach of the federal securities laws, the rise of decentralized transactions in digital assets has called that promise into question.

This article explores the evolution — or convolution — of *Morrison* in the Second Circuit, and how the recent decision in *Williams v. Binance* has highlighted *Morrison*'s limitations when applied to transactions in digital assets.

Pre-Binance: The Second Circuit Muddies Morrison by Creating "Predominantly Foreign" Carveout

In the wake of *Morrison*, every circuit to evaluate whether a transaction is "domestic" and thus within the scope of the federal securities laws' anti-fraud provisions has adopted the so-called irrevocable liability test.[6] Under this test, a transaction is domestic if "irrevocable liability was incurred or ... title was transferred within the United States," as the Second Circuit outlined in *Absolute Activist Value Master Fund Ltd. v. Ficeto* in 2012.[7]

However, though the Second Circuit has embraced the irrevocable liability test, it has also adopted a judicial carveout or gloss that other circuits have criticized as, once again, muddying the waters of *Morrison*.

Just four years after *Morrison*, the Second Circuit held in *Parkcentral Global Hub Ltd. v. Porsche*



Andrew Rhys Davies



Jessica Lewis

Automobile Holdings that Exchange Act claims will not arise from domestic transactions if the claim is nonetheless "so predominantly foreign as to be impermissibly extraterritorial." [8]

Parkcentral arose from allegations of fraud in connection with domestic swap transactions, but the Second Circuit held that the claims were predominantly foreign because those swaps referenced the stock of a non-U.S. company that was listed only on foreign exchanges. As the Second Circuit saw it, the swaps were the economic equivalent of trading stock on foreign exchanges.

The First and Ninth Circuits have rejected the Second Circuit's "predominantly foreign" carveout. [9]

In *Stoyas v. Toshiba Corp.*, the U.S. Court of Appeals for the Ninth Circuit in 2018 rejected the argument that purchases of American depository receipts should fall outside the reach of the federal securities laws because they — like the swaps at issue in *Parkcentral* — allow U.S. investors to hold beneficial interests in companies listed overseas. The Ninth Circuit declined to follow *Parkcentral* because it is "contrary to Section 10(b) and *Morrison* itself." [10]

The U.S. Court of Appeals for the First Circuit relied on *Stoyas* to reach the same conclusion in *U.S. Securities and Exchange Commission v. Morrone* in 2021. [11]

Nevertheless, also in 2021, the Second Circuit took the "predominantly foreign" standard further in *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, to affirm the dismissal of Exchange Act claims arising from a securities transaction into which two Bermudan parties entered in New York.

There, the Second Circuit reiterated that "the presence of a domestic transaction alone cannot satisfy the statute's geographic requirements" if the claims are predominantly foreign. [12] Even though the purported misstatements occurred in New York and the parties partially executed the agreement in New York, the claims were "impermissibly extraterritorial," largely because the parties were not U.S. investors and the transaction was structured to avoid the application of U.S. securities laws. [13]

Questions *Williams v. Binance* Leaves Open When It Comes to Digital Assets

The Second Circuit's decision in *Williams v. Binance* does not explain why the "predominantly foreign" carveout does not bar claims arising from purchases of digital assets on a trading platform provided by a non-U.S. company.

The plaintiffs in this case sued under the federal securities laws, seeking the rescission of token purchases they made on Binance's trading platform. The U.S. District Court for the Southern District of New York dismissed, holding that the plaintiffs had not sufficiently alleged the domestic transaction required by *Morrison*.

In particular, the district court held that the plaintiffs did not plead a domestic transaction by alleging that title to the tokens "passed in whole or in part over [third-party] servers located in California that host Binance's website." [14]

The Second Circuit reversed, finding it plausible that the investor plaintiffs incurred irrevocable liability to purchase the tokens in the U.S. As the Second Circuit saw things, the plaintiffs placed their orders from their homes in the U.S., so it was plausible that they became irrevocably committed to purchase when those orders were matched on the third-party servers located in California. [15]

The Second Circuit cautioned, however, that "it may not always be appropriate" to determine whether a digital asset transaction is domestic or foreign "solely based on the location of the servers the exchange runs on." [16] The court acknowledged its prior holding that a transaction is not domestic simply because the investor places their order from the U.S., [17] but brushed it aside because "here the relevant exchange disclaims any location, foreign or otherwise." [18]

In the Second Circuit's view, the trading platform's lack of nexus to any jurisdiction, foreign or domestic, alleviated the comity considerations that *Morrison* sought to address.

Williams v. Binance illustrates the challenges of applying *Morrison* to nontraditional transactions in nontraditional assets. A pending petition for en banc review highlights some of the questions that will have to be answered in this and future cases.

Why should the federal securities laws apply based solely on the location of third-party servers? As the Ninth Circuit held in February in *Daramola v. Oracle America Inc.*: "Given the ubiquity of server connections to and through the United States, treating such a tenuous connection as sufficient domestic conduct would effectively negate the presumption against extraterritoriality." [19]

Even if in-forum servers are sufficient to make a transaction domestic, how does the Second Circuit's "predominantly foreign" carveout apply to claims where third-party servers represent the only nexus to the U.S.?

Why does the U.S. residence of the plaintiffs make it plausible that their purchases were matched on the U.S.-based servers? What if the plaintiffs had been foreign residents? Would it still have been plausible that their purchases were matched in the U.S.? Why or why not?

Notably, although the named plaintiffs in *Williams v. Binance* allegedly are U.S. residents, the putative class appears to include investors worldwide.

Conclusion

Almost 15 years after *Morrison*, courts still struggle to determine whether a securities transaction is domestic. In the meantime, as *Williams v. Binance* illustrates, the landscape has only become more involved and complicated given the dramatic rise in digital asset transactions.

Absent legislative reform, litigants and courts are left to apply existing law to products, activities and modes of transacting — tokens, mining, staking, blockchains, decentralized finance platforms, smart contracts, digital wallets — that would have been unimaginable to the *Morrison* court in 2010, let alone the New Deal-era drafters of the securities laws.

Time will tell whether courts can adapt and evolve to develop a workable means of applying *Morrison* to modern digital assets, but as of now, the forecast is as unpredictable as the framework.

Andrew Rhys Davies and Jessica Lewis are partners at WilmerHale.

WilmerHale counsel Sonia Sujanani and senior associate Gian Gualco-Nelson contributed to this article.

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[1] *Williams v. Binance* , 96 F.4th 129 (2d Cir. 2024).

[2] *Id.* at 132-34.

[3] *Morrison v. Nat'l Australia Bank Ltd.* , 561 U.S. 247, 270 (2010).

[4] See *id.* at 267.

[5] See *id.* at 260-61, 268. As a result of the 2010 Dodd-Frank Act, a version of the conduct-and-effects test continues to apply in actions brought by the Securities and Exchange Commission or Department of Justice. In such enforcement actions, the antifraud provisions apply when significant steps are taken in the United States to further a violation or conduct outside the United States has a foreseeable substantial effect within the United States. See *SEC v. Scoville* , 913 F.3d 1204, 1215 (10th Cir. 2019).

[6] See *SEC v. Morrone* , 997 F.3d 52, 60 (1st Cir. 2021); *Stoyas v. Toshiba Corp.* , 896 F.3d 933, 949 (9th Cir. 2018); *United States v. Georgiou* , 777 F.3d 125, 137 (3d Cir. 2015); *Absolute Activist Value Master Fund Ltd. v. Ficeto* , 677 F.3d 60, 62 (2d Cir. 2012); *Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada* , 645 F.3d 1307, 1310-11 (11th Cir. 2011);

[7] Absolute Activist Value Master Fund Ltd., 677 F.3d at 62; see also Morrone, 997 F.3d at 60; Georgiou, 777 F.3d at 137; Stoyas, 896 F.3d at 949.

[8] [Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings](#) , 763 F.3d 198, 216 (2d Cir. 2014).

[9] See Morrone, 997 F.3d at 60; Stoyas, 896 F.3d at 950.

[10] Stoyas, 896 F.3d at 950.

[11] Morrone, 997 F.3d 60-61.

[12] [Cavello Bay Reinsurance Ltd. v. Shubin Stein](#) , 986 F.3d 161, 165 (2d Cir. 2021).

[13] Id. at 165.

[14] [Anderson v. Binance](#) , 1:20-cv-2803, 2022 WL 976824, at *4 (S.D.N.Y. Mar. 31, 2022) rev'd sub nom [Williams v. Binance](#) , 96 F.4th 129 (2d Cir. 2024).

[15] Williams, 96 F.4th at 137.

[16] Id. at 139.

[17] See id. at 140.

[18] Id. at 140.

[19] [Daramola v. Oracle Am. Inc.](#) , 92 F.4th 833, 842-43 (9th Cir. 2024).

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III. Judge Accepts 3rd Try To Allege Fraud Against Boeing

By **Daniel Wilson**

Law360 (April 19, 2024, 8:42 PM EDT) -- An investment fund leveling allegations of fraud against Boeing managed to convince an Illinois state court judge on its third attempt that the aircraft maker may have inflated stock values by purportedly covering up safety issues with its 737 Max airplanes.

Ruling from the bench Friday following a hearing on Boeing Co.'s motion to have the case thrown out again after two previous dismissals, Cook County Circuit Court Judge Mary Roberts said that Fred Alger Management LLC had "cleaned up" its complaint with enough "specificity and particularity" to plausibly conclude it had been fraudulently induced to buy Boeing stock both prior to and after deadly crashes involving the 737 Max.

Judge Roberts cited the pleading standard set by the Illinois Supreme Court in its 1996 [Connick v. Suzuki Motor Co.](#) decision, a fraud case involving the sale of allegedly unsafe cars.

"We have a fraud claim ... and in Connick, the court wanted more specificity and more particularity. And they said a successful common law fraud complaint must allege with specificity and particularity facts from which fraud is the necessary or probable inference, including what representations were made, when they were made, who made them and to whom they were made. And I find this newly amended complaint does all of that," Judge Roberts said.

Boeing counsel Michael Slade of Kirkland & Ellis LLP argued that the funds needed to specifically allege false statements of material fact by Boeing, "prove and plead" intent to defraud, and show "actual and justifiable reliance and causation and damages" for their case to move forward.

But that level of scrutiny would effectively require the court to make findings of fact, which would be "more appropriate" for summary judgment after discovery is completed, Judge Roberts said.

Ten Alger funds **sued** Boeing and its leadership in March 2022, alleging the company unlawfully inflated the value of its stock by assuring investors that the 737 Max was flight-safe and market-ready even though it purportedly knew of significant defects in the jet's Maneuvering Characteristics Augmentation System, or MCAS, that caused the aircraft to crash.

After the 737 Max — the fourth-generation version of the 737 passenger jet — was grounded by authorities and airlines across the world in the wake of a deadly Lion Air crash in October 2018 and another deadly Ethiopian Airlines crash in March 2019, Boeing continually misrepresented the anticipated timeline for fixing the MCAS issue and getting the plane back in the air, the funds argued. Boeing's misrepresentations cost them millions of dollars, they said.

Slade said Friday that although there were several pending cases alleging fraud by Boeing over the 737 Max, the funds' case served as an "outlier," accusing the company of making misrepresentations about the aircraft not only after the deadly crashes, but in the year leading up to them when the funds had already bought most of their stock in the company.

In doing so, the Alger funds had cited "boilerplate" statements made at the end of Boeing's quarterly financial reports, in which the company's CEO or chief financial officer certifies that, based on their knowledge, the reports contain only true facts and that the company has adequate "disclosure," or accounting, controls, Slade said.

But nothing in those statements specifically pertained to the 737 Max or gave any indication that Boeing's leadership intentionally made false statements, Slade said.

Also, other statements made by Boeing leaders prior to the crashes that had been cited by the funds as evidence of fraud, such as comments about the plane "having high efficiency or performing well in the field," were "puffery," with "no knowledge and intent" of any falsehood in those statements, according to Slade.

"Nothing in the complaint alleges that any of the individual speakers could predict the future and had any idea about what was to come," Slade said.

Slade also argued that allegations that the funds had been misled into buying more Boeing stock at an inflated price after the crashes by Boeing downplaying the extent of problems with the 737 Max were undercut by the fact that they were a "massive net seller" of stock during that period.

Michael Hampson of Rolnick Kramer Sadighi LLP, representing the funds, said that the statements made by Boeing's leaders ahead of the 737 Max crashes had suggested the plane was "going to change the trajectory of the company," giving it a competitive advantage over rival Airbus.

What those statements did not say was that Boeing had lied to the Federal Aviation Administration to get certification for the plane and that its leadership knew or should have known about the problems with the plane, which had been raised internally by a whistleblower, according to Hampson.

"If our clients had known that at the time, obviously, that would have been a major fact," he said. "But they believed Boeing at that time, that the plane had been properly certified, that it was safe, and they believed the statements that this was going to be a game changer for the company."

Hampson also pushed back on Slade's "net seller" argument, saying the funds could independently pursue claims based on additional stock purchases made after initial issues with the 737 Max had been discovered, saying Boeing "continued to lie" at that point about issues such as how quickly the problems with the plane would be fixed.

"I think what he's saying ... is that the fact that we sold [stock] somehow makes our reliance on the statements when we made the additional purchases unreasonable," Hampson said. "That is a quintessential fact issue for the jury, or at least something that should be judged by Your Honor on a full discovery record at summary judgment."

The Alger funds are represented by Michael J. Hampson and Nicole T. Castiglione of Rolnick Kramer Sadighi LLP.

Boeing is represented by Michael B. Slade and Joseph C. Schroeder of Kirkland & Ellis LLP.

The case is Alger Capital Appreciation Fund et al. v. The Boeing Co. et al., case number 2022-L-002342, in the Circuit Court of Cook County, Illinois, Law Division.

--Additional reporting by Lauraann Wood. Editing by Andrew Cohen.



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Edelson Pitches 'Better Way' To Pick Leads In Privacy Suits

By Allison Grande

Law360 (April 19, 2024, 11:15 PM EDT) -- Plaintiffs in proposed privacy class actions should be given more say in who's picked as class counsel, in order to crack down on the "anemic settlements" that have resulted from the ineffective "old way of litigating" these matters, law firm Edelson PC argued in vying for lead counsel in a dispute over a data breach at genetics testing provider 23andMe.

In a motion lodged Thursday in California federal court, attorneys from Edelson contended that the "old way of litigating privacy class actions hasn't been working" and instead proposed "a better way" of handling these matters that the plaintiffs' firm claimed would reduce the frequent occurrence of litigants reaching "anemic settlements" that "primarily benefit the lawyers" by focusing on elements such as credit monitoring and cy pres payments rather than on delivering substantive monetary relief to class members.

The firm asserted that to reverse this tide, the court should start by ensuring that it's "appointing class counsel that will steer the case away from that path." To accomplish that, courts need to take a hard look at the dual role they're playing in acting as an impartial arbitrator of the dispute while simultaneously deciding who should be directing the plaintiffs' strategy. It's a process that often leads to judges picking slates of leadership that the parties have mutually agreed on rather than conducting a "subjective, ambiguous inquiry," the firm said.

"How, then, can a court take an objective approach to deciding what's in the best interests of its temporary, millions-strong client?" the law firm said. "A burgeoning area of scholarship suggests a surprising but commonsense solution: perhaps we should just ask them."

In its motion, which asks the court to appoint Edelson's Rafey S. Balabanian as interim lead counsel in consolidated litigation accusing 23andMe of failing to take adequate measures to prevent and mitigate the fallout of a 2023 data breach that compromised roughly 7 million customers' personal and genetic information, the firm said that it had already started this novel work.

Edelson, which is representing David Melvin and an individual identified as J.L. **in one** of nearly 40 actions being pressed by more than four dozen plaintiffs' firms over the breach, told the court that it had retained University of Miami professors Alissa del Riego and Joseph Avery to "survey class members on the questions relevant for lead: specifically, what strategies they'd like their counsel to adopt and what characteristics the lead firm should have."

Described in the brief as "authors of the pioneering work in this area," del Riego and Avery are leading researchers on class member preferences of class counsel and determining adequacy of counsel.

The results, which were based on feedback that the professors were able to gather from nearly 400 independent putative class members, produced several "clear" takeaways, including that class members "overwhelmingly" prefer a smaller and more efficient lead team that will focus on rigorously litigating the case rather than reaching an early settlement.

The surveyed class members also indicated that they want lead counsel that's financially stable, has "significant experience" in handling data privacy and genetic privacy matters and has a proven "track record not only of securing significant monetary relief, but also of getting that money to class members," according to the motion.

"In many ways, the fact that the class values these things is not a surprise," the firm said. "But beyond providing objective support for weighing these factors in the lead determination, the survey also reveals that the class put surprising weight on things that firms rarely want to discuss: in addition to financial viability, a firm's ability to attract top talent and commitment to actually communicating with the class were highly rated."

The respondents also expressed concerns about the cost of their representation, with nearly half rating commitment to cap fee request at 20% as "highly important," the firm argued.

In asserting that Balabanian and his team at Edelson "fit what the class wants," the firm pointed to its thorough prelitigation investigation into the data security breach at 23andMe and the unique harms presented to class members by the disclosure of their genetic data, as well as its prior work on both genetic privacy matters and in securing groundbreaking settlements, including **a \$650 million deal** that Facebook reached with Illinois users over alleged biometric privacy violations that provided each class member with at least \$345 and garnered a 22% claims rate that won praise from the presiding judge.

The firm also noted its efforts to spearhead "reform within the plaintiffs' bar, on everything from **calling out criminality** to pointing out the subtle ways in which lawyers routinely put themselves first."

"We will always cooperate — with our fellow plaintiffs' counsel and even defendants — but will never capitulate to a result that hurts our clients," the firm asserted. "Instead, we will do what class action clients demonstrably want us to do: be creative, vigorous, and worthy adversaries to the institutional players we litigate against."

Also in response to surveyed class members' concerns, the firm committed to taking a reduced fee request, which would be tied to the conditions that it won't seek more than the claims rate in any settlement and that it won't ask for more than the actual monetary relief that the class obtains in a deal, according to the motion.

Balabanian is vying to lead the plaintiffs in not only the case that his firm filed on behalf of the Melvin plaintiffs in January, but also those in the 38 other proposed class actions that have been lodged in California and Illinois since 23andMe **disclosed the data breach** in late 2023.

The U.S. Judicial Panel on Multidistrict Litigation earlier this month consolidated these cases before Judge Edward M. Chen in the Northern District of California, finding that the venue was appropriate since most of the cases are pending in that district, 23andMe is headquartered there and much of the relevant evidence likely will be located there.

"We are confident that Judge Chen will steer this matter on an efficient and prudent course," the panel wrote.

Aside from Edelson, at least one other competing bid has already been made for lead counsel. In a motion filed on the MDL docket Thursday, a plaintiff in another related matter, Michele Bacus, argued that her attorney Hassan A. Zavareei of Tycko & Zavareei LLP as well as Cari Campen Laufenberg of Keller Rohrbach LLP, who also filed suit over the breach, should be appointed as interim co-lead counsel in the consolidated litigation.

While not advancing the radical method of surveying users being pressed by the Edelson team, Bacus contended that her request, which she said is supported by plaintiffs in five other cases, should be granted because Zavareei and his team have "extensive substantive knowledge" in complex class actions and have "recovered hundreds of millions of dollars on behalf of consumers in complex class action litigation across the country and has been appointed to leadership in numerous class action cases, including many data breach cases."

Bacus added that it was vital that Judge Chen appoint interim leadership at this juncture, and before any potential settlement is considered, "as it will leave no doubt as to who is accountable to and speaks on behalf of the putative classes."

"Appointing leadership will ensure that all plaintiffs speak with one voice and that all plaintiffs' and proposed class members' interests are protected, and it will make any potential settlement negotiations more transparent and more equitable," Bacus argued.

Judge Chen is scheduled to consider the interim lead counsel bids during a June 13 hearing, according to the latest motions.

The Melvin plaintiffs are represented by Rafey S. Balabanian, Jay Edelson, Ari Scharg, J. Eli Wade-Scott, Michael Ovca, Emily Penkowski Perez and Hannah P. Hilligoss of Edelson PC.

Bacus is represented by Hassan A. Zavareei, Glenn E. Chappell, David W. Lawler, Leora N. Friedman, Sabita J. Soneji and Em F. Cooper of Tycko & Zavareei LLP.

23andMe is represented by Ian C. Ballon, Rebekah S. Guyon and Kristin O'Carroll of Greenberg Traurig LLP.

The Edelson case is Melvin et al. v. 23andMe Inc., case number 3:24-cv-00487, in the U.S. District Court for the Northern District of California.

The MDL is In re: 23andMe Inc. Customer Data Security Breach Litigation, case number 24-md-03098, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.

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Trump Media CEO Fears Illegal Short Selling Is Harming Stock

By Tom Zanki

Law360 (April 19, 2024, 8:11 PM EDT) -- The chief executive of the company that owns Donald Trump's Truth Social platform wants Nasdaq's help in determining whether manipulation stemming from illegal short selling is harming the company's stock price, according to a securities filing on Friday.

Trump Media Technology Group Corp. CEO Devin Nunes requested that Nasdaq CEO Athena Friedman look into whether "potential market manipulation" caused by so-called naked short selling is causing volatility in shares of Trump Media, which have been on a wild ride since going public following the **recent merger** of Truth Social's parent company with a special-purpose acquisition company. Trump Media shares trade under the symbol DJT on the Nasdaq exchange.

Naked short selling is generally illegal under the U.S. Securities and Exchange Commission's Regulation SHO. In his letter, Nunes notes that DJT shares are on Nasdaq's Reg SHO Threshold List, which he said could indicate "unlawful trading activity."

"This is particularly troubling given that 'naked' short selling often entails sophisticated market participants profiting at the expense of retail investors," Nunes said in his letter dated Thursday and released through an SEC filing on Friday.

Short-selling is a legal practice whereby traders borrow stock from a broker and sell those shares, betting on a price decline. Such investors hope to later repurchase those shares at a lower price and return them to their original owner after pocketing a profit.

Naked short selling, by comparison, is a largely illegal practice of short selling shares that have not been determined to exist or that a trader has not yet secured. Regulation SHO mandates that broker-dealers have reasonable grounds to say that shares will be available for delivery before arranging such transactions. In a statement on Friday, Nasdaq said it aggressively monitors signs of naked short selling without referring to recent volatility surrounding Trump Media shares.

"Nasdaq is committed to the principles of liquidity, transparency, and integrity in all our markets," a Nasdaq spokesperson said in a statement. "We have long been an advocate of transparency in short selling and have been an active supporter of the SEC's rules and enforcement efforts designed to monitor and prohibit naked short selling."

The SEC and the Financial Industry Regulatory Authority, the brokerage industry's self-regulatory arm, are responsible for enforcing rules against naked short selling. SEC and FINRA representatives declined to comment on the matter.

Nunes' letter cites recent news reports that DJT stock was the most expensive U.S. stock to short as of April 3, which he argues indicates that brokers have a "significant financial incentive to lend non-existent shares."

According to Nunes, Trump Media's data indicate that four trading firms have been responsible for more than 60% of the volume of DJT shares traded: Citadel Securities, VIRTU Americas, G1 Execution Services, and Jane Street Capital. Nunes, a former Republican U.S. representative and an ally of Trump's, did not accuse any of the firms of manipulation but called on Friedman to examine recent trading.

"Please advise what steps you can take to foster transparency and compliance by ensuring market makers are adhering to Reg SHO, requiring brokers to disclose their 'Net Short' positions, and preventing the lending of shares that do not exist," Nunes wrote in his letter to Friedman.

Citadel Securities, which has a big market presence as it executes trades on behalf of broker-dealers who serve retail investors, blasted Nunes' query.

"Devin Nunes is the proverbial loser who tries to blame 'naked short selling' for his falling stock price," a Citadel Securities spokesperson said in a statement. "Nunes is exactly the type of person Donald Trump would have fired on 'The Apprentice.' If he worked for Citadel Securities, we would fire him, as ability and integrity are at the center of everything we do."

Messages to Virtu and Jane Street were not immediately returned on Friday. Contact information for G1 Execution Services was not immediately available.

In response to Citadel Securities' statement, Trump Media fired back.

"Citadel Securities, a corporate behemoth that has been fined and censured for an incredibly wide range of offenses including issues related to naked short selling, and is world famous for screwing over everyday retail investors at the behest of other corporations, is the last company on earth that should lecture anyone on 'integrity,'" Trump Media said in a statement.

This is not the first time Trump Media has sounded alarms on alleged abuse of short selling. In a "frequently asked questions" section on the company's website updated earlier this week, Trump Media advised investors how to opt out of securities lending programs operated by their broker and thus prevent their shares from being shorted.

Trump Media shares rose nearly 10% to close at \$36.38 on Friday, continuing a roller-coaster for the stock since it **began trading** on March 26 after the company merged with Digital World Acquisition Corp., the SPAC that acquired Trump Media and took it public. Shares of Trump Media have fallen by about half since closing at \$68.50 on March 27.

Sarasota, Florida-based Trump Media is unprofitable and has warned in previous filings that it may never generate sufficient operating revenue to turn consistent profits. Trump owns a majority stake of about 58% of shares in the company, whose chief product is the Truth Social platform.

Trump is restricted from selling shares under a lockup provision in effect for six months after the company's listing date. Trump's stake of 78.75 million shares was worth nearly \$2.9 billion based on Friday's trading, though Trump can earn additional shares if certain stock performance targets are met.

--Editing by Peter Rozovsky.



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Flint Class Urges Approval Of \$25M Water Firm Settlement

By **Mike Curley**

Law360 (April 19, 2024, 8:09 PM EDT) -- A proposed class of 45,000 Flint, Michigan, property owners, businesses and adult residents on Friday urged a Michigan federal court to give the go-ahead to a \$25 million settlement with Veolia North America, the last remaining engineering defendant in sprawling litigation over the city's water crisis.

In a **memorandum** filed in support of the motion for preliminary approval, the proposed class said the deal had been reached through arm's-length mediation by counsel well-versed in the case after eight years of litigation.

The proposed class added that while they are confident they would succeed at court, they're not certain, and the settlement is fair and preferable to the potential pitfalls of continuing the litigation, such as adverse rulings and extended appeals of favorable ones.

"This settlement is an important step to bringing some closure to the Flint community," Ted Leopold of Cohen Milstein Sellers & Toll PLLC, representing the class, said in a statement Friday. "We hope the court will swiftly approve the unopposed motion for settlement against VNA, so the community can put the Flint water crisis behind them and move forward and rebuild their lives."

According to the memorandum, the deal would see \$25 million put into the existing court-monitored qualified settlement fund set up by previous settlements, plus payments of \$1,500 per individual minor claimant represented by class counsel, not to exceed \$1.5 million.

Class members can make claims through the same process as previous settlements, according to the memorandum, and those class members who have already completed a registration and claim form will not have to do anything further.

After attorney fees are subtracted — the memorandum does not state how much class counsel intend to request — the remainder will be divided among a subclass of adults who were exposed to the tainted water, a subclass of business owners who claim economic losses as a result of the contamination, and a subclass of property owners who claim damage to their property.

According to the memorandum, 48% of the funds will go to the adult exposure subclass, 50% to the business economic loss subclass, and 2% to the property damage subclass.

"This settlement against Veolia is long overdue," Steve Morrissey, a partner at Susman Godfrey LLP, also representing the proposed class, said in a statement Friday. "While we continue to fight for justice before the courts for the Flint community, I'm glad this latest case against the last water engineering firm involved in the water crisis is coming to an end."

Leopold added in an email Friday, "We look forward to moving the approval process along as quickly as we can in order to help bring closure to this sad chapter in the life of the Flint community."

Representatives for Veolia could not immediately be reached for comment Friday.

Veolia and the proposed class first announced the **settlement** in February, less than two weeks before a trial was set to begin in Ann Arbor.

The class alleged in 2016 that Veolia failed to identify corroding pipes and warn government officials, and that had Veolia recommended remediation, the contamination could have ended sooner. The residents have said Veolia had a **duty to warn** users of the water when it voluntarily took on an investigation of Flint's water.

According to attorneys for the class, the settlement brings the total amount of settlements reached on behalf of Flint plaintiffs to more than \$655 million, including the landmark **\$625 million settlement** against the state of Michigan in 2021. The class also **settled** with private engineering firm Lockwood Andrews & Newnam in October for \$8 million, and has sought final approval of that settlement in January.

The class is represented by Cohen Milstein Sellers & Toll PLLC, Pitt McGehee Palmer Bonanni & Rivers PC, Weitz & Luxenberg PC, Susman Godfrey LLP, Motley Rice LLC, the Law Offices of Teresa A. Bingman PLLC, Bronstein Gewirtz & Grossman LLC, the Law Offices of Deborah A. LaBelle, the NAACP, Goodman Hurwitz & James PC, Trachelle C. Young & Associates PLLC, Dedendum Group LLC, McKeen & Associates PC, the Law Office of Cirilo Martinez PLLC, Shea Aiello PLLC, Cynthia M. Lindsey & Associates PLLC, McAlpine PC, and the Abood Law Firm.

Veolia is represented by Michael A. Olsen of Mayer Brown LLP, and James M. Campbell and Alaina Devine of Campbell Conroy & O'Neil PC.

The case is In re: Flint Water Cases, case number 5:16-cv-10444, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Cara Salvatore, Elliot Weld, Peter McGuire, Carolyn Muyskens, Hailey Konnath, Madeline Lyskawa and Danielle Ferguson. Editing by Adam LoBelia.

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Timing Of Cigna Workers' Relief Bid Perplexes Conn. Judge

By **Brian Steele**

Law360 (April 19, 2024, 9:44 PM EDT) -- A Connecticut federal judge wondered Friday if a class of more than 25,000 Cigna workers waited too long to renew a request for an accounting tied to the millions of dollars in underpaid benefits the workers won nearly a decade ago, questioning if the plaintiffs had a right at this stage in the 23-year-old matter to again challenge the company's calculations.

Amid oral argument in Hartford, U.S. District Judge Sarala V. Nagala — the third judge to preside over the case since it was first filed in 2001 — said the workers were objecting to an offset they've known about since 2018, which Cigna has used when calculating certain annuities to credit amounts that it had already paid to retirees.

"The question in my mind is, has the ship sailed on this argument?" Judge Nagala asked.

The parties disagreed about the proper amount of the offset, with the company arguing that adopting the plaintiffs' more restrictive position would result in double payments of hundreds of thousands of dollars to many retirees. Class counsel Stephen R. Bruce said the offset is larger than what prior court orders allowed.

The class' June 2023 motion cited "new actuarial valuation reports, notices, illustrations and letters that were unavailable to class counsel when this court denied plaintiffs' motion for an accounting in August 2020."

The relief is calculated as a combination of the annuities due to class members under Cigna's pre-1998 defined benefit plan, known in court records as Part A, and amounts due under the newer cash benefit plan, or Part B. The company's conversion from the Part A plan to Part B formed the basis of the lawsuit under the Employee Retirement Income Security Act, which was brought by workers who said the switch provided fewer benefits and the company's disclosures were inadequate.

Bruce said Cigna showed the proper offset in class notices sent in January 2019, but claimed a larger offset in notices sent in September 2019. He said class counsel "repeatedly" informed Cigna that they did not agree with its calculations.

"It's all ad hoc and with no consultation with the court or class counsel," Bruce said. "That's not how things are supposed to be done."

Arguing for Cigna, A. Klair Fitzpatrick of Morgan Lewis & Bockius LLP said the notices showed the recipients mere estimates of their expected payouts if they chose a lump sum versus an annuity payment.

"The notices they've been challenging have been before the court. The court accepted them," Fitzpatrick said.

The long-running ERISA suit against Cigna Corp. and Cigna Pension Plan has been the subject of numerous federal appellate court rulings, including a unanimous **2011 decision** by the U.S. Supreme Court.

The class won a bench trial before U.S. District Judge Mark R. Kravitz in 2008, but the high court

vacated and remanded the ruling that required Cigna to recalculate benefits, holding that the plaintiffs had to show actual harm instead of likely harm.

In December 2012, U.S. District Judge Janet Bond Arterton used the equitable remedies section of ERISA to order the same plan reforms to benefit the employees. She stayed her decision to provide an opportunity for appeal; in 2014, the Second Circuit affirmed that Cigna needed to reform the plan and the remedy combining amounts due under Part A and Part B went into effect the following year. The parties have argued over the methodology ever since.

The Second Circuit denied challenges to Cigna's methodology in November 2022 as **time-barred** and agreed with the lower court's denial of a request for sanctions and an equitable accounting.

The plaintiffs renewed their accounting motion in June 2023, arguing Cigna is trying to decrease the amount of relief to the class by using interest rates that the district court deemed "inappropriate" in a January 2017 order. The renewed motion was the main subject of Friday's oral argument.

"An equitable accounting or post-judgment discovery will allow this court to address Cigna's unnoticed restrictions on the [plaintiff Janice C.] Amara relief and ensure that this is remedied and that there are no more unapproved restrictions on Amara relief taken by Cigna without notice to class counsel or approval by this court," the motion said.

Fitzpatrick told Judge Nagala that Cigna's methodology complies with prior court orders that "thoughtfully and thoroughly balanced the equities" and said the case should be closed after 23 years and eight total plaintiffs' motions for an accounting.

"The idea that we should change it now doesn't make sense to us and would be very administratively inconvenient," Fitzpatrick said.

The class is represented by Stephen R. Bruce of Stephen R. Bruce Law Offices and Christopher J. Wright of HWG LLP.

Cigna is represented by Stephanie R. Reiss, A. Klair Fitzpatrick and Jeremy P. Blumenfeld of Morgan Lewis & Bockius LLP and James A. Wade of Robinson & Cole LLP.

The case is Amara v. CIGNA Corp et al., case number 3:01-cv-02361, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Ben James and Grace Elletson. Editing by Janice Carter Brown.