

UnitedHealth Sued by Investor Over Antitrust Firewall, DOJ Probe

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XAV0FC5C000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XAV0FC5C000000)

Class Action

UnitedHealth Group Inc. headquarters stands in Minnetonka, Minnesota, U.S., on Wednesday, March 9, 2016. UnitedHealth Group Inc.'s OptumRx unit struck an agreement to ease customers' access to drugs through Walgreens Boots Alliance Inc.'s drugstores, a move to help the business compete with rival pharmacy benefit managers.

Photographer: Mike Bradley/Bloomberg via Getty Images

- **COURT:** D. Minn.
- **TRACK DOCKET:** 0:24-cv-01743

UnitedHealth Group Inc. failed to avoid antitrust problems in its acquisition of Change Healthcare Inc. by adequately separating its business units, prompting a government investigation and a stock drop, an investor says in a proposed class action.

Before the public learned of the US Department of Justice probe in February, the company's chairman sold more than \$105 million worth of stock and its CEO sold more than \$15 million worth, a Hollywood, Fla., pension fund says in the proposed class action, filed Tuesday in the US District Court for the District of Minnesota.

After the investigation was made public Feb. 27 of this year, UnitedHealth's stock price declined by \$27 over two days, from a closing price of \$525 on Feb. 26 to \$498 at closing on Feb. 28.

The deal went through after a September 2022 US Department of Justice court challenge over Change's integration into UnitedHealth's existing Optum business for insurance-related services, which the government said would create antitrust problems with the UnitedHealthcare insurance unit, according to the complaint. UnitedHealth's creation of a firewall persuaded the court to allow the merger, the investment fund says.

But "UnitedHealth never established proper firewalls between Optum and UnitedHealthcare as required by its own policy," it says.

Democratic lawmakers recently asked the Securities and Exchange Commission to investigate the timing of insiders' stock sales.

The proposed class of those who acquired UnitedHealth stock between March 14, 2022, and Feb. 27, 2024, inclusive, consists of hundreds or thousands of members, according to the complaint.

The investment fund seeks compensatory damages and injunctive relief on its securities fraud claims.

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

Lockridge Grindal Nauen PLLP, Bernstein Litowitz Berger & Grossmann LLP, and Klausner, Kaufman, Jensen & Levinson PA represent the pension fund.

The case is City of Hollywood Firefighters' Pension Fund v. UnitedHealth Group Inc. , D. Minn., No. 0:24-cv-01743, complaint 5/14/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

[Browse More Stories in Class Action](#)

© 2024 Bloomberg Industry Group, Inc.

All Rights Reserved

Opendoor Investors Can Pursue Claim Over Home-Flipping Algorithm

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X26TLD7C000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X26TLD7C000000)

Litigation

May 15, 2024, 9:20 AM PDT



Matthew Bultman

Reporter

- Investors can proceed with claim over alleged misstatement
- Lawsuit accuses Opendoor of misportraying algorithm

Opendoor Technologies Inc. investors convinced a federal judge to revive part of their lawsuit alleging the home-buying company misled them about its pricing algorithm.

Judge Michael Liburdi in the US District Court for the District of Arizona on Tuesday agreed to reconsider his February decision dismissing the lawsuit. Investors can move ahead with a claim that Opendoor made a misleading statement in public offering documents, Liburdi found on second look.

At issue was the judge's earlier finding that Opendoor showed a decline in its stock price was caused by factors other than the alleged misstatement. The statement concerns the ability of Opendoor's algorithm to "dynamically adjust" to market indicators and react to real-time conditions.

But Liburdi said Tuesday that issues around the cause of the price decline were better left for later in the case.

"The issue is typically reserved for summary judgment, except for when negative causation is apparent from the face of the complaint," Liburdi said. The judge said he was "unable to find negative causation from the face of the consolidated amended complaint."

Opendoor went public in 2020 by merging with a blank-check company. The lawsuit, filed in 2022, accused Opendoor of inaccurately portraying its algorithm in its offering documents and other public statements.

The complaint cited a Bloomberg report that Opendoor lost money on 42% of its flipped homes in August of that year. Opendoor's stock price dipped to \$3.56 following the report, the complaint said. That was down from its first post-merger closing price of \$31.25 per share, the complaint said.

Liburdi gave investors a chance to amend their complaint in his February decision, which dismissed claims not impacted by Tuesday's order. The amended complaint is due before the end of the month.

Labaton Keller Sucharow LLP is lead counsel for the investors. Shearman & Sterling and Lewis Roca Rothgerber Christie LLP represent Opendoor.

The case is In re Opendoor Technologies Inc. Securities Litigation , D. Ariz., No. 22-cv-01717, 5/14/24 .

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

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

[Browse More Stories in Litigation](#)

© 2024 Bloomberg Industry Group, Inc.

All Rights Reserved

Tesla Denies Musk Bullied Scholar Ahead of \$56 Billion Pay Vote

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEM98MIO000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEM98MIO000000)

- Retired professor resigned from firm over ‘appalling’ threats
- Conflict is real, proposed court filing irrelevant, Tesla says

Tesla Inc. is denying that Elon Musk tried to threaten and bully a scholar out of speaking against a plan to have shareholders validate the \$56 billion CEO pay package struck down by a judge.

The automaker filed a letter with Delaware’s Chancery Court saying it opposes the request by Charles Elson to file a legal brief about the planned investor vote solely because the proposed filing “has nothing at all to do with any question or topic before this court.” It looks more like an effort to influence the vote itself, the company said in its letter Tuesday to Chancellor Kathaleen St. J. McCormick, the court’s chief judge.

“Tesla categorically rejects the amicus motion’s suggestion that it is ‘appalling’ or ‘bullying’ to raise a potential conflict issue with outside counsel,” the company said. “The false and irresponsible suggestion that Mr. Musk individually had any role in that conversation confirms that the amicus motion targets some audience other than this court.”

The shareholder vote, set for June 13, reflects an attempt at a redo after McCormick’s 200-page ruling in January assailed the original compensation-setting process, which Musk described in a deposition as “me negotiating against myself.” The decision relied heavily on the billionaire’s status as a ‘superstar CEO’ with wide-ranging influence over Tesla, even though he owns less than a quarter of the company.

Read More: Musk’s \$55 Billion Loss Threatens Soaring Pay for Superstar CEOs

The company’s letter came a day after the retired University of Delaware law professor said in a May 13 court filing that Musk tried to block him from submitting a friend-of-the-court brief by having Tesla threaten to fire Holland & Knight LLP—a law firm that represents Tesla on unrelated matters—over its 30-year consulting relationship with Elson.

The conflict-of-interest claim was clearly a pretext for making the “appalling” threats, given that the ethical rules in question are irrelevant to neutral experts seeking to weigh in on behalf of neither side, according to Elson. He said he had left the firm earlier that day to uphold “the important principle of academic freedom.”

Tesla countered in its letter Tuesday that Elson's proposed submission—which says shareholders can't retroactively ratify a pay package tainted by fiduciary breaches—fails “to address actual issues in this case.” The professor's brief barely mentions the only remaining live issue, according to Tesla: how much the company should be forced to pay the shareholder attorneys who successfully clawed back Musk's 11-figure compensation.

They have requested more than \$5 billion in legal fees.

Tesla is represented by Richards, Layton & Finger PA; Morris, Nichols, Arsht & Tunnell LLP; DLA Piper LLP (US); Ashby & Geddes PA; and Sullivan & Cromwell LLP. Elson is represented by Grant & Eisenhofer PA and Equity Litigation Group LLP. Musk and other board members are represented by Ross Aronstam & Moritz LLP and Cravath, Swaine & Moore LLP. The pension fund leading the lawsuit is represented by Bernstein Litowitz Berger & Grossmann LLP, Andrews & Springer LLC, and Friedman Oster & Tejtell PLLC.

The case is *Tornetta v. Musk*, Del. Ch., No. 2018-0408, letter filed 5/14/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Lawsuit claiming Uber hid Dutch tax haven is dismissed by US judge

 [reuters.com/legal/lawsuit-claiming-uber-hid-dutch-tax-haven-is-dismissed-by-us-judge-2024-05-15](https://www.reuters.com/legal/lawsuit-claiming-uber-hid-dutch-tax-haven-is-dismissed-by-us-judge-2024-05-15)

Jonathan Stempel

By Jonathan Stempel

May 15, 2024 9:23 AM PDT Updated an hour ago

The logo of Uber is seen at a temporary showroom at the Promenade road during the World Economic Forum (WEF) 2023, in the Alpine resort of Davos, Switzerland, January 20, 2023. REUTERS/Arnd Wiegmann/File Photo Rights 

May 15 (Reuters) - A U.S. judge has dismissed a proposed class action lawsuit accusing Uber Technologies (UBER.N) , opens new tab of defrauding shareholders by concealing its use of its Netherlands subsidiary as a tax haven.

The case stemmed from the July 2022 release of the Uber Files, based on former lobbyist Mark MacGann's whistleblower claims that Uber broke laws and secretly lobbied politicians to expand its ride-sharing operations into new markets.

Uber's share price fell 5.1% on the next trading day, wiping out more than \$2.2 billion of market value.

But in a Tuesday decision, U.S. District Judge Rita Lin in San Francisco found no proof Uber made false statements, and said Chief Executive Dara Khosrowshahi acknowledged that taxes were one reason Uber based its European operations in Amsterdam.

Shareholders said Uber should have disclosed that former Chief Executive Travis Kalanick had in 2015, two years before his ouster, authorized a "kill switch" to block European investigators from reviewing company finances.

They also said Khosrowshahi falsely claimed during Uber's May 2020 annual shareholder meeting that the company based its European operations in Amsterdam for personnel reasons.

Lin, however, noted that Khosrowshahi referred multiple times during the annual meeting to the tax benefits.

"Considered in context, Khosrowshahi's statement thus did not affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists," Lin wrote.

The video player is currently playing an ad.

Lawyers for Uber shareholders did not immediately respond to requests for comment on Wednesday. Uber and its lawyers did not immediately respond to similar requests.

The case is *Cao v Uber Technologies Inc et al*, U.S. District Court, Northern District of California, No. 22-04688.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Jonathan Stempel in New York

Read Next / Editor's Picks

Bank accused of helping FTX fraud scheme fights to dismiss class complaint

DJ [dailyjournal.com/articles/378771-bank-accused-of-helping-ftx-fraud-scheme-fights-to-dismiss-class-complaint](https://www.dailyjournal.com/articles/378771-bank-accused-of-helping-ftx-fraud-scheme-fights-to-dismiss-class-complaint)

New York Times News Service

Counsel representing a putative class of former customers of the bankrupt cryptocurrency exchange FTX argued a San Diego federal judge did not err in her decision to keep alive claims that Silvergate Bank helped FTX founder Sam Bankman-Fried execute a multi-billion dollar fraud scheme.

In a motion to reconsider the ruling, or alternately certify interlocutory review, the bank's counsel argued U.S. District Judge Ruth Bermudez Montenegro erred in her negligence law analysis that denied the defense's bid to drop the suit.

The plaintiffs' counsel at Fitzgerald Monroe Flynn PC opposed the bank's motion in a court filing Tuesday. "Unhappy with the outcome, defendants ... now ask the court for the 'extraordinary' remedy of reconsideration, or alternatively, the 'exceptional' remedy of interlocutory appeal. Silvergate, however, provides no salient reason the court should revisit its well-reasoned decision," the opposition stated.

Silvergate's reconsideration motion is scheduled to be reviewed without oral argument by Montenegro.

The action against the now-defunct bank and FTX's former banking partner was filed last year. The plaintiffs claimed "a significant portion" of their money was lost because Silvergate and its CEO, Alan Lane, accepted customer deposits into non-FTX accounts that were controlled by Bankman-Fried, who was found to have misappropriated funds of over \$8 billion. *Bhatia et al. v. Silvergate Bank et al.*, 3:23-cv-01406 (S.D. Cal., filed Aug. 2, 2023).

On March 28, Bankman-Fried was sentenced by a New York federal judge to 25 years in prison for his orchestration of a fraud scheme carried out against FTX customers, investors and lenders. He was also ordered to pay \$11 billion in forfeiture. *U.S. v. Bankman-Fried*, 1:22-cr-00673 (S.D. New York, filed Dec. 9, 2022).

Silvergate's attorneys at Sheppard Mullin Richter & Hampton LLP argued the action against the bank should be dropped because it did not owe a direct duty to FTX customers and the plaintiffs only made conclusory allegations with no factual support. However, Montenegro rejected Silvergate's dismissal arguments in March and allowed the "adequately alleged" claims against the bank to move forward.

In April, Silvergate's counsel urged the judge to reconsider her ruling and argued she erred in her analysis of *The Law Firm of Fox & Fox v. Chase Bank, N.A.*, 95 Cal. App. 5th 182 (2023) and *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958) to determine whether the plaintiffs' negligence claim met the requirements for imposing a duty to protect.

"This court misreads *Fox & Fox* as indicative of a willingness by the California Court of Appeal to apply the *Biakanja* factors to extend a bank's duty of care to non-customers beyond that traditionally recognized," the defense's motion stated. "Although *Fox & Fox* applied the *Biakanja* factors, that case did not concern any alleged failure by a bank to police deposit account activity or protect non-consumer from economic losses caused by a third party's wrongdoing."

In its opposition filing, the plaintiff's counsel argued Silvergate "mischaracterized" the court's ruling. "As the decision in *Fox & Fox* illustrates, banks may well owe non-customers duties of care that differ from the monitoring duty in [*Sun 'n Sand Inc. v. United Cal. Bank*]. Silvergate acknowledges this distinction ... But it fails to recognize the distinction's fatal implications for its motion."

In the complaint, the plaintiffs argued Silvergate's technology - a system the bank created that sped up cryptocurrency transactions instantaneously and called Silvergate Exchange Network or SEN - was crucial to FTX's existence and the bank processed transfers that diverted money from FTX accounts to its sister cryptocurrency exchange, Alameda Research, also founded by Bankman-Fried.

"Here, plaintiffs alleged Silvergate and Lane breached their duty to plaintiffs in several different ways, including by designing and operating the SEN, which lacked the control procedures required. This was the basis of the court's finding a duty of care," the plaintiffs' argued in its opposition filing.

#378771

Devon Belcher

Daily Journal Staff Writer
devon_belcher@dailyjournal.com

FTX law firm Sullivan & Cromwell says crypto customers' lawsuit is 'innuendo masquerading as facts'

 [reuters.com/legal/litigation/column-ftx-law-firm-sullivan-cromwell-says-crypto-customers-lawsuit-is-innuendo-2024-05-14](https://www.reuters.com/legal/litigation/column-ftx-law-firm-sullivan-cromwell-says-crypto-customers-lawsuit-is-innuendo-2024-05-14)

Alison Frankel

Sullivan Cromwell law firm in New York City, U.S., July 27, 2022. REUTERS/David Dee Delgado Purchase Licensing Rights , opens new tab

May 14 (Reuters) - U.S. law firm Sullivan & Cromwell asked , opens new tab a Florida federal judge on Monday to dismiss a lawsuit , opens new tab by FTX customers who accuse the firm of helping the crypto exchange cheat them out of billions of dollars. Sullivan & Cromwell argued that the customers' lawyers offered no plausible allegation that the law firm was aware of wrongdoing by FTX insiders when it provided legitimate legal services to FTX in about 20 matters before the exchange filed for federal bankruptcy protection in late 2022.

The customers' claims, argued the firm's lawyers at Hunton Andrews Kurth, are nothing more than "innuendo masquerading as facts," unsupported by specific allegations that Sullivan & Cromwell lawyers knew FTX CEO Sam Bankman-Fried and other FTX executives were illegally diverting customer money.

"If a claim existed against S&C, plaintiffs have had every opportunity to find that claim and plead it," the law firm said in its motion to U.S. District Judge Michael Moore of Miami, citing customers' cooperation agreements with Bankman-Fried and several other FTX insiders. "Their failure to do so speaks volumes," the motion said.

If anything, Sullivan & Cromwell suggested in its motion to dismiss the prospective class action, FTX customers should be grateful for the law firm's "around the clock" efforts as FTX's bankruptcy counsel "to unwind the fraud perpetrated by Bankman-Fried and his inner circle."

Thanks to that hard work of Sullivan & Cromwell lawyers, the firm said, almost all of FTX's onetime customers will be repaid the full amount of money in their accounts at the time the exchange went bankrupt, plus 9% interest.

Customers' counsel Adam Moskowitz of The Moskowitz Law Firm and David Boies of Boies Schiller Flexner did not respond to my email query on the Sullivan & Cromwell motion.

As the customers' complaint alleges in great detail, Sullivan & Cromwell's pre-bankruptcy work for FTX has been scrutinized by judges, regulators and lawmakers amid questions about whether the firm was too conflicted to investigate the exchange's collapse as FTX

bankruptcy counsel.

Sullivan & Cromwell, which has reaped more than \$180 million in fees from the FTX bankruptcy, pointed out in its dismissal motion that the judge presiding over the Chapter 11 proceeding rejected those arguments, but the 3rd U.S. Circuit Court of Appeals ruled in January that an independent examiner should have been appointed in the sprawling, multibillion-dollar Chapter 11 case.

The customers' lawsuit centers on allegations that through its pre-bankruptcy assignments for FTX, Sullivan & Cromwell "placed itself in a unique position to gain deep insight into the FTX entities' convoluted organizational structure, abject lack of internal controls and dubious business practices."

By representing FTX in, among other matters, the acquisition of derivatives trading company LedgerX and the contemplated acquisition of assets from bankruptcy crypto exchange Voyager, the complaint asserted, Sullivan & Cromwell conducted due diligence that should have exposed FTX's illegal use of customer funds. The complaint noted that rival exchange Binance needed only hours to spot the potential misuse of customer deposits when it backed out of plans to acquire FTX as FTX steamed toward bankruptcy in 2022.

Sullivan & Cromwell, according to the complaint, had far more exposure to FTX's inner workings than Binance. Through work on LedgerX matters, the complaint alleged, the law firm was privy to a software audit revealing a "back door" in FTX's platform code that allowed Bankman-Fried and other insiders to divert customer money to FTX's sister hedge fund, Alameda Research. The complaint asserted that FTX's lead in-house lawyer, a former Sullivan & Cromwell partner, likely told Sullivan partners about the back door.

But the firm's dismissal motion said those allegations are far too vague and speculative to justify claims that it was part of FTX's fraud.

"Based on the facts set forth in the complaint, all that can be inferred is that S&C agreed to perform lawful legal services for FTX," Sullivan & Cromwell argued. "The complaint pleads no facts suggesting the existence of some other corrupt agreement, let alone one to misappropriate billions of dollars' worth of FTX assets."

If you've been keeping track of the consolidated FTX customer litigation, you'll recall that Sullivan & Cromwell's arguments sound a lot like defenses asserted by the crypto exchange's other main outside law firm, Fenwick & West. As I told you last September, Fenwick also insisted that its routine legal work for FTX was not evidence of conspiracy or abetting fraud under Florida state law.

In response, plaintiffs' lawyers argued [FTX v. Sullivan & Cromwell](#), opens new tab last November that California law should apply to claims against Fenwick, a California firm. Under California law, FTX customers argued, lawyers can be liable for knowingly helping a fraudster, even if that assistance is in the form of ordinary legal work.

Interestingly, Sullivan & Cromwell's dismissal motion attempts to turn customers' choice-of-law arguments against them. The law firm argued that under customers' reasoning, New York law should apply to claims against the New York-based firm – and New York law is extremely protective of professional service providers, including law firms.

In fact, according to the motion, customers are precluded from claiming fraud against the law firm because they did not contract for its services. New York law also does not allow plaintiffs to claim that lawyers abetted fraud merely by providing legal advice to fraudsters, according to Sullivan & Cromwell, which contends that customers must show that the law firm had actual knowledge of wrongdoing by FTX insiders.

Under New York law, according to Sullivan's motion, it's not even enough for plaintiffs to allege that the law firm ignored warning signs or could have figured out the fraud based on the work it provided.

The law firm asked Moore to rule that plaintiffs' lawyers cannot attempt to address the holes in their case by amending their complaint, since they've already had a chance to capitalize on their cooperation deals with Bankman-Fried and other insiders.

The customers' response is due on May 28.

Read more:

FTX investors sue law firm Sullivan & Cromwell, claiming role in fraud
Bankman-Fried's FTX to get bankruptcy examiner to probe collapse - US appeals court
FTX lawyers from Fenwick defend 'routine legal services' for imploded crypto exchange
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting By Alison Frankel

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters,

FTX Users Will Be Paid Back, With Interest. They're Mad Anyway.

By Steven Church and Jonathan Randles

Bloomberg Law News 2024-05-15T10:16:4822134299-04:00

FTX Users Will Be Paid Back, With Interest. They're Mad Anyway.

By Steven Church and Jonathan Randles2024-05-15T06:00:24870-04:00

Arush Sehgal and Acaena Amoros Romero saw their life savings disappear, all at once, into the vortex of FTX's fraud-fueled collapse.

Then the crypto market staged a stunning surge back from the depths of the 2022 crash. Over the next year and a half, Bitcoin climbed so much, in fact, that by their count what they had entrusted to FTX — if it weren't tied up in bankruptcy court — would have swelled to at least \$4 million.

That's at the root of mounting anger at what is — by traditional measures, at least — a surprising victory for FTX's more than two million customers, all of whom will have a chance to vote on the plan for winding down the company's bankruptcy.

While FTX said it expects to collect enough cash to pay them 100% of what they're owed, plus interest, there's a catch. They're not getting their crypto back. Instead, they're getting US dollars based on what the accounts were worth when FTX went bust in November 2022. Since the price of Bitcoin has roughly quadrupled since then, that means they missed out on the biggest crypto bull run since the go-go days of the pandemic.

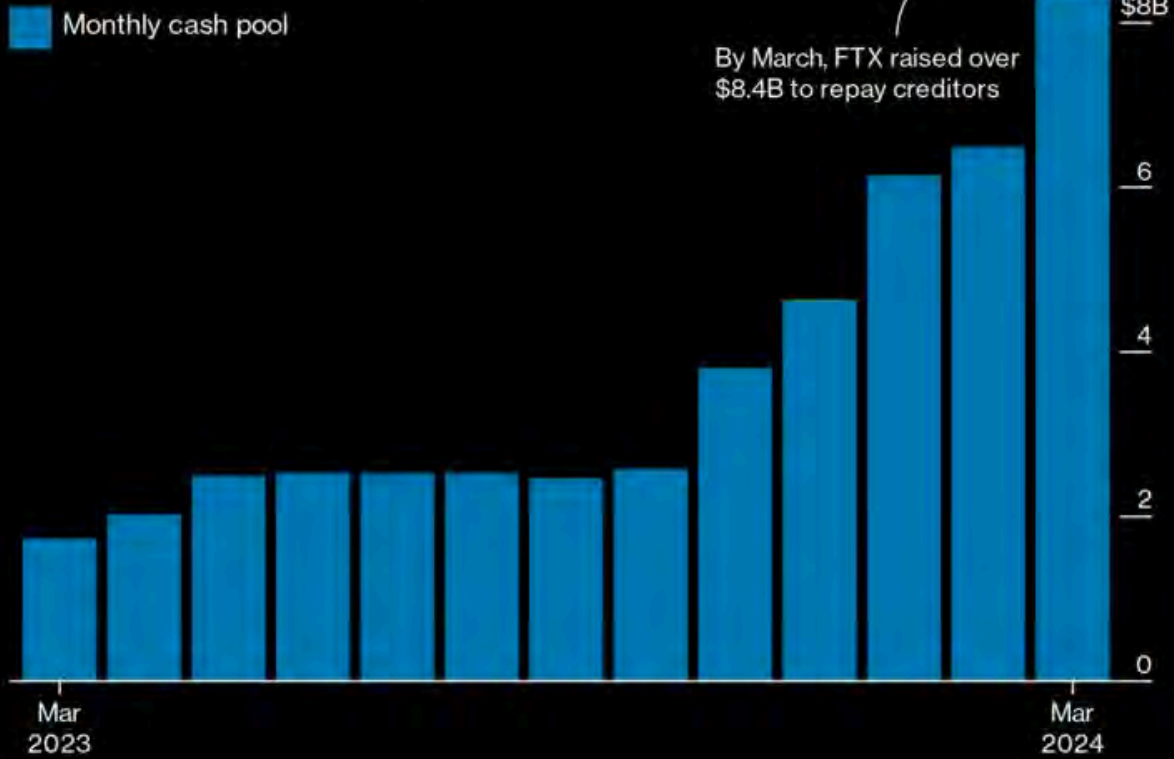
"A hundred cents on the dollar doesn't really mean much to me," said Sehgal, a former member of the FTX creditor committee who has been a vocal critic of how restructuring advisors have handled the case. Sehgal and Romero say they stand to recoup about \$1 million — a quarter of what their account would be worth.

Compared with the outcomes of most bankruptcies, FTX is shaping up to be an improbable success, considering that creditors often battle it out for just pennies on the dollar.

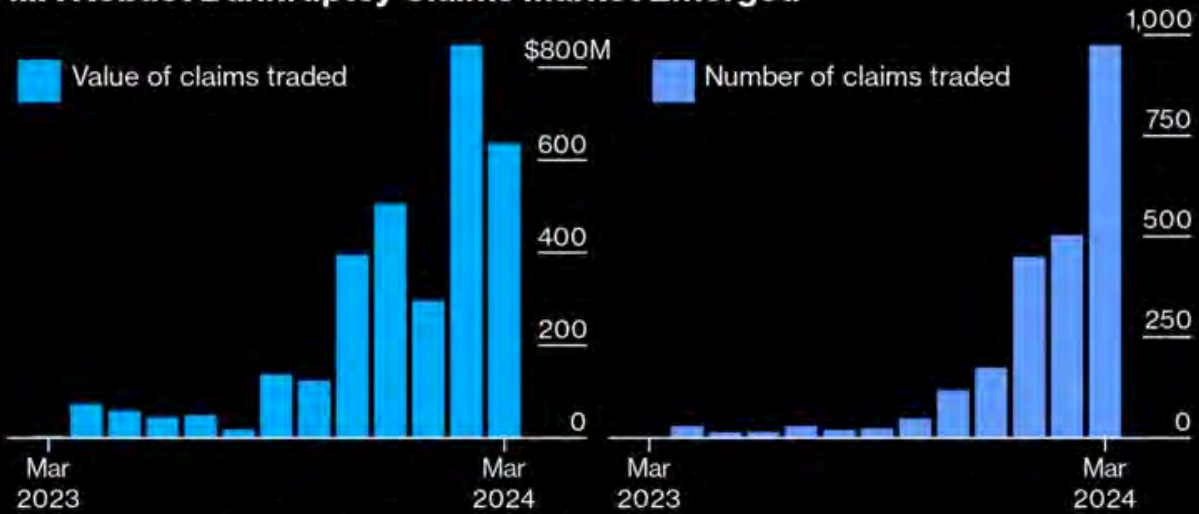
When the company went broke, customers' prospects looked especially dim, after co-founder Sam Bankman-Fried's hedge fund had secretly gambled away their crypto, leaving a massive hole. Some account holders sold off their bankruptcy claims at a deep discount rather than roll the dice on the outcome.

Then the crypto rally, fueled by the rollout of Bitcoin exchange-traded funds, inflated the value of FTX's assets as they were slowly liquidated. At the same time, FTX's newly installed managers tracked down the cash and crypto scattered around a byzantine network of accounts and sold off other assets, like a stake in the artificial-intelligence startup Anthropic.

As FTX Padded Its Balance Sheet...



...A Robust Bankruptcy Claims Market Emerged



Sources: Bankruptcy filings; Cherokee Acquisition

Bloomberg

Together, the steps more than made up for the hole left by Bankman-Fried's hedge fund. On May 7, the company said it expects to have as much as \$16.3 billion once it's done selling assets, far more than the approximately \$11 billion owed to customers and other private-sector creditors, leaving most of them in line to get 118% of what they had in their FTX accounts. Government regulators will still get just a fraction of they're owed, and the company's shareholders will be wiped out, as is often the case in bankruptcy since there's usually nothing left over for the original owners.

Only a handful of large corporate US bankruptcies in recent times — including Hertz's — have wound up repaying creditors in full. The FTX payouts are also set to exceed those in other crypto cases. If all goes as planned, the checks should start arriving later this year — an unusually rapid turnaround.

"That is a bankruptcy grand slam when you compare it to other major fraud cases over the past twenty five years," said Deirdre O'Connor, managing director at Epiq, which provides claims processing in large bankruptcy cases.

But the plan hasn't appeased some FTX customers. More than 80 have filed letters with the bankruptcy court attacking the decisions made by FTX Chief Executive Officer John Ray, including how the value of their accounts were determined.

Sehgal said he has heard from some 1,500 with similar views through FTXvote, which he set up to rally opposition to the plan. In January, one group sued in bankruptcy court, claiming that their crypto was not the kind of property that FTX was allowed to sell. The judge overseeing the FTX Chapter 11 will likely need to resolve that case before any payouts can flow to customers.

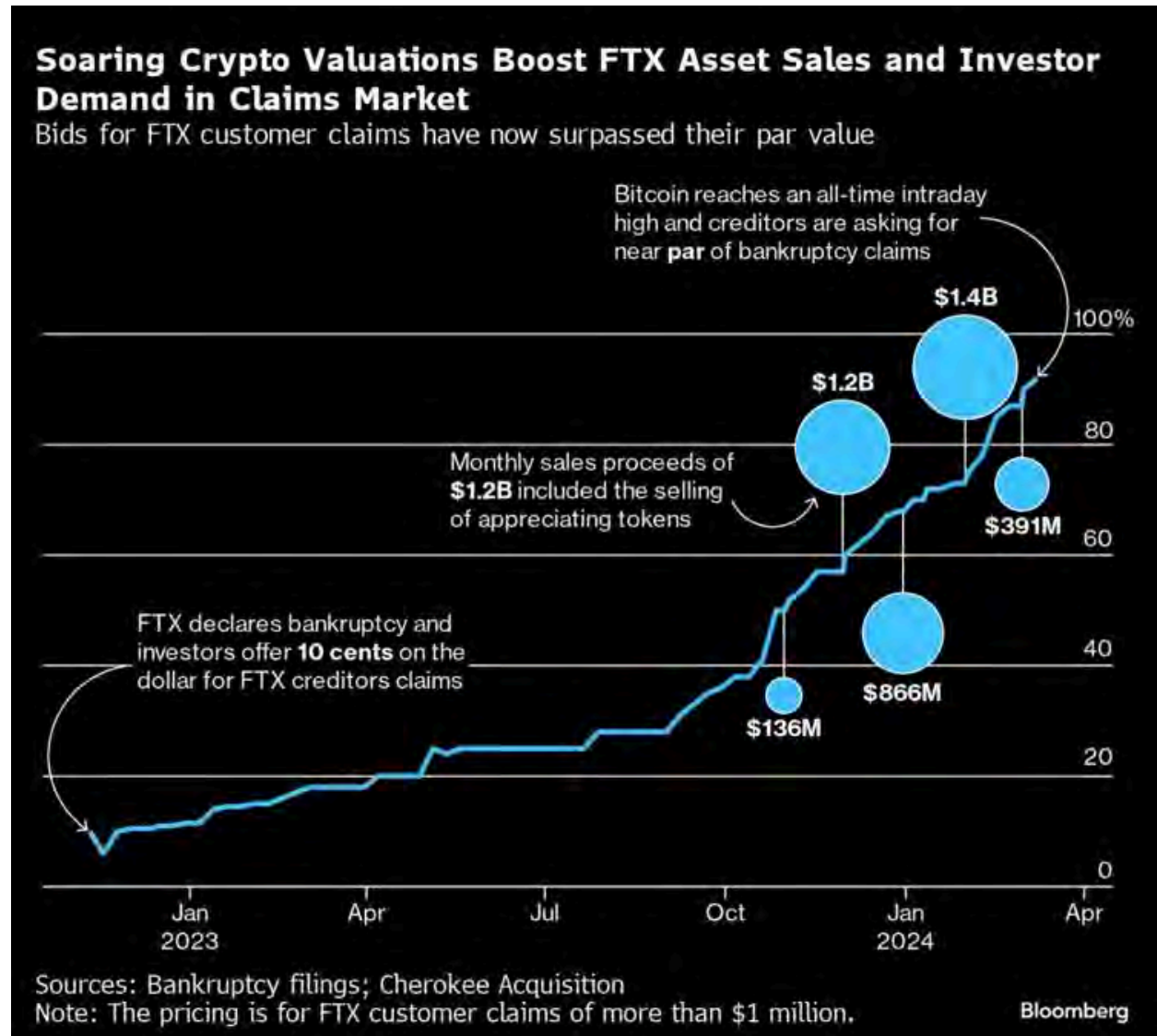
Ray, a long-time bankruptcy expert who was brought in to handle FTX's collapse, said the decisions have been made in line with bankruptcy law and how similar cases have been handled. Bankman-Fried's fraud and poor record keeping meant that returning crypto to customers wasn't an option because there simply wasn't enough to go around. What it does have is being sold to repay creditors.

"We're not a hedge fund," Ray said in an interview before the current plan was released. "I think this is somewhat lost. We're managing an estate for the benefit of all creditors, we're not risk takers."

It's unclear whether the customer complaints will be numerous enough to jeopardize the outcome, and many will likely welcome their payouts. In June, US Bankruptcy Judge John Dorsey will consider sending the FTX plan out to account holders for approval. Dorsey will take that vote — as well as creditor comments — into account when considering whether to sign off on it.

The rancor from some corners is adding an element of uncertainty to the proceedings, given that the number of creditors is far larger than what is seen in a typical bankruptcy. The crypto speculators — including some die-hards who were prepared to ride out the market's trough — are also different than the investment firms, vendors and other creditors who typically determine the outcome of a bankruptcy case.

"I can't recall a case with that many voters," said Cliff White, a bankruptcy lawyer who oversaw the Office of US Trustee for 17 years. "Here you've got a more multifaceted range of groups that is more difficult to corral."



Veno Bojanovsky, 34, didn't care to follow news of FTX's sudden demise too closely, resigned to the feeling of being "scammed" by the company.

Bojanovsky, who like many FTX's customers lives overseas, said before the latest plan was released that he's skeptical he'll get what he thinks he's owed. Despite his misgivings, he held to his FTX claim instead of selling it off.

"I've not regretted it, though I still don't trust I'll get anything much for it," he said.

--With assistance from Lucca De Paoli and Claire Ballentine.

To contact the authors of this story:

Steven Church in Wilmington at schurch3@bloomberg.net

Jonathan Randles in New York at jrandles5@bloomberg.net

To contact the editor responsible for this story:

William Selway at wselway@bloomberg.net

Michael Tsang

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Game Finally On! Judge Denies Key Motions to Dismiss in Kentucky Retirement Systems Litigation, Subjecting KKR, Blackstone, PAAMCO, and Top Financiers Henry Kravis, George Roberts, Steve Schwarzman, and Tomlinson Hill to Discovery

 [nakedcapitalism.com/2024/05/game-finally-on-judge-denies-key-motions-to-dismiss-in-kentucky-retirement-systems-litigation-subjecting-kr-blackstone-paamco-and-top-financiers-henry-kravis-george-roberts-steve-schwarzman-a.html](https://www.nakedcapitalism.com/2024/05/game-finally-on-judge-denies-key-motions-to-dismiss-in-kentucky-retirement-systems-litigation-subjecting-kr-blackstone-paamco-and-top-financiers-henry-kravis-george-roberts-steve-schwarzman-a.html)

By Yves Smith

May 15, 2024

It now seems like an eternity ago, but the latest big play in the long-running Kentucky Retirement Systems case, with the centerpiece a deeply underfunded pension fund reaching for return, was the Kentucky Attorney General Daniel Cameron rousing himself to enter the case on behalf of allegedly all potential plaintiffs. This was despite the previous AG having filed a motion supporting the effort by the legal team lead by Michelle Lerach, with her formidable and controversial husband, one-time top securities litigator Bill Lerach, and a cast of other able lawyers to obtain damages from some of the biggest names in finances, KKR, Blackstone, PAAMCO (a one-time affiliate of bond giant Pimco), their top execs (!!!) and many co-conspirators and enablers. The basis for action was over fiduciary duty breaches and other bad conduct in the sale and management of custom hedge funds.

This is a very hard won and important victory for the plaintiffs. As you may recall well from the financial crisis, individual executives are virtually never successfully targeted for their misconduct, let alone figures as prominent as these. Here, they are subject to punitive damages and their personal finances are discoverable. So expect more pitched battles to try to continue to keep this case from advancing.

Forgive me for skipping over the extensive legal and factual arguments to focus on the high points of the progress of the case; Footnote 1 presents some of the major evidence and arguments.

As we will discuss in detail below, after yet another long detour from the original case, Mayberry v. KKR, first filed in 2017 and now replaced by overlapping new actions, judge Thomas Wingate has finally completed what must have been the painful process of evaluating the merits of a very large number of motions to dismiss. We've embedded his orders at the end of the post. He deserves a lot of credit for patiently working through the different circumstances of the various defendants and delivering sound and clearly-explained rulings.

We and others saw the Cameron maneuver was as intended to displace this tenacious legal team and entering a lowball, quiet settlement with powerful Republican donors. Cameron is the protege of Mitch McConnell. The targets in the suit include heavyweights like KKR co-

founder Henry Kravis and Blackstone's current chief Steve Schwarzman.

For those of you following this saga, the case was originally Mayberry v. KKR. The legal team presented a derivative case on behalf of all beneficiaries, who nearly all are in defined benefit plans. A "derivative suit" is when plaintiffs step in to assert the legal rights of other parties, typically a corporation or other entity, who are supposed to be serving plaintiffs' interests but have failed to do so (there are various tests for that).

The case was appealed before any trial court rulings had been made, a highly irregular development. The decision against the plaintiffs raised a lot of eyebrows; even one of the defendant's attorneys privately said was a bad ruling.

Mayberry v. KKR then went to the Kentucky Supreme Court, which tossed it due to lack of standing as a result of intervening Federal appeals court and a Supreme Court decisions that took place after the initial filing. The result was that beneficiaries in defined benefit plans could not sue for losses unless they had suffered reduction in or termination of their benefits (as in the plan had to be totally out of money). Even at an only 13% funding level at the time, Kentucky Retirement System was still satisfying all its current obligations.

In the case of intervening decisions, plaintiffs are usually allowed to replead their cases.

But then came another effort to throw a spanner. As it became clear that the plaintiffs were not going to go away easily even after their Kentucky Supreme Court defeat, Attorney General Daniel Cameron got out of bed. In July 2020, he intervened on behalf of the plaintiffs, shamelessly reworked the original plaintiffs' filings (this was done with the cooperation of one of the original lead attorneys. Anne Oldfather, whose loyalties were seen as questionable from the outset). He later asserted he would fully occupy the field, as in represent the state (which is backstopping the funds), Kentucky Retirement Systems, and its beneficiaries. Kentucky Retirement Systems bleated, pointing out it was one of the state agencies that got to pick its own counsel and had not authorized Cameron to act on its behalf.

The core legal team sought to file a reconstituted case, which kept some of the original plaintiffs, the ones who had "hybrid" so-called "Tier 3" plans (both defined benefit and defined contribution components) and added other Tier 3 plaintiffs. Defined contribution plan members have a substantial body of precedent allowing them to sue over losses to their plan assets, even if they have not started withdrawing funds. That solved the earlier standing problem. Admittedly these beneficiaries represent a much smaller amount of total Kentucky Retirement System funds, but the fact of harm was presumably enough to get to discovery.

At the end of December 2020, the trial court court rejected nearly all efforts to replead the case except the above mentioned Tier 3 claims (now called Taylor v. KKR). Perhaps other close followers of this many chaptered saga will disagree, but Judge Philip Shepherd,

considered to be one of the most progressive judges in the state, seemed to sour on the case after the appellate and Supreme Court reversed his initial rulings.

Judge Shepherd said he could not rule on whether the Tier 3 plaintiffs could proceed on their own until the Cameron articulated the “nature and scope of the claims that will be asserted by the OAG.” The Attorney General kept asking for extensions of time, even as Shepherd voiced frustration with the foot dragging. That was a pretty strong sign that Cameron’s presumed plan of negotiating a fast settlement had gone pear-shaped. So Cameron is looking like the dog that caught the car.

The defendants then successfully sued to have Shepherd removed from the case because he had touted his tough position on the Mayberry v. KKR cases in his re-election campaign (Shepherd recused himself in May 2022). The defendants no doubt believed a more conservative judge would prove to their advantage. It appears not to have occurred to them that a competent judge, regardless of his ideological bent, would not blindly accept what the coastal ~~con-artists~~ financiers were selling out of deference to their status.

Judge Wingate has finally issued orders on the extremely large number of motions to dismiss, nearly all by differently-situated plaintiffs. The magnitude of that task, plus getting his arms around the very very large body of past filings, presumably accounted for the substantial delay. The compact orders are well reasoned. They seem even more credible by rejecting the idea that the Attorney General could properly represent the Tier 3 plaintiffs, and denying the motions to dismiss of the hugely powerful defendants, KKR, Blackstone, PAAMCO, and private equity kingpins Henry Kravis, George Roberts, Steve Schwarzman, and Tomlinson Hill personally.

Needless to say, the fact that the Tier 3 plaintiffs have gotten a discovery green light further complicated the Attorney General’s life....who by the way is no longer Daniel Cameron, who left office earlier this year, leaving the hot mess of this not-completed gambit on his successor, Republican Russell Coleman’s desk. How can he enter into a lowball settlement, which will be subject to disclosure, if the Tier 3 plaintiffs keep fighting and eventually get a healthy number on what is certainly to be less monetary harm based on their smaller interest in total fund assets?

And finally keep in mind that everyone close to the case understands what the real leverage is. It’s exposing the chicanery of the big ticket, supposedly reputable private equity leaders and getting deeply into the economic and commercial relationship of their top leaders to their firms.

Pass the popcorn. The Lerach team has been so chomping at the bit that your humble blogger is behind their pace of action. They’ve already filed their first big motion/demand, which I will cover tomorrow. I thought it important to give an adequate recap of this tortured history before moving to the new battles.

¹ From a 2021 post:

The 50,000 foot version of the plot thus far is that in late December 2017, attorneys filed a derivative lawsuit for eight Kentucky Retirement System beneficiaries against three fund managers, KKR/Prisma, Blackstone, and PAAMCO, that had sold customized hedge fund products that contrary to their sales pitch, had high risk and underwhelming performance.¹ The Kentucky Retirement System, at only 13% funded, is the most spectacularly underwater large pension fund in the US, despite Kentucky having some of the most stringent statutory fiduciary duty requirement in the US.

The fund managers allegedly focused on KRS and other desperate and clueless public pension funds who were unsuitable investors, particularly at the risk levels they were taking. KRS made what was a huge investment for a pension fund of its size. \$1.2 billion across three funds all at once, in 2011, roughly 10% of its total assets at the time. They all had troublingly cute names. The KKR/Prisma funds was “Daniel Boone,” the Blackstone fund was “Henry Clay” and the PAAMCO fund, “Colonels”.

In the case of KKR/Prisma, the fund had installed an employee at KRS as well as having a KKR/Prisma executive sitting as a non-voting member of the KRS board. The filing argues that that contributed to KRS investing an additional \$300 million into the worst performing hedge fund even as it was exiting other hedge funds.

The stakes here are much higher than the potentially meaty recoveries. Private equity and hedge funds fetishize secrecy because too often, their conduct will not stand up to scrutiny. The giant fund managers are almost certain to be most afraid of discovery, since the sharp practices they used with Kentucky Retirement Systems were very likely to have been replicated at other public pension funds. Even the limited discovery so far uncovered more misconduct and allowed the plaintiffs to add to their claims.

The initial case was appealed before discovery had gotten meaningfully underway, an unusual sequence of events. The plaintiffs lost on what most independent lawyers thought was an extremely strained ruling. The case then went to the Supreme Court, which dismissed the case without prejudice on standing due to intervening appellate and US Supreme Court decisions. The Supreme Court also got peculiarly snippy about private attorney pursuing these claims.

The Kentucky Attorney general, Mitch McConnell protege Daniel Cameron, filed a surprise Motion to Intervene on July 20. Bear in mind the attorney general's office could have intervened at any time to support the case but oddly chose to now. Its filing was also clearly and wholly dependent on the earlier submissions by the private plaintiffs.

After a raft of oppositions, including multiple formulations by the somewhat reshuffled plaintiffs' legal team (former lead counsel Anne Oldfather was replaced by her former co-counsel Michelle Lerach), Judge Shepherd issued an order on December 28. He

rejected most of the plaintiffs' reformulations to deal with the standing issues except having the so-called Tier 3 Plaintiffs effectively make their pitch. The reason the earlier case had been largely shot down was those intervening decision (such as *Thole v. US Bank*) required that the plaintiffs have suffered a "particularized" loss. The Kentucky Retirement System beneficiaries hadn't yet, since the fund has not yet missed a payment and arguably even if the system does, the State of Kentucky is also on the hook.

By contrast, the Tier 3 plaintiffs had mandatory deductions from their paychecks for a hybrid pension which is not state guaranteed. Even though public pension plans are not subject to ERISA, they are often managed in accordance with ERISA principles. The Kentucky Supreme Court in fact used ERISA cases to guide its decision. Unlike a defined benefits plan, which is what the Tier 1 and Tier 2 plaintiffs have, the Tier 3 plan is a defined contribution plan. Extensive case law backs the idea that under a defined contribution plan, the employee has suffered when his account balance is impaired. So the standard for loss is completely different than for the original "Mayberry Eight."

Entered

21-CI-00645 05/01/2024

Kathryn Marshall, Franklin Circuit Clerk

DOCUMENT

NOT ORIGINAL
21-CI-0064505/01/2024 04:17:44 PM
JEFF@WALSONLCM.COCOMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 21-CI-00645

TIA TAYLOR, *et al.*,

PLAINTIFFS

vs.

KKR & CO., L.P. *et al.*,

DEFENDANTS

ORDER

This matter is before the Court upon the KKR Parties' *Motions to Dismiss*; David Peden's *Motion to Dismiss*; William Thielen's *Motion to Dismiss*; R.V. Kuhns & Associates, Inc.'s *Motion to Dismiss*; David Eager's *Motion to Dismiss*; T.J. Carlson's *Motion to Dismiss*; Cavanaugh Macdonald Consulting, LLC's *Motion to Dismiss*; Brent Aldridge's *Motion to Dismiss*; PAAMCO Prisma, LLC, Jane Buchan, Prisma Capital Partners LP, Girish Reddy, and Michael Rudzik's (collectively, "Prisma/PAAMCO Defendants") *Motion to Dismiss*; PAAMCO Prisma, LLC, Jane Buchan, Prisma Capital Partners LP, Girish Reddy, Michael Rudzik, Blackstone Alternative Asset Management L.P., Blackstone Inc., Steven A. Schwarzman, J. Tomilson Hill, R.V. Kuhns & Associates, Inc., Ice Miller, LLP, and William Cook's *Consolidated Motion to Dismiss*; Ice Miller LLP's *Motion to Dismiss*; Blackstone Alternative Asset Management L.P., Blackstone Inc., Stephen A. Schwarzman, and J. Tomilson Hill's (collectively, "Blackstone Defendants") *Motion to Dismiss*; and Adam Tosh's *Motion to Dismiss*. This action was called before the Court on Thursday, October 26, 2023. Upon review of the parties' briefs and papers, and being sufficiently advised, the Court hereby **DENIES** KKR Parties' *Motions to Dismiss*;

OPD IS : 000001 of 000019

1

Entered

21-CI-00645 05/01/2024

Kathryn Marshall, Franklin Circuit Clerk

Entered

21-CI-00645 05/01/2024

Kathryn Marshall, Franklin Circuit Clerk

DOCUMENT

NOT ORIGINAL

21-CI-00645

05/01/2024 04:17:44 PM

JAMES TOMILSON@NLCM.CO

GRANTS in part, DENIES in part David Peden's *Motion to Dismiss*; **GRANTS in part,****DENIES in part** William Thielen's *Motion to Dismiss*; **GRANTS** R.V. Kuhns &Associates, Inc.'s *Motion to Dismiss*; **GRANTS in part, DENIES in part** David Eager's*Motion to Dismiss*; **GRANTS in part, DENIES in part** T.J. Carlson's *Motion to Dismiss*;**GRANTS** Cavanaugh Macdonald Consulting, LLC's *Motion to Dismiss*; **GRANTS in****part, DENIES in part** Brent Aldridge's *Motion to Dismiss*; **GRANTS in part, DENIES****in part** PAAMCO Prisma, LLC, Jane Buchan, Prisma Capital Partners LP, Girish Reddy,and Michael Rudzik's (collectively, "Prisma/PAAMCO Defendants") *Motion to Dismiss*;**DENIES** PAAMCO Prisma, LLC, Jane Buchan, Prisma Capital Partners LP, Girish

Reddy, Michael Rudzik, Blackstone Alternative Asset Management L.P., Blackstone Inc.,

Steven A. Schwarzman, J. Tomilson Hill, R.V. Kuhns & Associates, Inc., Ice Miller, LLP,

and William Cook's *Consolidated Motion to Dismiss*; **GRANTS** Ice Miller LLP's *Motion**to Dismiss*, **DENIES** Blackstone Alternative Asset Management L.P., Blackstone Inc.,

Stephen A. Schwarzman, and J. Tomilson Hill's (collectively, "Blackstone Defendants")

Motion to Dismiss; and **GRANTS** Adam Tosh's *Motion to Dismiss*.**STANDARD OF REVIEW**

Under Kentucky law, when a court considers a motion to dismiss under Civil Rule 12.02, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960). "The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) quoting *James v. Wilson*, 95

2

Entered

21-CI-00645 05/01/2024

Kathryn Marshall, Franklin Circuit Clerk

OPD IS : 000002 of 000019

Page Printed From:

https://www.law.com/2024/05/15/critical-mass-with-law-coms-amanda-bronstad-why-the-plaintiffs-bar-is-roiled-over-this-ballot-initiative-new-lawsuit-targets-plaintiffs-talc-experts/



NOT FOR REPRINT

Critical Mass With Law.com's Amanda Bronstad: Why the Plaintiffs' Bar is Roiled Over This Ballot Initiative, New Lawsuit Targets Plaintiffs' Talc Experts

May 15, 2024 at 09:39 AM

Critical Mass



Amanda Bronstad
staff reporter



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: A Nevada ballot proposal financed by Uber would cap contingency fees at 20% for all civil cases, including those involving sexual assault. A Johnson & Johnson subsidiary filed a new lawsuit against three plaintiffs' experts in talc trials. Find out who got named co-lead counsel of the Ozempic multidistrict litigation.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on [LinkedIn](#) or X: [@abronstadlaw](#).

Judge Greenlights Uber-Backed Ballot Initiative

A proposed ballot initiative in Nevada would cap contingency fees on all civil cases at 20%—and that's got the attention of lawyers suing Uber over sexual assaults.

Here's my story on the ballot initiative, announced earlier this year by a political action committee called **Nevadans for Fair Recovery**. Uber, which faces 240 lawsuits by passengers alleging its drivers sexually assaulted them, donated \$4 million to the initiative.

So, what's the big deal about this ballot initiative? Plaintiffs' lawyers consider the move unprecedented and the most restrictive contingency fee cap in the nation. Colorado has a ballot initiative that would limit contingency fees for certain cases to 25%. Uber also has backed previous ballot initiatives in California and Massachusetts, but those have focused primarily on whether its drivers should be classified as independent contractors or employees.

The Nevada proposal got pushback: The Nevada Justice Association and a group called **Uber Sexual Assault Survivors for Legal Accountability**, represented by [Deepak Gupta](#) (Gupta Wessler), filed a lawsuit last month challenging the initiative as improper. They got a lot of support: dozens of letters from Nevada lawyers, the **American Association for Justice** and lead counsel in the sexual assault multidistrict litigation against Uber, which has moved to dismiss in the Northern District of California.

Update: On May 10, **Carson City District Court Judge James Russell** sided with Uber, represented by [Bradley Schrager](#) (**Bravo Schrager**). While he took no position on the merits, Russell found “plaintiffs have made strong arguments” about the ballot initiative’s negative effects but found them too “speculative and hypothetical” to be included in the petition’s description. He concluded that the ballot initiative complied with the requirements under the Nevada Constitution, writing:

“In this case, the court finds that the primary purpose of the petition, clear from both its text and the description of effect, is the limitation of contingency fees in civil cases. Further, the court finds that the petition’s text, its description of effect, and the arguments of the defendants in briefing and at hearing confirm the petition’s primary purpose.”

Another Talc Trial Begins in Oregon

Johnson & Johnson lodged another attack against “junk science” in talcum powder lawsuits after its subsidiary sued three plaintiffs’ experts on May 9.

[Here’s my report](#) on the suit against Drs. Theresa Emory, John Maddox and Richard Kradin.

Who are these experts? All three co-authored a 2020 study that found 75 unnamed mesothelioma patients had no exposure to asbestos other than cosmetic talcum powder. Their findings have appeared in dozens of trials against Johnson & Johnson.

What does the suit say? The suit alleged that at least six of the individuals had other exposures, such as asbestos pipes and cigarettes. [Benjamin Hatch](#) (**McGuireWoods**) filed the case in the **Eastern District of Virginia** after a judge last month dismissed an identical 2023 lawsuit in **New Jersey**, citing jurisdictional reasons.

Meanwhile, talc trials have restarted since last year’s dismissal of a second bankruptcy filed by Johnson & Johnson’s subsidiary **LTL Management**, now restructured as **LLT Management**. So far, juries in Florida have [deadlocked](#) or [sided with Johnson & Johnson](#). In mesothelioma cases, an Illinois jury [awarded \\$45 million](#) last month, and [another trial in Oregon](#) began on May 9.

Of note: The same plaintiffs’ firm, **Dean Omar**, is behind both mesothelioma trials. [Benjamin Adams](#) (**Dean Omar**) told jurors in Oregon that his client, **Kyung Lee**, was diagnosed with mesothelioma at age 48 after decades of using Johnson & Johnson’s baby powder, while defense attorney [Will Stute](#) (**Orrick**) countered that Lee had multiple other exposures to asbestos, primarily growing up five kilometers from a textile factory in Busan, South Korea.

Who Got the Work?

A federal judge overseeing multidistrict litigation over **Ozempic** and related drugs [appointed four lawyers](#) as co-lead counsel: [Parvin Aminolroaya](#) (**Seeger Weiss**), [Jonathan Orent](#) (**Motley Rice**), [Paul Pennock](#) (**Morgan & Morgan**) and [Sarah Ruane](#) (**Wagstaff & Cartmell**). U.S. District Judge Gene Pratter, of the **Eastern District of Pennsylvania**, who previously named eight lawyers to serve on a plaintiffs’ committee, also established a 10-lawyer plaintiffs’ executive committee, led by **Alex Walsh** (**Walsh Law**) and [Bradley Honnold](#) (**Goza & Honnold**) and a 10-lawyer plaintiffs’ steering committee.

Here’s what else is happening:

Casino Clash: A federal judge’s dismissal of a case against Las Vegas casino hotels [creates a court split](#) over the cutting-edge claim of algorithmic pricing in antitrust lawsuits. On May 8, **U.S. District Chief Judge Miranda Du**, of the **District of Nevada**, found the hotels’ use of algorithmic pricing software to set room rates did not constitute an antitrust

conspiracy, despite U.S. District Chief Judge Waverly Crenshaw’s Dec. 28 ruling refusing to dismiss a similar case against RealPage in the Middle District of Tennessee. On Monday, casino hotels in Atlantic City flagged Du’s ruling in an antitrust case in the District of New Jersey.

Benzene Verdict: ExxonMobil was [hit with a \\$725.5 million verdict](#) on May 9 after a jury found it failed to warn that its gasoline contained benzene. The jury, in the Philadelphia Court of Common Pleas, found that plaintiff Paul Gill developed acute myeloid leukemia as a result of his exposure working at a gas station and garage in the 1970s. Plaintiffs’ lawyers [Patrick Wigle](#) (Waters Kraus), [Rajeev Mittal](#) (Waters Kraus) and [Andrew DuPont](#) (Locks Law Firm) were up against a defense team from Dickie, McCamey & Chilcote: [Christopher Stofko](#), [Vaughn Schultz](#) and [Theresa Folino](#).

Bestwall Denial: The U.S. Supreme Court on Monday declined to review Georgia-Pacific subsidiary Bestwall’s asbestos bankruptcy, created through a so-called “Texas two-step” merger. Lawyers for cancer victims have attempted to overturn the automatic stay in order to allow trials against Georgia-Pacific, owned by Koch Industries. They had supporting amicus briefs from U.S. senators and state attorneys general that considered the merger tactic an abuse of the U.S. bankruptcy system. “While we are disappointed the Supreme Court did not take this case at this time, Georgia-Pacific and Koch Industries’ unconstitutional assault on the rights of its cancer victims will fail,” [Clay Thompson](#) (Maune Raichle) argued on behalf of mesothelioma victims. “Bankruptcy isn’t a menu choice for non-distressed, multi-billionaires that are simply afraid of juries.”

Thanks for reading Critical Mass! I’ll be back next week.

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Page Printed From:

<https://www.law.com/2024/05/14/after-dismissal-of-las-vegas-casino-antitrust-case-algorithmic-pricing-dicey/>



NOT FOR REPRINT
NEWS

After Dismissal of Las Vegas Casino Antitrust Case, Algorithmic Pricing Dicey

In her May 8 order, U.S. District Judge Miranda Du, in Nevada, ruled that a "mere use of algorithmic pricing" doesn't make an antitrust conspiracy.

May 14, 2024 at 02:53 PM

Class Actions



Amanda Bronstad
staff reporter



What You Need to Know

- The Nevada judge drew distinctions from a Dec. 28 order that refused to dismiss similar claims against software provider RealPage.
- On Monday, Caesars and other defendants in another antitrust case involving Atlantic City casino hotels wrote a letter informing U.S. District Judge Karen Williams of the Las Vegas ruling.
- The U.S. Justice Department and the Federal Trade Commission have increasingly spoken out about the use of algorithmic pricing as an antitrust conspiracy.

A federal judge’s dismissal of a cutting-edge antitrust case over room prices at Las Vegas casino hotels has created a court split over the use of algorithmic pricing.

On May 8, U.S. District Chief Judge Miranda Du of the District of Nevada granted dismissal of the Las Vegas class action after concluding that the plaintiffs failed to plausibly allege a “tacit agreement” between the defendants. That is in part because they were not required to accept the pricing recommendations of Cendyn Group.

She also drew distinctions from a Dec. 28 order that refused to dismiss similar claims against software provider RealPage, noting “the complaint, in that case, included allegations of the exchange of otherwise confidential information between competitors through the algorithm, while this case did not.”

“Thus, mere use of algorithmic pricing based on artificial intelligence by a commercial entity, without any allegations about any agreement between competitors—whether explicit or implicit—to accept the prices that the algorithm recommends does not plausibly allege an illegal agreement,” Du wrote.

Cendyn, which is based in Boca Raton, Florida, was represented by Latham & Watkins partners Sadik Huseny, in Austin, Texas; Brendan McShane, in San Francisco; and Anna Rathbun, in Washington, D.C.

“We welcome Chief Judge Du’s detailed decision to dismiss the lawsuit with prejudice,” Latham & Watkins said in an emailed statement to Law.com. “Our client remains deeply committed to serving its hospitality customers by providing software solutions that help them individually perform to their goals and maximum potential.”

Skadden, Arps, Slate, Meagher & Flom’s New York partners Boris Bershteyn, Kenneth Schwartz and Michael Menitove represented Las Vegas-based Caesars Entertainment.

They declined to comment.

Mark Holscher, a Los Angeles partner at Kirkland & Ellis, declined to comment on behalf of Wynn Resorts Holdings, as did Goodwin & Procter Washington, D.C., partner Armen Oruc, on behalf of the Rainmaker Group, later acquired by Cendyn.

Lawyers for the other defendants—Dan McNutt of Las Vegas-based McNutt Law Firm and Matthew McGinnis, of Ropes & Gray in Boston, for Blackstone Inc., which owned the Cosmopolitan of Las Vegas; and Patrick Reilly, a Las Vegas partner at Brownstein Hyatt Farber Schreck, on behalf of Treasure Island—did not respond to requests for comment. Plaintiffs’ lawyers Steve Berman, of Seattle’s Hagens Berman Sobol Shapiro, and Brian Panish, of Los Angeles-based Panish Shea Ravipudi, also did not respond.

On Monday, Caesars and other defendants in another antitrust case in New Jersey involving [Atlantic City casino hotels](#) wrote a letter informing U.S. District Judge Karen Williams of the Las Vegas ruling.

“*Gibson* raises essentially the same claim regarding Cendyn’s software and an alleged conspiracy among casino-hotels to raise prices via that software, albeit casino-hotels in Las Vegas, rather than Atlantic City, as here,” Skadden’s Tansy Woan, in New York, wrote in the letter. “Mindful that this court has not authorized supplemental briefing, we have not presented here argument on or analysis of Chief Judge Du’s opinion. We stand ready to do so if the court would find it helpful.”

The New Jersey hotels have moved to dismiss the amended complaint. The U.S. Justice Department, which, along with the Federal Trade Commission, has increasingly spoken out about the use of algorithmic pricing as an antitrust conspiracy, filed a statement of interest in the New Jersey case. The [March 28 statement](#) clarified that “algorithmic price fixing is a per se violation of Section 1” of the Sherman Act.

“Judicial treatment of the use of algorithms in price fixing has tremendous practical importance,” they said in the statement.

‘The Devil Is in the Details’

On Oct. 24, Du first granted dismissal in the Las Vegas case “because the complaint suffers from numerous pleading deficiencies.” She allowed plaintiffs to amend their complaint.

But, months later, U.S. District Chief Judge Waverly Crenshaw of the Middle District of Tennessee refused to dismiss similar claims in the RealPage case, in which the DOJ filed a statement of interest supporting the plaintiffs suing over apartment rental prices.

“While the allegations in that case, on their face, appear analogous to this case, the devil is in the details,” he wrote. “Here, the multifamily complaint clearly alleges that RealPage’s revenue management software inputs a melting pot of confidential competitor information through its algorithm and provides price recommendations based on that private competitor data.”

Plaintiffs filed a 222-page amended complaint against the Las Vegas casino hotels, adding more details about the alleged conspiracy, plus an additional antitrust claim that Cendyn and the hotels had established a vertical agreement. Their March 6 opposition against a renewed motion to dismiss liberally cited the *RealPage* decision.

The defendants said the RealPage ruling was not binding and irrelevant.

In this month’s ruling, Du agreed.

“Said otherwise, plaintiffs’ allegations that defendants entered into a tacit agreement to fix prices still have not crossed the line from conceivable to plausible despite the multitude of additional allegations in the FAC,” Du ruled, referring to the first amended complaint. “This case remains a relatively novel antitrust theory premised on algorithmic pricing going in search of factual allegations that could support it.”

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Environmentalists hit snag in Navy fuel contamination case

 [courthousenews.com/environmentalists-hit-snag-in-navy-fuel-contamination-case](https://www.courthousenews.com/environmentalists-hit-snag-in-navy-fuel-contamination-case)

Candace Cheung

A Hawaii group accusing the military of contaminating the islands' waters with jet fuel will get a chance to clarify parts of their environmental endangerment claims, but may have to wait until ongoing defueling is completed.

HONOLULU (CN) — A federal judge set back a Hawaii environmental nonprofit's case against the U.S. Navy for contamination of the ecosystem near the military's Red Hill Bulk Fuel Storage Facility Tuesday, dismissing a portion their environmental endangerment claims.

U.S. District Judge Leslie Kobayashi dismissed the complaint but will allow Wai Ola Alliance to submit a third amended complaint specifying their claims as they apply to issues with the defueling and closure of the Red Hill facility not covered in administrative orders from the Environmental Protection Agency and the Hawaii Department of Health.

"In the instant case, although this court is competent to decide issues regarding the defueling and closure of Red Hill," Kobayashi wrote. "It would be inefficient for this court to undertake either review of the defueling process, which defendants represented at the hearing was almost complete, or review of the closure process, which is underway with significant oversight by DOH and the EPA."

Citing the Clean Water Act and the Resource Conservation and Recovery Act, Wai Ola points specifically to the potential decades of fuel leaks from the World War II-era facility that they say have infiltrated nearby groundwaters along with waters in Halawa Stream and Pearl Harbor, affecting the animals living along the shoreline and degrading waters that hold cultural significance to Native Hawaiians.

The facility's massive 20 underground storage tanks and miles of pipes also risk contaminating Oahu's main aquifer, which sits just 100 feet below the facility and provides water to over three-fourths of the island.

Wai Ola maintains that the water crisis is ongoing and that a May 2022 emergency order from the Department of Health and 2023 Consent Order from the EPA guiding the ongoing closure and defueling process of Red Hill — predicted to not be completed until at least 2028 — are not enough to clean up or prevent continued pollution.

The alliance also argues that the administrative orders do not address aquifer remediation, Clean Water Act violations or identification of the source of the violations.

Kobayashi disagreed with the government's contention that any ruling arising from the case would conflict with federal agency action.

"This court's review of those issues would not disrupt the state's efforts to establish coherent policy in its programs under RCRA and the CWA, and this court's decision on the remaining portions of the citizen suit will not intrude upon the state's interests," she wrote.

Kobayashi also ruled that once the amended complaint is submitted, the portions already covered by administrative procedures will be stayed for at least year, pending the ongoing defueling the Navy began in October 2023.

Experts have estimated at least 1.94 million gallons of toxic fuel have been discharged from the facility since 1943, though military inspections throughout have consistently declared it safe.

State officials are also taking steps to put pressure on the Navy to follow through with environmental remediation of Red Hill.

Neither the Navy nor Wai Ola Alliance immediately responded to a request for comment.

The alliance first sued the Navy in 2022, several months after reports of an extensive fuel leak from Red Hill emerged alongside reports from nearby residents — including the Navy's own members and their dependents — of severe illnesses. Trial for a case brought by of those families against the Navy for the contamination is ongoing in federal court in Hawaii.

Categories / Courts, Environment, Government, Regional

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

AT&T faces another class action over data breach

DJ [dailyjournal.com/articles/378777-at-t-faces-another-class-action-over-data-breach](https://www.dailyjournal.com/articles/378777-at-t-faces-another-class-action-over-data-breach)

Data Privacy,

Class Action

Share

May 15, 2024

The new lawsuit, filed in Santa Clara Superior Court by Mark D. Potter and James M. Treglio of Potter Handy LLP, comes a few weeks after AT&T was hit with two similar proposed class actions in Texas and California federal courts.

Litigation against phone carrier AT&T Mobility LLC over a 2021 data breach continues to mount, with a proposed class action lawsuit filed Monday accusing the company of failing to protect customers' confidential information. The lead plaintiff only became aware that they were a victim of the attack on April 11, when the company publicly admitted an additional 7.6 million users had their information compromised.

The new lawsuit, filed in Santa Clara Superior Court by Mark D. Potter and James M. Treglio of Potter Handy LLP, comes a few weeks after AT&T was hit with two similar proposed class actions in Texas and California federal courts. The data breach is understood to have affected more than 70 million customers. *Dean et al v. AT&T, Inc.*, 3:23-cv-00776 (N.D.T.X. filed April 1, 2024); *Vita et al. v. AT&T, Inc.*, 5:24-cv-02356 (N.D.Cal. filed April 19, 2024).

In an email Monday, Treglio addressed AT&T's 2021 data breach at the root of the recent litigation and articulated his clients' hopes for the new state court lawsuit.

"As you recall, AT&T had the data of 73 million subscribers stolen from it and AT&T was completely unaware of the theft until the hackers started posting the data on the internet," Treglio wrote. "All the while, AT&T was regularly and annually promising to protect the data of its customers, including the plaintiff. It is our hope that through this litigation, AT&T will take the appropriate steps to fulfill its obligations set forth in its own privacy policy."

According to the most recent complaint, the lead plaintiff first became aware of his financial information becoming available on the dark web through his American Express Dark Web Monitoring service in October 2023, six months before AT&T's latest notice to customers that

information including social security numbers and birth dates had been stolen. *Nguyen et al. v. AT&T Mobility LLC et al.*, 24CV438852 (S.F. Super. Ct. filed May 13, 2024).

Additionally, the new state court complaint challenges AT&T's privacy policy and its lack of transparency regarding the company's alleged sale of customer information for profit.

"The acts and practices described above also violate the Consumer Legal Remedies Act, and the False Advertising Law, as described above, in that Defendants have represented to Plaintiff and the general public, that their personally identifiable information will be adequately protected," the attorneys wrote.

AT&T did not respond to requests for comment Monday but wrote in the April 11 notice that it would be "offering complimentary identity theft and credit monitoring services" to affected customers.

#378777

Wisdom Howell

Daily Journal Staff Writer
wisdom_howell@dailyjournal.com

Email jeremy@reprintpros.com for prices.
Direct dial: 949-702-5390

Varsity Spirit, Bain to pay \$82 million in cheerleading antitrust settlement

 [reuters.com/legal/litigation/varsity-spirit-bain-pay-82-million-cheerleading-antitrust-settlement-2024-05-14](https://www.reuters.com/legal/litigation/varsity-spirit-bain-pay-82-million-cheerleading-antitrust-settlement-2024-05-14)

Mike Scarcella

Logo of Bain Capital is screened at a news conference in Tokyo, Japan September 28, 2017. REUTERS/Kim Kyung-Hoon Purchase Licensing Rights , opens new tab

- Private equity firms Bain and Charlesbank among defendants
- Accord comes after related \$43 million deal with gyms

May 14 (Reuters) - Varsity Spirit, its current and former private equity owners and others have agreed to pay \$82.5 million to resolve a class-action lawsuit accusing the cheerleading events promoter of overcharging athletes.

Attorneys for the plaintiffs disclosed the terms , opens new tab of the proposed accord in a filing on Monday night in Memphis federal court, where athletes and their parents filed the lawsuit more than three years ago.

Advertisement · Scroll to continue

They accused Varsity and affiliated entities of scheming to box out competitors from the cheer industry, allowing Varsity to charge higher prices in violation of U.S. antitrust law.

Varsity's current owner, Bain Capital, and prior owner Charlesbank Capital were also defendants and are participating in the settlement. The defendants all denied wrongdoing.

The settlement, which is subject to court approval, did not disclose what share of the \$82.5 million total each defendant would pay.

In a statement, Memphis-based Varsity said it welcomed the resolution and would contribute to a shared fund with other defendants. "We are confident that Varsity Spirit acted appropriately and in the best interest of our sport," it said.

Bain and the plaintiffs declined to comment. Charlesbank did not immediately respond to a request for comment.

Varsity last year settled a related case lodged by gyms, spectators and other "direct purchaser" plaintiffs for \$43 million.

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

The new settlement with "indirect purchasers" came in advance of a scheduled July trial before Chief U.S. District Judge Sheryl Lipman. It centered on claims by athletes and their parents who paid Varsity or affiliates "registration, entrance or fees associated with participation in Varsity Cheer competitions."

The court had not yet ruled whether to let the plaintiffs sue as a class.

Varsity under the settlement also agreed to stop basing eligibility for an end-of-season championship competition on prior participation at a Varsity-owned cheer camp until at least 2029.

The plaintiffs' attorneys said they would seek up to about 33% of the settlement for legal fees, or about \$27 million.

The case is Jessica Jones et al v. Varsity Brands et al, U.S. District Court for the Western District of Tennessee, No. 2:20-cv-02892-SHL-TMP.

For plaintiffs: Joseph Saveri of Joseph Saveri Law Firm; Richard Paul III of Paul LLP; Jason Hartley of Hartley LLP; Daniel Gustafson of Gustafson Gluek; and Van Turner Jr of Turner Field

For Varsity Brands: George Cary and Steven Kaiser of Cleary Gottlieb Steen & Hamilton

For Bain Capital Private Equity: Michael Bonanno, Ryan Andrews and Christopher Tayback of Quinn Emanuel Urquhart and Sullivan

For Charlesbank Capital Partners: Richard Parker, Scott Edelman and Katherine Kelly Fell of Milbank

Read more:

Varsity Brands to pay \$43 mln in cheer industry antitrust settlement

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Mike Scarcella

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Page Printed From:

<https://www.law.com/dailybusinessreview/2024/05/15/what-makes-a-compelling-sec-whistleblower-tip/>



NOT FOR REPRINT
COMMENTARY

What Makes a Compelling SEC Whistleblower Tip?

In this article, we discuss the elements of what makes a compelling SEC Whistleblower Tip, such that it is likely to be investigated by the SEC’s Enforcement Division resulting in an enforcement action, substantial monetary penalties and ultimately payment of a financial bounty to our whistleblower client.

May 15, 2024 at 09:51 AM

Whistleblower Laws

By David R. Chase and Scott Silver | May 15, 2024 at 09:51 AM



In this article, we discuss the elements of what makes a compelling SEC Whistleblower Tip, such that it is likely to be investigated by the SEC’s Enforcement Division resulting in an enforcement action, substantial monetary penalties and ultimately payment of a financial bounty to our whistleblower client.

But first, a bit of background on the SEC Whistleblower Program.

The Establishment and Success of the SEC Whistleblower Program

The SEC Whistleblower Program was established by the U.S. Securities and Exchange Commission as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. The program provides monetary incentives for individuals who report original information to the SEC that leads to an enforcement action in which a judgment is entered in excess of \$1 million. SEC whistleblowers are eligible, after application, for an award ranging between 10% to 30% of any funds collected on that judgment.

The SEC’s Whistleblower Program has, by all accounts, been a game changer by substantially assisting the SEC in its efforts to effectuate its goals of protecting investors and upholding the integrity of the financial markets. Last year alone, the SEC awarded a record high \$600 million to whistleblowers, and has paid in excess of \$1 billion to whistleblowers since the program’s inception. With that success, however, has come a deluge of whistleblower filings, thus making it more important than ever that the SEC tip submitted constitutes not only original information (i.e., the SEC is unaware of it), but that it is compelling, credible and supported by persuasive evidence, if it is to have a chance to catch the eye of the regulator and lead to an investigation.

The Elements of a Compelling SEC Whistleblower Tip

As SEC Whistleblower Lawyers, we have found that the most successful tips typically share a few common characteristics.

Types of Whistleblowers

We absolutely love corporate insiders. They are usually the most effective whistleblowers in that they have first-hand knowledge of the violative conduct—they have seen it, understand it, can explain it, know who is involved and on what level, and quite often are in possession of internal documents and communications that conclusively prove it.

We also highly value and represent short sellers, who may not have inside information, but through their highly sophisticated analysis of publicly available information, including company filings and financials, earnings calls and macro industry trends, can identify securities law violations from the outside in a persuasive and compelling manner. The mere fact that they have a direct financial interest in seeing the company's stock price fall, does not mean that their analysis is not otherwise sound.

Defrauded investors can also prove, in certain circumstances, to be effective whistleblowers. This is particularly true when they have had extensive discussions with management, and are in possession of emails and text messages that evidence potentially fraudulent conduct. This is distinct, however, from a scenario where an investor has a mere hunch or feeling that they have been defrauded, but have no concrete evidence to prove it.

Types of Cases

While the scope and nature of potential federal securities violations for which a SEC whistleblower tip can be submitted is extremely broad, ranging from accounting fraud, market manipulations, unregistered sale of securities, false filings, crypto fraud, insider trading, Ponzi Schemes and violations of the Foreign Corrupt Practices Act, there are a few common themes that guide our decisions in determining what case to file or to decline representation. First, no matter the type of securities violation, the conduct must be egregious, blatant and systemic, not technical, isolated and/or grey, and must be coupled with credible and persuasive evidence.

Second, it always helps to file a tip that involves securities misconduct that is an enforcement priority for the SEC. For example, insider trading has historically, and continues to be, a key enforcement priority. More recently, crypto fraud has taken center stage, with the SEC devoting tremendous resources to its investigation and prosecution. These tips are thus more likely to be investigated.

Third, tips that identify securities misconduct, particularly ongoing frauds, that directly harm vulnerable investors (the elderly, retirees and the unsophisticated) will typically gain more traction than others, given that such cases directly implicate the SEC's statutory obligation to protect the investing public. Ponzi schemes are a classic example.

To File Anonymously or Not?

The SEC goes to great lengths to protect the identify of its whistleblowers and to ensure their anonymity during the investigatory process, whether they file their SEC whistleblower tip anonymously or if they reveal their identify. If an individual chooses to file anonymously, he must be represented by counsel.

We prefer, but do not require, that our whistleblower clients identify themselves in the whistleblower tip as it adds credibility and context to their claims, and it also facilitates cooperation with the SEC Enforcement Division after the tip has been filed. Such ongoing cooperation is often critical in assisting the SEC in making its case, and can help increase the size of the financial bounty when awarded. Quite often our whistleblower clients will file anonymously only to then reveal their identify after they have spoken with the SEC (anonymously by phone for example) and become comfortable with the process and with the SEC enforcement staff working the investigation.

SEC Whistleblowing: A Win-Win

The SEC Whistleblower Program has clearly proven that whistleblowers play an absolutely critical role in alerting the SEC to serious securities violations of which, but for their tips, the SEC would likely never become aware. By doing so, whistleblowers can personally reap tremendous financial rewards for courageously stepping up and reporting, while simultaneously doing a public service by assisting the SEC in its mission to protect investors and the integrity of the financial markets.

The Importance of Working With Experienced SEC Whistleblower Counsel

Given the tremendous success of the SEC Whistleblower Program and the resulting avalanche of whistleblower tips being submitted on a daily basis, the statistical likelihood of having a filing investigated, successfully prosecuted and a financial bounty awarded is less than ever. Thus, more than ever, it is critical to be represented by seasoned SEC whistleblower counsel who understands the SEC whistleblower process, knows how to present the tip in the most compelling and persuasive manner and can maximize the value of a financial bounty by effectively cooperating the whistleblower in the SEC investigation.

Scott Silver *is the managing partner of Silver Law Group, a nationally recognized law firm representing investors worldwide to recover their investment losses.*

David R. Chase, *an attorney with the firm, is a seasoned SEC defense attorney and SEC whistleblower lawyer, and former SEC prosecutor, with over 30 years’ experience, represents clients around the nation and internationally.*

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Climate Capital **California Public Employees' Retirement System****Calpers to direct \$25bn to green private market investments**

US public pension plan says it will look at real estate, private equity and infrastructure



The allocation will propel the \$483bn fund to become one of the world's largest investors in so-called climate solutions © Ken James/Bloomberg

Josephine Cumbo and **Attracta Mooney** YESTERDAY



Get ahead with daily markets updates. **[Join the FT's WhatsApp channel](#)**



Calpers, the US's biggest public pension plan, will pour more than \$25bn into green-related private market investments, in one of the largest commitments by a major fund to unlisted climate assets.

The giant US pension group is examining the private equity, real estate and infrastructure markets, particularly in Asia and Europe, as it looks to deploy the capital over the next six years, a senior executive told the Financial Times.

“Those are the ones [private market assets] that have very evident climate investment opportunities,” said Peter Cashion, Calpers’ managing investment director, sustainable investments.

The comments are the first time Calpers has publicly revealed how it plans to spend an extra \$53bn it committed last November to an expanded low carbon assets portfolio. The new goal would take the total portfolio to \$100bn by 2030, or more than double the initial \$47bn in funds.

“We’re expecting [private markets will] represent more than half of the \$53bn,” he added. “It’s pretty significant.”

The allocation will propel the \$483bn fund to become one of the world’s largest investors in so-called climate solutions, in spite of the political pushback against environmental, social and governance-based investing in the US.

“The reason we have conviction around it, we’re really doing this [is] to generate alpha and outperformance, because we see the investment opportunity set from this really fundamental change in the economy,” said Cashion. “At the same time, it’ll have a side benefit of having a portfolio that has a lower carbon intensity.”

California is distinct for having set out a framework aimed at using the state’s big public pension plans, including Calpers, to drive investments in sustainable technologies and other green assets.

Calpers’ green investment push comes as the issue of how to pay for a shift to a cleaner economy [dominates global discussions](#) about climate change.

Almost 200 countries agreed to transition away from fossil fuels at the UN COP28 climate summit in Dubai in December, leaving governments with already-stretched budgets scrambling to drive investments to green solutions.

A report last year from the Climate Policy Initiative found that climate finance globally will need to increase to about \$9tn a year by 2030, up from \$1.3tn in 2021-2022, in order to meet the Paris accord, where countries agreed to limit the long-term global temperature rise. Investments from pension funds and the private sector are expected to play a crucial role.

In real estate, Cashion said he saw opportunities in so-called green buildings. “The measurement for what qualifies in your real estate portfolio as green is becoming easier,” he said.

Calpers would build out its investments in renewable infrastructure, he said, as well as looking at private equity investments in companies that support the shift to clean energy, citing those servicing wind turbines or developing software to make solar panels more efficient as examples.

“[Renewables are] already an area where we’re very active and we’ll continue to do that and build out that portfolio,” he said.

In terms of where the climate money would be deployed, Cashion said his “expectation is that Asia and Europe will present significant opportunities”, with a particular focus on emerging markets.

Cashion, who was in Europe to meet other pension funds, said that with the rise in global greenhouse gas emissions now coming from non-western nations, “the opportunity set in emerging markets will be huge”.

But he added that the emerging market countries where Calpers could operate at scale was a “pretty small number” and would be driven by where the asset managers it uses saw the best opportunities.

The Biden administration has tried to make the US more attractive for climate investors with tax incentives, through the Inflation Reduction Act. But Cashion said its investment criteria were global.

“The IRA has been excellent and has increased (investment) opportunities for us,” he said. “But we’ll be driven by where we see the opportunities.”

As well as working with its existing asset managers, Calpers would look to work with “specialised, smaller managers who may well have access to deals that the bigger players do not”.

Further details of the climate plan come two months after Calpers approved plans to increase its overall allocation to private markets from 33 per cent of plan assets to 40 per cent.

A spokesperson for Calpers said this increased allocation, approved by the Calpers Board of Administration in March, would not be measured on the same timeline as the \$100bn climate plan, which is linked to 2030. No further details on investments from the wider private markets drive were disclosed.

<https://twitter.com/MorganTrau/status/1790791333042430381>



Morgan Trau
@MorganTrau

NOW: I'm at State Teachers Retirement System of Ohio's board meeting (STRS).

This comes as AG Dave Yost filed a lawsuit this morning against two board members, saying they have breached their fiduciary duties — accusing them of contract steering.

@WEWS @WCPO @OhioCapJournal



10:08 AM · May 15, 2024 · 2,532 Views



Morgan Trau @MorganTrau · 20m

Here is the story I am working on -- it will be updated and I will have reports for TV.



From news5cleveland.com

1 4 2 1K

Morgan Trau @MorganTrau · 6m

BREAKING: STRS reformers just ousted the current board chair and vice chair.

Rudy Fichtenbaum, one of the individuals being sued by Yost, is now the chair of STRS. The vice chair is Elizabeth Jones.

110

cat @thecat854 · 39s

Stop voting for republicans.

1

DarkBlueBuckeye @OxfordBuckeye · 47m

What a pathetic piece of play acting from Yost, at the behest of DeWine. This, in spite of the fact that he won't do likewise to DeWine, even after two breaches of the law. The man is a disgrace and an embarrassment to the state of Ohio.

6 69

Prof. Snark @camp84481738 · 1m

Who appointed those two members?

1

1Gr8ful1 @Yo_Martinez · 50m

Yost cant be trusted

72

More replies

Colonel Inguss @Colonel_Inguss · 27m

Corrupt GOPers DeWine, Kasich and Josh Mandel involved and Yost only find 2 people to bring a lawsuit against? He's either incompetent, corrupt himself or both

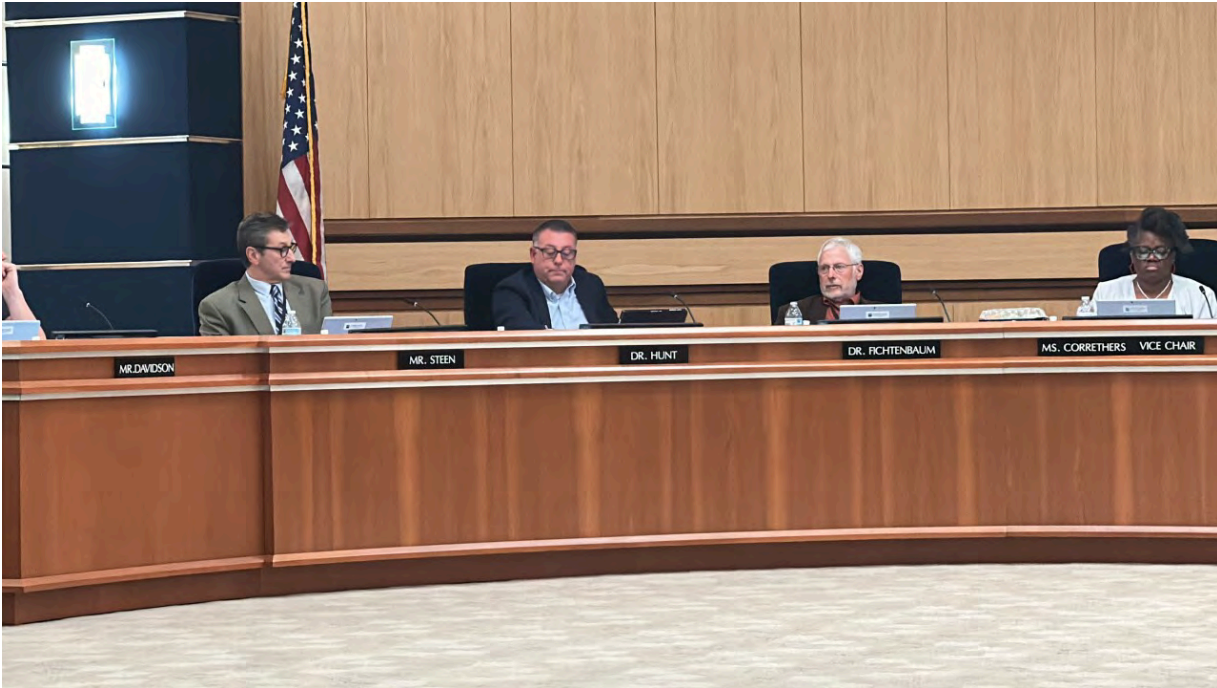
18

Yost files lawsuit to remove members of teachers' pension board

[news5cleveland.com/news/politics/ohio-politics/ag-yost-files-lawsuit-to-remove-members-of-teachers-pension-board-accuses-them-of-breaching-fiduciary-duties](https://www.news5cleveland.com/news/politics/ohio-politics/ag-yost-files-lawsuit-to-remove-members-of-teachers-pension-board-accuses-them-of-breaching-fiduciary-duties)

Morgan Trau

May 15, 2024



COLUMBUS, Ohio — Attorney General Dave Yost filed a lawsuit Wednesday against two State Teachers Retirement System of Ohio (STRS) board members, saying they must be removed from their roles for breaching their fiduciary duties. He accused them of being a part of an attempt "to hijack" the pensioners' retirement accounts. Defendants Wade Steen and Dr. Rudy Fichtenbaum have denied the allegations in the AG's filing in the Franklin County Court of Common Pleas.

Steen and Fichtenbaum "seek to steer" as much as 70% of current STRS assets, which is \$65 billion, to a "shell company" that has "backdoor ties" to the members, Yost argued.

This is a developing story. I am currently at the STRS board meeting where the topic is being discussed. This story will be updated.

This is a "sham investigation," Steen said, to applause from people in the gallery.

Recap

STRS lost \$5.3 billion in 2022 alone. In 2023, it lost \$27 million invested in the failed Silicon Valley Bank. In addition to those — the cost of living adjustments, or COLAs, were suspended for more than 150,000 retired Ohio teachers for five years starting in 2017. In

2012, the qualifying retirement number was moved from 30 years to 35 years. Last year, this was changed to 34.

This has led to a group of pensioners, who have named themselves the "reformers," to fight for change.

Last week, Yost launched an investigation into the teachers' pension fund after allegations that a "hostile takeover" is putting educator money in jeopardy.

RELATED: Ohio AG investigating alleged 'hostile takeover' inside teachers' pension fund

The concerns came from anonymously sent documents sent to Gov. Mike DeWine's office. The governor's spokesperson, Dan Tierney, told me that he believes they were prepared by multiple STRS staff members. Through public records requests, I obtained dozens of papers.

The documents allege that several STRS board members have been doing the bidding of private investment group QED Systematic Solutions.

Who is QED? [Click here to learn more.](#)

FirstEnergy was billed \$5, 000 a month for bitcoin consulting that emails say came from Dennis Kucinich

 1.next.westlaw.com/Document/I88dc8c40127a11ef89c28075493d4d0e/View/FullText.html

NewsRoom

5/14/24 cleveland.com (Cleveland, Ohio) (No Page)

2024 WLNR 6845539

cleveland.com (Cleveland, OH)

Copyright © 2024 cleveland.com

May 14, 2024

FirstEnergy was billed \$5,000 a month for bitcoin consulting that emails say came from Dennis Kucinich

Jake Zuckerman; cleveland.com

COLUMBUS, Ohio - Cleveland businessman Tony George invoiced FirstEnergy for what company emails describe as \$5,000 a month for Bitcoin consulting from former Cleveland mayor Dennis Kucinich, not long after Kucinich lost his 2018 gubernatorial primary, newly unearthed emails show.

The correspondence shows that George sent emails to Dennis Chack, then-senior vice president for marketing and branding at FirstEnergy, about at least two invoices in 2018 that Chack forwarded for processing to the executive assistant of the then-CEO of the scandal-tainted company. The emails suggest a financial relationship between FirstEnergy and Kucinich, which the former mayor and congressman has unequivocally denied in the past and the present, including in a lawsuit against Cleveland.com and The Plain Dealer.

Between 2018 and 2020, FirstEnergy paid nearly \$1.5 million to a company owned by George for "block chain technology" and consulting, a recent regulatory audit found, but the audit didn't draw any connection between the company and Kucinich.

The newly revealed invoices were sent in the same era that FirstEnergy was executing a self-professed scheme to bribe ex-Ohio House Speaker Larry Householder in exchange for legislation charging ratepayers \$1 billion to bail out two nuclear plants owned by a company

subsidiary. Householder was convicted at trial and sentenced to 20 years in prison. Former CEO Chuck Jones and senior vice president Mike Dowling await trial on state bribery charges. Three other men have been convicted in the scandal.

But a recent trove of emails released in connection with a related civil lawsuit brought by company investors has shown how FirstEnergy also paid millions into opaque political nonprofits backing other politicians: Republican Gov. Mike DeWine, Lt. Gov. Jon Husted, 2018 Democratic gubernatorial candidate Rich Cordray, and Republican Senate President Matt Huffman.

Kucinich in May 2018 lost to Cordray in the Democratic primary. Two months later, George's executive assistant emailed a \$10,000 invoice that was described in the email subject line as being for June and July to Chack. Chack forwarded the invoices to Jones' administrative assistant.

"This is consulting fees for Dennis Kucinich re: Bitcoin," Chack wrote that July. "This will be a \$5,000 monthly fee until I terminate the arrangement."

It's unclear how many such consulting payments were submitted. George emailed Chack at least one other invoice in September of that year, which Chack forwarded on to Jones' assistant. The emails do not show payment.

"Please process for Dennis Kucinich," Chack wrote.

The invoices themselves come from JoBob Inc. to FirstEnergy, specifically Chack, and reference "block chain technology." They contain no reference to Kucinich, even though the emails do.

As Cleveland's mayor between 1977 to 1979, Kucinich waged a high-profile battle with banks over Cleveland Public Power and his unwillingness to sell the publicly owned utility to the Cleveland Electric Illuminating Company - now part of FirstEnergy.

Kucinich has not been accused of wrongdoing. He didn't respond to calls and text messages. Through his attorney, Andrew Stebbins, he denied consulting for FirstEnergy on cryptocurrency or blockchain.

Stebbins said Kucinich, 77, has a "depth of experience" in blockchain and cryptocurrency. Stebbins said Kucinich Consulting has advised many clients on the matter. He noted Kucinich is speaking on a "Running on Crypto: Electing a Pro-Crypto Congress" panel alongside GOP U.S. Senate Candidate Bernie Moreno at the Washington D.C. Blockchain Summit this week. In 2018, Kucinich spoke at the Blockchain for Impact Global Summit, held at the United Nations.

Neither Kucinich nor Stebbins offered any clear explanation as to why Chack explicitly connected the invoices to Kucinich. Stebbins declined to answer specific questions in writing.

"Any insinuation that I was performing these services on behalf of FirstEnergy is not true and is casting me in a false light," Kucinich said in a statement Stebbins provided. "I never worked for FirstEnergy. I never received money from FirstEnergy."

JoBob Inc.

Much about the invoices is unclear, including how long any consulting arrangement lasted. Cleveland.com tried to reach George via phone, text, and email but received no response.

An attorney for Chack, who was fired alongside Jones and Dowling as the bribery scandal unfurled, didn't respond to an email. FirstEnergy declined to answer specific questions, but spokeswoman Jennifer Young said the company has made "meaningful improvements to advance our culture of ethics, integrity and accountability."

The new records came to light as part of a rolling release of records from the Ohio Consumers' Counsel, which obtained vast troves of records from the pre-trial evidence exchange process of a group of investors suing FirstEnergy in relation to the scandal. Dave Anderson, a researcher and advocacy journalist with the Energy and Policy Institute, first spotted the emails mentioning Kucinich amid the thousands of pages that have been released.

Evidence and witness testimony from Householder's trial showed that George, a major Republican donor, arranged for Householder to travel on FirstEnergy's corporate jet to Washington, D.C., for President Donald Trump's inauguration in 2017. He also dined with Householder and the company men. It's during meals and cocktails over that weekend, federal prosecutors convinced a jury last year, that a statehouse bribery plot was hatched.

In one of the emails to Chack, George's executive assistant's email signature lists JoBob Inc., a company owned by George.

JoBob Inc. surfaced in a recent Public Utilities Commission of Ohio audit of FirstEnergy's use of millions of dollars charged to ratepayers known as the "Delivery Capital Recovery" rider. Auditors determined millions of DCR dollars flowed to two entities associated with Householder, two associated with PUCO Chairman Sam Randazzo, and 12 associated with George, including JoBob Inc.

JoBob Inc. received nearly \$1.5 million from FirstEnergy, according to the audit, which was spent on "consulting invoices" and "Block Chain Technology Invoices" between 2018 and 2020.

FirstEnergy in court filings admitted to a separate scheme of paying Randazzo a \$4.3 million bribe shortly before his appointment as PUCO chairman. Jones, FirstEnergy's former CEO, Mike Dowling, a senior vice president and lobbyist, and Randazzo all pleaded not guilty to their recent charges and said the money wasn't a bribe but a term of a consulting contract. Randazzo died by suicide as he faced both state and federal bribery indictments.

The audit recommended FirstEnergy return \$6.6 million to ratepayers, mostly connected with money that flowed to entities associated with George. It doesn't mention Kucinich.

Comeback

After losing his gubernatorial primary, Kucinich unsuccessfully mounted a comeback mayoral bid in 2021, losing to current Mayor Justin Bibb.

In early 2022, Kucinich filed a lawsuit against the Cleveland Plain Dealer, its top editor, its parent company, and two reporters about a story and podcast involving Kucinich's campaign donations. The lawsuit has not yet been resolved.

In the lawsuit, Kucinich's attorneys wrote that "any allegation that Plaintiff took money from FirstEnergy or consorted with FirstEnergy was completely erroneous" and that Cleveland.com made these accusations with "knowledge of their falsity."

He recently served as a presidential campaign manager for environmental attorney turned anti-vaccine activist Robert F. Kennedy Jr., although Kucinich left the campaign in October. He's currently running for Congress, challenging incumbent Republican Max Miller as an independent.

Jake Zuckerman covers state politics and politics for Cleveland.com and The Plain Dealer.
---- Index References ----

Company: FIRSTENERGY CORP.

News Subject: (Campaigns & Elections (1CA25); Crime (1CR87); Fraud (1FR30); Social Issues (1SO05); U.S. President (1US75); U.S. Presidential Campaigns (1US04))

Industry: (Bank Operations (1BA31); Banking (1BA20); Electric Utilities (1EL82); Electronic Data Interchange & Funds Transfer (1EL53); Electronic Funds Transfer (1EL88); Energy & Fuel (1EN13); Financial Services (1FI37); I.T. in Banking (1IT59); I.T. in Financial Services (1IT24); Utilities (1UT12))

Region: (Americas (1AM92); North America (1NO39); Ohio (1OH35); U.S. Midwest Region (1MI19); USA (1US73))

Language: EN

Other Indexing: (FirstEnergy) (Dennis Kucinich)

Word Count: 1183

End of
Document

© 2024 Thomson Reuters. No claim to original U.S. Government
Works.

NewsRoom

Don't Blame Auditors When a Company Fails. Learn to Predict It

- *Stout shares tips for stakeholders to predict insolvency*
- *Red flags include credit downgrades, cash flow decrease*

Bloomberg Law News 2024-05-15T10:18:47820145911-04:00

Don't Blame Auditors When a Company Fails. Learn to Predict It

By Joel Cohen and Jeffrey Granel2024-05-15T04:30:50000-04:00

- *Stout shares tips for stakeholders to predict insolvency*
- *Red flags include credit downgrades, cash flow decrease*

When a major company fails, investors may be left staring at financial statements wondering how they never saw it coming.

Blame may be cast at auditors in these cases, but that could be a misunderstanding of a critical nuance: Auditors uphold accounting principles but aren't responsible for predicting insolvency. For example, the failure of a company due to a major macroeconomic shock would lie beyond auditor purview.

Instead, the responsibility for watching for insolvency typically falls on analysts, creditors, and other stakeholders who assess external factors alongside financial statements.

Auditors' Responsibility

Public Company Accounting Oversight Board guidance identifies auditor obligations when confronting uncertainties during audits.

When faced with significant doubts, auditors examine management strategies and their feasibility. But auditors depend on information provided by management, and external variables such as market volatility and management efficacy may be outside the audit's scope.

As they assess the likelihood of strategy success, auditors usually will have a thorough discussion with management which in turn is expected to explain their assumptions, considering their industry and company-specific expertise. However, these plans may falter due to poor execution, management's lack of credibility, or unforeseen market dynamics.

As such, auditors operate within the confines of the information at their disposal. They may find themselves blindsided or misled when pertinent information is withheld from them.

Auditors are responsible for discerning if there is substantial doubt about an entity's ability to continue as a going concern. This determination hinges on conditions existing at or preceding the auditor's report date. But this approach is somewhat limiting for predicting bankruptcy, as an initial determination may not address early warning signs on future performance.

Answering Questions Raised

The auditor-client dialogue can highlight areas of concern on financial statements and management's strategy for remediation, but the dialogue may raise more questions than it answers. Answering those questions often isn't the responsibility of auditors or tax professionals.

Although auditors may use footnotes to outline concerns or provide additional details of what certain line items include, these footnotes may raise further questions for the investment community.

However, auditors can assist by having experts scrutinize the viability of management's projections, evaluating competence of the management team, and reviewing the adequacy of the company's internal controls. Inadequate internal controls may heighten the risk of insolvency.

Lenders and Creditors

Lenders often wield significant tools to assess the viability of potential borrowers. They can impose stringent requirements or covenants for loans and credit predicated on thorough analyses and risk assessments.

While auditors play a crucial role in ensuring financial transparency, lenders also must exercise due diligence in scrutinizing loan applicants and monitoring their ongoing financial performance and adherence to covenants.

If borrowers are at risk of breaching covenants, agent banks discuss cure options with borrowers and notify other banks within the syndicate.

Red Flags

Recognizing the warning signs of financial distress helps safeguard investments and interests. By understanding and heeding these warning signs, stakeholders can proactively assess the financial health of organizations and take preemptive measures to mitigate risks and protect investments.

Macroeconomic shocks. Foreign and domestic economic events can drastically impact large or small companies. For example, fluctuations in oil and gas prices can exert pressure on margins, potentially leading to negative margins for businesses reliant on these commodities.

Secular declines. Industries may experience a gradual decline in support as consumer preferences shift. For example, as consumers adopted new technologies and demanded real time news consumption, print newspaper subscriptions declined in place of a lower margin product being online subscriptions.

Regulatory or legislative changes. Significant impacts can occur in industries such as oil and gas, life sciences, and health care because of regulatory or legislative changes. For instance, amendments to Medicare reimbursements rates in assisted homes required additional nursing staff in order to receive the same rate reimbursement, increasing the assisted homes expenses and placing strain on the business.

Rating agency credit downgrades. These ratings are determined by a blend of qualitative and quantitative factors, assessing both current and projected performance, alongside comparisons to peers and macroeconomic conditions. A downgrade in ratings can signal potential future instability, as was the case in Bed Bath & Beyond's ratings downgrades.

Decrease in cash flow. Nominal or negative cash flow may require a company to tap into reserves to fulfill weekly obligations or capital expenditure requirements. Without a return to positive cash flow, reserves eventually will be depleted.

High leverage. Increased leverage resulting from additional debt or declining performance can make managing debt more challenging, potentially requiring bankruptcy protection for companies with excessively high leverage ratios.

Fraud or mismanagement. Instances of fraud such as Enron aim to deceive auditors. Once uncovered, they typically reveal additional underlying issues that may lead to bankruptcy, as further exemplified by cases such as FTX or Theranos.

Litigation. Legal battles, such as the Johnson & Johnson talc cases, can escalate, with unfavorable decisions potentially pushing a company toward bankruptcy.

Underperformance compared to peers. Significant underperformance relative to peers may indicate poor management decisions or unfavorable long-term contracts, adversely affecting the business.

Increase in media coverage of the industry. Shifts in technology, management, or regulations highlighted in the media can adversely affect business operations, its perception in the investing community, and its regulatory focus, as was the case with Gamestop.

Preventing and predicting financial distress requires a collective effort, with auditors, lenders, and stakeholders each playing a distinct yet interconnected role. Understanding these roles and paying attention to signs of distress can help stakeholders identify risk of insolvency before it is too late.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Joel E. Cohen is managing director and New York office leader at Stout, focusing on dispute, forensic, and insolvency primarily in the financial services and asset management industries.

Jeffrey T. Granell is director at Stout in Miami and provides financial advisory and investment banking services to both public and private-sector clients.

Write for Us: Author Guidelines

To contact the editors responsible for this story: Melanie Cohen at mcohen@bloombergindustry.com; Rebecca Baker at rbaker@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Amazon fights FTC probe of data safeguards in antitrust lawsuit

 [reuters.com/legal/transactional/amazon-fights-ftc-probe-data-safeguards-antitrust-lawsuit-2024-05-14](https://www.reuters.com/legal/transactional/amazon-fights-ftc-probe-data-safeguards-antitrust-lawsuit-2024-05-14)

Mike Scarcella

The logo of Amazon is seen at the company's logistics centre in Boves, France, October 6, 2021 REUTERS/Pascal Rossignol/File Photo Purchase Licensing Rights  , opens new tab

May 14 (Reuters) - Amazon.com has urged a U.S. judge to bar the Federal Trade Commission from probing the company's data preservation efforts, arguing in a court filing that the agency had not shown any relevant evidence in its antitrust lawsuit has been lost.

Amazon's Monday night filing  , opens new tab in Seattle federal court came after the FTC claimed last month that the company had failed to stop the "widespread deletion" of senior executives' messages on the communications platform Signal.

The FTC sued Amazon last year, accusing the company of abusing its retail market power to reduce competition and keep prices artificially high. Amazon has denied the allegations and asked a judge to dismiss the case.

Amazon and the FTC declined to comment.

The FTC asked the court  , opens new tab to force Amazon to reveal more information about its preservation practices. Amazon executives, the agency said, used Signal's "disappearing message" feature to destroy records of their internal communications despite being on notice to preserve such data.

Signal is a popular, secure messaging service that allows users to set how long they want their messages to remain available.

Amazon countered in its Monday filing that the FTC was seeking legally protected information. It said its founder and former CEO Jeff Bezos started using Signal on his personal phone after his phone was hacked in 2018.

The company said it has been "cooperative and transparent about Signal" with the FTC, providing screenshots and other data to the agency as part of its request for information.

The FTC took testimony from Amazon executives including Bezos and current CEO Andrew Jassy, among others, about their Signal use, court records show.

Amazon said there was no evidence "despite the FTC's best efforts to suggest otherwise" that company officials used Signal to discuss business practices that are at the heart of the case.

The case is Federal Trade Commission v. Amazon.com Inc, U.S. District Court, Western District of Washington, No. 2:23-cv-01495-JHC.

For FTC: Susan Musser, Edward Takashima and Emily Bolles of FTC

For Amazon: Patty Eakes and Molly Terwilliger of Morgan, Lewis & Bockius; Heidi Hubbard and John Schmittlein of Williams & Connolly; Thomas Barnett and Katharine Mitchell-Tombras of Covington & Burling; and Kosta Stojilkovic of Wilkinson Stekloff

Read more:

US judge sets October 2026 trial for FTC antitrust suit against Amazon

Amazon asks court to dismiss antitrust lawsuit over web traffic sharing

FTC's Amazon antitrust lawsuit faces high bar in US court - experts

US court sanctions Google for deleting evidence in antitrust cases

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Read Next / Editor's Picks

Page Printed From:

<https://www.law.com/newyorklawjournal/2024/05/15/shadow-trading-how-far-can-the-sec-expand-the-insider-trading-prohibition/>

NOT FOR REPRINT

ANALYSIS

Shadow Trading: How Far Can the SEC Expand the Insider Trading Prohibition?

The SEC's long, successful campaign against insider trading has been legally predicated on two words—"deceptive device"—in Section 10(b) in the Securities Exchange Act. In terms of its legal authority, the SEC has little else to rely on, as insider trading is nowhere defined in federal legislation.

May 15, 2024 at 11:04 AM

By John Coffee | May 15, 2024 at 11:04 AM



Regulators who do not know history are destined to repeat it. This pattern may be playing out again. In the 1980s, federal prosecutors vastly stretched the reach of the federal mail and wire fraud statutes, using a novel theory that it reached not only deprivations of property but also of the citizen's political and civil rights. Prosecutors alleged that citizens had a right to an honest government devoid of conflicts of interest. The tactic worked for a time, and some prominent politicians went to prison. But then the rubber band snapped, and in *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court rejected the theory in its entirety.

The U.S. Securities and Exchange Commission's (SEC) long and successful campaign against insider trading has been legally predicated on two words—"deceptive device"—in Section 10(b) in the Securities Exchange Act. In terms of its legal authority, the SEC has little else to rely on, as insider trading is nowhere defined in federal legislation.

Over the long term, the Supreme Court has been alternately skeptical and then supportive of the SEC's efforts to expand the scope of insider trading. In *United States v. Chiarella*, 445 U.S. 222 (1980) and *Dirks v. SEC*, 463 U.S. 646 (1983), the court rejected a "parity of information" theory and insisted upon a fiduciary breach to demonstrate the use of a deceptive device.

More recently, the SEC won a major victory in *United States v. O'Hagan*, 521 U.S. 642 (1987), which upheld "misappropriation theory" under which it is sufficient to deceive the source of the material, nonpublic information (rather than the corporate issuer). But even there, Justice Ginsburg emphasized that the prosecution had to show that the defendant "feigned fidelity" to the source of the information. On the facts of *O'Hagan*, there was abundant evidence of this disloyalty where a law firm partner not working on a takeover induced his juniors to disclose to him the target corporation's identity so he could trade in its stock.

But how far does misappropriation theory extend? In *O'Hagan*, it was clear that the court was concerned about issues of lawyer integrity. As Ginsburg wrote, "[I]t makes scant sense to hold a lawyer like O'Hagan a violator if he works for a law firm representing the target of a tender offer, but not if he works for a law firm representing the bidder." Still, what if there is no transaction between the source of the information and the issuer whose stock is purchased by the defendant? What if the two companies are strangers with no cross-ownership, common personnel, or any past history? The same concern about the "integrity" of the bar is not as clearly at issue.

Such a less intimate relationship is essentially the fact pattern in *SEC v. Panuwat*, 2023 U.S. Dist. LEXIS 234133 (N.D. Cal. 2023), where the jury recently accepted the SEC's theory. Here, an executive officer of a company (Medivation) that was known to be up for auction purchased the stock of an unrelated firm (Incyte), largely because securities analysts had predicted that if Medivation were acquired at a premium, this acquisition would serve to boost the stock prices of other companies in the same field (including Incyte). The defendant had no nonpublic information about Incyte; nor did he have any contact with it, but he did know that Pfizer was about to acquire Medivation at a premium.

The SEC believes that this fact pattern is no different than *O'Hagan*, where the defendant also traded in the stock of a company to whom he owed no duty. But note that a major development at one firm (a merger, a bankruptcy, a scientific discovery, or a major drilling strike) could materially affect the stock prices of multiple other firms (either raising or lowering these other prices). Indeed, one can imagine cases (such as one having advance knowledge of the Federal Reserve's plans to move interest rates) that could affect most public corporations' stock prices.

Not only does the potential reach of this "shadow trading" theory extend much further, but the defendant has not breached any duty to these other companies (whereas in *O'Hagan*, it was implicit that the two parties to the merger transaction would maintain confidentiality). This difference in the scale and scope of the SEC's novel shadow trading theory suggests that when and if such a case ever reaches the Supreme Court, the SEC could face an adverse decision similar to *McNally*.

Many disagree with me, however, arguing that in both cases a duty has been breached to the source of the information (here, Medivation). Yet, *O'Hagan* and *Panuwat* are different in important respects. First, all cases involving "misappropriation theory" prior to *Panuwat* seem to have involved conduct by the defendant that caused "likely harm" to the shareholders of the source of the information. See Yoon-Ho, Alex Lee & Alessandro Romano, "Insider Trading and Macroeconomic Risk", 13 Harv. Bus. L. Rev. 393 at 411 (2023).

This potential for harm is clearest in *O'Hagan*, where the defendant's extensive trading in call options of the target company raised the target's stock price and also alerted sophisticated market professionals that an acquisition of the target was likely. This both raised the cost of the acquisition to the bidder (O'Hagan's client) and disrupted the bidder's timing. If there is a "likely harm" requirement, neither Pfizer (the acquirer) nor Medivation (the target) suffered any injury because of Panuwat's purchases of Incyte stock.

Nor did Panuwat "feign fidelity" to the source, at least in the same way that O'Hagan did. Owing no duty to Incyte, it is unclear why defendant Panuwat should be liable to its shareholders. This is not to excuse Panuwat's conduct. He clearly deserved to be fired, and companies, if they want, can monitor their employees' trading (as brokerage firms do).

Proponents of the "shadow trading" theory nonetheless point out that Medivation had both an Insider Trading Policy that expressly covered all collaborators, customers, partners, suppliers, and competitors of the company. Clearly, Medivation did not want Panuwat trading in a competitor's stock, and it had a Confidentiality Agreement with him. But does this mean that Panuwat breached a fiduciary duty to Medivation?

It may be more accurate to say that he breached a contractual duty. The classic fiduciary duty of loyalty does not require a corporate officer to obey all the preferences and orders of their corporation. For example, if a Medivation directed Panuwat to vote for Donald Trump (because it believed Trump to be vital to their future), this is probably not enforceable as a breach of a fiduciary obligation. Moreover, if the duty not to trade in competitors' stocks can be enforced, Medivation should be the party to enforce this obligation (not the SEC).

Here, we come to a point that I do not believe has been sufficiently recognized: how much deference should be given by courts to private ordering in the insider trading context? In denying the defendant's motion for summary judgment, the *Panuwat* court emphasized that Medivation had deliberately designed its insider trading policies to bar trading in the stock of competitors. But Rule 10b-5 was never intended to protect or enforce such private ordering on a company-by-company basis.

Indeed, because Rule 10b-5 carries criminal penalties, giving weight to the special preferences of each corporate employer would mean that Rule 10b-5's criminal application would become uneven and inconsistent. This is contrary to the core tradition of the criminal law that the legislature frames the definition of the crime. Private ordering deserves recognition for many purposes, but not for the purposes of allowing corporate issuers to tailor the criminal law to their special needs.

Today, in light of *Panuwat*, many corporations are reconsidering their insider trading policies. This is perfectly acceptable for some purposes, but consider the disparities that are likely to result. Corporation X may instruct its employees not to trade in any competitor or any firm in the same general market area. Others, at least a few, may instead keep their insider trading prohibition narrow, possibly to allow their officers and employees to engage in highly profitable shadow trading. A criminal statute cannot not seek to accommodate these differing interests.

Normatively and possibly constitutionally, the criminal law must stay consistent and even. Tailoring it to the desires of individual corporations is unjust and arguably delegates the legislature's power to private bodies. To be sure, companies can have different insider trading policies and confidentiality agreements, but the SEC should be enforcing only one standard.

What should the SEC do on the policy level? To date, we do not know how pervasive "shadow trading" is, but some academic studies have estimated that it is common. See Mihir N. Mehtz, David M. Reeb & Wanli Zhao, "Shadow Trading", 96 *Acc. Rev.* 367 (2021) (coining and defining the term). To the extent that this is the case, prohibiting shadow trading is moving us, at least marginally, toward the "parity of information test" that *Dirks* and *Chiarella* rejected.

Possibly, the SEC could adopt rules under §14(e) of the Williams Act that would supplement existing Rule 14e-3. The premise here is that much shadow trading is occurring in the takeover context and might be reached by some extension or modification of existing Rule 14e-3 (which prohibits insider trading, even in the absence of a breach of fiduciary duty, if a substantial step towards a tender offer has been taken).

Still, if the SEC were to adopt a new rule to extend Rule 10b-5 (call it Rule 10b5-3), it may face a serious problem under the "major questions doctrine" recently announced in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). To be sure, there is probably not the same national impact as in the *West Virginia* case, because there the use of coal as a fuel by utilities hung in the balance. But under the current court, this doctrine is expanding, not shrinking.

One final uncertainty has not been addressed by the SEC: Can private litigants sue under a "shadow trading" theory? If so, who is entitled to sue? In the *Panuwat* case, it seems open to serious question whether the shareholders of Incyte who sold their shares should be able to sue, as the defendant owed them no duty. If any duty was breached by the defendant, it was a duty to Medivation, which had instructed him not to trade. Although Medivation suffered no loss, it might conceivably seek disgorgement, which would be measured by the defendant's gain (minus any legitimate expenses).

There will be an inevitable dispute between Medivation's and Incyte's shareholders as to who is the true victim (if shadow trading is upheld). Predictably, Incyte shareholders will seek to rely on Section 20A of the Securities Exchange Act which gives a cause of action to contemporaneous traders. But can persons who were contemporaneous traders sue under Section 20A where no legal duty owed to them was breached? I will leave that and other topics for another day.

John Coffee is the Adolf A. Berle Professor of Law at Columbia University Law School and director of its Center on Corporate Governance.

NOT FOR REPRINT

Feds say Boeing violated \$2.5 billion settlement over 737 Max crashes

 [courthousenews.com/feds-say-boeing-violated-2-5-billion-settlement-over-737-max-crashes](https://www.courthousenews.com/feds-say-boeing-violated-2-5-billion-settlement-over-737-max-crashes)

David Lee

FORT WORTH, Texas (CN) — Federal prosecutors told a judge in Texas Tuesday evening that Boeing may be facing criminal charges after violating a \$2.5 billion settlement that put on hold charges brought against the company after two crashes of the 737 Max killed 346 people.

The Department of Justice filed a two-page letter, telling U.S. District Judge Reed O'Connor in Fort Worth that Boeing breached multiple paragraphs of a deferred prosecution agreement by “failing to design, implement and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws through its operations.”

The federal conspiracy case against the Virginia-based aerospace manufacturer has been on hold since 2021 after the settlement was reached with the Trump administration. Two of Boeing's 737 Max pilots were accused of deceiving the Federal Aviation Administration in 2017 about the Maneuvering Characteristics Augmentation System software, which was designed to push the nose of the 737 Max down to prevent stalling. Boeing reportedly added the software due to the 737 Max's larger, more fuel-efficient LEAP1-B engines requiring higher mounting points on the wing, which changed the center of gravity of the plane.

The FAA grounded the 737 Max on March 13, 2019, after the deadly crashes of Lion Air Flight 610 five months earlier and Ethiopian Airlines Flight 302 three days earlier. The FAA allowed the 737 Max to return to service on Nov. 18, 2020.

Boeing agreed under the settlement to pay a criminal penalty of \$243.6 million, \$1.77 billion in compensation for airline customers and establish a \$500 million crash victim fund.

The deferred prosecution agreement expired in January — within days of a door plug on a Boeing 737 Max 9 blowing out mid-flight on Alaska Airlines Flight 1282. This latest mishap has refocused scrutiny on the troubled 737 Max variant and Boeing's safety and quality control standards.

Boeing quickly disputed the Justice Department's determination, stating it will engage federal prosecutors “with the utmost transparency” on the matter, including the government's inquiries about Alaska Airlines 1282.

“We believe that we have honored the terms of that agreement and look forward to the opportunity to respond to the Department on this issue,” Boeing said in a written statement Tuesday evening.

The FAA disclosed this month that Boeing voluntarily reported a safety inspection issue with the company's 787 Dreamliner plane — that inspectors might not have confirmed adequate bonding and grounding where wings join the fuselage. The FAA is investigating claims that workers falsified records to say the inspections were completed.

Federal prosecutors have so far only taken one criminal case regarding the 737 Max to trial, accusing former Boeing chief test pilot Mark Forkner of lying to the FAA and airlines about the MCAS software. A Fort Worth federal jury acquitted Forkner of four counts of wire fraud in 2022 after deliberating for one hour. He faced up to 80 years in federal prison.

The Justice Department told Judge O'Connor that it will inform him of whether it will criminally charge Boeing by July 7 and that it will confer with the families of the victims of Lion Air 610 and Ethiopian Airlines 302 on May 31. Boeing has until June 13 to respond to the breach determination.

Follow @davejourn

Categories / Business, Criminal

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

Boeing at Risk of Prosecution for Breaking Deal Over Crashes (1)

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X68BBE1C000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X68BBE1C000000)

Boeing Co. faces possible criminal prosecution after the

found the company violated a deferred-prosecution agreement tied to two fatal crashes half a decade ago, intensifying the crisis engulfing the embattled US planemaker.

The company breached the \$2.5 billion settlement “by failing to design, implement, and enforce a compliance and ethics program to prevent and detect violations of the US fraud laws throughout its operations,” according to the

late on Tuesday.

Boeing, whose shares were down more than 1% shortly after trading began on Wednesday, now has four weeks to respond with its analysis and comments, which will be taken into consideration with regard to any next steps. The Justice Department said it’s still determining how to proceed, including whether and how to punish the company.

The decision escalates the legal risks facing the planemaker in the wake of a near-catastrophe in early January, when a fuselage panel blew off an

737 Max 9 mid-flight after workers failed to install critical bolts. The accident took place two days before the expiration of the deferred-prosecution agreement, in which Boeing agreed to comply with the settlement and cooperate with the government for a period of three years, after which the charge would be dismissed.

“We believe that we have honored the terms of that agreement, and look forward to the opportunity to respond to the Department on this issue,” Boeing said in a statement after the Justice Department filing.

Under the terms of the accord, the company adopted a compliance program designed to prevent it from deceiving regulators, including the

. The deferred-prosecution agreement, reached in the waning days of the Trump administration, appeared to give Boeing the equivalent of a “get out of jail free” card despite the two crashes that took the lives of 346 people.

Public Outrage

Boeing shares were down 1.1% to \$178.85 at 9:38 a.m. Wednesday in New York. The shares fell less than 1% following the department’s decision in after-hours trading Tuesday. The stock has tumbled about 31% so far this year, the second-worst performance on the Dow Jones Industrial Average.

Boeing also faces another ultimatum, that one from the FAA, to devise a plan to fix what the regulator called “systemic” quality-control issues. Those 90 days, issued in late February, are set to run out at the end of this month.

Read More:

US prosecutors in Seattle have already sent subpoenas seeking documents and communications from Boeing and supplier Spirit AeroSystems Holdings Inc., which made the door plug that blew out. The

is also scrutinizing Boeing’s comments about its safety practices after the Alaska Air accident.

The 2021 agreement not to prosecute Boeing over the two 737 Max jetliner crashes sparked intense criticism, including from victims’ families. Members of the victims families were outraged that prosecutors had not reached out to them before cutting the deal with Boeing, which agreed to pay a criminal fine of \$243 million, but was allowed to dodge a fraud charge for withholding important information about the 737 Max from the FAA.

Presiding Judge

In 2022, the families were able to convince the presiding judge in the case that the Justice Department had improperly excluded them, in violation of the Crime Victims’ Rights Act. Even so, the judge declined to alter the terms of the Boeing agreement.

Scrutiny of Boeing has ramped up in the months since the Alaska Airlines accident, the February FAA report, and amid a wave of new whistleblower allegations pertaining to the planemaker’s manufacturing processes. Congressional panels, including the Senate Commerce Committee, have already held hearings on some of these issues with plans to have both the FAA and Boeing executives testify in the near future.

Lawyers for families of crash victims hailed the Justice Department’s findings.

“This is a positive first step, and for the families, a long time coming,” said Paul Cassell, a lawyer representing the crash victims’ families. “But we need to see further action from DOJ to hold Boeing accountable, and plan to use our meeting on May 31 to explain in more details what we believe would be a satisfactory remedy to Boeing’s ongoing criminal conduct.”

‘Egregious’ Acts

Erin Applebaum, a partner at

who also represents families, said her clients “hope that DOJ will continue to pursue justice for Boeing’s victims and move forward with a prosecution against Boeing for its egregious criminal acts that resulted in the deaths of 346 innocent people.”

The Justice Department said it plans to confer with the families and their lawyers on May 31 and inform the court of its decision for any punishment against Boeing no later than July 7.

Boeing took steps to improve safety following the two 737 Max crashes in 2018 and 2019, including creating a chief aerospace safety officer and changing the management structure so its engineers reported to chief engineer **Howard McKenzie** rather than business leaders. But the measures didn’t go nearly far enough, according to scathing

issued by the Federal Aviation Administration in February.

The yearlong study found that many Boeing employees didn’t know how to flag potential safety issues and didn’t trust the “Speak Up” program the company put in place to flag wrongdoing. The planemaker was also faulted for ineffective procedures and training.

USA v. The Boeing Company, 21-cr-00005, US District Court, Northern District of Texas (Fort Worth).

(Updates with share price Wednesday morning.)

--With assistance from Allyson Versprille.

To contact the reporters on this story:

Chris Strohm in Washington at cstrohm1@bloomberg.net;

Julie Johnsson in Chicago at jjohnsson@bloomberg.net;

Greg Farrell in New York at gregfarrell@bloomberg.net

To contact the editors responsible for this story:

Sara Forden at sforden@bloomberg.net

Peter Blumberg, Peter Jeffrey

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

US says Boeing breached 2021 737 MAX criminal prosecution deal

 [reuters.com/business/aerospace-defense/us-says-boeing-breached-2021-deferred-prosecution-737-max-agreement-2024-05-14](https://www.reuters.com/business/aerospace-defense/us-says-boeing-breached-2021-deferred-prosecution-737-max-agreement-2024-05-14)

David Shepardson, Mike Spector

Boeing's 737 MAX-9 is pictured under construction at their production facility in Renton, Washington, U.S., February 13, 2017. REUTERS/Jason Redmond//File Photo Purchase Licensing Rights , opens new tab

- US may prosecute Boeing, decision by July 7
- Boeing may face fines, tighter oversight if US prosecutes
- Boeing says it believes it honored 2021 agreement

May 14 (Reuters) - The U.S. Justice Department said on Tuesday that Boeing Co (BA.N) , opens new tab had breached its obligations in a 2021 agreement that shielded the planemaker from criminal prosecution over fatal 737 MAX crashes in 2018 and 2019 that killed 346 people.

The Justice Department said in a court filing in Texas that the U.S. planemaker had failed to "design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations."

Justice Department officials made the finding in the wake of a separate January in-flight blowout that exposed continuing safety and quality issues at Boeing. A panel blew off a new Boeing 737 MAX 9 jet during a Jan. 5 Alaska Airlines (ALK.N) , opens new tab flight, just two days before the 2021 agreement shielding Boeing from prosecution over the previous fatal crashes expired.

The determination exposes Boeing to a potential criminal prosecution over the 2018 and 2019 crashes that could carry steep financial penalties and tougher oversight, deepening a corporate crisis and reputational damage stemming from the January blowout.

While Boeing is now subject to prosecution as a result of breaching the 2021 agreement, the Justice Department said in the court filing, officials will consider steps the planemaker has taken to address and remediate violation of the pact before determining how to proceed.

The Justice Department directed Boeing to respond by June 13 and intends to decide whether to prosecute Boeing by July 7, the filing said.

Boeing confirmed it had received word from the Justice Department of its determination that the company breached the 2021 deal, known as a deferred prosecution agreement, or DPA.

"We believe that we have honored the terms of that agreement, and look forward to the opportunity to respond to the Department on this issue," Boeing said in a statement late on Tuesday. "As we do so, we will engage with the Department with the utmost transparency, as we have throughout the entire term of the agreement, including in response to their questions following the Alaska Airlines 1282 accident."

The Justice Department declined to comment beyond the court filing.

Boeing's ongoing crisis has already resulted in a management shakeup and government investigations. During a U.S. Senate hearing in April, a Boeing engineer testified the company took dangerous manufacturing shortcuts with certain planes and sidelined him when he raised safety concerns, claims the company disputes.

Relatives of people killed in the crashes and their lawyers, meanwhile, had argued that Boeing violated the 2021 deal with prosecutors, which required the company to overhaul its compliance program. Federal prosecutors had previously agreed to ask a judge to dismiss a criminal charge against the planemaker so long as it complied with the deal's terms over a three-year period.

But the Jan. 5 in-flight blowout occurred just two days before the agreement expired. Justice Department officials weighed that incident as part of a broader probe into whether Boeing violated the deal, people familiar with the matter previously told Reuters.

Justice Department officials are set to meet with family members of the victims of the previous fatal crashes and their lawyers on May 31 to discuss their decision, according to correspondence Reuters reviewed.

"This is an important first step towards holding Boeing accountable for the deaths of 346 passengers and crew on the two flights," Paul Cassell, a lawyer representing victims' family members, told Reuters. "But now the Justice Department needs to move this prosecution forward, vigorously and effectively towards a conviction."

Erin Applebaum, another lawyer for victims' family members, told Reuters that she and her clients were "pleased that DOJ has chosen to do the right thing" and hoped a prosecution would follow.

NEXT STEPS

In January 2021, Boeing agreed to pay \$2.5 billion to resolve a criminal investigation into the company's conduct surrounding the previous fatal crashes. The company agreed to compensate victims' relatives and overhaul its compliance practices as part of the deal with prosecutors.

The agreement gives U.S. officials six months from the deal's Jan. 7 expiration to decide whether to prosecute Boeing on a charge that the company conspired to defraud the Federal Aviation Administration or pursue other alternatives to dismissing the case.

Prosecutors can extend the 2021 settlement for another year or push for oversight by a court-appointed monitor, a costly change from the 2021 agreement where Boeing was allowed to oversee its own changes to its practices.

The Justice Department could also attempt to hit the planemaker with additional fines or push the company to plead guilty, an outcome that could affect Boeing's ability to secure government contracts, according to a Reuters review of prosecutors' actions following findings that companies violated other similar agreements.

Breaches of such agreements deferring prosecution are rare. But the Justice Department under President Joe Biden has ratcheted up scrutiny on repeat corporate wrongdoers and has penalized companies that violate these deals.

Just over a year ago, Sweden's Ericsson (ERICb.ST) [opens new tab](#) agreed to pay a hefty fine and plead guilty after violating its own 2019 deal with prosecutors.

Make sense of the latest ESG trends affecting companies and governments with the Reuters Sustainable Switch newsletter. [Sign up here.](#)

Reporting by David Shepardson in Washington and Mike Spector in New York; Additional reporting by Chris Prentice in New York. Editing by Leslie Adler, David Gregorio and Sonali Paul

Our Standards: The Thomson Reuters Trust Principles. [opens new tab](#)

Mike Spector
Thomson Reuters

Mike Spector is a correspondent at Reuters covering corporate crises that span bankruptcy, mass tort litigation and government investigations. He was the first to expose Johnson and Johnson's plan to offload into bankruptcy lawsuits alleging its iconic Baby Powder caused cancer. He later revealed in an investigative series how J&J and other businesses and nonprofits use the bankruptcy system to escape liability for lawsuits over deadly products and sexual abuse while avoiding filing for Chapter 11 themselves. Mike has also contributed to an award-winning Reuters series on pervasive secrecy in American courts that covers up evidence of deadly products. Mike previously worked at The Wall Street Journal, where he covered bankruptcy and private equity on the paper's mergers and acquisitions team, and also the automotive industry. He has been part of award-winning teams that covered the government-brokered rescue and bankruptcy of General Motors; insider trading and related

bankruptcy debt-trading issues; and emerging concerns with Tesla's self-driving car technology. He has a master's degree from Columbia University's journalism school and an undergraduate degree from Johns Hopkins University.

Move to Change Delaware Law After Musk Attacks Called Knee-Jerk

By Mike Leonard

- State bar committee proposed overturning two major rulings
- Move an overreaction to fears about Delaware, critics say

Bloomberg Law News 2024-05-15T09:46:42377214235-04:00

Move to Change Delaware Law After Musk Attacks Called Knee-Jerk

By Mike Leonard 2024-05-15T05:00:04000-04:00

- State bar committee proposed overturning two major rulings
- Move an overreaction to fears about Delaware, critics say

Calls for Delaware's legislature to overturn a landmark court decision are dividing the state's corporate bar over whether a statutory fix would be an overcorrection.

An influential committee is urging the legislature act to restore the status quo after a judge upended a popular corporate strategy in February. The proposal aims to put stockholder agreements—a key tool for boards defusing proxy fights and venture capital firms leading public listings—back on the right side of the law.

The move to directly override a court ruling looks uncomfortably like a concession to Elon Musk, who has publicly threatened to move Tesla Inc. to another state after a Delaware judge invalidated his \$55 billion pay package, said Stephen Ram, a partner at Stradling Yocca Carlson & Rauth LLP.

"If something happens to your team, you might want to see big changes right away because you're in the moment," he said. "Then you take a step back and think, 'Maybe we don't need to fire the coach. Maybe we can just tinker with the lineup a little.'"

An initial version of the state bar committee's proposal drew widespread criticism for language that arguably created more uncertainty than it resolved. Although the committee tweaked the amendments a few weeks later, the rush to rewrite the statute without hashing out all the implications—or allowing time for an appeal—is still giving short shrift to "the coherence of the law," according to Tulane University law professor Ann Lipton.

The push reflects “excess anxiety around Delaware’s status that is plausibly related to Musk,” said University of Michigan law professor Gabriel Rauterberg.

The main court decision targeted by the proposal invalidated stockholder agreement clauses that hand the corporate reins to founders, preferred backers, or activist investors. The ruling by Vice Chancellor J. Travis Laster struck down extensive veto rights in a pact between Moelis & Co. and its billionaire founder, along with sections pledging the investment bank’s support for his future board nominees. Constrained by those provisions, “the board is not really a board,” Laster said.

Rick Alexander, a member of the Corporation Law Council—the body proposing the changes—said the proposed amendments would restore faith in Delaware among venture-backed companies that prize flexibility. Regardless of Musk’s broadsides, the state has always sought to strike a balance between the rights of investors and the needs of management, according to Alexander, CEO of the nonprofit Shareholder Commons.

With states like Nevada and Texas competing for corporate charters, a race to the bottom “would be bad for American capitalism,” he said. “If we break the deal by all of a sudden calling into question thousands of these existing contracts—applying a rule no one was aware of—there’s a real risk people will say, ‘Why choose Delaware?’”

Activist Agreements

The amendments take aim at recent Delaware Chancery Court rulings that got an anxious reception, particularly the Feb. 23 decision on shareholder agreements by Laster, who said the “irresistible force of market practice” must yield to the “immovable object of statutory law.” The court’s chief judge, Chancellor Kathaleen St. J. McCormick, echoed Laster’s language a week later when she issued a ruling that could threaten the way companies typically negotiate mergers and acquisitions.

Corporate boards and their attorneys have complained that the novel decisions raised more questions than answers, a departure for a judiciary that usually bends over backward to offer clear guidance even on emerging issues.

Read More: Novel Corporate Rulings Fuel Charged Debate on Delaware’s Role

About a month after those rulings, the council—a 26-member subcommittee tasked with keeping Delaware’s corporate laws state-of-the-art—began circulating the proposed amendments. Delaware-based law firms, meanwhile, started publishing client alerts about their potential impact, along with others doubling down on doubts about the state’s role in the corporate world. The legislature hasn’t yet formally taken up the proposal.

At the same time, a wave of litigation has targeted accords thrown into legal limbo by the Moelis decision. Several of the lawsuits concern cooperation agreements between companies and activists such as Elliott Investment Management LP, a major hedge fund. Others, including one against private equity giant Apollo Global Management Inc., involve similar pacts with corporate founders.

The disputes underscore “how useful and widespread these things are,” said University of Iowa law professor Robert Miller, who supports the proposal. Companies “are settling with activists every day,” reaching agreements that often represent the only way to avoid a protracted conflict, according to Miller.

“In the great long history of the world, this is something that should be done now,” he said.

Secret Sauce

Neither the Moelis decision nor McCormick’s ruling—in a case challenging the \$69 billion merger between Microsoft Corp. and Activision Blizzard Inc.—has reached the Delaware Supreme Court yet. If the legislature effectively overturns the results in those cases, it would rob the state’s justices of the chance to alleviate the confusion, according to Lipton.

Read More: Crackdown on Corporate Insiders Collides With New Era of Control

The council revised its proposal in early May to make clear the changes would only let companies use stockholder agreements to establish otherwise legal corporate structures—rather than create an end run around mandatory limits. Rauterberg called the new version “a major improvement,” but said it’s still a mistake to short-circuit any potential appeal.

Although the council’s work is “widely admired,” the state’s courts are “way more admired,” according to Rauterberg. “When people think, ‘What’s Delaware’s secret sauce?,” they think, ‘The Delaware Chancery Court is the leading adjudicative forum for corporate law.’”

Miller, speaking in favor of the proposal, stressed the urgency created by the Moelis decision, particularly for proxy fights. Usually, “the Delaware court says what the law is and the market adjusts,” he said. But *Moelis* reined in the main mechanism driving those adjustments: private contractual arrangements circumventing default rules.

Although the courts would likely find their way to some sort of equilibrium, “I wouldn’t wait for the Delaware Supremes to do it,” Miller said. “Yes, this is Delaware, and we litigate quickly, but it could still take a year.”

Red Herring

Rauterberg called those arguments off-base, saying the types of agreements needed to resolve activism campaigns remain legal. The Moelis ruling only invalidated longer-term promises to back unknown future board nominees, he said, not pledges to support specific candidates.

The amendments seem geared more toward founders and venture firms trying to creatively engineer bespoke capital structures that let them exercise longer-term corporate control after they begin taking money from the public, according to Ram.

The proposal “gives the board and those types of shareholders a lot more flexibility to do what they want in perpetuity,” Ram said.

Shareholder agreements reflect a legitimate way for companies to order their affairs “as long as you’re doing them for the right reasons,” said Alexander, who stressed that the amendments would only overturn portions of the Moelis decision declaring common provisions outright illegal. Judges hearing fiduciary breach claims would still have a chance to ensure the pacts aren’t abused, according to Alexander.

“There were a lot of settled expectations, and then all of a sudden, thousands of financings are at risk,” he said.

Rauterberg said he sympathizes with the clamor for more clarity. “But if you’re doing something in tension with basic, longstanding principles of corporate law, sometimes you don’t get to have immediate certainty,” he said.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editors responsible for this story: Drew Singer at dsinger@bloombergindustry.com; Kiera Geraghty at kgeraghty@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

<https://twitter.com/AnnMLipton/status/1790778061681459379>



@annmlipton@esq.social · 1h

...

So here's the thing about the Tesla requests for shareholders to re-approve Musk's comp package, and approve the move to Texas.

4

15

46

9.4K



@annmlipton@esq.social · 1h

...

I blogged about a bit of this here:

lawprofessors.typepad.com/business_law/2...

1

2

11

1K



@annmlipton@esq.social · 1h

...

The company took pains to paper everything. They hired experts and mouthed all the right words in their proxy filings and reports. Everything was done by the book.

1

1

13

981



@annmlipton@esq.social · 1h

...

Possibly, discovery and/or 220 requests will uncover mistakes in the documentation, but if the company was smart, anything written took pains to respect the formalities.

1

2

10

1K



@annmlipton@esq.social · 1h

...

So if shareholders approve this stuff and it gets before a court again, the main question will be - do we have to believe it?

1

1

14

905



@annmlipton@esq.social · 1h

...

For the love of god, we know Musk was angry at Delaware - not just because of his comp, but also because of Twitter - and he tweeted angrily about moving.

1

1

17

895



@annmlipton@esq.social · 1h

...

Of course he wants another \$56 billion or whatever the stock is worth today, and of course his board friends who invest in his private companies and do drugs with him are going to accommodate that.

1

6

24

959



@annmlipton@esq.social · 1h

...

And of course they hired stellar attorneys who will do their best to paper that decision. But does a court, entertaining all of this, have to accept that at face value, or can it instead acknowledge what we all know, which is - there is no way

1

2

16

870





@annmlipton@esq.social @AnnMLipton · 1h

...

no matter what the company says in its proxy, that a board would have of its own accord all by itself decided "Yes, we should move to Texas, which has uncertain law and looks to Delaware, bc Tesla is all in on Texas?"



3



16



337



@annmlipton@esq.social @AnnMLipton · 1h

...

Do we have to believe that an independent special committee of one decided, all by herself, and with absolutely no outside pressure, that yes, it's in the best interests of Tesla to give Musk stock for work he already performed and likely would have performed anyway?



1



19



746



@annmlipton@esq.social @AnnMLipton · 1h

...

And by the way I do have to reiterate: Tesla's proxy, and the spec comm report, imply that this will save costs that would come with a new pay package. But does that mean there won't be a new pay package going forward?



1



11



717



@annmlipton@esq.social @AnnMLipton · 1h

...

Musk certainly doesn't think so - here's what he tweeted before the Tornetta decision:



Elon Musk 
@elonmusk

Subscribe

...

I should note that the Tesla board is great. The reason for no new "compensation plan" is that we are still waiting for a decision in my Delaware compensation case. The trial for that was held in 2022, but a verdict has yet to be made.

I put "compensation plan" in quotes, because, from my standpoint, this is primarily about ensuring the right amount of voting influence at Tesla.

If I have 25%, it means I am influential, but can be overridden if twice as many shareholders vote against me vs for me.

At 15% or lower, the for/against ratio to override me makes a takeover by dubious interests too easy.

I would be fine with a dual class voting structure to achieve this, but am told it is impossible to achieve post-IPO in Delaware.

5:16 PM · Jan 15, 2024 · 1.6M Views



5



12



961





@annmlipton@esq.social @AnnMLipton · 1h

...

So if shareholders vote in favor of all of this, the real question for the court is: do they have to ignore all the extrinsic evidence, all the circumstances that led up to this, and pretend to believe the proxy filing? Or can they say what I'm pretty sure most spectators say -

2



13

705



@annmlipton@esq.social @AnnMLipton · 1h

...

This is ridiculous! There is no way an independent board decided this and put it before the stockholders!

1



23

1.2K



@annmlipton@esq.social @AnnMLipton · 1h

...

Anyway I'll probably blog this which I think is the fundamental question but I haven't had a chance, so I'm doing this instead.

2



12

832



Dave Hoffman @HoffProf · 1h

...

But the shareholders know everything you know -- they've been shown the Tornetta decision which makes it clear. At some point, court should take yes for an answer, no?

1



77



@annmlipton@esq.social @AnnMLipton · 1h

...

right see I agree with that - it is my basic question about Tornetta itself. Legally material information was withheld but given this company, was it factually material?

2



89



Dave Hoffman @HoffProf · 1h

...

It's the toughest call about the case. But would be easier in round two.

1



63



@annmlipton@esq.social reposted



@annmlipton@esq.social

...

@AnnMLipton

i'll say fundamentally - tornetta plus the angsting over moelis and delaware law - seems to me to be a lot of CEOs corporate lawyers being unpleasantly surprised that Delaware is actually enforcing its standards instead of putting on a pantomime about pretending to do so

law - seems to me to be a lot of CEOs/corporate lawyers being unpleasantly surprised that Delaware is actually enforcing its standards instead of putting on a pantomime about pretending to do so



9:15 AM · May 15, 2024 · 460 Views



1



2



9



Post your reply

Reply



Dave Hoffman @HoffProf · 1h



I had thought Delaware's motto was not "we enforce our standards" but rather "we toe the middle line."



1



48



@annmlipton@esq.social @AnnMLipton · 1h



there's a school of thought where the motto is, we enforce our standards, but only in the next case



2



1

56



@annmlipton@esq.social @AnnMLipton · 1h



that said, tornetta is doctrinally very very middle! it doesn't happen with most companies because most companies don't have a problem with creating the right paper trail



1



1

86



Bloomberg Law News 2024-05-15T12:47:21693135359-04:00

Tesla Courts Retail Investors for Musk's \$56 Billion Pay Package

By Dana Hull and Anders Melin2024-05-15T06:22:16934-04:00

Tesla Inc. is looking to woo its unusually large base of retail investors to get approval for Chief Executive Officer Elon Musk's \$56 billion pay package.

To help lead that drive, the company's board has hired a strategic adviser, according to a person familiar with the matter. To bolster the campaign, the adviser is working with an outside law firm, the person said.

The adviser has set up a dedicated [Vote Tesla](#) website to encourage participation among retail investors, who hold an estimated 42% of shares in the company. It urges shareholders to cast votes online, by QR code, by phone and by mail. It also features a video with board Chair Robyn Denholm, who says supporting Musk's pay is critical to Tesla's growth.

That's all ahead of Tesla's June 13 annual meeting, when investors in the electric-car maker will vote on whether to uphold a 2018 compensation agreement. A Delaware judge vetoed the package three months ago, writing in her opinion that Tesla directors hadn't looked out for the best interests of investors.

"We don't believe one judge's opinion should void the will of millions of votes cast by all of the owners," Denholm says in the video on the [Vote Tesla](#) website.

While the vote is only advisory, it could have big implications for the future of Musk's leadership. Securing majority approval would bolster the board's arguments that the Delaware court was wrong. A loss would be a major embarrassment.

Musk has threatened to develop products outside of Tesla if he doesn't attain at least a 25% equity stake in the carmaker — a key part of the voided pay package. If the remuneration deal is reinstated, the CEO has enough options to almost double his current holding in Tesla and land at roughly 21%. The path for Musk to attain that larger stake becomes unclear if shareholders don't vote it through.

On Musk's social media platform X, Tesla fans have been voicing their support for the CEO. In hundreds of posts tagged [#VotedTesla24](#), many users who say they're investors claim to have already cast their ballots. Musk himself [has urged shareholders](#) to participate, reposting messages from people like self-described "Fangirl of Elon," Alexandra Merz.

Merz, a Santa Barbara, California, resident known as "Tesla Boomer Mama" on X, has created tools to help Tesla shareholders write to large index funds and ask to vote shares that may be held in retirement accounts or other accounts they don't manage directly.

[Twitter: Ale????andra Merz on Twitter / X](#)

"I want to make sure that retail investors vote," Merz said by phone. "But I also want people to reach out to their fund managers." (Some brokers outside of the US don't allow retail shareholders to vote.)

Even with Musk fans rallying for support, the board still has work to do to win the vote. Typically, few retail investors actually vote at annual meetings.

At least one large retail investor, Leo KoGuan, has said he [won't support](#) the pay deal. He's also publicly railed against the way Musk has been managing Tesla, which seems to have also unsettled the market at large.

Tesla's financial performance has been flagging amid a global slowdown in electric vehicle sales. Days before the company asked shareholders in a filing to support Musk's \$56 billion pay deal, Tesla said it was cutting global headcount by more than 10%.

- Take the MLIV Pulse survey: Is this meme-stock rally of any significance? Share your [views](#).

Meanwhile, a series of top executives have left Tesla as it's shifted focus to building autonomous robotaxis over more affordable EVs. The stock has fallen 29% so far this year, compared to a 10% gain in the S&P 500.

Singapore-based KoGuan, a billionaire businessman, has long been a big admirer of Musk. But he's grown [increasingly wary](#) of the entrepreneur's many commitments — SpaceX, Neuralink, X and more

— and said his job at Tesla shouldn't merely be a way to bankroll other business ventures.

"The court had spoken and many facts came out," KoGuan, who owns about 0.8% of Tesla, said in an email. "He has to respect and obey the court's decision."

Read More: How a Retail Trader Amassed a \$7 Billion Tesla Holding

KoGuan said he'll also vote no on a [separate proposal](#) to move Tesla's corporate domicile to Texas from Delaware, where the judge struck down Musk's pay deal. Tesla already moved its corporate headquarters to the Lone Star state from California in December 2021. This week, the company said it's running [sponsored ads](#) to vote for both proposals.

The board's strategic adviser that set up the Vote Tesla website is also helping the company liaise with large asset managers, people familiar with the matter said. Those investors hold roughly 46% of the company's shares, down from about 70% when the first vote was held back in 2018, according to data compiled by Bloomberg.

Observers will closely watch the impending recommendations by proxy advisory firms Institutional Shareholder Services Inc. and Glass Lewis & Co., which are widely believed to have some impact on how votes are cast, particularly for shares held in passive funds.

After Musk himself, Tesla's largest investors are Vanguard and BlackRock, which hold shares in myriad active and passive funds. Representatives for both asset managers declined to comment, citing company policy on publicizing votes before annual meetings.

The Tesla board won the 2018 pay vote with 73% of votes cast supported the deal, but the situation may be tougher now.

Shareholders who held stock six years ago have seen the value of their equity soar as Musk met one pay condition after another. He ultimately earned the last of his options in the second quarter of 2021 after the value of Tesla soared above \$650 billion. It later peaked at about \$1.2 trillion.

Now, Tesla's market capitalization sits at less than \$600 billion. Musk has attracted new critics as the owner of X, where he frequently posts controversial political opinions and attacks the media.

Still, there's no clear executive to take the place of Musk, who's widely seen as the driver behind its transformation from a scrappy Silicon Valley startup to the world's most valuable automaker. On social media, shareholders have been praising his contributions to the company as they urge others to vote for the pay deal.

"It's not much, but I did what I could!" one X user [wrote](#) on May 11, posting a screenshot of their vote confirmation. "The people are with you, [@elonmusk!](#)"

--With assistance from Silla Brush.

To contact the authors of this story:

Dana Hull in San Francisco at dhull12@bloomberg.net

Anders Melin in Kuala Lumpur at amelin3@bloomberg.net

To contact the editor responsible for this story:

Kelly Gilblom at kgilblom@bloomberg.net

Rebecca Greenfield

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our Subscriber Agreement and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com.

<https://www.wsj.com/business/tesla-hits-the-road-to-persuade-shareholders-to-pay-elon-musk-46-billion-6ea31ea5>

BUSINESS

Tesla Hits the Road to Persuade Shareholders to Pay Elon Musk \$46 Billion

Investors to vote on 2018 pay package again after judge threw it out

By [David Benoit](#) [Follow](#), [Emily Glazer](#) [Follow](#) and [Corrie Driebusch](#) [Follow](#)

May 15, 2024 5:30 am ET



Tesla is launching ambitious plans that its board believes CEO Elon Musk is integral to achieving.

PHOTO: APU GOMES/GETTY IMAGES

Tesla **TSLA -1.18%** ▼ shareholders have a big decision to make in the next month about Elon Musk.

On June 13, they are set to vote on whether to reinstate stock options currently valued at \$46 billion to Musk, the carmaker's chief executive and one of the world's richest people, after a judge struck down the award in January.

Having a revote on such a giant pay package is uncharted territory, and there is a lot at stake for Tesla: The company is launching ambitious plans that its board believes Musk is integral to achieving. Approval should erase investor concerns

that Musk could leave the company if he doesn't get paid, which some investors say are weighing on Tesla's stock price. And, Tesla hopes, a fresh vote would sidestep a drawn-out appeals process in court.

Tesla board chair Robyn Denholm and others at the company plan to spend the next several weeks crisscrossing the globe to rally support from shareholders.

Their challenge is taking shareholders back to 2018, when they originally signed off on Musk's pay package, and detaching from the vote concerns that have cropped up since then.

Tesla share price



Source: FactSet

In 2018, Tesla had a market value of around \$50 billion and was losing money. The company is now valued at nearly \$570 billion. Denholm and Tesla are telling shareholders Musk deserves to be rewarded for hitting lofty goals set back then. They say he earned that pay and should get it.

The present complicates their efforts. Tesla's shares are down about 30% this year, as sales and margins have fallen. Musk's varied business interests,

including his ownership of social-media platform X, his changes to plans for Tesla and his drug use have stoked controversy. (Musk has brushed off concerns he is distracted and said he hasn't failed drug tests.)

Adding to Tesla's challenge, individual investors whose votes are harder to wrangle amassed an outsize portion of its shares in the past several years. In 2018, shareholders voted 73% of their shares in favor of the pay package. Tesla is bracing for a tighter vote this time around.

How to get to Mars

The board awarded Musk the unusual pay package in 2018. If Tesla shares skyrocketed by more than 10 times and the company hit several operational targets, Musk would be able to buy a huge stake at cheap prices. If he fell short, he would get nothing.

Musk would have to hold the stock for at least five years. He planned to use the money to go to Mars.

"The added comp is just so that I can put as much as possible towards minimizing existential risk by putting the money towards Mars," Musk wrote to an executive at the time, according to the judge's opinion. "This is kinda crazy, but it is true."

Vanguard, the biggest outside shareholder, rejected the pay package, while BlackRock, the second biggest, approved it.

Within five years, the company had hit all the targets, and its share price had increased more than 1,000%. Tesla was valued at \$1 trillion, and the package was valued at \$55.8 billion. Mars looked a bit closer.

But earlier this year, a Delaware judge ruled the board's process in negotiating the pay package was "deeply flawed," citing the directors' close ties to Musk. She invalidated the shareholder vote and ordered the pay rescinded.

In response, Musk fumed on X: "Never incorporate your company in the state of Delaware."

The board has said a fresh shareholder vote should cure the judge's concerns, but the shareholder who sued over the pay is challenging the idea. Appeals are also likely to remain live.

The board also put up for a vote moving the company's incorporation from Delaware to Texas, where it has its corporate headquarters.

Campaigning for votes



Tesla board chair Robyn Denholm and others plan to spend the next several weeks rallying support from shareholders. PHOTO: HILARY WARDHAUGH/BLOOMBERG NEWS

Convincing shareholders falls to Denholm, an Australian businesswoman who was on the board committee that negotiated the pay package and succeeded Musk as chair later in 2018. She has been reaching out to shareholders and the proxy advisers whose opinions, published ahead of the vote, hold important sway.

She met with some investors in New York this week and plans to return in early June, people familiar with the matter said.

Some big holders are taking a fresh review, not just repeating their 2018 votes, investors and Tesla say.

T. Rowe Price, which owns about 0.8% of the shares, blessed the pay package in 2018 and pushed for the board to take it to a vote again. Other shareholders say Musk, who owns roughly 13% of Tesla's shares, has been handsomely rewarded by the stock price's rise. Some plan to use the meetings to air current gripes.

Denholm and Tesla are making several arguments beyond the company's performance. They are telling shareholders their rights have been usurped by a judge and they should ratify the original vote, whether they approved of the package or not.

They also say approval will remove doubts about Musk's interest in running Tesla.

Musk said in testimony he wouldn't have quit if the original vote had gone against him.

But he did take the vote personally. In 2018, he told Tesla representatives to tell big shareholders who voted against the package he was "very offended by their action," according to the judge's opinion. He wanted to tell one holder to divest themselves of all of his companies because "they are not welcome."

The need for individual investors

Individual investors, who often sit out shareholder votes entirely, now own about 30% of Tesla's shares.

For the pay package to be approved, a majority of shares voted must support it, excluding Musk's stake and a much smaller stake owned by his brother. That leaves Tesla racing to get individuals to show up. It is rolling out new ads—including paid posts on Musk-owned X—urging investors to vote.

The campaign to incorporate in Texas likely faces even harder odds. That vote needs a majority of all shares outstanding, so anyone who doesn't vote is essentially a no.

Write to David Benoit at David.Benoit@wsj.com, Emily Glazer at Emily.Glazer@wsj.com and Corrie Driebusch at corrie.driebusch@wsj.com

We Want to Hear From You

Are you a Tesla shareholder? We want to know how you will vote at the shareholder's meeting.

How many Tesla shares do you own?*

Tesla accused of hazardous emissions at Fremont factory

DJ [dailyjournal.com/articles/378776-tesla-accused-of-hazardous-emissions-at-fremont-factory](https://www.dailyjournal.com/articles/378776-tesla-accused-of-hazardous-emissions-at-fremont-factory)

New York Times News Service

Clean energy pioneer Tesla Inc. was sued by an environmental group for alleged violations of the Clean Air Act arising from the release of harmful pollutants at its Fremont plant.

The lawsuit, filed by Oakland-based Environmental Democracy Project in the Northern District of California, accuses the electric vehicle manufacturer of repeatedly exposing residents in neighborhoods surrounding the factory to chemicals including nitrogen oxides, arsenic and cadmium. Levels of these chemicals exceeded limits stipulated by the company's Air Permit, granted under Title V of the Clean Air Act. Environmental Democracy Project v. Tesla, Inc. 3:24-cv-02888-AGT (N.D. Cal. filed May 13, 2024).

Tesla had not responded to a request for comment at the time of press.

The primary source of the pollutants is believed to be two paint shops located at the factory. The complaint states that Tesla had self-reported more than 90 instances of noncompliance with its air permit requirements between January 2022 and June 2023 and cites these self-reported incidents as prima facie violations of the Clean Air Act. It alleges that these violations are ongoing and that the Act had been violated "hundreds of times."

In addition to these violations, the complaint claims that Tesla failed to operate and maintain pollution abatement equipment, failed to report noncompliance with Air Permit requirements, and failed to conduct mandatory emissions testing.

The complaint notes that neither the Bay Area Air Quality Management District nor the Environmental Protection Agency have commenced civil action against the company regarding these failures. The Air District had separately requested an abatement order from its independent hearing board to correct Tesla's air quality violations in an announcement dated May 2.

The complaint, which also names Tesla Motors Inc., seeks injunctive and declaratory relief and civil penalties of up to \$121,275 per day for each Clean Air Act violation.

The Environmental Democracy Project is represented by Lucas C. Williams and Jacob M. Janzen of the Lexington Law Group. Neither attorney had replied to a request for comment at the time of press.

Elon Musk ordered to testify again in US SEC probe of Twitter takeover

 [reuters.com/legal/us-federal-court-enforces-secs-subpoena-depose-elon-musk-2024-05-14](https://www.reuters.com/legal/us-federal-court-enforces-secs-subpoena-depose-elon-musk-2024-05-14)

Reuters

Tesla CEO Elon Musk and his security detail leave the company's local office in Washington, U.S. January 27, 2023. REUTERS/Jonathan Ernst/File Photo Purchase Licensing Rights , opens new tab

SAN FRANCISCO, May 14 (Reuters) - A federal court ordered on Tuesday that Elon Musk must testify again in the U.S. Securities and Exchange Commission's investigation into his \$44 billion takeover of Twitter.

The SEC sued Musk in October to compel the CEO of electric carmaker Tesla (TSLA.O) , opens new tab and rocket company SpaceX to testify after he refused to attend a September interview for the investigation. The billionaire said the SEC was trying to "harass" him with a number of subpoenas.

The investigation concerns whether Musk broke federal securities laws in 2022 when he bought stock in Twitter, which he later renamed X. It is also reviewing statements and SEC filings he made in relation to the deal, the agency has previously said.

U.S. Magistrate Judge Laurel Beeler in February ruled in favor of the agency to compel the deposition and Musk requested a review of the decision.

"As Judge Beeler explained, the investigations Musk contends constitute harassment are 'legitimate government investigations'," U.S. District Judge Jacqueline Scott Corley said on Tuesday.

"Musk has not met his burden of demonstrating the subpoena is unreasonable."

This marks the latest dispute in a years-long feud between Musk and the top U.S. markets regulator, dating back to 2018 when he tweeted that he had "funding secured" to take Tesla private.

In 2022, Musk supplied the SEC with documents for its probe and also testified via videoconference for two half-day sessions in July of that year, the SEC has said in court documents. Agency lawyers have said they have more questions for Musk after receiving new documents, and had sought additional testimony.

Musk was not immediately available for comment.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

May 14, 2024, 2:00 PM PDT

Musk Ordered to Resume Testimony in SEC Twitter Investigation

By Rachel Graf

Bloomberg Law News 2024-05-15T10:15:46375652657-04:00

Musk Ordered to Resume Testimony in SEC Twitter Investigation

By Rachel Graf2024-05-14T17:00:36397-04:00

Elon Musk must submit to further questioning in the US Securities and Exchange Commission's investigation of his 2022 Twitter Inc. acquisition, a federal judge ruled.

Tuesday's decision upholds an earlier finding by a magistrate judge that the billionaire should have to comply with the agency's subpoena even though he complained it amounted to harassment. US District Judge Jacqueline Scott Corley limited the questioning to five hours and said it must take place within 60 days.

The SEC is seeking information about Musk's purchases of Twitter stock and statements he made about his investments ahead of his \$44 billion purchase of the social media platform. The SEC sent Musk a letter asking about the delayed disclosure of his Twitter stake, which he reported a week late.

Musk previously testified twice in July 2022, the SEC said, but failed to show up last year for follow-up questioning.

Musk, the world's third-richest person, has frequently accused the SEC of overzealous enforcement, ever since he agreed with the agency in 2018 to have an in-house lawyer pre-approve his social media posts about Tesla Inc. In April, the US Supreme Court refused to take up Musk's challenge to the "Twitter sitter" agreement.

[Read More: Musk Judge Rejects Idea Billionaire Is Too Busy for SEC Probe](#)

Before issuing Tuesday's order, Corley directed a pointed question to Musk's attorney at a hearing last week.

"Are you saying then that Mr. Musk, because he's a very important, busy person, that the SEC can't investigate him?" the judge said.

Lawyers for Musk didn't immediately respond to a request for comment.

The case is Securities and Exchange Commission v. Musk, 23-mc-80253, US District Court, Northern District of California (San Francisco).

To contact the reporter on this story:

Rachel Graf in San Francisco at rgraf27@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Peter Blumberg

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Tesla is sued over emissions from California plant

 [reuters.com/legal/tesla-is-sued-over-emissions-california-plant-2024-05-14](https://www.reuters.com/legal/tesla-is-sued-over-emissions-california-plant-2024-05-14)

Jonathan Stempel, Clark Mindock

The Tesla factory is seen in Fremont, California, U.S. June 22, 2018. REUTERS/Stephen Lam/File Photo Purchase Licensing Rights [↗](#), opens new tab

May 14 (Reuters) - Tesla (TSLA.O) [↗](#), opens new tab has been sued by an environmental nonprofit that accused Elon Musk's electric car company of violating the federal Clean Air Act hundreds of times by letting its Fremont, California, plant emit harmful pollutants.

In a complaint filed on Monday, the Environmental Democracy Project said Tesla has since January 2021 exposed nearby residents and workers to excessive nitrogen oxides, arsenic, cadmium and other harmful chemicals, mainly through its paint shop operations.

The nonprofit wants an injunction to halt excess pollution, plus civil fines of up to \$121,275 per day per violation of the Clean Air Act.

Tesla did not immediately respond on Tuesday to requests for comment.

The lawsuit filed federal court in San Francisco adds to pressure on Tesla to improve air quality surrounding the Fremont plant, its main U.S. factory.

On May 2, the Bay Area Air Quality Management District said it wanted an independent hearing board to order Tesla to reduce harmful emissions from its paint shop operations.

It said that Tesla's emissions abatement system breaks down "repeatedly," and the automaker has since 2019 racked up 112 notices of violation [↗](#), opens new tab, each accounting for as much as 750 pounds of illegal air pollution.

In February, Tesla agreed to pay \$1.5 million to settle a lawsuit by 25 California counties that claimed it mishandled hazardous waste at locations across the state.

The Environmental Democracy Project said it has authority to file a "citizen" lawsuit under the Clean Air Act because Tesla "has violated or in violation of conditions imposed by an operating permit for major sources of pollution."

Lawyers for the nonprofit did not immediately respond to requests for additional comment.

The case is Environmental Democracy Project v Tesla Inc et al, U.S. District Court, Northern District of California, No. 24-02888.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up [here](#).

Reporting by Jonathan Stempel in New York; Editing by Nick Zieminski

The inside story of Elon Musk's mass firings of Tesla Supercharger staff

 [reuters.com/business/autos-transportation/inside-story-elon-musks-mass-firings-tesla-supercharger-staff-2024-05-15](https://www.reuters.com/business/autos-transportation/inside-story-elon-musks-mass-firings-tesla-supercharger-staff-2024-05-15)

Chris Kirkham, Hyunjoo Jin, Abhirup Roy

Item 1 of 2 Tesla electric vehicle chargers are seen during the winter in Hofn, Iceland, February 16, 2022. REUTERS/Nacho Doce/File Photo

[1/2] Tesla electric vehicle chargers are seen during the winter in Hofn, Iceland, February 16, 2022. REUTERS/Nacho Doce/File Photo [Purchase Licensing Rights](#) , opens new tab

May 15 (Reuters) - The day before Elon Musk fired virtually all of Tesla's electric-vehicle charging division last month, they had high hopes as charging chief Rebecca Tinucci went to meet with Musk about the network's future, four former charging-network staffers told Reuters.

After Tinucci had cut between 15% and 20% of staffers two weeks earlier, part of much wider layoffs, they believed Musk would affirm plans for a massive charging-network expansion.

The meeting could not have gone worse. Musk, the employees said, was not pleased with Tinucci's presentation and wanted more layoffs. When she balked, saying deeper cuts would undermine charging-business fundamentals, he responded by firing her and her entire 500-member team.

The departures have upended a network widely viewed as a signature Tesla achievement and a key driver of its EV sales. Tesla Superchargers account for more than 60% of U.S. high-speed charging ports, federal statistics show, and the company has been the biggest winner so far of \$5 billion in federal funding for new chargers.

This account, the most detailed to date on the Supercharger firings and the fallout, is based on interviews with eight former charging-division employees, one contractor and a Tesla email sent to outside vendors. Only Musk and Tinucci were in the meeting described to Reuters; the four sources with knowledge of the meeting are relaying what they heard about it from Supercharger department managers.

Tesla, Musk and Tinucci did not respond to requests for comment from Reuters.

Despite the mass firings, Musk has since posted on social media promising to continue expanding the network. But three former charging-team employees told Reuters they have been fielding calls from vendors, contractors and electric utilities, some of which had spent millions of dollars on equipment and infrastructure to help build out Tesla's network.

A letter sent earlier this month by a Tesla global-supply manager to Supercharger contractors and suppliers instructed them to “please hold on breaking ground on any newly awarded construction projects” and halt materials purchases, according to a copy reviewed by Reuters. “I understand that this period of change may be challenging, and that patience is not easy when expecting to be paid!”

Tesla's energy team, which sells solar and battery-storage products for homes and businesses, was tasked with taking over Superchargers and calling some partners to close out ongoing charger-construction projects, said three of the former Tesla employees.

One construction contractor said Tesla staffers contacting his company since the layoffs “don't know a thing.” The contractor said he had expected Supercharger projects to provide about 20% of his 2024 revenue but now plans to diversify to avoid relying on Tesla.

Tinucci was one of few high-ranking female Tesla executives. She recently started reporting directly to Musk, following the departure of battery-and-energy chief Drew Baglino, according to four former Supercharger-team staffers. They said Baglino had historically overseen the charging department without much involvement from Musk.

The charging-team layoffs mark the latest drama in a tumultuous year for Tesla as Musk has shut down or delayed several core efforts meant to drive the rapid EV sales growth that investors have expected. Instead, Musk now says Tesla will shift its main focus to self-driving cars, a fiercely competitive and riskier business that could take years to develop.

The company posted its first decline in auto sales since 2020 in the first quarter amid fierce competition from Chinese electric-vehicle makers and sagging worldwide EV demand. Reuters reported in April that Tesla had scrapped plans for a long-awaited affordable car known as the Model 2. That has thrown into doubt Tesla's plans for new factories in Mexico and India, where Musk had been expected to travel last month to meet Prime Minister Narendra Modi, before canceling at the last minute. And a host of executives have departed amid deep companywide layoffs.

SCALED-BACK CHARGING EXPANSION

The energy team that was assigned to take over charging-network management has some similar design and construction roles, two of the former Tesla employees said. But charging projects are fundamentally different because they are located in public places and require extensive negotiations with utilities, local governments and landowners, they said.

The energy team was already struggling to keep pace with its current workload, said two of the former charging-network staffers. Yet when the layoffs came down on April 30, Musk posted that the company “still plans to grow the Supercharger network, just at a slower

pace.” On Friday, Musk posted that “Tesla will spend well over \$500M expanding our Supercharger network to create thousands of NEW chargers this year.”

Two former Supercharger staffers called the \$500 million expansion budget a significant reduction from what the team had planned for 2024 - but nonetheless a challenge requiring hundreds of employees. In an analysis provided to Reuters, San Francisco research firm EVAdoption estimated a \$500 million investment this year would translate to Tesla building 77% fewer charging ports per month in the United States compared with the automaker's pace through April.

‘HOLDING THE BAG’

Tesla unveiled its first Supercharger stations throughout California in 2012, with Musk calling the network a “game changer” for EVs that would enable long-distance travel and convenience “equivalent to gasoline cars.”

The EV-charging business requires substantial upfront investment, and analysts have often viewed it as unprofitable. But Tesla's network had been profitable before the layoffs, according to four former Tesla employees familiar with the division's financial performance.

That owed to Tesla's cost-control and extensive analysis to choose locations that could draw business throughout the day rather than only during peak-demand times, when electricity costs spike. One former Supercharger staffer said Tesla's costs per-charging-port were typically at least 50% lower than those of competitors.

As recently as last month, Tesla said in a securities filing that it needed to expand charging to “ensure adequate availability” for customers, particularly after automakers including Ford (F.N) [opens new tab](#), General Motors (GM.N) [opens new tab](#), Toyota (7203.T) [opens new tab](#) and Hyundai (005380.KS) [opens new tab](#) announced they would start making their cars compatible with Tesla's charging plugs, giving their vehicles Supercharger access.

Another former employee said that rollout is “completely jeopardized” because there will not be enough new charging sites coming online, and the company was only starting to implement upgrades to allow more compatibility with other manufacturers' vehicles.

Three of the former employees called the firings a major setback to U.S. charging expansion because of the relationships Tesla employees had built with suppliers and electric utilities. Tesla had grown into one of the larger customers for many major utilities around the country, and many had hired new staff and planned new infrastructure based on Tesla's charging-network expansion plans, the former employees said.

Other companies may be able to fill the gap, the former employees said, but the goodwill built over time with utilities and other contractors from Tesla's large-scale charging investments will be difficult to replicate.

"It's just unfortunate that now they're stuck holding the bag on all these different projects," one of the former employees said. "It's really sad to see all these relationships burned and people be really angry - rightfully so."

Stay up to date with the latest news, trends and innovations that are driving the global automotive industry with the Reuters Auto File newsletter. [Sign up here](#).

Reporting by Chris Kirkham in Los Angeles, and Hyunjoo Jin and Abhirup Roy in San Francisco Edited by Brian Thevenot and Matthew Lewis

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Chris Kirkham
Thomson Reuters

Chris Kirkham is a business reporter in Los Angeles who has covered topics including tobacco, worker safety, internet privacy and corporate sustainability efforts. Chris previously worked at The Wall Street Journal and the Los Angeles Times.

Exclusive: Musk's Neuralink has faced issues with its tiny wires for years, sources say

 [reuters.com/technology/musks-neuralink-has-faced-issues-with-its-tiny-wires-years-sources-say-2024-05-15](https://www.reuters.com/technology/musks-neuralink-has-faced-issues-with-its-tiny-wires-years-sources-say-2024-05-15)

Rachael Levy

Neuralink logo and Elon Musk silhouette are seen in this illustration taken, December 19, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

May 15 (Reuters) - Neuralink's disclosure last week that tiny wires inside the brain of its first patient had pulled out of position is an issue the Elon Musk company has known about for years, according to five people familiar with the matter.

The company knew from animal testing it had conducted ahead of its U.S. approval last year that the wires might retract, removing with them the sensitive electrodes that decode brain signals, three of the sources said. Neuralink deemed the risk low enough for a redesign not to be merited, the sources added.

Neuralink is testing its implant to give paralyzed patients the ability to use digital devices by thinking alone, a prospect that could help people with spinal cord injuries.

The company said last week that the implant's tiny wires, which are thinner than a human hair, retracted from a patient's brain in its first human trial, resulting in fewer electrodes that could measure brain signals.

The signals get translated into actions, such as moving a mouse cursor on a computer screen. The company said it managed to restore the implant's ability to monitor its patient's brain signals by making changes that included modifying its algorithm to be more sensitive.

The sources declined to be identified, citing confidentiality agreements they had signed with the company. Neuralink and its executives did not respond to calls and emails seeking comment.

The U.S. Food and Drug Administration was aware of the potential issue with the wires because the company shared the animal testing results as part of its application to begin human trials, one of the people said.

The FDA declined to comment on whether it was aware of the issue or its possible significance. The agency told Reuters it would continue to monitor the safety of patients enrolled in Neuralink's study.

Were Neuralink to continue the trials without a redesign, it could face challenges should more wires pull out and its tweak to the algorithm proves insufficient, one of the sources said.

But redesigning the threads comes with its own risks. Anchoring them in the brain, for example, could result in brain tissue damage if the threads dislodge or if the company needs to remove the device, two of the sources said.

The company has sought to design the threads in a way that makes their removal seamless, so that the implant can be updated over time as the technology improves, current and former employees say.

In January, Neuralink implanted the device in the brain of its first patient, Noland Arbaugh, who is paralyzed from the shoulders down due to a 2016 diving accident.

In the weeks after the surgery, "a number of threads retracted from the brain," Neuralink said in a blog update last week. The post made no mention of adverse health effects to Arbaugh and did not disclose how many of the device's 64 threads pulled out or stopped collecting brain data.

So far, the device has allowed Arbaugh to play video games, browse the internet and move a computer cursor on his laptop by thinking alone, according to company blog posts and videos. Neuralink says that soon after the surgery, Arbaugh surpassed the world record for the speed at which he can control a cursor with thoughts alone.

It is common for medical device companies to troubleshoot different designs during animal trials and for issues to arise during animal and clinical testing, according to outside researchers and sources who have worked at Neuralink and other medical device companies.

Specialists who have studied brain implants say the issue of threads moving can be hard to solve, partly due to the mechanics of how the brain moves inside the skull.

Robert Gaunt, a neural engineer at the University of Pittsburgh, described the movement of the wires so soon after the surgery as disappointing but said that is not unforeseen. "In the immediate days, weeks, months after an implant like this, it's probably the most vulnerable time," he said.

PIG HEAVING

In 2022, the FDA initially rejected Neuralink's application to begin human trials, and raised safety concerns about the threads, Reuters exclusively reported last year.

Neuralink conducted additional animal testing to address those concerns, and the FDA last year granted the company approval to begin human testing.

The company found that a subset of pigs implanted with its device developed a type of inflammation in the brain called granulomas, raising concerns among Neuralink's researchers that the threads could be the cause, according to three sources familiar with the matter and records seen by Reuters.

Granulomas are an inflammatory tissue response that can form around a foreign object or an infection.

In at least one case, a pig developed a severe case of the condition. Company records reviewed by Reuters show that the pig developed a fever and was heaving after surgery. Neuralink's researchers did not recognize the extent of the problem until examining the pig's brain post-mortem.

Inside Neuralink, researchers debated how to rectify the issue and commenced a months-long investigation, said the sources familiar with the events.

Ultimately, the company could not determine the cause of the granulomas, but concluded that the device and the attached threads were not to blame, one of the sources said.

The Technology Roundup newsletter brings the latest news and trends straight to your inbox. Sign up here.

Reporting by Rachael Levy and Marisa Taylor in Washington; Editing by Greg Roumeliotis and Bill Berkrot

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Social Media Software Co.'s Deal Hurt Investors, Suit Says

By **Sydney Price**

Law360 (May 14, 2024, 5:30 PM EDT) -- Social media management platform Sprout Social was hit with a proposed class action alleging that it concealed that its growth following the acquisition of an influencer marketing platform was unsustainable and that it damaged investors when disappointing financial results and a guidance-cut announcement led to a share decline.

According to the **complaint** filed by investor Richard Munch in Illinois federal court on Tuesday, Sprout Social announced in August that it had acquired Tagger, an influencer marketing and social intelligence platform used by enterprise brands and agencies.

Sprout Social gave positive financial updates to investors for months while failing to disclose that it faced integration challenges with its acquisition of Tagger, Munch alleges. Sprout Social would eventually revise its fiscal year 2024 revenue guidance, leading to a 40% share decline after the announcement was made, the suit alleges.

In addition to Sprout Social, the suit's individual defendants include its CEO Justyn Howard, President Ryan Barretto and Chief Financial Officer Joe Del Preto.

On Nov. 2, 2023, the first day of the class period, Sprout Social announced its third-quarter 2023 operating results. The defendants told investors that Tagger's integration had "progressed smoothly."

That day, Barretto told investors that "we generally have a faster sales cycle than you might see with other enterprise software players, both in our space and outside of it" and "we've seen really good cycles."

During the call and throughout the rest of the class period, Sprout Social did not disclose that its sales and revenue growth were not indicative of its growth as it transitioned to an enterprise sales cycle, the suit alleges.

On May 2, 2024, Sprout Social announced that the company had missed its revenue guidance for the quarter and that the company had revised its full-year 2024 revenue guidance downward by \$20 million. Del Preto said the company had "underestimated the magnitude of enterprise seasonality" and that Sprout Social had also been "self-inducing sales execution headwinds."

Barretto also told investors that Sprout Social was now "more heavily weighted" to traditional enterprise buying cycles and that the company had underestimated the magnitude of this shift.

"We thought we could manage these changes without disruption, but they collectively set us back," Barretto said, according to the suit.

Following the announcements, Sprout Social's shares declined \$19.33, or about 40%, to close at \$28.82 on May 3, according to the suit.

The suit claims Sprout Social and the individual defendants acted with scienter, or actual knowledge, of wrongdoing or reckless disregard, and violated the Exchange Act. Munch seeks damages on behalf of the proposed class.

Counsel for Munch and a representative of Sprout Social did not immediately respond to requests for

comment on Tuesday.

Munch is represented by Marvin A. Miller and Lori A. Fanning of Miller Law LLC, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP and Corey D. Holzer of Holzer & Holzer LLC.

Counsel information for Sprout Social and the individual defendants was not immediately available on Tuesday.

The case is Munch v. Sprout Social Inc. et al., case number 1:24-cv-03867, in the U.S. District Court for Northern District of Illinois.

--Editing by Rich Mills.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Apache Investors Get First OK On \$65M Deal In Drilling Suit

By **Katryna Perera**

Law360 (May 14, 2024, 10:10 PM EDT) -- A U.S. magistrate judge has given the first green light to a \$65 million settlement resolving a lawsuit against oil and gas company Apache Corp. filed by investors alleging they were deceived by promises of a potentially lucrative drilling project that ultimately led to a \$3 billion write-down when it went bust.

U.S. Magistrate Judge Andrew M. Edison issued an **order** Monday saying the deal is fair, reasonable and adequate. He also said it seems likely that he will be able to certify a settlement class consisting of all individuals and entities who purchased or acquired Apache common stock from Sept. 7, 2016, through March 13, 2020, as the proposed class meets all the requirements for certification.

According to the order, the Plymouth County Retirement Association and the Trustees of the Teamsters Union No. 142 Pension Fund were named lead plaintiffs and attorneys from Kessler Topaz Meltzer & Check LLP and Saxena White PA were appointed lead counsel in October 2021.

The order states that lead counsel will seek an award of attorney fees not to exceed a third of the settlement fund — or roughly \$21 million — along with litigation costs of no more than \$1.9 million.

In an exhibit attached to Monday's order, the plaintiffs said that the settlement is a favorable recovery for the class given the risks of continued litigation, including a shortening of the settlement class, following Judge Edison's February report and recommendation.

Investors initially **sued** Apache in 2021, claiming that the company overstated the amount of natural gas and oil available at Alpine High, the Permian Basin project at the core of the suit, and that it made enthusiastic statements about the play's profitability even though it knew it didn't have the infrastructure to drill and transport those resources even if they existed.

Apache has said it was upfront with investors about the potential precarity of the project and blamed the stock price drop on the volatility of the energy markets. However, the company **was defeated** in its attempt to have the case thrown out.

In his February **report and recommendation**, Judge Edison said the class period should be limited to Sept. 7, 2016, to Feb. 22, 2018, finding that for the period between 2018 and 2020, the drop-off in stock prices was the result of market factors rather than statements about Alpine.

But the investors **pushed back**, saying the judge committed "clear error" in his refusal to endorse a class period that encompassed all those who held stock through at least Oct. 25, 2019, the day that Apache announced the "godfather" of Alpine High had unexpectedly resigned, causing the stock price to close 5% lower compared to the prior trading day.

They argued that Judge Edison was wrong to state that the resignation of high-ranking geologist Steven Keenan "did not reveal anything new about Alpine High," a play in West Texas, and was more likely linked to the market's concern about the company's prospects in drilling for oil in Suriname.

In his Monday order, Judge Edison said the certified settlement class would be lengthened to the class period proposed in the investor's 2021 amended complaint.

A hearing for final approval of the settlement is scheduled for September, according to Monday's

order.

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

The investors are represented by Gregory M. Castaldo, Johnston de F. Whitman Jr., Joshua E. D'Ancona, Richard A. Russo Jr., Evan R. Hoey and Austin W. Manning of Kessler Topaz Meltzer & Check LLP, David R. Kaplan, Wolfram T. Worms, Emily R. Bishop, Steven B. Singer, Joshua H. Saltzman and Sara DiLeo of Saxena White PA, Thomas R. Ajamie and John S. "Jack" Edwards Jr. of Ajamie LLP and Douglas A. Daniels of Daniels & Tredennick PLLC.

Apache and the other defendants are represented by David D. Sterling, Amy Pharr Hefley, J. Mark Little, Anthony J. Lucisano, Frank Mace and John B. Lawrence of Baker Botts LLP.

The case is In re Apache Corp. Securities Litigation, case number 4:21-cv-00575, in the U.S. District Court for the Southern District of Texas.

--Additional reporting by Jessica Corso. Editing by Jay Jackson Jr.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Vein Tech Maker Faces Investor Suit Over DOJ Kickback Probe

By **Emilie Ruscoe**

Law360 (May 14, 2024, 8:46 PM EDT) -- Vein disease device maker Inari Medical Inc. and three of its current and former executives face a proposed investor class action over claims that the company's share price fell after it disclosed an investigation into its compliance with federal anti-kickback laws.

In a complaint filed Monday in Manhattan federal court, Michigan-based institutional investor the Michiana Area Electrical Workers' Pension Fund claimed the company misled investors by concealing that its financial results and product sales numbers were propped up by "bribes and other improper and illegal payments to healthcare providers."

The investor pointed to market records showing the company's trading prices declined after it disclosed in February that the U.S. Department of Justice had demanded information from Inari related to "payments to healthcare professionals relating to meals and consulting services."

When the company announced the civil investigative demand, it also cautioned investors that the Justice Department probe could have a material effect on its business, the pension fund said, adding that the disclosure prompted investment bank analysts to downgrade Inari's stock.

The following day, trading prices for Inari's shares fell from about 21% from over \$58 to about \$46, erasing about \$700 million in market capitalization from the company, the complaint said.

The proposed class includes those who purchased Inari shares between February 2022, when the company allegedly misled investors about why it had seen strong results in its 2021 fiscal year, and February 2024.

Inari makes devices for treating blood clots that form in veins and has warned investors that its products are subject to "extensive regulation" including from U.S. federal healthcare fraud and abuse laws, the suit said.

"The Anti-Kickback Statute is particularly relevant because of its broad applicability," the company said in its filings, adding that its business could be harmed by an investigation into its practices under this law, according to the pension fund's complaint. The investor also stated that the DOJ's investigative demand cited the federal False Claims Act, which makes it illegal to submit fraudulent claims for payment to federal health care programs.

The news of the probe was included as the company announced its full financial results for its 2023 fiscal year, and on an analyst call the same day, company CEO Andrew Hykes said that Inari received the demand in December, adding that it was cooperating with the Justice Department and that it takes compliance seriously.

The Inari brass named alongside the company includes Hykes, former CEO William Hoffman, and Chief Financial Officer Mitch C. Hill.

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

The Michiana Area Electrical Workers' Pension Fund is represented by Daniel L. Berger, Caitlin M. Moyna and Timothy Clark B. Dauz of Grant & Eisenhofer PA.

Counsel information for Inari was not immediately available Tuesday.

The case is Michiana Area Electrical Workers' Pension Fund v. Inari Medical Inc et al., case number 1:24-cv-03686, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Carbon Capture Co.'s \$1.8B SPAC Deal Sparks Chancery Suit

By **Jeff Montgomery**

Law360 (May 14, 2024, 3:10 PM EDT) -- Stockholders who lost big after a blank-check company took carbon-capture venture LanzaTech NZ Inc. public in a purportedly \$1.8 billion reverse-merger in February 2023 have sued for damages in Delaware's Court of Chancery, alleging disclosure failures and other defects prior to closing.

The proposed class action, filed on Monday by stockholders William A. Schara Jr. and Gonul Schara, pointed out that the valuation of what is now LanzaTech Global Inc. has fallen from \$1.8 billion at the time of the merger proxy in January 2023 to \$420 million as of May 1.

According to the complaint, those behind the special-purpose acquisition company — AMCI Acquisition Corp. II — who sought the merger assembled an "inherently unfair process designed to blindside" investors in the deal for insider benefit. The alleged scheme allegedly deprived public investors of a chance to consider the merger as informed, uncoerced and disinterested shareholders.

"Legacy Lanza's business was new, untested and lacked meaningful comparable companies," the complaint said. "While it purported to have new and exciting technology, it was, in fact, losing money and had no track record upon which the shareholders of AMCI II could make an informed decision."

LanzaTech's focus is on commercialization of an operation that produces ethanol, a valuable energy-rich organic compound that is the end product of a process wherein a specific bacterium is fed carbon dioxide, potentially emitted from a variety of industrial sites. The company describes its business as "recycling carbon."

Public investors who buy into SPACs, or blank-check companies, typically pay \$10 per share, with assurances they will recover the buy-in with interest if the company doesn't complete a business combination within a fixed timeframe, usually between 18 and 24 months.

The stockholders who sued argued the business is new and relatively untested — and one that was allegedly "grossly overvalued" at the time of closing. The blank-check company architects of the deal were accused of drawing in investors based on "exaggerated and unsupported" claims about the company's growth prospects.

"Defendants took advantage of this information asymmetry and put an unreasonably high value on Legacy Lanza's business for the sole purpose of getting the deal done," the complaint said. It alleged AMCI II's "desperation to find a merger partner was so great that it did not think twice before it selected a company that was not only a weak, money-losing business, but also would be value-destroying" for stockholders.

Among the undisclosed, material factors, the complaint said, were resignations of ARC III's advisers and pre-closing due diligence that amounted only to a "cursory and superficial four-day visit to Legacy Lanza's facility in Belgium, which was still under construction and not material to the company's current commercial operations."

The complaint alleged the SPAC never sought an independent fairness opinion and struggled to raise cash for the deal. Ultimately, it opted to raise cash through three "private investment in public equity" deals that diluted existing SPAC investors, the stockholders alleged, leaving public shares estimated to be worth no more than half their original \$10-per-share price.

"Moreover, given that the equity value of Legacy Lanza was never \$1.8 billion, the value of plaintiffs' shares were being eroded at both ends and nowhere close to its redemption price of \$10 per share," the complaint said.

LanzaTech was one of two companies chosen in March to begin negotiations for up to \$200 million in Bipartisan Infrastructure Law and Inflation Reduction Act demonstration funding. On March 31, the company reported in a Securities and Exchange Commission quarterly report that licensees of LanzaTech's technology operate four commercial-scale waste-to-gas ethanol plants in China, one plant in India, and one plant in Belgium.

The company did not immediately respond to a request for comment.

Counts in the suit include breach of fiduciary duty against AMC II individual investors and against the alleged controllers, as well as an unjust enrichment count against all those named.

William A. Schara Jr., Gonul Schara and the class are represented by Russell D. Paul, Michael Dell'Angelo, Andrew Abramowitz and Radha Nagamani Raghavan of Berger Montague PC and Eric Lechtzin and Mark H. Edelson of Edelson Lechtzin LLP.

Counsel information for the directors, officers and LanzaTech Global Inc. was not immediately available.

The case is William Schara et al., v. LanzaTech Global Inc. et al., case number 2024-0505, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Stitch Fix Stockholder's Del. Suit Alleges \$102M Insider Trades

By **Leslie A. Pappas**

Law360 (May 14, 2024, 8:03 PM EDT) -- Insiders at online personal styling service Stitch Fix Inc. sold \$102 million worth of company stock while hiding information for nearly 18 months about the company's faltering business prospects, a shareholder has alleged in a new Delaware Chancery Court complaint.

The 55-page complaint accuses insiders of selling "tens of millions" worth of stock between Dec. 7, 2020, and June 9, 2022 — when they allegedly knew but hadn't yet disclosed that a direct-buy program was undercutting Stitch Fix's original business model, and privacy changes on Apple's operating systems had decimated customer acquisition.

As the company's deteriorating performance became increasingly clear to management, the insider trading defendants "sold tens of millions of dollars of stock while concealing the fact that its business would soon experience severe headwinds with a concomitant stock price drop," the complaint from shareholder Melonie Schultz alleges.

Schultz accuses several directors and officers of making insider trades, including Stitch Fix's founder, executive chairperson and current CEO Katrina Lake, former CEO Elizabeth Spaulding, and former Stitch Fix directors Marka Hansen and Mike Smith.

From December 2020 to June 2022, Lake, Spaulding, Hansen and Smith sold stock worth \$69.23 million, \$1.47 million, \$3.07 million and \$18.05 million, respectively, the complaint alleges.

The new Chancery Court complaint builds upon allegations in a derivative complaint that Stitch Fix investor Keith Horton **filed last year**.

Horton's complaint alleges that for almost a year and a half, the company's officers and directors made "false and misleading statements and material omissions" about the company's "Freestyle" program, which allowed customers to buy directly from the website instead of through a subscription service.

San Francisco-based Stitch Fix traditionally sold items through its "Fix" subscription, which periodically delivered boxes of stylist-selected items to customers for them to try on, buy what they liked, and then return the rest.

Beginning in July 2019, Stitch Fix started letting subscribers buy certain items directly from its website in between box deliveries, without having to rely on a stylist's suggestions first. In September 2021, the company officially launched the "Freestyle" program, allowing customers to purchase items directly from the Stitch Fix website without a Fix subscription.

Like Horton, Schultz accuses Stitch Fix directors of breaching their fiduciary duties by hiding the truth about the negative effects that the "Freestyle" program had on Stitch Fix's business.

It wasn't until March 2022 that then-CEO Spaulding revealed that the Freestyle program had inadvertently cannibalized its subscription business, both complaints say.

Schultz's complaint also asserts that directors should have revealed more to investors about the impact that new privacy settings on Apple's iPhone and iPad were having on Stitch Fix's business.

The Stitch Fix business model had relied heavily on Facebook and other social media marketing — which in turn relied on Apple's iOS systems — for capturing customer data, customer acquisition and revenue growth, according to the complaint.

Apple's new iOS 14.5 privacy settings went into effect on or about April 26, 2021, exacerbating the company's marketing and customer acquisition problems, the complaint says.

Stitch Fix should have known that its revenue and customer acquisition would suffer significantly from the privacy setting changes at Apple, but it failed to disclose anything to investors until a March 2022 earnings call, the complaint says.

The three-count complaint asserts breaches of fiduciary duty and unjust enrichment, seeks disgorgement of all insider trading profits, and asks for restitution and attorney fees and expenses.

Other company directors named as defendant in the case include former company directors Neal Mohan and Mikkel Svane, and current Stitch Fix directors Kofi Amoo-Gottfried, Elizabeth Williams, Steven Anderson, J. William Gurley and Sharon McCollam.

Stitch Fix Inc. is named as a nominal defendant.

None of the parties immediately responded to Law360's request for comment Tuesday.

Melonie Schultz is represented by Lee Squitieri of Squitieri & Fearon LLP, Fletcher Moore of Moore Law PLLC, and P. Bradford deLeeuw of deLeeuw Law LLC.

Counsel information for Stitch Fix and the individual defendants was not immediately available.

The case is Melonie Schultz v. Katrina Lake, et al., case number 2024-0511, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Sullivan & Cromwell Seeks To Ax Claims Of Aiding FTX Fraud

By **Madison Arnold**

Law360 (May 14, 2024, 4:31 PM EDT) -- Sullivan & Cromwell LLP wants a Florida federal court to dismiss a proposed class action alleging the firm knew about and helped facilitate the massive fraud by FTX, saying customers of the cryptocurrency exchange platform fail to claim anything beyond a "series of speculative allegations with no factual basis."

In a Monday **motion to dismiss**, Sullivan & Cromwell argued the customers' lengthy 75-page complaint does not back up claims of conspiracy to commit fraud, aiding and abetting the fraud that brought down FTX, breaches of fiduciary duty, and violations of the Racketeer Influenced and Corrupt Organizations Act.

"All of plaintiffs' claims suffer from numerous legal defects, and rest on threadbare allegations, unwarranted assumptions, and legal conclusions that the court need not accept as true even at the pleading stage. Accordingly, the court should dismiss plaintiffs' claims," the motion said.

The law firm argued that New York law governs state law claims made by the customers because that is the state where its lawyers gave most of their advice. If that's the case, New York law says representing a fraudster on lawful transactions does not provide a basis for imputing knowledge of fraud to a lawyer, and courts have said it does not constitute substantial assistance of the fraud, the firm said.

"Even if one accepts plaintiffs' conclusory allegation that S&C was 'well positioned' to discover FTX's fraud, that still does not satisfy their burden. Allegations that S&C could have ferreted out the truth do not establish that S&C actually did so," Sullivan & Cromwell said.

The customers, who lost money in FTX's 2022 collapse, **filed suit** against Sullivan & Cromwell in February, accusing it of knowing about and helping facilitate the massive fraud while serving as the company's outside counsel. They also alleged the firm profited from the fraud by overseeing FTX's ongoing bankruptcy proceeding.

"We are glad these important claims are moving ahead and look forward to having Judge [K. Michael] Moore address all of the numerous FTX lawsuits. We hope these claims can proceed along with the investigation by the FTX Independent Examiner," Adam M. Moskowitz, attorney for the customers, said in a statement to Law360 Pulse on Tuesday.

Sullivan & Cromwell partner Ryne Miller left the firm to become FTX's general counsel in the summer of 2021 and hired the firm to help with several acquisitions and other transactions, which earned Sullivan & Cromwell \$8.5 million in fees and helped FTX "become one of the largest cryptocurrency exchanges in the world," the complaint said.

Those transactions also "revealed key components of [FTX's] fraud" to Miller and his former firm, the complaint said.

"S&C provided services to the FTX Group entities that went well beyond those a law firm should and ordinarily provides," the complaint said. "As the evidence will reveal, S&C lawyers were eager to craft not only creative, but misleading strategies that furthered FTX's misconduct."

Founded in 2021 by Sam Bankman-Fried, FTX normalized and broadly marketed cryptocurrency to

investors. The exchange touted its platform as the "safest and easiest way to buy and sell crypto."

In the summer of 2022, FTX faced a liquidity crisis caused by the broader decline of cryptocurrency values. After several months of scrambling to stay afloat and a failed buyout bid from a competitor, FTX filed for bankruptcy in 2022.

Bankman-Fried and other executives raided FTX customer funds to lavish on personal purchases; finance business dealings, such as the acquisition of cryptocurrency exchange LedgerX; and make political donations, among other things.

Additionally, FTX used customer money to place reckless bets worth hundreds of millions of dollars by funneling their money into Alameda Research, a cryptocurrency trading firm founded by Bankman-Fried in 2017.

Bankman-Fried and FTX told customers and regulators that the two entities were separate, but in reality, Alameda Research had full access to FTX's customer deposits. He was eventually convicted by a jury and sentenced to 25 years in prison for crimes related to the scheme.

Since FTX's downfall, Sullivan & Cromwell attorneys have represented the bankruptcy estate of FTX.

"Plaintiffs' theory is that because S&C provided lawful legal services to FTX while Bankman-Fried was at the helm, before his fraud was uncovered, S&C must have been complicit in that fraud," the motion said.

Under New York law, plaintiffs claiming aiding and abetting fraud or breach of fiduciary duty must show that an underlying tort exists and that the defendants had actual knowledge of the underlying tort and provided substantial assistance, the motion said.

"The complaint fails on two out of three requirements. The crux of the alleged fraud and breach of fiduciary duty is this: FTX told customers it would safeguard assets deposited into accounts controlled by FTX and not commingle and misappropriate them for FTX's own purposes," the firm said. "But the complaint includes no well-pled facts that even suggest — much less establish for pleading purposes — that S&C knew about or substantially assisted this misconduct, so the aiding-and-abetting claims must be dismissed."

Counsel for Sullivan & Cromwell didn't immediately respond to requests for comment Tuesday.

The plaintiffs are represented by Adam M. Moskowitz of The Moskowitz Law Firm PLLC, Kerry J. Miller and Molly L. Wells of Fishman Haygood LLP, and José M. Ferrer and Desiree Fernandez of Mark Migdal & Hayden.

Sullivan & Cromwell is represented by Samuel A. Danon, María Castellanos Alvarado and Johnathon E. Schronce of Hunton Andrews Kurth LLP.

The case is Edwin Garrison et al. v. Sullivan & Cromwell LLP, case number 1:24-cv-20630, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Ryan Boysen. Editing by Drashti Mehta.

Update: This article has been updated to include a comment from Moskowitz.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Autonomy Overstated Revenue Before HP Sale, Jury Hears

By **Bonnie Eslinger**

Law360 (May 14, 2024, 11:09 PM EDT) -- Autonomy's reported revenue was overstated by a combined \$300 million in the two-and-a-half years before HP acquired it, an accounting expert testified Tuesday in a California criminal trial over claims that Autonomy founder Michael Lynch duped HP into buying his software company for an inflated \$11.7 billion price.

Lynch and Stephen Chamberlain, the company's former vice president of finance, are being tried on conspiracy and fraud charges related to HP Inc.'s October 2011 acquisition of the British technology company. The trial **kicked off** on March 18 and is expected to run into June.

Toward the end of the day Tuesday, the government brought to the stand Steven Brice of international advisory firm Mazars, an expert in accounting standards and rules applicable to U.K. companies.

Brice told jurors he had been hired by prosecutors in 2015 to determine whether Autonomy had appropriately accounted for and disclosed its software and hardware sales. He said he and his team had reviewed hundreds of thousands of documents in the course of their investigation and had billed the federal government about \$3.3 million for the work done to date.

The opinions the accounting expert gave on Tuesday focused on the 2½-year period before HP struck its deal with Autonomy. During those 10 quarters – from the start of 2009 to the second quarter of 2011 – Autonomy misstated its reported revenue figures, Brice said.

The issues with Autonomy's revenue accounting included concerns related to software transactions done through resellers, transactions that were linked, the timing when revenue was posted for some deals, agreements involving royalty payments, valuation errors and how certain hardware sales were recorded.

Autonomy should have reported less revenue for each of those 10 quarters as a result of those concerns, Brice said.

The revenue was overstated by \$104.3 million in 2009, \$113.7 million in 2010 and \$93.1 million for the first half of 2011, Brice told jurors.

Autonomy's accounting for some hardware it sold at a loss as marketing expenses – which would not affect gross revenue – is an example of a "qualitative material" misstatement, Brice told the jury. That line items should have been marked down within cost of goods sold, the expert said.

Dozens of deals Autonomy inked with resellers were also problematic, Brice said. According to international accounting rules, in order for a company to recognize revenue from a purported reseller, that buyer has to assume the risks of ownership, the original seller cannot maintain continued involvement or control over the goods, the revenue involved must be capable of being "measured reliably," and the deal must be "probable" and have "collectability." If a transaction did not meet all five criteria the revenue cannot be recognized, Brice said.

For example, if a deal was struck between Autonomy and a reseller in one quarter, the revenue could not be marked for that time period if the documentation related to the agreement was not inked until later.

"I didn't consider that the risks and rewards have been transferred," Brice said.

That includes an \$11 million deal Autonomy recorded in one quarter in 2010 for software that it said was going to the Vatican through a reseller, MicroTechnologies LLC. The Vatican deal never went through, jurors have been told during the trial.

"Is it your opinion that this transaction should not have been recognized by Autonomy?" Green asked. Brice said yes.

Green also asked if the revenue could be accounted for if a reseller was only able to pay Autonomy for its products if an end user deal was executed.

"If Autonomy was paying a reseller, just so that the reseller could then return those funds to Autonomy to pay for its transaction, is that relevant to your opinion as to whether you can recognize revenue on those deals?" the prosecutor asked.

Brice said the "circularity" of the funds would prevent the revenue from being recognized.

He also said there were multiple situations in which negotiations between Autonomy and a potential customer were aborted, and a reseller was suddenly inserted into the deal to post the revenue, seemingly for inflated purchase prices.

Brice said he also found issues with Autonomy transactions in which it paid a reseller a fee or commission or some other payment, when the reseller "seemed to perform no services."

Those included a 2009 deal involving a company called Capax buying Autonomy software in exchange for performing electronic discovery services.

"I understood that maybe the [electronic discovery] services were not performed," Brice said.

The expert's direct examination is expected to continue on Wednesday.

On Monday, the judge overseeing the case, U.S. District Judge Charles Breyer, blasted lawyers for the government and the two former Autonomy Corp. PLC executives for the slow pace of the trial, saying he was "annoyed," **but also "complicit"** because he "did not take more of a controlling posture" during the proceedings.

The defendants are poised to present their case starting next week.

The trial follows the April **2018 conviction** of Sushovan Hussain, a former Autonomy chief financial officer, on related charges. He was sentenced to five years in prison and ordered to pay \$4 million in fines.

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

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

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

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

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Peter Rozovsky.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tort Report: Mass Tort Settlements Beset By Crooked Claims

By **Y. Peter Kang**

Law360 (May 14, 2024, 5:58 PM EDT) -- Fraud attempts during the settlement claims process for class actions and mass torts highlighted by a new report and an \$82 million verdict in a drunk driving crash suit lead Law360's Tort Report, which compiles recent personal injury and medical malpractice news that may have flown under the radar.

Fraud Claims Skyrocket For Mass Tort Settlements, Report Says

Fraudulent attempts to get a slice of any given settlement pie in class actions and mass tort cases have increased 19,000% in the last two years, according to research conducted by a bank that specializes in handling disbursements for such types of sprawling litigation.

Using data from nearly 600 class action or mass tort settlements handled by Western Alliance Bank over four years, 80 million claims showed indications of fraud, according to the Phoenix-based bank's report, "Digital Payments in Class Actions and Mass Torts," released on May 1.

"The decades-long mantra that it is better to allow ten ineligible claims than to turn away one legitimate claim is being re-examined by judges, lawyers, and settlement administrators," one bank official said in a statement. "While it remains absolutely critical that actual class members and mass tort victims receive their settlement benefits, the scale of the fraud — more than 80% of claims in some cases — poses a significant risk of diluting those settlement benefits."

The report also found that use of digital payments continue to increase and are far more effective than paper checks, as recipients almost always opt to be paid electronically.

Texas Jury Awards \$82M Against ex-U.S. Marshal

A Texas state jury has rendered an \$81.7 million verdict in a suit accusing a former deputy U.S. Marshal of driving drunk on the wrong way of a freeway exit ramp resulting in a January 2020 crash that killed a 23-year-old nursing student, plaintiffs' attorneys announced.

The April 22 verdict was handed up by a Bexar County jury, which found that the former marshal, Jonathan Paul Jones, negligently operated his vehicle while intoxicated and caused the crash that killed Taylor McCowan, 23, according to lawyers at Roberts Markland LLP.

Jones, who had been drinking with fellow marshals at a San Antonio bar, was alleged to have failed to give any aid to McCowan, who was trapped in her vehicle for 40 minutes before first responders were able to cut her out, according to attorneys for McCowan's parents. Their daughter died after two weeks in a coma, the lawyers said.

"The jury accepted its responsibility to not only compensate this grieving family but to also send a message to Texas drivers who choose to drive home drunk instead of calling a cab or Uber," Robert Markland's Clive Markland said in a statement. "Mr. Jones, a commissioned federal peace officer at the time, had a duty to protect citizens like Taylor McCowan but instead chose to put the lives of San Antonio drivers at risk. Unfortunately, Ms. McCowan paid the ultimate price for these reckless decisions, and the jury was asked to try to fix that."

The case is Raquel Hatch et al. v. Jonathan Paul Jones, case number 2020C102447, in the 408th

Judicial District Court of Bexar County, Texas.

Disneyland Goofy's Collision Sparks Suit Against Disney

Disney has been sued in California state court by a woman alleging an employee dressed as Goofy fell on top of her, severely injuring her, according to news reports.

In a complaint filed in Orange County Superior Court in late March, Katrina Griffin alleges she was perched over her daughter tying her shoes in April 2022 when a Disneyland California Adventure worker in a Goofy costume barreled into her and knocked her to the pavement, giving her "severe, traumatic, debilitating, and permanent injuries that necessitated significant medical care as well as emotional pain and suffering," according to news reports.

The suit also blames another Disneyland Resort employee working as the "handler" for the Goofy costume, saying they failed to prevent the collision, according to news reports.

Case information was not immediately available.

Detroit Animal Control Sued Over Man's Death By Dog Mauling

The widow of a man who was fatally mauled by three dogs has filed a wrongful death suit against Detroit's animal care and control department, claiming the agency did nothing despite being warned of the dogs' dangerous propensities, according to news reports.

Shauntaye Phillips filed the suit in Wayne County Circuit Court on April 1 alleging that the three dogs owned by Trevina and Roy Goodman were negligently allowed to roam free and attack Harold Phillips as he was walking home from a bus stop, news reports said.

The suit alleges that the couple and Detroit Animal Care and Control were warned multiple times since 2019 that the five dogs that they owned were dangerous and that the couple were charged with a number of misdemeanors relating to the dogs' care and behavior. In addition, the dogs attacked another man last year, according to news reports.

Phillips' attorney told a local news outlet about the "grim reality of the mismanagement of the Detroit Animal Care and Control division," in which multiple serious attacks on people causing hospitalizations sparked no action by the city agency aside from an initial response.

The case is Phillips v. City of Detroit et al., case number unavailable, in the Wayne County Third Judicial Circuit of Michigan.

N.J. Jury Awards \$55M to Double Amputee in Crash Suit

A New Jersey state jury has handed up a \$55 million verdict in a suit accusing two trucking companies of causing a collision that caused a motorist to lose both of her legs, according to news reports.

Following a two-week trial, an Essex County jury on April 11 awarded the amount to Angel May Rider, who was in her mid-20s when a driver working for Alert Motor Freight and Jersey City Transport negligently caused the collision that resulted in the amputation of both of Rider's legs, requiring the use of prosthetic limbs and daily assistance, news reports indicated.

After the verdict, plaintiff's counsel told local news outlets that they intend to lodge a bad-faith suit against the companies' insurance carrier for failing to timely offer to settle the case for the \$1 million policy limit until just shortly before trial, according to news reports.

The case is Rider v. Jersey City Transport Inc. et al., case number ESX-L-002221-19, in the Superior Court of the State of New Jersey, County of Essex.

--Editing by Emily Kokoll.