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NEWS

Who Got the Work: Manning Gross Steps in to Defend Argee Manufacturing Co., Garlic King in Breach-of-Contract Suit

Daniel Paul Schrader and Andrew Benny Leal of Manning Gross + Massenburg have stepped in as defense counsel to Argee Manufacturing Co. of San Diego and Garlic King in a pending breach-of-contract lawsuit.

May 17, 2024 at 04:34 PM



Victoria Pfefferle-Gillot



Daniel Paul Schrader and Andrew Benny Leal of Manning Gross + Massenburg have stepped in as defense counsel to Argee Manufacturing Co. of San Diego and Garlic King in a pending breach-of-contract lawsuit. The case was filed March 26 in California Southern District Court by Shields Law Offices on behalf of Custom Foods of America, which seeks over \$1.2 million due to allegedly receiving a contaminated shipment of food items. The case is assigned to U.S. District Judge Linda Lopez.

Blake Padget and Blaine Veldhuis of Butzel Long have stepped in to defend Prime Healthcare Services-Garden City in a pending lawsuit. The suit, filed March 28 in Michigan Eastern District Court by Eisenberg & Baum on behalf of Ora Sue Bogden and other plaintiffs, accuses the defendant of failing to provide an American Sign Language interpreter for Bogden’s husband after he suffered from cardiac arrest and was transported to Garden City via an ambulance. The case has been assigned to U.S. District Judge Terrence G. Berg.

Hawaiian Electric Industries has retained Cades Schutte LLP partners C. Michael Heihre, Michi Momose and Lisa K. Swartzfager to fend off a pending shareholder lawsuit. The action, filed April 8 in Hawaii District Court by attorney Carl M. Varady; Robbins LLP; Robbins Geller Rudman & Dowd; and RM Law on behalf of George Assad, accuses the defendants of making false and misleading statements about the inadequacy of the company’s wildfire prevention and safety protocols, which allegedly placed Maui at ‘heightened risk’ of wildfires. The case is assigned to U.S. District Judge Micah W.J. Smith.

John K. Diviney, Kenneth A. Novikoff and Caitlyn Gibbons from Rivkin Radler have stepped in as defense counsel to Neil Karnofsky DDS PLLC in a pending wage-and-hour class action. The complaint, which arises from an alleged failure to pay overtime wages, was filed April 1 in New York Eastern District Court by Valli Kane & Vagnini and Rissmiller PLLC. The case has been assigned to U.S. District Judge Brian M. Cogan.

Hinckley, Allen & Snyder partner **Lisa A. Zaccardelli** has entered an appearance for Southport Contracting in a pending ERISA lawsuit. The [complaint](#), filed April 1 in Connecticut District Court by **Robert M. Cheverie & Associates** on behalf of Trustees of the Connecticut Pipe Trades Local 777 Annuity Fund and other plaintiffs, seeks to recover more than \$493,000 in unpaid plan contributions and audit costs. The case is assigned to U.S. District Judge Michael P. Shea.

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Toymaker Funko Gets Investors' Inventory Chaos Suit Thrown Out

By Martina Barash

- Company allegedly misled investors about warehouse, software
- Complaint falls short in pleading securities fraud, court says

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Toymaker Funko Gets Investors' Inventory Chaos Suit Thrown Out

By Martina Barash 2024-05-17T08:13:06000-04:00

- Company allegedly misled investors about warehouse, software
- Complaint falls short in pleading securities fraud, court says

Funko Inc. investors failed to show that the Pop! figurine maker's statements about a warehouse move and new inventory software were false, a federal court said, dismissing the proposed class action.

The shareholders also didn't adequately allege the necessary level of intent for securities fraud, Judge James L. Robart said Thursday for the US District Court for the Western District of Washington.

The suit came after a 59% one-day drop in Funko's stock price on Nov. 4, 2022—steeper than any prior decline for the stock, according to data compiled by Bloomberg—and an additional selloff on March 2, 2023, following announcements of financial results.

Good inventory management is essential for Funko because some of its pop culture-derived vinyl figures are in demand for only a short period or are licensed for a limited duration, the investors alleged.

Funko misled shareholders when it promoted a planned transition from warehouses in Washington state to a distribution center in Buckeye, Ariz., they said. The company was also changing its inventory management software at that time, the investors said. Neither process went smoothly, resulting in "chaos" at the Buckeye facility, they said.

But Robart said he "generally" agreed with Funko that the 28 "challenged statements either are not false or misleading, or are protected forward-looking statements, opinions, or puffery." The investors didn't meet the falsity requirement for securities fraud claims, he said.

They also failed to create an inference of fraudulent intent, even with confidential witness accounts, he said.

The investors will have a chance to re-plead their claims.

Robbins Geller Rudman & Dowd LLP is lead counsel for the investors. Latham & Watkins LLP and DLA Piper US represent Funko.

The case is *Studen v. Funko Inc.*, W.D. Wash., No. 2:23-cv-00824, 5/16/24 .

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This Week in Chancery Court: Rocket, Kraft Heinz, Sculptor

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A Delaware Court of Chancery judge is weighing whether to approve a settlement of litigation over Rithm Capital Corp.'s acquisition of struggling asset manager Sculptor Capital Management Inc., but objections to attorneys' fees may prolong that process.

Here's a look at that matter and what else is coming up in the Chancery Court this week:

Monday: In re Sculptor Cap. Mgmt. Inc. S'holder Litig., Del. Ch., No. 2023-0921, settlement hearing 5/20/24.

At issue: Vice Chancellor Sam Glasscock III will consider approving a proposed \$6.5 million settlement to resolve litigation over a merger that Sculptor founder Dan Och initially opposed. He changed his mind after Rithm increased its offer and made other changes to its terms. The settlement class includes anyone holding shares of Sculptor Class A common stock when the merger closed Nov. 17 and received, or were entitled to receive, a public merger consideration. The plaintiffs' counsel seeks a \$5.75 million fee award, plus reimbursement of almost \$110,000 in expenses, according to a brief arguing the litigation pushed Rithm to raise its bid to \$12.70 per share. Rithm supports the settlement but says they shareholder attorneys should get no more than \$268,000 in fees after playing a minimal role in the price bump, according to a brief. Och and other founders also support the settlement but have pushed back on the suggestion that they sought to hinder the plaintiffs' case.

Court order: The settlement hearing will take place in Georgetown, Del.

Rithm Completes Deal to Acquire Sculptor After Monthslong Drama

Monday: In re Rocket Companies Inc. S'holder Derivative Litig., Del. Ch., No. 2021-1021, trial 5/20/24.

At issue: A derivative lawsuit against online lender Rocket Companies Inc. goes to trial over the sale of 20.2 million shares of Class A common stock by majority shareholder Rock Holdings Inc. in March 2021 for approximately \$500 million, shortly before disappointing revenue guidance sent Rocket's market value plummeting. Rocket's chairman, Dan Gilbert, initially was named as a defendant in the litigation, but claims against him were dismissed in January. The plaintiffs' argue that Rock Holdings' announcement that the sale facilitated a charitable donation to the city of Detroit by the Gilbert Family Foundation was "a cover story" when it knew that "Rocket's business was going to fall back to pre-pandemic levels much

faster than the market was anticipating,” according to a pre-trial brief. “There was nothing nefarious about this sale, which was not motivated by” material, non-public information, Rocket said in its own brief.

Court action: A four-day trial begins Monday in Wilmington, Del.

Dan Gilbert Faces \$500 Million Insider Trading Suit Over Rocket

Monday: Newman v. Sports Acquisition Holdings LLC, Del. Ch., No. 2023-0538, bench ruling 5/20/24.

At issue: Architects of the merger that took online gambling company Super Group (SGHC) Ltd. public are facing shareholder litigation challenging the blank-check transaction. The lawsuit, targeting the finance and sports industry veterans who engineered the combination, is one of dozens of cases taking aim at the lopsided deal incentives that drove a wave of mergers in 2020 and 2021 between private businesses and special purpose acquisition companies, a type of publicly traded shell entity. The Super Group suit focuses on allegations that the deal’s sponsors concealed the gap between their SPAC’s \$10-per-share nominal value and the roughly \$4 a share it was likely worth after accounting for shareholder opt-outs, transaction costs, and other factors. They have moved to dismiss the case.

Court action: Vice Chancellor Lori W. Will is set to rule by phone on the motions to dismiss.

Super Group’s Blank-Check Backers Hit With SPAC Deal Challenge

Wednesday: Fortis Advisors LLC v. Johnson & Johnson, Del. Ch., No. 2020-0881, post-trial oral argument 5/22/24.

At issue: Johnson & Johnson faces fraud claims over its Ethicon unit’s \$3.4 billion acquisition of Auris Health Inc., which was developing a surgical robot with blockbuster potential. The lawsuit, filed in 2020, says Ethicon duped Auris investors into making billions in post-deal payouts contingent on unachievable regulatory and sales milestones related to the “iPlatform” surgical system, then diverted funding to a competing project. Will, who let the case move forward in 2021, is set to hear an additional round of oral argument after presiding over a trial in January.

Court action: Post-trial oral argument in Wilmington.

J&J Merger Undermined Surgical Robot Project, Auris Exec Says

Thursday: Erste Asset Mgmt. GmbH v. Hees, Del. Ch., No. 2023-1191, oral arguments 5/23/24.

At issue: Kraft Heinz Co. senior leaders and affiliates of 3G Capital Inc. seek to halt an attempt to reopen litigation over claims the private equity giant made insider sales of \$1.2 billion in stock shortly before Kraft's share price plummeted in 2018. Earlier investor claims were tossed in 2021; that ruling didn't affect a related lawsuit filed in 2022. The defendants named in the current action include two Brazilian billionaires, 3G co-founders Alexandre Behring and Jorge Paulo Lemann.

Court action: Oral arguments on the motion to dismiss will take place in Wilmington.

3G, Behring, Lemann Targeted in Bid to Revisit \$1.2 Billion Case

Friday: Calif. Safe Soil LLC v. KDC Agribusiness LLC, Del. Ch., No. 2021-0498, post-trial arguments 5/24/24.

At issue: California Safe Soil LLC, which uses "breakthrough technology" to make fertilizer and pet food out of supermarket waste, and rival KDC Agribusiness LLC went to trial in February over claims that KDC used bogus deal negotiations to steal its trade secrets. Vice Chancellor Morgan T. Zurn now hears closing arguments in the case. KDC's former principals attempted to delay proceedings with "frivolous" counterclaims that have since been dropped or dismissed, CSS said in a brief. KDC Executive Chairman Harold Kamine, his two sons, and KDC's Chief Manufacturing Officer Barry Starkman argue CSS's technology is "not just easy to duplicate, but in fact is a simple widely-known food processing process used in and out of the same industry," according to an answering brief.

Court action: Post-trial arguments will take place in Wilmington.

Food Waste Recycling Firm CEO Says Rival Stole Trade Secrets

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Judge 'Reluctantly' Closes Duplicated FirstEnergy Investor Case

By Martina Barash

- Judge slams settlement of claims allegedly worth billions
- Sixth Circuit decision affirming settlement compels dismissal

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Judge 'Reluctantly' Closes Duplicated FirstEnergy Investor Case

By Martina Barash 2024-05-17T17:16:17000-04:00

- Judge slams settlement of claims allegedly worth billions
- Sixth Circuit decision affirming settlement compels dismissal

A FirstEnergy Corp. shareholder derivative suit over the power company's bribery scandal must be dismissed because the Sixth Circuit has approved a settlement in a parallel suit in a different district, a federal judge in Ohio said Friday.

The request for dismissal "is reluctantly granted," Judge John R. Adams said for the US District Court for the Northern District of Ohio.

Adams' court is where shareholders initially sued over alleged damage to FirstEnergy, claiming that former executives were involved in a bribery scheme that eventually cost the company a huge fine and hurt its stock value. The investors estimated losses that could amount to billions of dollars, Adams said.

But his skepticism about mediation drove the parties to the US District Court for the Southern District of Ohio, the judge said. The resulting settlement "for only \$180 million," despite billions at stake, was further clouded by procedural shortcomings in that court, Adams said.

The investors alleged that FirstEnergy board members and executives engaged in a scheme to pay elected officials \$60 million to provide FirstEnergy with a \$1.3 billion bailout for two struggling nuclear power plants.

"As more information is uncovered almost weekly, the knowledge of the depth and reach of FirstEnergy's bribery scheme and use of dark money to influence Ohio elected officials continues to expand," Adams said in his ruling.

The scandal has spawned numerous criminal cases, with an indictment against three key figures issued in February.

Parallel Suits

The shareholders in June 2022 asked Adams to dismiss the suit in his court, but he refused.

Judge Algenon L. Marbley of the Southern District approved the deal, and an objector appealed. The US Court of Appeals for the Sixth Circuit affirmed the ruling in February.

FirstEnergy was pursuing recoupment of damages through the settlement, not public interests that might have been vindicated after more extensive discovery, the Sixth Circuit said. The appeals court also said the objector had forfeited his arguments.

The investors again asked for dismissal in the Northern District.

As a result of the Sixth Circuit's ruling, "the stay must be lifted, and this matter must be dismissed," Adams said.

"The people of Ohio deserved to have sunlight cast upon *all* aspects of the FirstEnergy bribery scheme," he said. "Instead, the public is left with proceedings that allowed a shroud of darkness to remain in place covering many of the details surrounding FirstEnergy's bribery scheme to occur—a shroud that is only slowly being lifted by an aggressive media and subsequent criminal proceedings."

"The people of Ohio—the ultimate victims of the FirstEnergy bribery scheme—deserved much, much more, but the law does not allow this Court to compel further proceedings," he said.

Edelson Lechtzin LLP; Saxena White PA; Cohen Milstein Sellers & Toll PLLC; and John C. Camillus, who practices in Columbus, Ohio, are among the firms representing the Northern District shareholders. ArentFox Schiff LLP, Perez Morris, and Debevoise & Plimpton LLP represent FirstEnergy. Jones Day represents the officers and directors.

The case is *Miller v. Anderson*, N.D. Ohio, No. 5:20-cv-01743, 5/17/24 .

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Alleged 'backdoor ties' between retired teachers' pension fund & investment firm

 [wcpo.com/news/state/state-ohio/the-alleged-backdoor-ties-between-retired-teachers-pension-fund-and-investment-firm](https://www.wcpo.com/news/state/state-ohio/the-alleged-backdoor-ties-between-retired-teachers-pension-fund-and-investment-firm)

Morgan Trau

May 18, 2024

COLUMBUS, Ohio — Ohio Attorney General Dave Yost has filed a lawsuit to remove two members of the retired teachers' pension fund, stating they are participating in a contract steering "scheme" that could directly benefit them. However, the AG stops short of detailing the alleged "backdoor ties" between the men and an "illegitimate" investment firm.

We unraveled as much as we could to figure out why Yost may be investigating this as a public corruption scandal.

Overview

The State Teachers Retirement System of Ohio (STRS) board is made up of 11 members. There are five elected contributing teachers and two elected retired teachers. The governor gets to appoint one investment expert. The speaker of the House and the Senate president get to jointly appoint an expert. The treasurer and director of the Department of Education and Workforce both get to designate an expert.

There is a debate on how STRS should invest money — through the current system of actively managed funds versus an index fund. Active funds try to outperform the stock market, have more advisors and typically cost more. Index funds perform with the stock market, are seen as more passive, and typically cost less.

To get a larger overview of the situation, we did a Q&A with viewers on Thursday.

RELATED: Answering viewer questions about Ohio's retired teachers' pension fund chaos

The "reformer" perspective on investments

Some retired teachers are trying to take back their money, believing that the STRS board has mismanaged their \$90 billion pension fund.

"I suffered a loss of \$35,000 of direct payments that I was promised," retired teacher Robin Rayfield said.

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. Then, the board approved \$10 million in bonuses for their staff.

Having the COLA freeze and now having a severely reduced COLA is one of the reasons why Rayfield's organization, the Ohio Retirement for Teachers Association (ORTA), has been helping elect STRS board members who want to change the system.

More reformers are being elected to the board. They are in favor of an index fund.

"The key to creating a stable retirement fund is diversification of that fund, meaning that if you want to minimize risk and end up with fairly stable returns, the best thing you can do is invest in a diversified portfolio with index funds," Case Western Reserve business law professor Eric Chaffee said. "They allow for diversification without that active management of the fund."

The reformers are also pushing for transparency.

"It's very opaque — we're not allowed to know what the fees are, how much money they're taking out of it, what the value of it is," he said, referring to the alternative investments, such as private equity. "None of the STRS board members can know what the value is and how much it's worth at any given time."

When the board approved the bonuses for staff, reformers spoke out, arguing that it wasn't fair. Chaffee said that bonuses are typical since it takes money to retain talent — but the optics are awful.

"When you see individuals involved with a public pension plan living lavish lives, it's a reason to raise eyebrows," the professor said.

I tried to look at Ohio Checkbook, the state-run site that shows how much public employees make, but the resource was not functioning properly. However, ORTA had captured data, which showed that STRS Chief Investment Officer Matthew Worley had an annual salary of about \$466,000 as of September 2023.

The average salary for STRS investment staff members was roughly \$230,300.

The "STRS status quo" perspective on investments

The Ohio Retirement Study Council posted a report that compared STRS with other statewide public pension systems from 1999-2022. During this time period, the average annual STRS return was 6.85%, while the Ohio Public Employee Retirement System (OPERS) was 6.14%, the School Employees Retirement System of Ohio (SERS) was 6.52%, Ohio Police & Fire Pension Fund (OP&F) was 6.76% and Highway Patrol Retirement Systems (HPRS) was 5.88%.

STRS staff members have pointed out this data on numerous occasions when addressing that the fund isn't failing like critics say it is.

"STRS Ohio's investment consultant, Callan, shared that STRS Ohio's total fund return outperformed its benchmarks and ranked in the top 10% of public funds tracked by Callan for the three-, five- and 10-year periods ending June 30, 2023," STRS spokesperson Dan Minnich said.

Pensioners have asked why, if the fund is doing well, do they not have an adequate COLA.

"In accordance with Ohio law, the Board's actuary must determine that any benefit changes approved by the Board will not materially impair the fiscal integrity of the system," Minnich responded.

In May 2023, STRS approved a 1% COLA to eligible retirees. Retirees can start receiving a COLA on their fifth anniversary of retirement.

"The reason why, from a financial standpoint, that it makes sense to cut COLA is because they compound over time," Chaffee said. "That being said, people depend on this based on the inflation that we've seen in recent years — it is really important to see those types of adjustments."

Recap: Investigation and lawsuit

Last week, Yost started an investigation after anonymous documents alleged that two board members, Wade Steen and Rudy Fichtenbaum, have been doing the bidding of private investment group QED Systematic Solutions. According to the suit, the firm asked board members for \$65 billion so that they could allegedly restore the COLA.

"We have strong evidence that there were serious discussions about taking two-thirds of the money and putting it in a very, very untested programming," Gov. Mike DeWine told reporters Wednesday.

QED was started by former Deputy Treasurer Seth Metcalf and Jonathan (JD) Tremmel. Metcalf worked under Josh Mandel in multiple capacities, including as general counsel. In 2020, they set their eyes on STRS, according to the main 14-page memo.

The documents claim that they — despite having no clients and no track record — tried to convince STRS members to partner with them.

They couldn't impress the board members, mainly because of their lack of experience and also the fact that QED was not registered as a broker-dealer or investment adviser. The men also didn't own the technology to "facilitate the strategy," the documents say.

Then, an evaluation of QED was done by the board's outside consultant, Cliffwater. The company highly advised not to follow their project or use them.

The bidding has been allegedly done by Steen and Fichtenbaum, continuously pitching QED's direct documents to board members and proclaiming the company's talking points to other staff.

The concerns came from documents given to Gov. Mike DeWine's office. The governor's spokesperson, Dan Tierney, told me that an STRS staff member hand-delivered the documents. The office believes numerous whistleblowers wrote the 14-page memo, also including about a dozen other documents in an attempt to verify their allegations. As this was happening, DeWine found out that STRS' consulting firm Aon had cut ties with them.

Yost filed suit Wednesday morning, accusing them of being a part of an attempt "to hijack" the pensioners' retirement accounts.

The accused reformers deny all allegations.

RELATED: AG Yost files lawsuit to remove members of teachers' pension board, accuses them of breaching fiduciary duties

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.

The AG states that the pair should be removed because they broke their fiduciary duties of care, loyalty and trust when "colluding" with QED.

This could cause a pay-to-play concern, Chaffee warned.

"Maybe things that are illegal will be uncovered, but things that are unethical could be uncovered as well," he said.

We asked the AG's office if he was looking into that.

"This is an ongoing investigation. Like I said yesterday, this lawsuit allows us to obtain the discovery documents necessary to finding answers to the allegations. This is a step in the process to ensure that we continue to fight to protect teachers' hard earned retirement dollars," Bethany McCorkle, communications director for Yost, said in an email Thursday.

The reformers call this investigation and lawsuit a sham and a "ruse" to stop transparency.

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

"Now we have a super majority, and now we can get all the information we need that they've been covering up or not being transparent about," Cleveland-area teacher Terry Caskey said.

DeWine is covering up for his Wall Street friends, she and other reformers added — but she is also concerned that this is a corruption scheme.

"I also think that the governor is going to pull out every stop to make sure that he has control of the STRS fund because I think that's a cash cow," she said.

Still, the lawsuit accuses the board members of directly benefiting from QED.

"While this scheme may benefit Steen and Fichtenbaum, it may spell disaster for Ohio teachers who have retired or hope to retire someday," it states.

But the attorney general stops short at how the men would benefit — and what "backdoor ties" exist.

Alleged ties

To determine what Yost was alleging, I cross-referenced the lawsuit and the documents sent to the governor. The "fiduciary breach" is alleged to stem from multiple organizations.

The documents say that once former board members rejected QED's request for \$65 billion, the firm joined forces with ORTA and Save Ohio STRS (SOS) to "replace board members and staff with those who would support their proposal."

SOS and Fixmypension.org sent out mass emails and mailers supporting Fichtenbaum's campaign to the STRS board. However, I was unable to find any campaign disclosure filings on the secretary of state's website.

SOS is registered on the sec. of the state's website as both an LLC and for-profit organization. I reached out to its creator, ORTA member Thomas Curtis, but did not hear back. I couldn't find any information about Fixmypension.org, considering the website is no longer active.

"If you try to influence an election in some way, then it's treated as an expenditure on behalf of a particular candidate or issued position and it has to be reported," CWRU elections law professor Atiba Ellis said. "The law treats such expenditures as coordinated expenditures."

Rayfield denied the allegations that ORTA was involved with SOS or QED in campaigning. It is unknown if QED campaigned.

"We don't have any money," Rayfield said, laughing. "What we have lent is our voice, and we do have a strong footprint."

He also reminded that the vast majority of ORTA members are retirees, and they are not allowed to vote in active member elections. Fichtenbaum, however, is retired.

Both the document and Chaffee raised red flags about ORTA's involvement in another matter.

Originally appointed by John Kasich, Steen has become somewhat of a martyr, many reformers told me. He was reappointed by DeWine when the governor started his administration, but the governor asked him to resign last year. Steen refused, so DeWine removed him. DeWine originally cited Steen's alleged poor attendance at board meetings as reasoning.

"We were concerned that Mr. Steen was seen as advocating for a very particular investment firm in a way that a fiduciary board member — it just didn't seem right," DeWine's spokesperson Dan Tierney said. "It almost seemed like Mr. Steen was trying to tip the scales in favor of this particular company that didn't agree with the administration."

ORTA got involved once Steen was ousted.

"I communicated with Wade," Rayfield said. "I said, Well, do you wanna fight this? And he goes, 'Let me think about it because fighting the governor is a tough thing to do...' But nonetheless, we stood with Wade and I said, 'Well, ORTA could potentially help you fight this.'"

He checked with his board, and they "unanimously said, 'Absolutely, let's see if we can raise money.'" They ended up raising at least \$40,000, but Rayfield said it could be \$60,000.

"We've kept meticulous records of those donations and we have been able to pay Wade's legal fees," Rayfield said. "We were successful in getting him reseated."

He understands that Yost may think that is improper, he said, but that Steen's attorney thought otherwise.

I asked if I could look through the donations, and he said that he would need to check with an attorney. I asked if it was possible that QED donated.

"We didn't receive any money from QED or QED-affiliated people," he responded.

The idea that he "colluded" with QED or SOS is ridiculous, he said.

He has shook hands with Curtis and exchanged pleasantries but never worked together, he said. However, he is more concerned about being associated with QED.

"It seems to me that there's an effort to connect ORTA with QED — we're not affiliated," he said. "I mean, I know both Seth Metcalf and JD Tremmel who were mentioned in the document and mentioned in the lawsuit, but it almost seems like the attorney general is trying to censor who ORTA can or cannot talk."

All of this is just a distraction from the real problem, he added.

Still, Chaffee is warned of another corruption scandal. Supporting a campaign in exchange for a contract is highly illegal. State lawmakers learned that the hard way.

In March 2023, a jury found that former House Speaker Larry Householder and former GOP leader Matt Borges, beyond a reasonable doubt, participated in the racketeering scheme that left four men guilty and another dead by suicide. Two other men are going through the court process currently — and the third died in April, with his death also being a suspected suicide.

Householder took a \$61 million bribe in exchange for legislation to give utility giant FirstEnergy a \$1 billion bailout, named H.B. 6, all at the expense of the taxpayers. After he was caught, faced a jury and found guilty, he was sentenced to 20 years in federal prison.

The bribe money came in the form of campaign contributions, dark money donations, that are nearly impossible to track due to Ohio's lax campaign finance disclosure laws.

Moving forward

In an act of defiance, the reformers removed STRS chair Dale Price, who was on the status quo side, and replaced him with Fichtenbaum.

"I think that says that the majority of the members of the board believe that I have carried out my fiduciary responsibilities and they have confidence that I will continue to do that," Fichtenbaum told me during a break in the Wednesday meeting.

So why not just use another reputable investment firm instead of QED? I asked this to Steen Wednesday.

"Now, I'm not even advising QED or anyone — what I'm advising is we need to look at index funding," Steen responded. "We really need to take a look at that that would dramatically reduce our costs."

Fichtenbaum declined to answer this question to reporters on Wednesday. Metcalf and Tremmel have not responded to comment.

Chaffee added that it's possible that both the status quo of the STRS board and QED are bad options — all coming at the expense of former educators.

To ask questions or provide comments about the STRS, please fill out the form below or email Morgan.Trau@wews.com with the subject line "STRS COMMENT."

We Follow Through

Want us to continue to follow through on a story? Let us know.

Supreme Court cabins scope of Rule 10b-5(b) liability for omissions

 [reuters.com/legal/legalindustry/supreme-court-cabins-scope-rule-10b-5b-liability-omissions-2024-05-20](https://www.reuters.com/legal/legalindustry/supreme-court-cabins-scope-rule-10b-5b-liability-omissions-2024-05-20)

John Gildersleeve, Henry Shreffler

The U.S. Supreme Court building in Washington, U.S. May 17, 2021. REUTERS/Jonathan Ernst Purchase Licensing Rights , opens new tab

May 20, 2024 - In a unanimous decision issued in April 2024, the Supreme Court in *Macquarie Infrastructure Corporation v. Moab Partners, L.P.* clarified the scope of issuers' potential liability to plaintiffs alleging securities fraud under SEC Rule 10b-5(b). 601 U.S. 257 (2024). The Court held that even if an issuer was required by Item 303 of SEC Regulation S-K to disclose certain information, omitting that information could give rise to liability in a private fraud action under Rule 10b-5(b) only if "the omission renders affirmative statements made misleading." 601 U.S. at 265.

Macquarie confirms that liability under Rule 10b-5(b) turns on statements affirmatively made, not on pure omissions.

By cabining the scope of potential liability under Rule 10b-5(b), Macquarie grants issuers some additional security against private lawsuits.

Background

Macquarie involved the interplay between an SEC regulation requiring affirmative disclosure of information, and Rule 10b-5(b), which implements Section 10(b) of the Securities Exchange Act of 1934 and makes it unlawful for an issuer "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

The SEC regulation at issue, Regulation S-K, requires management to make specific disclosures in annual and quarterly reports on Forms 10-K and 10-Q, respectively. The then-current version of Item 303 of that regulation required describing in a section known as management's discussion and analysis (often called MD&A) "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on" net sales, revenues, or incomes. 17 C.F.R. § 229.303(a)(3)(ii) (2019). (The current version of Item 303 slightly rephrases this requirement.)

Macquarie, the defendant, operated through a subsidiary facilities that handle and store liquid commodities including No. 6 fuel oil, a high-sulfur oil. In 2016, a United Nations body adopted a regulation that capped sulfur amounts in fuel oils used in maritime shipping, which

caused a decline in the market for No. 6 fuel oil. Macquarie did not discuss the regulation or its expected effect in its disclosures until 2018, when it announced a decline in contracted storage capacity due to a structural decline in the market for No. 6 fuel oil.

Before this case, the federal Courts of Appeals had disagreed on whether failing to make a disclosure required by Item 303 could support a private cause of action under Rule 10b-5(b). The 2nd U.S. Circuit Court of Appeals had concluded in a 2015 decision, *Stratte-McClure v. Morgan Stanley*, that such a failure could support private liability.

But several other circuits, including the 3rd and 9th Circuits, had rejected the proposition that failing to comply with Item 303 necessarily violates Rule 10b-5(b).

In *Macquarie*, the 2nd Circuit, applying *Stratte-McClure*, held that because Macquarie allegedly had an affirmative duty under Item 303 to disclose the U.N. regulation and its effects before 2018, private plaintiffs could premise a Rule 10b-5(b) claim on that alleged omission.

The Supreme Court granted certiorari to resolve whether "failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement."

The Supreme Court's decision in *Macquarie*

In *Macquarie*, a unanimous Court reversed the 2nd Circuit and held that failure to disclose information required by Item 303 is not actionable under Rule 10b-5(b) unless the omission makes an affirmative statement misleading.

Justice Sonia Sotomayor, writing for the Court, explained that Rule 10b-5(b) proscribes two things: (1) making "any untrue statement of a material fact," and (2) "omitting a material fact necessary 'to make the statements made ... not misleading.'" 601 U.S. at 263.

The issue in the case, the Court explained, was whether Rule 10b-5(b)'s "second prohibition" barred only half-truths — that is, statements misleading by reason of omission — or extended to "pure omissions." *Id.* Pure omissions, in the Court's framing, occur when an issuer entirely fails to disclose information. By contrast, half-truths are "representations that state the truth only so far as it goes, while omitting critical qualifying information." *Id.* (citation omitted).

The text of Rule 10b-5(b), the Court held, "does not proscribe pure omissions." *Id.* at 264. Rather, Rule 10b-5(b)'s prohibition on misleading omissions requires "disclosure of information necessary to ensure that statements already made are clear and complete." *Id.* Logically, this means that before any omission can be deemed misleading, one must first identify "affirmative assertions (i.e., 'statements made')." *Id.*

The Court turned to statutory context to confirm its understanding of Rule 10b-5(b)'s text. Section 11(a) of the Securities Act of 1933, like Rule 10b-5(b), prohibits making untrue statements of material fact and omitting facts required to make statements not misleading. But unlike Rule 10b-5(b), Section 11(a) also prohibits omitting "a material fact required to be stated" in a registration statement. *Id.* (quoting 15 U.S.C. § 77k(a)). The Court found it "telling" that "neither Congress in § 10(b) nor the SEC in Rule 10b-5(b)" chose to "mirror[] § 11(a) to create liability for pure omissions." *Id.* at 265.

Finally, the Court disposed of two contrary arguments. Both *Moab* as the respondent, and the United States as amicus, had argued that because investors know that Item 303 requires disclosing known trends and uncertainties, plaintiffs need not plead a particular affirmative statement rendered misleading by an Item 303 violation.

The Court explained that this argument "reads the words 'statements made' out of Rule 10b-5(b) and shifts the focus of that Rule and § 10(b) from fraud to disclosure," and renders § 11(a)'s explicit prohibition of pure omissions "superfluous by making every omission of a fact 'required to be stated' a misleading half-truth." *Id.*

The Court also rejected *Moab*'s argument that without "private liability for pure omissions under Rule 10b-5(b), there will be 'broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose.'" *Id.* at 892. It explained that private plaintiffs still could bring claims for "Item 303 violations that create misleading half-truths," and that the SEC still could investigate and pursue Item 303 violations. *Id.*

Implications

Macquarie confirms that Rule 10b-5 addresses fraud — not disclosure — and that issuers can control their exposure to private liability under Rule 10b-5(b) by controlling what they say to the market. The decision promotes predictability relating to the scope of potential liability in actions alleging securities fraud. Overturning the contrary holding of the 2nd Circuit, a hub for private securities litigation, brings useful clarity.

Moreover, other provisions of the securities laws, such as Section 17(a)(2) of the Securities Act and Section 14(e) of the Securities Exchange Act, contain language similar to that clarified by the Court in *Macquarie*.

Because issuers must comply with Item 303 regardless of potential liability under Rule 10b-5(b), *Macquarie* does not change issuers' underlying disclosure obligations. Also, because theories of "pure omission," like that advanced in *Macquarie*, are typically alleged alongside theories that affirmative statements were rendered misleading by the same alleged omissions, the overall quantum of private litigation is unlikely to change. Private plaintiffs rarely confine themselves to alleging fraud based on "pure omissions."

In presenting its decision as a targeted correction of the 2nd Circuit's atextual holding, the Supreme Court expressly declined to opine on "whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions." Like Rule 10b-5(b), those "scheme liability" provisions require pleading fraudulent conduct with particularity — a high hurdle for plaintiffs who might try to advance "pure omission" theories as a species of scheme liability.

The Court also declined to address "what constitutes 'statements made'" under Rule 10b-5(b). Courts have long rejected efforts by plaintiffs to label broad swaths of text misleading as inconsistent with the requirement of pleading fraud with particularity. While there was discussion of this issue at argument, nothing in the Court's opinion purports to change the law in this regard.

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Teladoc Misrepresented Unit's Marketing Costs, Investor Says (1)

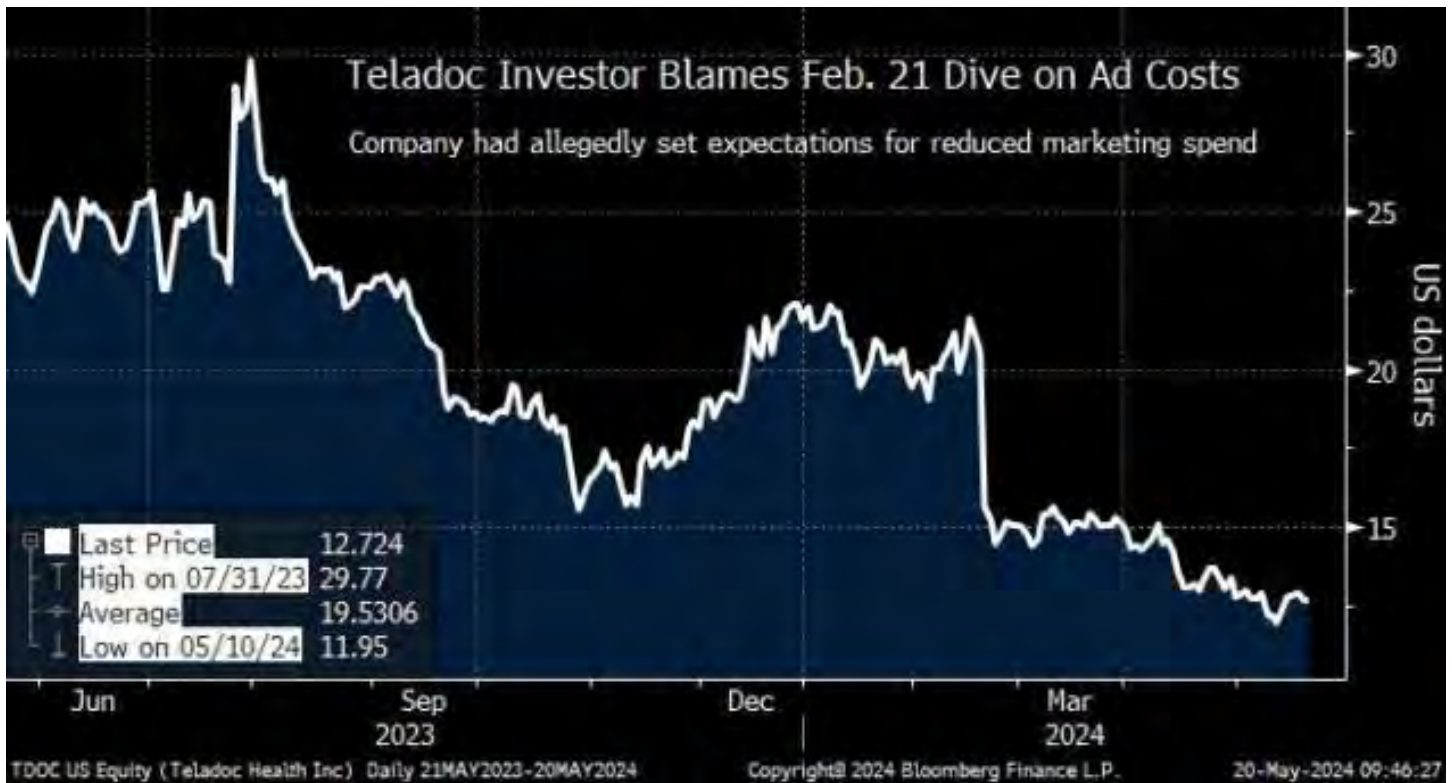
By Martina Barash 2024-05-20T10:04:39000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-03849](#)

[Teladoc Health Inc.](#) projected lower advertising costs for its BetterHealth online counseling services, keeping stock prices inflated before a disappointing revenue report, an investor alleges in a proposed class action.

The Feb. 20 Form 10-K report caused the company's stock price to fall 24% overnight, shareholder Paul Stary says in his complaint, filed May 17 in the US District Court for the Southern District of New York.

Teladoc's Form 10-K "demonstrated substantially increased advertising costs," Stary says. "In 2023, advertising and marketing spend was \$668,854,000, up from \$623,536,000 in 2022—itself an increase from \$416,726,000 in 2021." The report attributed the increase to higher digital and media advertising costs for BetterHelp, he says.



BetterHelp, Teladoc's largest division, contributed about 42% of overall revenue, the greatest share among segments, according to the complaint.

"BetterHelp revenue fell \$1 million compared to the year prior, and fell about \$10 million from 3Q-2023 to 4Q-2023," Stary said. That kept the company's overall revenue "flat compared to the prior year and down 3% sequentially," he said.

Teladoc is aware of the filing but hasn't been served, it said in an email Monday. "We won't comment on pending litigation other than to say that the company will vigorously defend itself," it said.

In 2021, Teladoc [defeated](#) a suit alleging it misled investors about a former executive's relationship with a subordinate.

The proposed class of those who acquired Teladoc stock between Nov. 2, 2022 and Feb. 20, 2024, inclusive, consists of hundred or thousands of members, according to the complaint.

Stary seeks damages on his securities fraud claims.

Levi & Korsinsky LLP represents Stary.

The case is [Stary v. Teladoc Health, Inc.](#) , S.D.N.Y., No. 1:24-cv-03849, complaint 5/17/24 .

(Updated with company response in sixth paragraph.)

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ANALYSIS: Boards Win in Delaware's 'Firm-Specific' Duty Ruling

By Kate Azevedo

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ANALYSIS: Boards Win in Delaware's 'Firm-Specific' Duty Ruling

By Kate Azevedo 2024-05-17T10:28:58000-04:00

Delaware companies scored with the Delaware Chancery Court's recent opinion in *McRitchie v. Zuckerberg*. The ruling clearly defined and limited Delaware's "firm-specific" fiduciary duties of the board, effectively taking the wind out of the sails of related shareholder litigation and proposals.

Litigation on the issue of boards' fiduciary duties has risen 83% in the state since two precedential rulings from 1985 left some questions unanswered, but *McRitchie* will likely put a stop to most lawsuits on the matter.

Key Delaware Case Law on Fiduciary Duties

The *McRitchie* ruling—and the two 1985 Delaware Chancery Court rulings cited in *McRitchie*—are vital to understanding board fiduciary duties.

McRitchie

The Delaware Chancery Court on April 30 dismissed a shareholder activist's claim that Meta's board of directors failed in their fiduciary duties by prioritizing company profits over public safety, social well-being, and the interests of its diversified investors. Meta argued that the fiduciary duty for Delaware-incorporated companies doesn't extend beyond their shareholder's investments in that company to diversified investments outside of the company.

Vice Chancellor J. Travis Laster's decision unequivocally stated that under Delaware law, directors only owe "firm-specific" fiduciary duties to the company and its shareholders. These duties are an inherent legal concept not explicitly stated in Delaware case law until now because "fish don't talk about water," Laster said.

Laster also noted that under the Delaware General Corporation Law (DGCL), companies may tailor directors' duties to account for the diversified investor, but only if so desired.

Unocal, Revlon Cases

Two "landmark" Delaware cases from 1985 on board fiduciary duties and the "stockholder versus stakeholder" issue set the stage for the decision to dismiss, Laster said.

In *Unocal v. Mesa Petroleum Co.*, the court only considered the economic interests of the company and not additional interests of some stakeholders when evaluating whether the board breached its fiduciary duties. In *Revlon, Inc. v. MacAndrews & Forbes Holdings*, the court found that its board breached its fiduciary duty by considering the interests of outsiders before those of shareholders.

However, these Delaware cases didn't address the scope of a director's fiduciary duty and failed to clarify that the "stockholder" interest only pertained to the company's investors, leading to related litigation.

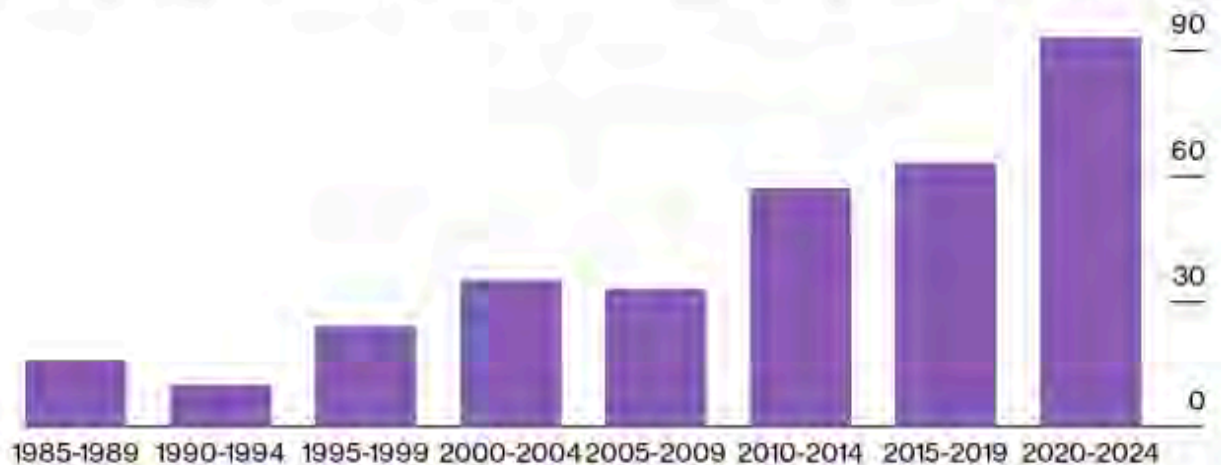
Stifling Shareholder Litigation and Proposals

Since *Unocal* and *Revlon*, litigation regarding the appropriate definition of a board of directors' fiduciary duties under Delaware law has escalated.

A Bloomberg Law BCite Search of Delaware Code 8 Del. C. § 141 (board of directors) identified 331 state court opinions since 1985 assessing the fiduciary duty of Delaware boards of directors under the law.

Surge in Litigation that Questions Delaware Law of Fiduciary Duties

Litigation filed assessing fiduciary duty in Delaware law, 1985-2024 YTD



Source: Bloomberg Law BCite Delaware Code 8 Del. C. § 141 filtered by strong discussion of fiduciary duty in Delaware jurisdiction, 1/1/1985 to 5/15/2024.

Bloomberg Law

A breakdown of these cases into five-year increments shows that filings from Jan. 1, 2020 to May 15 are the highest they've been for any five-year period since the one beginning the year that *Unocal* and *Revlon* were decided. The time was ripe for a ruling on a definition for directors' duties in Delaware, and *McRitchie* should stifle most future activist shareholders lawsuits.

Additionally, *McRitchie*'s "firm-specific" definition of the board's fiduciary duty should bolster any Delaware corporation's response to shareholder proposals involving fiduciary duties of the board. The corporation could rely on Rule 14a-8 to exclude a shareholder proposal based on a substantive deficiency that the proposal is improper under state law and receive an SEC No-Action Letter to swiftly dismiss the matter.

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Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/05/playtika.html

Friday, May 17, 2024

Playtika

By Ann Lipton

Earlier this month, VC Glasscock issued an opinion in *Kormos v. Playtika Holding UK II*, where he dismissed breach of fiduciary duty claims against the Chair/CEO and CFO of a controlled company. The opinion made reference to an earlier bench ruling where he *sustained* claims against the company's controlling shareholder, Giant/Alpha, which is what alerted me to the bench ruling – which issued in January – in the first place. And that bench ruling is actually what has my attention.

Playtika Holding Corp is a publicly traded company with a controlling shareholder, Playtika Holding UK II Limited (“Holding”). Holding is a wholly-owned subsidiary of Giant/Alpha. In 2021, Giant/Alpha faced a liquidity crisis and desperately needed to raise cash, which it sought to do by selling Holding's Playtika stock, potentially in connection with a sale of the entire company. But the process was rushed and messy, with Playtika itself and Giant/Alpha running separate inquiries; eventually, Giant/Alpha instructed Playtika's board to stop talking to potential buyers, but to instead cause Playtika to institute a self-tender for its own stock. SEC rules require that tender offers treat all shares of a class equally, which meant that the public shareholders – as well as Giant/Alpha – were able to tender in to the offer. But, with Giant/Alpha tendering, it could receive cash back from Playtika which would then solve its liquidity problems.

Plaintiffs, the public holders of Playtika, alleged that this was a conflicted transaction that was not in Playtika's best interests, and was therefore subject to entire fairness review (though they did not claim the price paid for the shares was unfair).

There's just one problem with that argument, doctrinally: ever since *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971), we know that in order to be a conflicted transaction, implicating the duty of loyalty, the controller must receive a nonratable benefit, i.e., some benefit not available to the other stockholders – and arguably, it has to be a benefit that specifically comes at the minority's expense. In *Sinclair* itself, for example, the controlling shareholder caused the company to pay out massive dividends that allegedly robbed the company of the ability to take advantage of alternative opportunities, and it did so for its own private reasons. Still, the dividend payments weren't a conflict transaction – and were therefore subject only to business judgment review – because all shareholders got the same dividends, controller and noncontrollers alike. The controlling shareholder did not receive a

special benefit at the expense of the minority (As the Delaware Supreme Court put it, “a proportionate share of this money was received by the minority shareholders of Sinven. Sinclair received nothing from Sinven to the exclusion of its minority stockholders. As such, these dividends were not self-dealing”).

Similarly, in *Playtika*, the self-tender may have been motivated by Giant/Alpha’s need for cash, but all shareholders could participate in the tender on equal terms, meaning, it wasn’t a conflict transaction, and was therefore subject only to business judgment review.

Except!

There was a twist.

Giant/Alpha did not want to risk tendering so many shares that it actually lost control of Playtika. So, it negotiated a provision whereby Playtika would have to announce the number of shares tendered publicly, which would allow Giant/Alpha to keep close tabs on the status of the offer. Giant/Alpha could also withdraw shares that it previously tendered – which I gather was a negotiated term of the agreement, but also, by the way, required under SEC rules for all tendering shareholders. So, because Giant/Alpha was able to monitor the shares tendered, and withdraw its own shares, it could adjust its tender and maintain control of the company.

Those provisions, according to VC Glasscock – as he explained in his bench ruling in January, and again in his recent opinion earlier this month, were a nonratable benefit to Giant/Alpha, because they uniquely allowed Giant/Alpha to maintain control, which was not something the minority could share. And that was enough to transform the Playtika self-tender into a conflict transaction, subject to entire fairness review.

So here’s the thing.

Treating the right to monitor the number of public shares tendered as a nonratable benefit to Giant/Alpha – let alone one that comes at the expense of minority shareholders – strikes me as a bit of a reach. SEC rules *require* that tendering shareholders be able to withdraw before the tender offer closes; that wasn’t a benefit unique to Giant/Alpha. And if Playtika publicly announced how many shares had been tendered, that meant *everyone* could see what the status was.

That said, the whole scenario was obviously hinky from the get-go. There was an awful initial search for alternative transactions; the self-tender itself was designed to benefit Giant/Alpha, and you can see why a judge might be looking for a reason to at least scrutinize the arrangement more closely. Hence, a nonratable benefit was identified – Giant/Alpha’s ability to modulate the number of shares it tendered.

And it matters because, as I've written two papers about, and also blogged repeatedly (here, here, here, here, here, here, here, here, here, here, here, here, and here), the more that Delaware makes it *very easy* to insulate deals from review *unless* they involve a controlling shareholder conflict, the more that courts are motivated to *identify* a controlling shareholder conflict in order to give themselves the opportunity to review problematic transactions. As my papers discuss, that's often exhibited in the *definition* of what it means to be a controlling shareholder in the first place – but, as we can also see here, it exhibits itself in the definition of conflict, as well.

Anyway, that kind of morass is exactly why the Delaware Supreme Court granted interlocutory review of *TripAdvisor*, i.e., to address the definition of a conflict transaction. But *TripAdvisor* involves a reincorporation from Delaware to Nevada; I have no idea whether the court will address just that scenario – which obviously involves questions of comity not present for other kinds of potential conflicts – or whether it will take a broader view of the problem.

Guest Post: Standardizing Early Case Appraisal in Securities Class Actions

K [dandodiary.com/2024/05/articles/securities-litigation/guest-post-standardizing-early-case-appraisal-in-securities-class-actions](https://www.dandodiary.com/2024/05/articles/securities-litigation/guest-post-standardizing-early-case-appraisal-in-securities-class-actions)

May 20, 2024

The D&O Diary

Guest Post: Standardizing Early Case Appraisal in Securities Class Actions



By Kevin LaCroix on May 20, 2024

Posted in Securities Litigation



Assen Koev

The resolution of many securities class action lawsuits would benefit from an economic assessment early in the case process. In the following guest post, Assen Koev argues in favor of a standardization of the initial economic assessment analysis as a way to provide

the parties and concerned insurers with a clearer picture of the securities lawsuit at an earlier point in the case. Assen is an economic consultant and founder of SCA iPortal. A version of this article previously was published on Law360. I would like to thank Assen for allowing to publish his article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is Assen's article.

Initial case assessment in securities class action litigation refers to a preliminary internal investigation by defense counsel in the earliest stages of a case. Such an investigation, which includes legal and economic analyses, is advocated by a number of prominent securities class action litigators as an important step in planning the defense strategy. Yet, it is far too often not undertaken.[1]

In this article, I focus narrowly on the economic analysis portion of the initial case assessment, which I refer to as an initial economic assessment.

There is no agreement on what an initial economic assessment should include. Some suggest using this time to perform a damages estimate and determine which areas will be addressed in later stages of the case.[2] Settlement estimates should be on the list as well.

What is generally agreed upon is that an initial economic assessment is a review of a wide range of fundamental economic questions and is, therefore, a limited high-level analysis by necessity.

An initial economic assessment, just like an initial case assessment, is rarely performed to address the full range of those questions. If and when economic consultants are retained before the motion to dismiss, the questions are often targeted based on some salient features of the case. Thus, potentially strategically important questions remain unaddressed until much later stages of the case.

In this article, I argue that a simple standardization of the initial economic assessment analysis can significantly improve its effectiveness and increase the likelihood of its implementation, thus providing counsel, clients and insurers with a much clearer view of the case at the early planning stage.[3]

The Importance of the Initial Damage Assessment on a Current Case

A comprehensive illustration of an initial economic assessment is the subject of a separate write-up. In this section, I provide an example of the importance of initial damage assessment only.

On Feb. 20, after market close, cybersecurity company Palo Alto Networks announced earnings and significantly reduced its guidance. The steep daily stock price decline on Feb. 21 triggered immediate and numerous notifications of investigations for securities law violations.

For example, Block & Leviton LLP announced an investigation noting that Palo Alto Networks' announcement "[wiped] away tens of billions of dollars of shareholder value."^[4] While the statement itself is correct — the company's market capitalization declined by over \$33 billion — it provides an inaccurate perception of the size of the case that was filed five days later.

A preliminary damages analysis shows that supportable damage claims in the Palo Alto Networks litigation would likely not exceed \$3 billion, a tenth of the staggering loss of value on Feb. 21!

This estimate is driven by the short class period of the filed case, large institutional holdings not traded in the class period and the increasing trajectory of the stock price during the class period.^[5] The estimate is even lower if potential defense-side loss causation analyses are applied.

Reasons for the Infrequent Use of Initial Economic Assessment

There are a number of reasons for the infrequent use of economic assessment at the outset of a securities class action. Some of them are the reasons hindering the initial case assessment in general. Others are specific to economic research itself.

For example, Doug Greene, the leader of BakerHostelter's securities and governance litigation team, wrote in 2022 that the infrequent use of initial case assessment — and by association, initial economic assessment — can be attributed to

a low cap or budget offered to secure the engagement; the (incorrect) view that a motion to dismiss is mostly a matter of identifying what the complaint does not allege, as opposed to an affirmative narrative that sticks up for the defendants' honesty and good faith; and understandable backlash over some firms' use of the background review to do a full-blown internal investigation.^[6]

The infrequent use of initial economic assessment is also driven by reasons unique to the economic research in securities class action litigation. The very high stakes in securities class actions inevitably demand exhaustive, careful, highly customized and, ultimately, expensive economic analyses.

Even preliminary and internal analyses follow this trend because these results form the basis of counsel's and client's expectations, and affect the broader defense strategy. Expert economists are weary of producing limited preliminary analyses with strategic implications. Reputational concerns alone result in strong incentives for any limited analysis to snowball into full-blown investigations closer to those typically performed at the later stages of the case.

Exhaustive high-cost research projects are, of course, unjustifiable at the outset of many cases for a number of reasons.

First, approximately 50% of all filed securities class actions are dismissed at the motion to dismiss stage. It is hard to justify significant expenditure on early analyses of damages, class certification or loss causation, when these stages have less than — and for some, much less than — a 50% chance of being reached.

Second, with the increase in the number of cases against smaller companies, detailed economic analyses are rarely undertaken because the total cost of litigation becomes an important deterrent.

Consider, for example, that 31% of all cases between 2014 and 2022 settled for less than \$4 million.[7] That is one of the reasons defense counsel is often interested in early settlement projections for small cases. The expected settlement in these cases is a threshold for sizing up the entire litigation budget. Setting aside strategic considerations, low expected settlements provide strong disincentives to undertake costly litigation and perform extensive economic analyses upfront.[8]

Third, customized economic analyses, by definition, change with the changing nature of cases. Those with a long tenure in economic consulting are familiar with various waves of litigations like the initial public offering cases, the options backdating cases, the financial crisis cases, the special-purpose acquisition company cases, the merger objection cases, the opioid cases, and so on.

Each of these litigation waves came with its own set of economic facts and logic. The differences in the economic underpinnings across these case types make customized analysis an ever-moving target, thus contributing to persistently high consulting costs.

Defining “Standardized Analyses” in Securities Class Action Litigation

As the prior section points out, an initial economic assessment may be infeasible in many cases if it is performed in the typical exhaustive and customized format as most securities class action economic research is. In this section, I list some methodologies that (1) have been widely accepted, (2) can be implemented in a highly efficient manner, and (3) are

highly informative for the initial economic assessment stage. I refer to them as standardized analyses.

Market-efficiency analysis — Cammer factors, Krogman factors, autocorrelation;^[9]

Price impact and loss causation — event chronology (event study, daily and/or intraday price charts, and news headlines);

- Damages analysis — “plaintiff-style damages”; and
- Settlement analysis — settlement prediction models.

The simple fact is that every major line of inquiry in a securities class action litigation has some standardized methodologies associated with it, alongside innumerable unique or cutting-edge ones. This should not be a surprise. After all, the legal framework of Section 10(b) of the Exchange Act and Section 11 of the Securities Act is over 90 years old. The Private Securities Litigation Reform Act is almost 30 years old. The event study — the “workhorse” in securities class action analysis — is over 55 years old. The efficient markets hypothesis is over 50 years old.

Basic v. Levinson, the landmark U.S. Supreme Court case that allowed securities class action plaintiffs to rely on a rebuttable presumption of market efficiency in demonstrating reliance, is over 35 years old.^[10] So is the U.S. District Court for the District of New Jersey’s 1989 decision in Cammer v. Bloom, which, along with the U.S. District Court for the Northern District of Texas’ 2001 ruling in Krogman v. Sterritt, are, by far, the most commonly used precedent cases for determining the efficiency of the market for a security in a securities litigation.

So, while legal interpretations, research techniques and technology continue to evolve, we have more than enough experience to provide standardized answers to most economic questions in securities class action litigation.

The list above is typical, though neither complete nor unique. In fact, the “standardized analysis” for any particular securities class action question will depend on the approach that counsel and their consultants typically use and can produce in the most efficient manner.

The Advantages of Standardization at the Initial Economic Assessment Stage

Standardized analyses have a lower expected cost.

Standardization of analyses can lower the expected cost of producing the initial economic assessment analysis by either standardization of the research tasks or outright automation.

Automation is a possibility for many standardized analyses. Take, as an illustrative example, the event study — the most ubiquitous and still-considered gold standard tool in securities class action analysis. The implementations of event studies in securities class actions are fairly similar in most cases, and not very different from the methodology published in the seminal 1969 paper, “The Adjustment of Stock Prices to New Information,” that formalized the event study in its current form.[11]

This conclusion is not lost on researchers and practitioners. A simple online search shows a number of commercial event study tools available for researchers and practitioners. The legal profession has benefited from the introduction of automation and artificial intelligence in many standardized workflows, such as document review or case law research. Standardized economic analyses are no different.

Even without automation, a standardization of the research tasks generates efficiency by building experience. It is far more efficient for consultants to deliver results on, say, market efficiency, based on the Cammer and Krogman factors, than on other rarely used and custom-designed tests. The experience accumulated by the consulting staff translates into higher-quality results, a better understanding of the results and fewer hours billed.

Standardized analyses have lower cost uncertainty.

Standardization reduces not only the expected costs but also the cost uncertainty. A standardized analysis is, by definition, a well-defined analysis. The cost of its implementation is not only relatively lower but also less variable than that of open-ended exploratory analyses.

Understandably, many questions in securities class action litigation are open-ended and exploratory. The analysis of loss causation, for example, depends on the facts of the case and the discovery materials that are reviewed as part of the analysis.

Open-ended analyses carry a justifiable risk of snowballing into more exhaustive or wider research projects with ever-increasing costs.

However, if counsel and consultants agree on a standard set of analyses with a prespecified scope for the initial economic assessment stage, expectations become manageable. The cost and delivery schedule uncertainty decline significantly for the client and counsel. The consultant, on the other hand, has fewer incentives to explore more side questions or delve deeper to prevent potential future surprises.

Standardized analyses capture core results.

The standardized preliminary analysis is not a small piece of the comprehensive research required later in the case. In fact, it often contains the core of the complete analysis. Loss causation analyses, for example, involve a review of the news, analyst reports, U.S. Securities and Exchange Commission filings, discovery materials, and other case-specific materials.

In most cases, however, the analysis integrates many of these into an event study to test the materiality of the misstatements. Hence, a preliminary implementation of a standardized event study, particularly if combined with a preliminary review of news headlines, would provide a considerable portion of the loss causation results that a more exhaustive analysis would produce at a later stage.

This approach is also observed in practice. Many economic consultants and experts routinely include standardized chronologies — event studies combined with news headlines — in expert reports.

Of course, experts perform exhaustive reviews of the news contents at the report preparation stage. However, a chronology and price charts, depicting the daily or intraday prices and major news headlines, provide counsel with an almost complete picture of the information environment during the class period.

Standardized analyses make the overall consulting process more efficient.

From a purely mechanical standpoint, once an important step or analysis is standardized for the purposes of an initial economic assessment, it will be performed more efficiently at the later stage when a complete, in-depth and customized analysis is performed. Investing in the standardization of an event study, trading model or other analysis implies that all future uses of these analyses will be performed more efficiently as well.

Any economist who has been through the process of writing an expert report knows that multiple iterations, scenario analyses and robustness checks are all but guaranteed in that process. Having some of these steps standardized can make a big difference to the full-blown research effort.

From a strategic viewpoint, both counsel and economists benefit from having preliminary results while planning legal and research strategies. Preliminary results can guide the planning process, and pinpoint important areas for research and weaknesses in the complaint or the defendant's position. Without a preliminary analysis, these processes are driven by experience and assumptions.

Standardized analyses reduce the learning cost of the audience.

Any customized analysis inevitably puts noneconomist audiences — counsel and clients — at the bottom of a potentially steep learning curve associated with that specific analysis. Producing a new custom-built analysis at the outset of a case adds a learning cost for counsel to what could be an already substantial consulting bill.

A standardized analysis, on the other hand, allows counsel to build up an understanding of the analysis with every implementation, across cases and even through continuing legal education credits built on the standardized framework. This is not a trivial advantage considering the trend of less specialization and less efficiency due to the fact that most defense counsel handle only a few cases.[12]

Concluding Remarks

As noted earlier, different counsel and their consultants can apply different standardized analyses depending on their usual practice. Standardization also provides an extra level of flexibility in implementation. A very initial analysis can be performed using fully automated or AI-assisted tools.

The benefit of starting with automated standardized analyses is that (1) they are usually extremely fast and cost-effective, and (2) counsel can always refer any interesting results to their consultants for deeper probing. Other standardized — and if needed, nonstandardized — analyses can be added based on the generated results.

The important point is that when the initial assessment starts with standardized, rather than customized, tools, counsel and consultants can now choose how exhaustive they want to be.

[1] Doug Greene, “The State of Securities Litigation: Good Communication is Key to Improving Securities Litigation Outcomes | D&O Discourse (dandodiscourse.com).”

[2] Id.

[3] Under “standardization,” I only mean the use of widely accepted and frequently used analyses like event studies, damages models, settlement prediction models, and others. The article should not be interpreted as advocating the “standardization” of IEA analyses across firms or even across cases for a particular law firm.

[4] <https://www.morningstar.com/news/globe-newswire/9041389/shareholder-alert-recent-purchasers-of-palo-alto-networks-who-have-lost-money-may-be-able-to-recover-damages-block-leviton-is-investigating>.

[5] For examples where an upward price trajectory can significantly curb damage claims, see J. Schreiber and J. Tschirgi (2020), “Market Rebound May Curb Securities Class Actions, Damages”, Law360, July 31, 2020.

[6] Doug Greene, “The State of Securities Litigation: Good Communication is Key to Improving Securities Litigation Outcomes | D&O Discourse (dandodiscourse.com).”

[7] Cornerstone Research, “Securities Class Action Settlements: 2023 Review and Analysis”.

[8] See also discussion of the cost concerns in litigation against small companies by Doug Greene in “Putting ‘Litigation’ Back in ‘Securities Litigation’ | D&O Discourse (dandodiscourse.com).”

[9] “Market Efficiency” refers to the “Efficient Markets Hypothesis (EMH)” which posits that all value relevant information is incorporated in the stock price very quickly. See Fama, Eugene F. “Efficient capital markets.” *Journal of finance* 25.2 (1970): 383-417. See also, *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989) and *Krogman v. Sterritt*, 202 F.R.D. 467, 474 (N.D. Tex. 2001).

[10] *Basic Inc. v. Levinson*: 485 U.S. 224 (1988).

[11] See Fama, E. Fisher, L., Jensen, M. and Roll, R. “The Adjustment of Stock Prices to New Information.” *International Economic Review* 10, 1-21, (February 1969).

[12] See, “Putting ‘Litigation’ Back in ‘Securities Litigation’ | D&O Discourse (dandodiscourse.com).”

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[NEWS](#)

Active Pa. Federal Judge Gene Pratter, 75, Dies

Pratter, who died May 17—a day after she issued two opinions in cases she was handling—was a 20-year veteran of the federal bench.

May 20, 2024 at 09:56 AM

Judges

By Max Mitchell and Amanda O'Brien | May 20, 2024 at 09:56 AM

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

U.S. District Judge Gene E. K. Pratter, who oversaw numerous high-profile cases and was actively handling the Ozempic MDL, has died, according to a statement from the Eastern District of Pennsylvania. She was 75 years old.

“Judge Pratter was an outstanding jurist whose skills as a trial judge were universally respected. Judge Pratter served the public through her distinguished scholarship, compassion, and diligence. Her passing is a tremendous loss for our court family,” the court’s statement said. “She was a mentor to many.”

Pratter, who died May 17—a day after she issued two opinions in cases she was handling—was a 20-year veteran of the federal bench. During that time she rose to prominence handling contentious [criminal](#) and civil cases, including the long-running egg price-fixing MDL and the Ozempic litigation, which was still [finalizing its leadership](#) team two weeks ago.

Her national reputation was also on display within the judiciary when she was recently appointed to the Judicial Conference Rules of Practice and Procedures Committee and when Chief Justice John Roberts selected her to serve on the Judicial Conference Advisory Committee on Civil rules.

Former Eastern District Judge Eduardo Robreno, now at McCarter & English, remembered Pratter as a “terrific person” and a “dedicated jurist,” who was an active teacher and very involved in bar activities. Robreno recalled their frequent lunches, where he said they often discussed dockets and MDL cases.

“She was always a source of information and joy during those lunches,” he said.

Philadelphia Bar Association Chancellor Jen Coatsworth issued a statement saying the group was “shocked and saddened” to hear the news. The statement remembered Pratter as a dedicated jurist and leader in terms of balancing family and professional roles “at a time when greater barriers existed for women to do so successfully.”

“We will remember Judge Pratter as someone who added to that rich tradition here in Philadelphia in numerous ways, and as someone who leaves behind a legacy of excellence. She will be greatly missed,” Coatsworth said.

The plaintiffs’ co-lead counsel in the Ozempic MDL, which is officially titled the *Glucagon-like Peptide-1 Receptor Agonists (GLP-1 RAs) Products Liability Litigation*, issued a statement to Law.com giving their thoughts and condolences to Pratter’s family.

“We mourn the unexpected passing of Judge Gene E. K. Pratter, a loss that is deeply felt by all who knew and admired her, and whose contributions to the legal community were invaluable,” the statement from, Paul Pennock of Morgan & Morgan, Parvin K. Aminolroaya of Seeger Weiss, Jonathan Orent of Motley Rice, and Sarah Ruane of Wagstaff & Cartmell said. “Although the GLP-1 RAs multidistrict litigation was pending before Judge Pratter for only a few months, her work on the case will have meaningful and positive impacts on the lives of many injured plaintiffs for years to come.”

Buchanan Ingersoll & Rooney lawyer Samantha Southall, who appeared before Pratter on the egg price-fixing MDL said the judge was very effective in the courtroom, but could also be funny, both on the bench and in her opinion. She said Pratter was also an advocate for having younger attorneys engage in oral argument.

“She did like to see the younger lawyers be the ones to argue and get on their feet,” Southall said. “She delighted in watching younger lawyers start to develop their courtroom chops.”

Speaking at a webinar in February, attorneys involved in the Ozempic MDL said she enjoyed a stellar reputation that extended far outside Pennsylvania and that lawyers who came before her “always felt heard, and felt that she was fair.”

However, she also had high expectations of those who came before her, the lawyers said.

“If you are in any way displaying a lackadaisical approach to the presentation of your clients or pursuit of your case, that is going to be a tough hole to get out of,” Pennock said at the time.

Orent, in Providence, Rhode Island, who observed the webinar, had called Pratter a “very well-qualified jurist.”

“We’ve heard nothing but good things about her,” he said. “She is a true student of the law. She is eminently fair, and very deliberate, which are all of the things we want to see from an MDL judge, and we’re really looking forward to moving this litigation forward. We could not be in better hands as a group. As plaintiffs, getting a fair shot is really all we can ask for.”

Pratter, an appointee of President George W. Bush, was sworn in to the Eastern District in 2004.

Prior to joining the bench, she served as general counsel at Duane Morris, where she began her legal career in 1975, according to her bio on the University of Pennsylvania Carey Law School website.

Pratter is both an alumna of and an adjunct professor at Penn Law.

“Judge Pratter is an important part of our court’s history and continuing legacy, and a beloved member of our court family who will be sorely missed,” the court said in the statement.

Amanda Bronstad contributed to this report. This is a breaking news story and will be updated throughout the day.

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McKinsey to face claims over opioid related birth defects

DJ [dailyjournal.com/articles/378824-mckinsey-to-face-claims-over-opioid-related-birth-defects](https://www.dailyjournal.com/articles/378824-mckinsey-to-face-claims-over-opioid-related-birth-defects)

May 16, 2024

After settling with school districts and governmental entities earlier this year, McKinsey & Co. must face pared-down claims by children with birth defects and developmental disabilities for the consulting firm's alleged role in the national opioid crisis.

"We appreciate the court's thorough and thoughtful decision recognizing negligence-derived claims of neonatal abstinence syndrome newborns and children injured through opiate exposure, and the opportunity to move these claims forward," read a statement from Elizabeth J. Cabraser, a partner at Lieff Cabraser Heimann & Bernstein LLP and the plaintiffs' lead counsel, and Scott R. Bickford, a partner at Martzell Bickford and Centola and a steering committee member for the neonatal abstinence syndrome plaintiffs.

McKinsey is defended by many firms, including Dinsmore & Shohl LLP, Todd & Weld LLP, Hogan Lovells US LLP, and Goodwin Procter LLP. Its attorneys did not return a request for comment. *In re: McKinsey & Co. Inc. National Prescription Opiate Consultant Litigation*, 3:21-md-02996-CRB (N.D. Cal., filed Jun. 8, 2021).

McKinsey, which has advised pharmaceutical companies like Endo International and Johnson & Johnson, has resolved most plaintiff groups' claims that the firm colluded with its clients to increase opioid addiction across the country. The company paid \$642 million last year to settle with state attorneys general and \$78 million in January to settle with insurers and third-party payers.

After approving a \$207 million settlement with cities and counties and a \$23 million settlement with school districts in February, U.S. District Judge Charles R. Breyer in San Francisco wrote in Thursday's order that the plaintiffs' aiding-and abetting, negligence, and medical monitoring claims could proceed to discovery.

However, the judge dismissed misrepresentation and fraud claims and threw out conspiracy claims brought by a Nevada mother, noting that the state's law required allegations of intent to cause harm.

The neonatal abstinence syndrome class includes eleven plaintiffs suing through their birth mothers. This condition occurs when a newborn experiences withdrawal after being exposed to drugs in utero. Addressing McKinsey's argument that the First Amendment barred the

plaintiffs' claims, Breyer said the company acknowledged the defense would not apply if McKinsey allegedly knew and intended that its advice would lead its clients to commit illegal acts.

"The plaintiffs do not seek to hold McKinsey liable for the ideas it expressed in its slide decks or the content of its conversation with its clients ... Rather, the plaintiffs seek to hold McKinsey liable for intentionally and knowingly collaborating with its manufacturer-clients in a scheme to misrepresent the benefits, conceal and understate the risks, and deliberately foster the medically illegitimate overprescription of opioids in violation of state and federal laws," the judge wrote.

Breyer was also unpersuaded by the consulting firm's argument that the plaintiffs used the word "epidemic" to label a collection of individual harms using a lawful product as a public nuisance. "The nuisance allegations are not that the product in question is defective. Rather, the allegations are that McKinsey conspired with its clients to aggressively and unlawfully increase opioid sales in a manner designed to foster an illegal secondary market in opioids and to profit from the abuse and diversion of the drugs," the judge said.

However, Breyer agreed with the defendant that the fraud and misrepresentation claims failed to plead third-party reliance. "The best the plaintiffs can do is allege that their doctors relied on the alleged misrepresentations and that some of them were on McKinsey 'target lists,' meaning lists of high-volume prescribers McKinsey compiled for its clients' sales representatives," read the order.

#378824

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Opinion **Inside Business**

Johnson & Johnson settlement shows the new stakes in litigation finance

Wall Street firms such as Fortress are backing legal showdowns against big companies

SUJEET INDAP



J&J claims the bargaining process has been distorted, with lawyers taking extreme positions because of the financial return requirements of their client © Reuters

Sujeet Indap YESTERDAY



Johnson & Johnson has an enterprise value of \$375bn. Yet it wants you to think of it as an underdog. Earlier this month, the healthcare titan announced that it had reached the outlines of a deal to settle liability over allegedly carcinogenic talcum powder. The [terms](#) would see the tens of thousands of claimants being paid \$14bn over 25 years, or \$6.5bn in present value terms.

The so-called mass tort case had been an ongoing, significant overhang for J&J. And the agreed deal was clever — a potential win-win for victims who would begin to get their money soon and closure for the company. But J&J in the press release [took](#) the opportunity to fire a broadside against its adversaries. It first singled out plaintiffs' lawyers who it said had “conflicted financial incentives”, amid the negotiations.

And then in a remarkable subsequent line, it blamed what it said was frivolous litigation as a result, in part, of “the unregulated and surreptitious financing of product litigation by financial institutions, including private equity and sovereign wealth funds”.

The release did not name the firms in question. But on Friday J&J told a federal court it sought the details on the plaintiffs' backers and it was serving a subpoena on the \$48bn alternative asset manager Fortress Investment Group, whose new owner is Abu Dhabi's Mubadala Investment Company.

Within Fortress's private credit business is one of the most sophisticated litigation funding players in the world, known as Fortress Legal Assets. One plaintiff's lawyer in the talc matter admitted last spring in a deposition that Fortress dollars were, at least in part, funding the multimillion-dollar pursuit of the claims.

Notwithstanding its agreement, J&J has maintained that the scientific evidence shows its talc did not cause either ovarian cancer or mesothelioma, a cancer that develops in the lining of some internal organs. And while it has unsurprisingly taken aim at the lawyers on the other side of the table, its real fury is trained on Fortress. J&J claims the firm's funding has distorted the bargaining process, with lawyers taking extreme positions because of the financial return requirements of their sponsor. In other words, the Fortress money — with a cost of capital of roughly 15 per cent — served as tax that prevented a settlement from being struck sooner, making both J&J and victims worse off.

Litigation finance is not new and has always been controversial. Plaintiff law firms have been derided as “ambulance chasers” and have stigma attached to them in the US. But they are increasingly backed by the Wall Street houses in mass tort cases, which is leading to showdowns with Fortune 500 companies like the J&J battle.

Litigation funders maintain that at their core they simply level the playing field. Corporate defendants have insurance policies that let them escape or cushion the consequences of their wrongdoing. Litigation finance is supposed to provide the counterbalance for victims of misconduct so they are not stymied in seeking justice by limited upfront cash.

Samir Parikh, a law professor at Wake Forest University who has studied mass tort litigation finance, says that, in fact, the quality of victim claims has little to do with how cases are ultimately resolved. He said in many cases, the most valuable service provided by attorneys is outside the courtroom. “Rather, the name of the game is really marketing, or ‘building inventory’,” he says.

Parikh was referring to the process of finding and accumulating thousands of claimants — meritorious and otherwise — in order to maximise pressure on companies to settle lawsuits. This marketing machine is ultimately what litigation finance is beginning to underwrite.

According to Fortress’s website, it has cumulatively funded \$6.8bn in litigation finance. Industry participants say virtually every major private capital firm is involved in funding lawsuits, though often quietly and through affiliates. Centerbridge and Apollo both funded lawsuits of victims of PG&E while also being financial creditors and shareholders of the California utility that paid victims billions over its role in devastating wildfires.

Corporate general counsels and the US Chamber of Commerce advocacy group are now arguing that litigation finance has become a grave threat to many companies given the billions in firepower of mainstream private capital firms. Private capital firms are trying to shed their long-standing image as cut-throat vultures. Still, investing in legal brawls can be lucrative business and the Johnson & Johnson stand-off shows that managing this dilemma is very real.

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NEWS

Johnson & Johnson, Citing 'Eye-Opening' Emails, Moves to Subpoena Beasley Allen

The subpoenas, requested in a Friday letter, would focus on Beasley Allen's litigation financing arrangements with Fortress Investment Group and its purported relationship with news agency Thomson Reuters.

May 17, 2024 at 07:14 PM

Litigators



Amanda Bronstad
staff reporter



The original version of this story was published on [New Jersey Law Journal](#)

What You Need to Know

- The subpoena request comes on the same day that both sides were due to file briefs in a hearing on whether to disqualify Beasley Allen from the talc litigation.
- Friday’s letter focused on Beasley Allen’s alleged attempt to thwart Johnson & Johnson’s latest \$6.48 billion bankruptcy plan, announced on May 1.
- The letter has attached emails purportedly from a Beasley Allen client and copied to Thomson Reuters.

Johnson & Johnson lodged a new attack against Beasley Allen, asking a federal judge to order subpoenas of the plaintiffs firm about its litigation financing and relationship with news agency Thomson Reuters.

Johnson & Johnson already has moved to disqualify Beasley Allen from the talcum powder litigation based on a partnership that principal Andy Birchfield, in Montgomery, Alabama, struck with one of its former lawyers, Jim Conlan, to pitch a \$19 billion settlement after opposing two bankruptcies of subsidiary LTL Management. Friday’s subpoena request focused instead on Beasley Allen’s alleged attempt to thwart Johnson & Johnson’s [latest \\$6.48 billion bankruptcy plan](#), announced on May 1.

Citing emails received this week from a Beasley Allen client, Johnson & Johnson’s letter to U.S. Magistrate Judge Rukhsanah Singh, in the talcum powder multidistrict litigation in New Jersey, raised concerns about ethical issues that could threaten the bankruptcy plan.

“Much like other motions now pending before this court, these circumstances strongly suggest that Beasley Allen should be relieved from its position on the PSC,” Johnson & Johnson attorney Allison Brown, of New York’s Skadden, Arps, Slate, Meagher & Flom, wrote in the letter, referring to the plaintiffs’ steering committee. “This crazed commitment to

derailing, time and again, a comprehensive resolution of the talc docket runs headlong into Beasley Allen's ethical obligations to the claimants, to its clients, to the broader claimants in this MDL, and to this court and to the bankruptcy court."

The letter asks for an order on an expedited basis given that the deadline to vote on the bankruptcy plan is July 26.

The letter has attached emails purportedly from a Beasley Allen client who gave an "eye-opening description of the false information that the firm previously has shared with her" regarding Johnson & Johnson's unwillingness to settle, the letter says.

"These emails, taken as a whole, make abundantly clear that Beasley Allen has not communicated the terms of defendants' numerous prior settlement offers and is misrepresenting the plan to the claimant," Brown wrote.

Some of the emails also were copied to Thomson Reuters, which published a 2018 exposé on the talc litigation called "Johnson & Johnson Knew for Decades That Asbestos Lurked in Its Baby Powder."

"J&J always makes it about the lawyers when this case is only about the women who have been harmed and killed by J&J's dangerous products," Birchfield told Law.com. "Our clients are our mission and we've kept them informed every step of the way. J&J's desperate plea to the court is filled with false statements and mischaracterizations. Truly, it's characteristic of a corporation trying to burn down the house to cover its misdeeds at the expense of the civil justice system, the media and juries while all the time believing it's not bound by the law and the rules of professional conduct. J&J must be held accountable."

Jeffrey Pollock, of Fox Rothschild in Princeton, New Jersey, who represents Beasley Allen and Birchfield in the disqualification hearings, said his clients are focused on "fair and reasonable compensation for talc exposure victims. That has been and remains their commitment."

The filing comes on the same day that both sides were due to submit briefing following three days—[March 26](#), [April 10](#) and [May 2](#)—of an evidentiary hearing on Johnson & Johnson's motion to disqualify Birchfield and Beasley Allen from the talc litigation. At those hearings, Johnson & Johnson's attorney, Steve Brody, of O'Melveny & Myers in Washington, D.C., had argued that Birchfield fought the two prior talc bankruptcies so that he could obtain higher attorney fees.

Friday's letter suggested that "recently discovered financial interests" could be driving Beasley Allen's behavior and, in a footnote, said Johnson & Johnson also plans to subpoena third parties Fortress Investment Group, a private equity firm, and Thomson Reuters, which allegedly has acted as a "mouthpiece of the plaintiffs' bar."

"Unfortunately, Reuters' odd, if not suspicious, inclusion in the claimant's communications implicates a recurring issue with Reuters' role in fomenting talc litigation on behalf of the plaintiffs' bar," Brown wrote.

In a statement to Law.com, a Thomson Reuters spokesperson wrote: "Our reporting on Johnson & Johnson has been fair and impartial throughout, in keeping with the Thomson Reuters Trust Principles. We reject the factually unfounded and legally meritless claims made by J&J's lawyers and will continue to report without fear or favor on matters of public interest."

A representative from Fortress did not immediately respond to a request for comment at the time of publication.

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NEWS

Monsanto: Reversal of \$185M Jury Award Could Wipe Out Other PCB Verdicts

Plaintiffs attorney Rick Friedman said he planned to petition the Washington Supreme Court to review an appeals court's May 1 decision. "Monsanto claiming it won this appeal is like Trump saying he won the 2020 election," he told Law.com.

May 17, 2024 at 01:36 PM

Products Liability



Amanda Bronstad
staff reporter



What You Need to Know

- The appeals court's ruling had the immediate impact of halting a planned May 20 trial that would have involved nine plaintiffs from two families.
- Bayer already has asked to set aside a \$438 million judgment from a trial in which the jury originally awarded \$857 million on Dec. 18.
- Jurors have issued verdicts in eight cases, ranging from \$21.4 million to \$857 million. One ended in a mistrial, and dozens more are planned.

A Washington Court of Appeals decision that reversed a \$185 million verdict against Monsanto over PCBs earlier this month could wipe out much of the \$1.6 billion in jury awards obtained over the past three years in the state of Washington.

The May 1 decision reversed the first verdict to come out of litigation in King County Superior Court brought by 200 students, teachers and parents at the Sky Valley Education Center alleging Monsanto, now owned by Bayer, was liable for exposing them to PCBs, or polychlorinated biphenyls, from fluorescent light ballasts. They complained of headaches, fatigue and memory and neurological problems.

The Washington appeals court found that Washington's Product Liability Act, which limits claims against manufacturers for harms done after 12 years, should have applied to the trial. The panel also found the jury should not have been allowed to award punitive damages for failure to warn past that period, which the law in Missouri, where Monsanto is headquartered, does not recognize.

The panel then struck plaintiffs' exposure expert, an industrial hygienist named Kevin Coghlan, after finding his methodologies were "novel" and unsupported by the scientific community.

The ruling had the immediate impact of halting a planned May 20 trial that would have involved nine plaintiffs from two families.

Plaintiffs attorney Rick Friedman, of Seattle's Friedman Rubin, said he would petition the Washington Supreme Court in the coming weeks.

"Monsanto claiming it won this appeal is like Trump saying he won the 2020 election," he wrote in an email to Law.com. "Plaintiffs prevailed on 90% of the issues Monsanto complained about in its appeal. Some of the issues it prevailed on are not even issues in subsequent trials."

Further, he said, the appeals court's ruling "gives the trial judges guidance on how to try these cases moving forward. It will now be more difficult for Monsanto to delay and confuse the proceedings—delaying the inevitable being its only semblance of a defense."

The appeals court's ruling in *Erickson v. Pharmacia* wasn't a complete win for Monsanto. Its ruling upheld the testimony of two other plaintiffs' experts: a neuropsychologist and a toxicologist. The panel also disagreed with Monsanto about certain jury instructions.

Still, Bayer immediately praised the appeals court's ruling and the decision to postpone this month's trial in *Grant v. Pharmacia*.

"The *Erickson* decision has cross-cutting effects on the SVEC injury litigation, including past and future cases, due to the inadmissibility of plaintiffs' key expert exposure opinions, the reliance of plaintiffs' causation experts on this testimony, and the lack of punitive damages available based on post-sale failure to warn," Bayer said in a statement.

'The Trial Court Got It Right'

In addition to the [\\$185 million award](#), which was for three teachers in 2021, jurors have issued verdicts in seven other cases, ranging from \$21.4 million to \$857 million. One ended in a mistrial, and dozens more are planned.

But Court of Appeals Judges Janet Chung and Linda Coburn found that Missouri law, which does not have a statute of repose, should not have applied to claims that Monsanto failed to warn about PCBs, which it stopped selling in 1977, two years before the U.S. Environmental Protection Agency's ban.

In a dissent, Court of Appeals Judge Stephen Dwyer agreed with the majority on applying Washington law but disagreed about Coghlan, who testified about PCB exposure.

"In admitting his testimony, the trial court determined that Monsanto's objections to the evidence 'are not to the scientific theory but to how Mr. Coghlan applied that theory in this particular instance,'" he wrote. "Such objections, the court ruled, are pertinent to the credibility of the expert's opinion, not to the admissibility of the testimony. In my view, the trial court got this right."

At a May 6 hearing, King County Superior Court Judge Jim Rogers referenced the appeals court's split decision after Friedman joined Monsanto in moving to continue this month's trial, so that he could petition the Washington Supreme Court.

"Of course you've got Judge Dwyer's dissent on the issue of Coghlan, and that's an obvious issue that I imagine the Supreme Court will be considering," he said, according to a hearing transcript.

Meanwhile, Monsanto's Seattle attorneys, Jennifer Campbell, of Bryan Cave Leighton Paisner, and Shook, Hardy & Bacon's Hunter Ahern, already have asked Rogers to set aside a \$438 million judgment in *Bard v. Pharmacia*, based on Coghlan's "novel and unreliable exposure opinions," the inadmissibility of experts who relied on them and the

unavailability of punitive damages for “post-sale failure to warn” claims, according to a May 3 motion. Jurors originally awarded \$857 million on Dec. 18 to two mothers and five students.

“Because the errors identified in the *Erickson* decision were repeated in the *Bard* case, the Court should grant a new trial, or, at a minimum, stay execution of the final judgment until the *Erickson* ruling can be properly applied to this case,” Bard said.

But it’s not just the *Bard* case. Bayer claims five verdicts also applied Missouri law, and Coghlan’s “junk science” was “central to the seven other adverse verdicts in this litigation and Monsanto will seek their reversal based on the well-reasoned conclusion by the Erickson appellate court.”

“Moreover,” Bayer continued, “the *Erickson* court also found that any causation testimony relying on Coghlan’s unreliable exposure methodologies should not have been admitted—another error that was repeated in all seven other cases.”

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Silver Traders Face Evidence Hurdle in Price Fixing Lawsuit

By Beth Wang

- Judges home in on timing of silver traders' transactions
- District court said no plausible effect on US trading

Bloomberg Law News 2024-05-20T10:41:32725085363-04:00

Silver Traders Face Evidence Hurdle in Price Fixing Lawsuit

By Beth Wang 2024-05-17T14:06:54000-04:00

- Judges home in on timing of silver traders' transactions
- District court said no plausible effect on US trading

Key evidence showing silver and gold futures traders were harmed when HSBC Holdings Plc, the Bank of Nova Scotia, and Deutsche Bank AG allegedly manipulated the price of silver may no longer exist, the traders told a federal appeals court during oral arguments Friday.

Judges for the US Court of Appeals for the Second Circuit asked the traders whether they had evidence to show they had to trade silver at an artificially reduced price as a result of the manipulation, and weighed whether that would be enough to reinstate the case at the district court.

"If they could produce specific allegations that the banks were trading on the exchange to exploit their knowledge of the fix, and they could say, 'We were the counterparty in this specific transaction and as a result we had to purchase or sell silver at an artificially reduced price,' would they then suffer an antitrust injury?" Judge Steven Menashi asked a lawyer for the banks.

Menashi asked whether that information would "overcome the objections of the district court," which in 2023 dismissed the case saying it's not plausible the artificial pricing had a significant lasting effect on trading in the US market.

It wouldn't resolve the district court's objections, Stephen Ehrenberg, partner at Sullivan & Cromwell LLP, said while arguing on behalf of the banks. The traders, for two years, were unable to produce evidence of when their transactions occurred, he added, and they were already on their third amended complaint when the case was dismissed.

Judge Alison Nathan asked if the traders ever tried to get information about their transaction times.

"I'm not sure that information exists anymore," said Daniel Woofter, a partner at Goldstein, Russell & Woofter LLC representing the silver traders.

"We sought all information from the clearinghouse on the plaintiffs' trades and it wasn't within that," Woofter added. "We did not specify timing. We just sought information regarding the documented transaction and it wasn't within that information. Neither side has that information."

The silver and gold futures traders allege HSBC, Bank of Nova Scotia, and Deutsche, which operate as "fixing banks" that set the benchmark price of silver around the world for trading, conspired with non-fixing banks UBS AG, Barclays Plc, Merrill Lynch, BNP Paribas Fortis S.A., and Standard Chartered Bank to artificially suppress the daily fix price of silver and its derivatives.

Plaintiffs allege injury under antitrust law because they traded on the days the banks set the prices in London, and those artificial prices persisted throughout the trading day in the United States.

The case is *Nicholson v. Scotia Capital (USA) Inc.*, 2d Cir., No. 23-00929, oral argument 5/17/24 .

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GM, LG agree on \$150 million relief for Chevy Bolt EV owners over faulty batteries

 [reuters.com/legal/gm-lg-agree-150-mln-relief-fund-chevy-bolt-ev-owners-over-faulty-batteries-2024-05-17](https://www.reuters.com/legal/gm-lg-agree-150-mln-relief-fund-chevy-bolt-ev-owners-over-faulty-batteries-2024-05-17)

Reuters

Item 1 of 2 The new GM logo is seen on the facade of the General Motors headquarters in Detroit, Michigan, U.S., March 16, 2021. Picture taken March 16, 2021. REUTERS/Rebecca Cook/File Photo

[1/2]The new GM logo is seen on the facade of the General Motors headquarters in Detroit, Michigan, U.S., March 16, 2021. Picture taken March 16, 2021. REUTERS/Rebecca Cook/File Photo [Purchase Licensing Rights](#) , opens new tab

May 16 (Reuters) - General Motors (GM.N) , opens new tab and South Korea's LG Energy Solution (373220.KS) , opens new tab, LG Electronics (066570.KS) , opens new tab reached a settlement to establish a \$150 million fund to provide relief to Chevrolet Bolt EV owners affected by defective batteries, documents filed in a U.S. court on Thursday showed. General Motors first launched Chevrolet Bolt EVs in 2015, and used batteries made by LG entities as part of a business arrangement with the car manufacturer. GM started recalls in 2020 after it faced numerous complaints about fires in some vehicles.

"GM, LG Energy Solution and LG Electronics have agreed to a settlement with plaintiffs to resolve class action litigation related to the Bolt EV battery recall," GM said in an emailed statement to Reuters.

"As a result, Bolt owners who received a battery replacement or who have installed the latest advanced diagnostic software may qualify for compensation," the company said.

Owners of the recalled Bolt EVs who installed the final software remedy at a GM-authorized dealership before Dec. 31, 2023 may receive up to \$1,400, according to documents filed with Michigan eastern district court.

Owners who sold or terminated the lease of their vehicle before the software remedy became available and those who already received a battery replacement will receive a minimum \$700 payment, according to the filing.

Last year, GM ended production of the Bolt EV to make room for new electric vehicles.

In 2021, the company had announced a billion dollar recall campaign to cover thousands of Bolts over battery fire risks. The recall prompted GM to halt Bolt production and sales for more than six months at that time.

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<https://www.law.com/thelegalintelligencer/2024/05/17/general-motors-faces-class-action-lawsuit-alleging-faulty-fuel-pumps-402-154951/>



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Berger Montague Files Class Action Against General Motors Over Allegedly Faulty Fuel Pumps

Plaintiffs, represented by Berger Montague and Capstone Law, alleged that two SUV models produced between 2020 and 2024 have defective gas flow systems that could affect control of the cars.

May 17, 2024 at 05:28 PM

Class Actions

By Ellen Bardash | May 17, 2024 at 05:28 PM



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

General Motors has been hit with a consumer class action [lawsuit](#) in the U.S. District Court for the District of Delaware that alleges two of the automaker's vehicles have faulty fuel pumps that put drivers at risk.

Berger Montague and Capstone Law filed the suit on Wednesday, claiming GM has known about the defect since at least 2019 and should be held accountable for Chevrolet Equinoxes and GMC Terrains produced between 2020 and 2024.

The complaint alleges those models produced by the Detroit carmaker use fuel pumps with defects that interfere with the flow of gas to the engine while the car is being driven, increasing the risk of a crash, and that the defect's impact ranges from making it more difficult for a driver to control their vehicle on the road to the affected vehicles failing to start entirely.

The fuel pump at issue and its control module are distributed by GM subsidiary AC Delco, and the complaint claims discovery will show whether the issue is caused by poor quality control, defective manufacturing or the use of substandard materials. Replacing the faulty part costs between \$1,200 and \$2,000, but GM has allegedly not offered a defect-free replacement part.

"GM knows there is no permanent repair for the defect, yet GM continues to direct its authorized dealerships merely to replace certain components with equally defective replacement components while informing consumers that their vehicles are fixed, whether or not those repairs are made under warranty," the complaint states. "GM has purposefully concealed the existence and extent of the defect to transfer the costs of repairs from GM to unsuspecting consumers."

The filings state the fuel pump components are intended to last the lifetime of the vehicle, or roughly between 150,000 and 200,000 miles, but they've been failing before the two classes of cars specified reach the 100,000-mile mark.

The case claims fraud, unjust enrichment and violations of the Magnuson-Moss Warranty Act. It also brings state law claims on behalf of class members residing in Florida and Texas.

Despite knowledge of the defect, the complaint states, GM has failed to disclose it to buyers and lessees of its vehicles, leading people that may not have done so if they knew of the defect to purchase the cars and potentially face poor performance, long-term damage and lower than expected resale values.

Spokespeople for GM did not immediately respond for comment.

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Hershey faces larger lawsuit over missing designs on Reese's candies

 [reuters.com/legal/hershey-faces-larger-lawsuit-over-missing-designs-reeses-candies-2024-05-17](https://www.reuters.com/legal/hershey-faces-larger-lawsuit-over-missing-designs-reeses-candies-2024-05-17)

Jonathan Stempel

Assorted Hershey's chocolate candies are seen displayed for sale in a shop in New York City, U.S., July 20, 2017. REUTERS/Mike Segar/File Photo Purchase Licensing Rights , opens new tab

May 17 (Reuters) - Hershey (HSY.N) , opens new tab is facing a renewed, larger lawsuit claiming it misled consumers about the amount of artistic detail they would find on several Reese's peanut butter candies after opening the packaging.

In a proposed class action on Friday, four Reese's consumers in southern Florida said they were "very disappointed" that the candies they bought late last year looked plain, and lacked the "explicit carved out artistic designs" shown on the packaging.

All said they would not have bought anything had they known the candies would be unadorned.

The nine candies included several with Halloween and Christmas themes, as well as Reese's Peanut Butter footBalls and Reese's Medal.

Photos included in the complaint showed pumpkin-shaped candies missing the advertised eyes and crooked mouths, and a football-shaped candy that resembled an egg because it lacked stitching,

Hershey and its lawyers did not immediately respond to requests for comment.

The lawsuit was filed by Nathan Vidal, Debra Kennick, Abdjul Martin and Eduardo Granados in the Fort Lauderdale, Florida federal court and seeks at least \$5 million.

Their lawyer filed a similar, narrower lawsuit in Tampa, Florida in December on behalf of one plaintiff, but voluntarily dismissed that case on Friday.

He has also filed lawsuits accusing Burger King (QSR.TO) , opens new tab and Taco Bell (YUM.N) , opens new tab of selling food that when served did not look as good as what was advertised.

The case is Vidal et al v Hershey Co, U.S. District Court, Southern District of Florida, No. 24-60831.

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Google Asks Virginia Federal Court to Remove Jury in DOJ's Antitrust Case

“Civil antitrust cases brought by the United States have historically been tried to the bench—not to a jury,” Google stated.

May 17, 2024 at 05:01 PM



Maydeen Merino



The original version of this story was published on [National Law Journal](#)

Google told a federal district court in Virginia on Thursday that it would break “historical precedent” if the antitrust case brought by the Department of Justice were decided by a jury instead of a judge.

“Civil antitrust cases brought by the United States have historically been tried to the bench—not to a jury,” Google stated in its filing. “Yet in this case, the Department of Justice is asking the Court for a jury trial, breaking with all historical precedent, even though the relief it seeks is overwhelmingly equitable and even though its allegations are, in DOJ’s words, ‘highly technical, often abstract, and outside the everyday knowledge of most prospective jurors.’”

The DOJ filed its case against Google last year, claiming the internet giant monopolized multiple digital advertising technology products. The attorneys general of California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee and Virginia filed with the DOJ.

In its motion to strike the DOJ’s request for a jury trial, Google stated that the Constitution’s Seventh Amendment right to a jury in civil actions for damages does not apply when the federal government—“a sovereign”—is the plaintiff.

“The Sherman (Antitrust) Act does not accord parties a right to a jury trial, and so the DOJ must find a jury-trial right in the Seventh Amendment,” Google wrote. “But the Seventh Amendment, enshrined in the Bill of Rights, protects citizens against the federal government, not the other way around.”

The company added damages are not an issue in the case anyway because Google “has in fact paid the United States every dollar the United States could conceivably hope to recover under the damages calculation of the United States’ own expert.”

Thus, “although Google continues to vigorously contest liability, its tender of full monetary relief moots the damages claim and streamlines the litigation,” the company added.

Google is represented by attorneys from Paul, Weiss, Rifkind, Wharton & Garrison; Freshfields Bruckhaus Deringer; Axinn, Veltrop & Harkrider; and local counsel, Craig C. Reilly.

The DOJ has not yet filed its response to Google’s motion. The department did not respond immediately to a request for comment on the motion Friday.

A hearing on Google’s motion is set for June 21 before U.S. District Judge Leonie Brinkema of the Eastern District of Virginia.

Herbert Hovenkamp, a University of Pennsylvania law professor, agreed with Google that a jury trial would be “fairly unprecedented,” adding that he could not recall a recent government enforcement case that was argued before jurors.

“Juries tend to be biased in favor of plaintiffs or the government,” said Hovenkamp, who teaches antitrust law.

The DOJ’s call for a jury trial is based on the department’s claim that it is among those harmed by Google’s anti-competitive conduct in advertisements and is seeking monetary relief, rendering the government a private plaintiff.

“There’s a section in the Clayton (Antitrust) Act that says if the government is a buyer and actually suffers harm, it can sue for damages,” Hovenkamp said. “So this is a mixture of a private action in which the plaintiff just happens to be the government and then a public enforcement action.”

He called Google “clever” in responding to the DOJ’s claim by saying the company has paid any damages that would be awarded, thus weakening the government’s Seventh Amendment argument of a right to a jury trial for damages.

“I can also appreciate that Google would be fearful of involving a jury because of the kind of pro-plaintiff bias that juries have in complex cases,” Hovenkamp said.

The case is set to go to trial in September.

The lawsuit is the second antitrust case the DOJ has brought against Google.

In its other case, the DOJ has alleged that Google illegally monopolized the search engine market. Closing arguments in that bench trial ended May 3.

U.S. District Judge Amit Mehta of Washington, D.C., is expected to rule in the coming months.

NOT FOR REPRINT

Red Lobster probes "endless shrimp" losses after bankruptcy filing

 [reuters.com/business/red-lobster-probes-endless-shrimp-losses-after-bankruptcy-filing-2024-05-20](https://www.reuters.com/business/red-lobster-probes-endless-shrimp-losses-after-bankruptcy-filing-2024-05-20)

Dietrich Knauth

People collect items from a dumpster in front of a closed Red Lobster restaurant whose entire contents are up for auction in San Diego, California, U.S., May 15, 2024.

REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, May 20 (Reuters) - Red Lobster, which filed for Chapter 11 bankruptcy in Florida on Sunday night, is investigating the role its majority owner Thai Union played in the restaurant chain's "endless shrimp" promotion that caused \$11 million in losses, court documents showed.

Red Lobster said the debacle was part of a pattern of mismanagement by the global seafood company that owns most of its equity and supplies shrimp to its restaurants.

Red Lobster, with about 550 casual dining restaurants in the U.S., had offered a \$20 endless shrimp dish as a limited-time promotion. Former CEO Paul Kenny made it a permanent, year-round option in May 2023 despite "significant pushback" from other management team members, the documents said.

Some Red Lobster restaurants soon faced major shrimp shortages. Around the same time, it eliminated two breaded shrimp suppliers, leaving Thai Union with an exclusive deal that led to higher costs, current CEO Jonathan Tibus wrote in the filing.

"Thai Union exercised an outsized influence on the company's shrimp purchasing," Tibus wrote. "The Debtors are currently investigating the circumstances around these decisions."

Thai Union could not immediately be reached for comment on Monday.

Red Lobster, with \$294 million in debt, plans to close some underperforming restaurants and sell the rest to a group of its lenders including Fortress Investment Group.

Red Lobster, based in Orlando, Florida, is one of the world's largest seafood restaurants with 54 outlets outside the United States and about 36,000 employees. It purchases 20% of all North American lobster tails and 16% of all rock lobsters sold worldwide, the documents showed.

Red Lobster said its business has suffered from poor management decisions, high inflation, unsustainable rent costs, and increased competition. It posted a \$76 million net loss in 2023, and recently closed 93 restaurants to cut costs.

Matt Levine's Money Stuff: The Endless Shrimp Investigation

By Matt Levine 2024-05-20T13:15:18062-04:00

Ultimate endless shrimp

Here is a hypothetical move:

- 1. You are in the business of producing and selling shrimp.
- 2. You expand vertically by acquiring a chain of seafood restaurants.
- 3. The restaurants start to struggle and are heavily indebted, and you worry that your equity investment is losing value and possibly worthless.
- 4. How to cut your losses?
- 5. Well, you have two relationships to the restaurant chain: You own the equity, and you also supply the shrimp.
- 6. Not much you can do with the equity: There's a lot of debt, the creditors rank ahead of you, and they are unlikely to let you take any cash out as a dividend.
- 7. But, as the equity owner, you also control the board of directors and get to appoint the chief executive officer.
- 8. The CEO decides how much shrimp to buy.
- 9. What if he decided to buy a *lot* of shrimp?
- 10. Then you'd make money on the shrimp, and extract at least some value out of your equity investment.

There is presumably some tipping point. There is some level where the restaurants are viable enough that you will want to operate them to maximize their equity value, but if they fall below that level, you will give up on the equity and just try to maximize the shrimp consumption. In the first equilibrium, you will spend money carefully on shrimp and biscuits and silverware and advertising, with the goal of increasing profitability. In the second equilibrium, you will spend money profligately and only on shrimp, with the goal of spending money on shrimp.

“Red Lobster Chain Goes Bankrupt After Unlimited Shrimp Deal” is the great Bloomberg News headline:

Seafood restaurant chain Red Lobster filed for bankruptcy, succumbing to onerous leases, high labor costs and a disastrous unlimited shrimp promotion.

The Orlando, Florida-based company filed for Chapter 11 protection on Sunday, listing assets and liabilities of \$1 billion to \$10 billion each in its bankruptcy petition. The filing allows the company to keep operating while it works out a plan to repay creditors.

Red Lobster plans to hand control of the company to its lenders, who have agreed to provide \$100 million in financing to support the chain through bankruptcy.

Here is the [bankruptcy docket](#), and here is yesterday's [first-day declaration](#) from Chief Executive officer Jonathan Tibus, a restructuring expert who was appointed in March and who effectively works for the creditors. Here he is on endless shrimp, and on the possible conflicts of interest of Red Lobster's equity owner and supplier, Thai Union :

Historically, the Debtors' Ultimate Endless Shrimp (“UES”) promotion was utilized as a limited-time promotion. In May 2023, however, Paul Kenny, the Debtors' former CEO, made the decision to add UES as a permanent \$20 item to the menu despite significant pushback from other members of the Company's management team. This decision created both operational and financial issues for the Debtors, costing the Debtors \$11 million and saddling the Company with burdensome supply obligations, particularly with its equity sponsor, Thai Union. The Debtors are currently investigating the circumstances around these decisions.

The Debtors are also investigating whether Thai Union and Mr. Kenny encouraged excessive merchandising of the UES promotion in-store (including heavy in-store promotion), which was atypical for the Company. The excessive merchandising decision led to supply issues resulting in major

shortages of shrimp with restaurants often going days or weeks without certain types of shrimp. Moreover, the Debtors are investigating whether Mr. Kenny's decision-making process circumvented the Company's normal supply chain and demand planning processes.

Furthermore, I understand Red Lobster's supply process was strained by virtue of its relationship with Thai Union, which, in addition to being the Company's equity sponsor and 100% owner of Red Lobster Master Holdings GP, has historically been a large-scale supplier to Red Lobster. I understand that Thai Union exercised an outsized influence on the Company's shrimp purchasing, as indicated by, for example, Mr. Kenny's April 2023 purported direction to Thai Union to continue producing shrimp for Red Lobster that did not flow through the traditional supply process or bid cycle or adhere to the Company's demand projections. I also understand that in apparent coordination with Thai Union and under the guise of a "quality review," Mr. Kenny made a series of decisions that eliminated two of the Company's breaded shrimp suppliers, leaving Thai Union with an exclusive deal that led to higher costs to Red Lobster.

The Debtors are exploring the impact of the control Thai Union exerted, in concert with Mr. Kenny and other Thai Union-affiliated entities and individuals, and whether actions taken in light of these parties' varying interests were appropriate and consistent with applicable duties and obligations to Red Lobster.

I love my job, but would I take a sabbatical to spend a few months on the team investigating whether Red Lobster's controlling shareholder "exercised an outsized influence" on its shrimp purchasing and "circumvented [its] normal supply chain and demand planning processes"? Probably. Someone has to get to the bottom of that shrimp merchandising.

Look: I think I am kidding. "As to what drove Red Lobster to the edge, it's clear that despite not being a very good idea, the blame doesn't fall on Endless Shrimp," Business Insider's [Emily Stewart](#) argued a few weeks ago. They didn't send all the money out the door for shrimp. My assumption here is that the investigation won't find much, everyone was operating in good faith and doing the best job they could to save a struggling company, and at the start of a bankruptcy you cast a wide net for possible ways to claw back money for creditors. But what if that's wrong? What if the executive meetings were like:

CEO: We're in a lot of trouble, any ideas?

Chief Financial Officer: Let's close some underperforming locations and do a liability management

exercise.

CEO: I have a better idea. Shrimp.

Chief Experience Officer: What about shrimp in particular?

CEO: I think we should buy a ton of shrimp and then sell the heck out of them. I'm talking heavy in-store promotion, a permanent unlimited shrimp for \$20 deal, maybe commission some songs about shrimp.

Chief Experience Officer: We actually have pretty detailed demand projections and they show that customers only want —

CEO: Never mind the projections, I am telling you, the answer is shrimp. We use every penny we have left to buy shrimp, and the demand will follow!

Chief Experience Officer: ...

CEO: Just bet the whole company on shrimp.

Chief Supply Chain Officer: Okay I guess we can bid out a huge new shrimp contract to suppliers.

CEO: Oh no, no bids.

Then he gets up from the table and shrimp fall out of his pockets and he walks out of the boardroom trailing shrimp everywhere, this is what corporate finance is all about.

Head of Macro

I have written before, about my time at an investment bank, that I was the head of a lot of businesses, and so was everyone else:

Everyone is the head of something, or at least co-head. Global Head of Cardboard Packaging Investment Banking, or Americas Head of Exotic Volatility Trading in Stocks Starting with 'P,' or whatever. And many people are the head of two things, or three things, or most commonly an indeterminate number of things.

I cannot stress enough how important the head-of-something thing is. As a fairly junior vice president I would regularly go into client meetings with some senior relationship banker whom I had just met and who had no real idea of who I was, to talk about some weird derivative trade, and the banker would always introduce me to the client as like "this is Matt, he's our global head of" whatever the weird trade was. ... These headships were not, like, written down anywhere. No vote was taken, no corporate resolutions passed to make me the head of whatever I was the head of that day. It was marketing: If a relationship banker was taking me to pitch some weird thing to a client, then the client would be happier and the relationship banker would be happier and I would be happier if we all agreed that I was the bank's leading expert and fully empowered manager of whatever weird thing I was pitching.

I went on to add that some headships are pretty real: "Head of Investment Banking" is a real title that matters. One way you know it matters is that a lot of investment bankers *report* to the head of investment banking; that person is an actual boss. As head of whatever I was head of, I had one analyst, if I was lucky.

I worked at a big investment bank, with thousands of employees, many of whom were, like me, the heads of a short list of obscure businesses. At a single-manager hedge fund things are a bit different:

- 1. There are probably only like a **couple of dozen** employees.
- 2. Titles are probably less important: There are fewer of you, and the job is less about marketing and more about results; most people would probably rather be called "an analyst" and get paid a lot than be called "head of consumer retail" and be paid less.
- 3. But there's still *some* use for titles: You might get your due diligence calls returned quicker if you are the "head of consumer retail" than if you are just "an analyst."
- 4. Those titles can be granted at least as informally as they are at a bank: Your boss can say "here's Matt, he's the head of consumer retail," and who is going to disagree?

- 5. Because there are fewer employees, the titles can be *bigger*. Being the head of consumer retail at an investment bank is a big job! There are a lot of investment bankers covering the consumer retail sector, and they all report to you; a lot of people would like to be the head of consumer retail but only one person (maybe two) gets to be it. At a hedge fund with a dozen analysts, probably each analyst will have her own fairly large coverage universe. If you're the analyst covering consumer retail companies, then you are also the "head of consumer retail." Who else could it be? You are the head of a team of one, but that's a pretty common experience in the financial industry.

Sorry! None of this is very important! But I cannot *not* mention James Fishback and Greenlight Capital Inc., who are [suing each other](#) about whether or not Fishback was Greenlight's "head of macro." Here is [Fishback's lawsuit](#) from last October, saying that he was:

Mr. Fishback was previously employed by Greenlight, beginning as a research analyst, then as a trader, and finally as its Head of Macro. ...

Greenlight repeatedly confirmed, both in writing and verbally, that Mr. Fishback was Greenlight's Head of Macro.

For example, on May 11, 2023, [Greenlight Chief Operating Officer Daniel] Roitman, in securing an invitation for Mr. Fishback to join a private call with Dr. Eric S. Rosengren, former president of the Federal Reserve Bank of Boston, emailed Heather Robertson, a Senior Manager of the GLG Group the following: ...

"Heather — can you sign James Fishback for this? He's our head of macro here. Copying him to the email." ...

In addition to this email from Roitman directly stating that Mr. Fishback was Greenlight's Head of Macro, the title had been communicated to Mr. Fishback and others numerous times, including when he was introduced by Greenlight employees at conferences, dinners, and on calls.

And here's [Greenlight's lawsuit](#) from March, saying that he wasn't:

Greenlight received information suggesting that Defendant had falsely represented himself as having held certain titles during his employment with Greenlight other than "Research Analyst," including but not limited to "Head of Macro," and upon information and belief, falsely represented his role in

Greenlight's investment performance. Greenlight became aware of these false representations through Defendant's efforts to market himself and a hedge fund that he had founded, Azoria Partners, to potential investors. Greenlight understood that Defendant was using the "Head of Macro" title to wrongfully appropriate Greenlight's track record and success in making investments informed by macroeconomic events (referred to as "macro" investing or trading). These representations were false because the purported "Head of Macro" title has never existed at Greenlight, and had not been given to Defendant.

Some of the most gloriously petty stuff you will ever see in investment management. Here is an [email exchange](#) between Roitman and Fishback, in which Fishback says "I will not be compelled to lie," and Roitman replies "Compelled to lie? What are you talking about?" Here is [Fishback's X account](#), where he posts memes about being the head of macro and [tries to debate](#) Greenlight boss David Einhorn about Tesla.

Fishback's complaint says that he had a lot of responsibility at Greenlight, including making trades with its capital, but it does not seem to mention how many *other* people were on the macro team that he headed. I have a guess! Anyway I assume both sides are right: Surely Greenlight did not have a "head of macro," and surely Greenlight did go around saying that Fishback was it.

T+1ish

The way it works now is:

- 1. On Monday, we do a stock trade: I agree to sell you 100 shares of XYZ for \$20 each.
- 2. On Wednesday, we settle the trade: I give you the 100 shares, and you give me the \$2,000.
- 3. That gives me two days to find the shares. Probably I already had them on Monday, but maybe not. Maybe I was doing a short sale, and I need to arrange to borrow the shares between Monday and Wednesday. Or maybe I was doing a long sale, but I had loaned my shares to someone else, and now I need to call them back.
- 4. And you have two days to find the money. Maybe you already had the money in your brokerage account on Monday, but maybe not. Maybe you need to move money from a bank

account. Maybe you need to get a margin loan from your broker. Maybe your money is in euros and you need to convert it into dollars.

- 5. Almost all of the time, this works out fine: I get the stock, you get the money, we meet up on Wednesday and exchange them.
- 6. Every so often, we run out of time: I recall my stock loan but the borrower doesn't return the shares in time, or your bank closes early and you can't move the money in time.
- 7. In that case ... we settle the trade on Thursday? Maybe Friday? Ehh. Mistakes happen. This is called a "settlement fail," and it's not *great*, you know, but mostly everyone survives. Not always. Fails "can result in regulatory punishment, loss of capital tied up in the trade, and even — in very rare instances when the transaction is large enough — the collapse of parties in the deal." Also they make Devin Nunes angry.

Anyway that system is called T+2 settlement, because trades settle two days after the trade date. Next week the US will move to T+1 settlement. That is the same as the above, except:

- 1. We settle on Tuesday instead of Wednesday.
- 2. This gives you one less day to find the cash, and me one less day to find the stock.
- 3. We will run out of time more often, especially in the beginning, when we are less used to doing stuff this fast.
- 4. In that case ... probably we settle on Wednesday? Mistakes happen. This will be more embarrassing on a systemic level — everyone is practicing real hard to settle trades T+1, and will be paying attention to the transition — but less embarrassing on an individual level, because of course everyone is going to mess it up sometimes.

Roughly speaking, moving from T+2 to T+1 settlement means something more like moving from T+2.001 settlement to, like, T+1.05 settlement. Most trades settle faster, but a larger minority don't. Bloomberg's Greg Ritchie reports:

When US markets reopen next Tuesday after the long weekend, everything will likely seem normal.

It's only after the close and in the following days that any cracks are expected to appear.

A spike in the number of failed trades, operational glitches and additional costs are among industry fears as the trading process for American securities accelerates, with the time allowed to complete every transaction halved to a single day. ...

"There's a lot of anxiety even just around the technology and the actual way by which settlement will take place," Amy Hong, head of market structure and strategic partnerships for global banking and markets at Goldman Sachs Group, told the Bloomberg Sell-Side Leaders Forum this month. "There are going to be some mismatches around funding, there are going to be some FX-related issues that we're going to need to work out." ...

Just 9% of sell-side firms polled by Coalition Greenwich in April and May said they expect the T+1 switch to go smoothly, with 38% warning that buy-side managers are unprepared, and 28% believing trading platforms aren't fully ready. Almost a fifth anticipate a large disruption with "many or severe issues."

The consensus view is that trade failures — when either a seller doesn't deliver securities or a buyer fails to produce payment — are about to rise. The question is how large and persistent that uptick will be. ...

The \$7.5 trillion-a-day foreign-exchange market is a flashpoint of the shift, because currency trades typically settle on a T+2 basis. An overseas investor buying a US stock will soon need to either have dollars ready or find them within a day in an arena where it can take two.

It's worth wondering what "many or severe issues" could mean. Like two possible categories of "severe issues" would be:

- The stock market will stop functioning, trades that are agreed will never settle, and major financial institutions will be bankrupted by the chaos.
- The person at the sell-side firm who is answering the Coalition Greenwich settlement-mechanics survey will get yelled at a lot more over the next month than she was over the prior month.

Those both probably *feel* severe.

ETH consensus

I wrote last Thursday about two brothers who were charged with wire fraud for doing an exploit on the Ethereum blockchain that allegedly earned them \$25 million from arbitrage bots. Ordinarily here is where I would give a two-sentence summary of the story, but honestly it is complicated, and I would advise you to either (1) read what I wrote last week or (2) skip the rest of this section.

If you are still here, though, I want to clarify two points based on emails I got from readers.

First, though I described the exploit as “front-running the front-runners,” I do want to be clear that it was not *just* that. This is not a *pure* case of (1) submitting spoofy orders to bait front-running bots, (2) having them take the bait and (3) finding some trade to make them lose money. (There *are* [prior examples of that](#), using oddly structured tokens to make the front-runners lose money.) Here, though, the brothers are accused of something closer to hacking, exploiting a weakness in software code to be able to see (and reorder) a series of transactions that was supposed to be kept confidential from them. That *is* worse; it's sort of like the difference between (1) putting in spoof orders on the stock exchange to try to trick a high-frequency trading firm and (2) hacking into the stock exchange's computer system to reverse the HFT firm's trades. Even if you think that the front-running bots are bad, you might — as the Justice Department does — object to this approach to punishing them.

Second, I said that “they exploited a bug in Ethereum” to do this, but that's not quite right. They exploited a bug in Flashbots' [MEV-Boost](#), open-source block-building software [that](#) “approximately 90% of Ethereum validators use” but that is not part of the core Ethereum system itself. (Here is [Flashbots' explanation](#).) They exploited a bug in how blocks are normally built and proposed on Ethereum. From the names “Flashbots” and “MEV-Boost,” though, you might get some sense of why the case is controversial. The way that blocks are normally built and proposed on Ethereum involves “maximal extractable value” (MEV), where arbitrage traders bid to pay validators for priority to make the most profitable trades. These brothers hacked *that* system, but not everyone likes that system, [because it involves](#) predatory traders front-running more naive traders.

This is also important because, as one reader commented: “A a crucial distinguishing factor here is that James and Anton did not re-order committed transactions; they instead picked an ordering of pending transactions that were favorable to them. Under this lens, the integrity of the blockchain is

not compromised; the network explicitly 'allows' validators to pick whatever arbitrary ordering of transactions they like; it's just that generally it's economically favorable for validators to prioritize transactions which pay them the most first."

Elsewhere, here is a good and balanced [CoinDesk article](#) about why this case is controversial:

MEV, which itself is controversial, can be a highly lucrative game dominated by automated bots that often comes at blockchain users' expense, which is partially why so many in the crypto community have rushed to denounce the DOJ's complaint. ...

"They used a flaw in MEV boost to push invalid signatures to preview bundles. That gives an unfair advantage via an exploit," former employee of the Ethereum Foundation and Flashbots Hudson Jameson told CoinDesk in an interview. Jameson added that the Peraire-Bueno brothers were also running their own validator while extracting MEV, which violates something of a gentleman's agreement in MEV circles.

"No one else in the MEV ecosystem was doing both of those things at once that we know of," he added. "They did more than just play by both the codified and pinky promise rules of MEV extraction."

"It's not some kind of robin hood story as they didn't return the money to people MEVers extracted it from," pseudonymous researcher Banteg said.

Well, no, they're not going to *return* the money.

Some sort of computer database to verify the provenance of cocoa beans

Every time I see an article [like this](#):

Starting from Dec. 30, chocolate makers that sell or produce in the EU will have to show that the cocoa they use wasn't grown on land cut from forests since the end of 2020. In practice, it means that each morsel of cocoa that makes its way into the bloc will need to be linked to the GPS coordinates of the farm where it was harvested.

That's where people like [Brice-Armel] Konan, who helps monitor cocoa farm data in Ivory Coast for the Rainforest Alliance, a nonprofit based in New York and Amsterdam, and his smartphone come in. Such nonprofits, along with industry groups, governments and chocolate companies, are racing to help farmers record the data they need in time.

Ivory Coast's cocoa and coffee regulator says it has mapped just over 80% of the country's estimated 1.55 million cocoa farms. That leaves some 300,000—or about 2,000 a day—to be mapped or otherwise accounted for by Oct. 1, the start of the new cocoa season.

I immediately search for the word “blockchain.” Five years ago, this article [would absolutely have used](#) the word “blockchain.” In 2024 it does not. I suppose that is some sort of progress.

Things happen

Millennium Covets Citadel-Size Commodities Gains, Just Not the Risk. Dimon Led Bank CEOs to [Fend Off Tougher Capital Rules](#). Flash in the Pan Meme Moment Takes Some Stock Traders on Wild Ride. [Russian court seizes](#) €700mn of assets from UniCredit, Deutsche Bank and Commerzbank. Meta's Plan to Win [AI Race](#): Give Its Tech Away Free. “Safety culture and processes have taken a backseat to [shiny products](#).” Why [prediction markets](#) aren't popular. There is No [Excess Volatility Puzzle](#). [Computer-Science Majors](#) Graduate Into a World of Fewer Opportunities. “[Excessive estimates of fraud damages](#) contribute to a perception that high finance is an industry rife with criminals capable of squandering unimaginable amounts of money.” Feds Say [Crypto Scammer](#) Gave Nod To ‘Seinfeld’ Gag.

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Wendy Pollack at wpollack@bloomberg.net

- 1. “Thai Union indirectly holds approximately 47% of common equity interests and 100% of the preferred equity units, and Seafood Alliance indirectly holds approximately 38% of the common equity

interests,” says the declaration; it appears to have effective governance control. “At the direction of Thai Union, Mr. Kenny became acting interim CEO following the resignation of the previous permanent CEO in April 2022,” says a footnote in the declaration.

- 2. The idea here is presumably something like equitable subordination, a [bankruptcy doctrine designed](#) “to prevent [corporate insiders] from converting equity interests into claims or from improving the priority of their claims in anticipation of bankruptcy.” My hypothetical trade at the beginning is, roughly, a way to convert equity interests into claims (as a supplier), and if you can prove that the shareholder/supplier was doing it intentionally then maybe you can claw back some money for creditors.
- 3. I feel like Greenlight is mostly known as a long/short equity fund, but it does do macro. Here’s a [2023 investor letter](#), noting 1.9% gross return from macro.
- 4. The [rule is](#) mostly that I need a “locate” to do the short sale, that is, my broker needs to be pretty confident that I *can* borrow the shares by Wednesday. But I don’t need to actually borrow the shares before doing the trade.

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<https://x.com/AnnMLipton/status/1792607229129916513>



@annmlipton@esq.social

@AnnMLipton

New DEFA14A filing incoming:



Teslaconomics @Teslaconomics · May 18

If Elon gets 25% voting power, Tesla is reincorporated in Texas, and compensation package is approved, then AI & Robotics stays within Tesla and the company can march on forward to become the largest company in the world



269

943

7.4K

196K



Elon Musk @elonmusk · May 18

Yes

260

246

2.6K

87K



10:24 AM · May 20, 2024 · 2,622 Views

3

6

18

3





@annmlipton@esq.social @AnnMLipton · 1h

...

Incidentally, here's the groundwork for Tesla to claim that Musk is not demanding a new comp package going forward, i.e., he isn't really demanding 25% of the company:

[wsj.com/business/autos...](https://www.wsj.com/business/autos...)

Some on the board, according to people familiar with the thinking, feel Musk's tweets were misunderstood. What Musk really intended to say was that he wants new safeguards around the company's AI, which he argues could be dangerous in the wrong hands.

1



4

176



@annmlipton@esq.social @AnnMLipton · 1h

...

That's important, bc if Musk admits he intends a new comp package going forward, it entirely undercuts the only real economic justification Tesla has offered for ratifying the 2018 package - that it will save on costs for a new comp package:

1



4

145



@annmlipton@esq.social @AnnMLipton · 1h

...

See previous tweet:



@annmlipton@esq.social @AnnMLipton · May 15

Replying to @AnnMLipton

Still, if you have to note one thing, again: here's the proxy, compared to Musk's tweet before the Tornetta decision. Does it sound like ratifying the comp package will somehow spare Tesla the cost of a new package going forward? But that's the justification the board offers.

Potentially Avoids Other Costs. The Special Compensation Award is not ratified, then Tesla may negotiate a new plan with Mr. Musk in order to motivate him to continue to lead the company. A new plan would likely take substantial time to develop and implement, which could lead to the 2018 CEO Performance Award. Mr. Musk to agree to the terms and amount. Although Mr. Musk did not negotiate (or renegotiate) with the board, in its interview with him that, for Mr. Musk to a similar magnitude to the 2018 CEO Performance Award. The board concluded that there is a risk that a new compensation plan would result in a very large, incremental dilution effect as the 2018 CEO Performance Award. For illustrative purposes, the Company has estimated that a new grant of 300 million fully vested shares would result in a dilution of approximately 1.5% of the Company's outstanding shares.

Elon Musk

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

"compensation plan" in quotes, because, from my standpoint, I'm not sure about ensuring the right amount of voting influence at the time of the decision.

25%, it means I am influential, but can be overridden if two-thirds of the shareholders vote against me vs for me.

or lower, the for/against ratio to override me makes a difference.

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@AnnMLipton

...

But Musk is again doubling down – he not only wants the old comp package ratified, he expects a new one, and he will pass on Tesla corp opportunities (or give them to his other companies) if he doesn't get his ask

10:27 AM · May 20, 2024 · 480 Views



2



4



8



Post your reply

Reply



Lukas (held to maturity) @LukasLueg · 49m

...

Does Musk damage the possibility of a waiver by Tesla of Corporate Opportunity by his demand for a new comp plan? My understanding is that if the board would decline an involvement in xAI, he's off the hook wrt CO. But his preconditioning robs the board of waiving, does it not?



1



20



@annmlipton@esq.social @AnnMLipton · 48m

...

the board could definitely do a corp opportunity waiver. i'm honestly not sure how that exactly plays out with the advance declaration, but the board hasn't tried the waiver. if i were a delaware court i'd be leery of policing waivers; the whole point is to allow some conflicts



1



1

16



[Show replies](#)



Eric Columbus @EricColumbus · 58m

...

Is that kosher?



1



44



@annmlipton@esq.social @AnnMLipton · 56m

...

no. but the formal legal rule and how it will actually be applied are two different things.

<https://x.com/RMac18/status/1792577576340218137>

🔄 @annmlipton@esq.social reposted



Ryan Mac 🧐

@RMac18

My "I did not ask for it" t-shirt has many people asking questions already answered by my shirt.



8:26 AM · May 20, 2024 · 9,918 Views

4

19

118

3





The Magic Berry Salesman @MagicBerryInc · 1h

...

Thanks for denying it Elon!!



Never believe anything in politics
until it has been officially denied.

-Otto Von Bismarck



48



Lukas (held to maturity) @LukasLueg · 2h

...

At Tesla, "This meeting should have been a DEF A 14A." is the new "This meeting should have been an eMail."



118



<https://x.com/AnnMLipton/status/1792579935703384437>



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@AnnMLipton

...

elon musk, not asking



Elon Musk   @elonmusk · 2h

...

The public vote is unequivocally in favor of Texas!

Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.



Elon Musk   @elonmusk · Jan 30

Should Tesla change its state of incorporation to Texas, home of its physical headquarters?

[Show this poll](#)



Ryan Mac   @RMac18 · 3h

My "I did not ask for it" t-shirt has many people asking questions already answered by my shirt.

 Pinned



Elon Musk   @elonmusk · 21m

...

The Tesla team put this together of their own volition (I did not ask for it). Thanks!



Tesla  @Tesla · 1h

We have put forward two especially important proposals for our Annual Meeting of Stockholders—and we need your vote.

Protect your rights as stockholders & protect the value of your investment by voting FOR the ratification of the 2018 CEO Performanc...

[Show more](#)



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<https://www.wsj.com/business/ceo-pay-packages-charts-3e7b1624>

Musk Effect Drives Spread of Supersize CEO Pay Packages

By *Theo Francis* [Follow](#)

May 20, 2024 5:30 am ET

Elon Musk didn't just upend the global auto business and space missions. The billionaire is also reshaping the landscape of executive pay.

Musk's multibillion-dollar pay package from 2018 has set the tone for other high-end pay deals, despite being thrown out by a Delaware court earlier this year. More executives have gotten outsize pay packages, and those packages have been bigger, in the years since Musk's came to light.

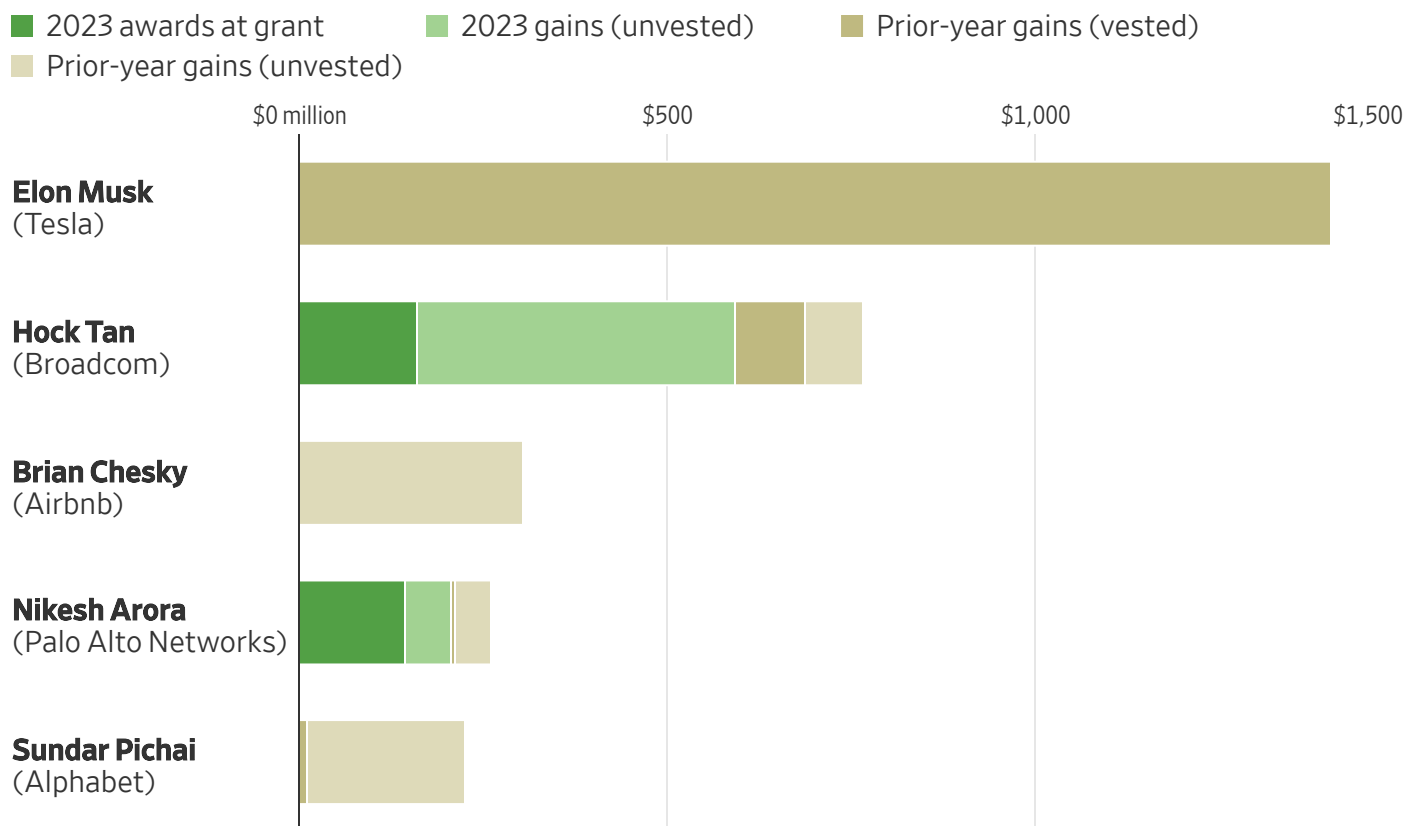
They also have the potential to keep growing for years—generating value for CEOs along the way.

“We've called them moonshot awards—awards with huge potential values that executives can earn if they meet their targets,” said Brian Bueno, a practice leader with pay consultancy Farient Advisors in New York.

Musk's pay package from 2018, which required meeting a mix of market-capitalization and financial goals, drove a \$1.4 billion gain for the executive last year, at least on paper. Other big-company CEOs didn't come close.

Top Gains

Stock-based compensation for 2023



Source: MyLogIQ

Since 2018, Musk has received no new equity awards or bonuses from Tesla and less than \$24,000 in total salary. His \$1.4 billion gain reflects the increase during 2023 in the value of options that vested during the year.

It adds to \$48 billion in gains on equity compensation over the preceding three years, Tesla securities filings show. Tesla's share price has fallen nearly 30% so far this year to about \$177, eroding the options' value.

The pay package granting Musk those options was rescinded by the Delaware court in January, though the final judgment hasn't been entered yet. Tesla reported the options as outstanding and exercisable as of the end of March, a late-April securities filing shows. The company has said it intends to appeal and is asking shareholders to re-approve the pay deal to reward Musk for the company's successes since 2018.

Supersize era

Other supersize pay packages haven't been as big, but more CEOs are getting them. In the past five years, three dozen CEOs of S&P 500 companies have received pay packages valued at \$50

million or more, up from nine in the five years before Musk's, according to a Wall Street Journal analysis of data from MyLogIQ, a provider of public-company data and analysis.

The total cost of those pay packages has also grown rapidly, quadrupling in the past five years from the earlier period, the Journal found.

The Journal's analysis included CEOs on the job for at least a year at more than 400 S&P 500 companies reporting pay through mid-May for fiscal years ending after June 30, 2023. A separate analysis by MyLogIQ also showed a rise in such pay packages.

Such packages remain uncommon. Last year, the seven highest-paid CEOs in the S&P 500 received them, and two topped \$150 million: Broadcom's **AVGO 0.97% ▲** Hock Tan, at \$162 million, and Palo Alto Networks' **PANW 0.75% ▲** Nikesh Arora, with \$151 million. Just one S&P 500 pay package topped \$150 million in the five years leading up to Musk's 2018 blockbuster arrangement. Nine have done so in the five years since.

Tan has received other big pay packages in recent years, including two valued at about \$60 million apiece in 2021 and 2022, and one in 2017 valued at just over \$100 million. Arora's compensation in 2018 totaled just over \$125 million.

Broadcom said the company has outperformed competitors under Tan, its CEO since 2006. Tan must stay on the job for five years and Broadcom's share price must reach certain targets after October 2025 for his equity awards to vest, Broadcom said in its securities filings. He isn't expected to receive additional equity grants or cash bonuses over five years, the company said.

Palo Alto Networks said in securities filings that the value of equity awards in Arora's pay include a mix of shares granted over three years.

Fair Isaac, which reported total pay of \$66.3 million for CEO Will Lansing, said it includes a one-time "retention and leadership bonus" targeted at \$30 million in stock and options that vests over five years. The company said its shareholder returns ranked among the top 1% of companies in the S&P 500 over the past decade and the company gives priority to long-term pay aligned with shareholder returns.

The outsiders

A few big pay packages go to less-senior executives, or to CEOs at companies outside the S&P 500, including several in the private-equity industry.

The \$199 million in total pay for Jon Winkelried, CEO of private-equity manager TPG TPG **0.49%** ▲ , which isn't in the S&P 500, included \$185 million of stock that vests over four to five years, described as an incentive for Winkelried to make the company more valuable. Sixty percent of the award is earned if the company's share price rises 50% to 100% from late November levels, TPG securities filings show.

Carlyle Group CG **1.14%** ▲ , also outside the S&P 500, reported total pay of \$187 million for Harvey Schwartz, including \$180 million in equity when he took the job in February 2023. Carlyle valued the award at \$229 million as of Dec. 31, including \$22 million that vested during the year. Much of the rest vests if Carlyle shares, which recently traded around \$42, reach thresholds as high as \$71.80 through 2028.

Blackstone BX **0.04%** ▲ said its total return of about 83% beat other U.S. asset managers last year and that its pay structure aligns executive incentives with those of investors.

Cable giant Charter Communications CHTR **0.44%** ▲ valued total pay for Richard DiGeronimo, its president of product and technology, at \$53.3 million, compared with \$89.1 million for CEO Chris Winfrey. Most of the pay for both men consisted of options and stock vesting over five years, much of it only if the company's shares rise 28% to 152% from when the grants were made, the company said.

Such outsize pay packages typically consist almost entirely of restricted stock or stock options. Often, the number of shares or options executives ultimately receive depends on meeting performance targets for some combination of share price and financial or operating results.

The reported figures reflect their values at the time of grant, by the company's calculation, and can dramatically understate their potential. At the same time, the opportunity for vast riches is offset by the potential that executives ultimately realize much less, or even nothing.

A \$211 million pay package put Chad Richison of Paycom PAYC **-1.82%** ▼ Software, a payroll processor, at the top of the Journal's 2020 CEO pay ranking. Earlier this year, Richison forfeited the stock that made up nearly all of that package when Paycom named executive Chris Thomas as his co-CEO, the company said in its securities filings.

Valuations put on the equity award reached \$700 million not long after it was made, and could have climbed as high as \$2 billion if the company's share price had hit \$1,000 and then \$1,750 over a decade, the Journal reported at the time.

More recently, prospects appeared less promising: Paycom shares haven't closed above \$554 and traded Friday around \$182.

Richison, who owns just under 12% of the company, hasn't received additional equity pay since. Last year, cash made up about half his \$3.1 million pay package, with personal flights and other perquisites making up the rest.

Write to Theo Francis at theo.francis@wsj.com

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<https://www.wsj.com/real-estate/commercial/starwood-capital-group-real-estate-fund-cash-crunch-409f56d5>

A \$10 Billion Real-Estate Fund Is Bleeding Cash and Running Out of Options

By *Peter Grant* [Follow](#)

May 20, 2024 5:30 am ET

A giant commercial real-estate fund is scrambling to escape a looming cash crunch caused by the long line of investors who want their money back.

The \$10 billion fund from Starwood Capital Group has been trying to preserve its available cash and credit by limiting investor redemptions. In the first quarter, the fund was hit with \$1.3 billion in withdrawal requests but satisfied less than \$500 million of them, according to regulatory filings.

Even with these limitations, the fund's liquidity, consisting of cash, marketable securities and a bank line of credit, has been drying up. It totaled \$752 million at the end of April, down from \$1.1 billion at the end of last year. It was \$2.2 billion at the end of 2022, according to filings.

"They don't have a lot of liquidity left," said Kevin Gannon, chief executive of Robert A. Stanger, an investment bank that specializes in real-estate funds.

These developments have left the Starwood Real Estate Income Trust, known as Sreit, with three options—none of them appealing. It could take on more debt. It could sell properties into a tough market. Or it could halt completely or limit further redemptions, a move that would greatly impair the fund's ability to raise new money. Unless it takes one of these three steps, Sreit looks poised to run out of cash and credit before year-end if the current pace of redemptions continues.

Other real-estate funds are handling the pressure from the long queue of redemptions in varying degrees. The largest of the funds, Blackstone Real Estate Income Trust, or Breit, has \$7.5 billion in liquidity and earlier this year was able to fulfill all redemption requests. But withdrawals continue to exceed new fundraising.

Sreit was one of the most prominent real-estate funds launched between 2017 and 2022, second in size only to Breit. These funds, known as nontraded real-estate investment trusts, invest in commercial property similar to publicly traded REITs. In all, these vehicles raised about \$95 billion, mostly from individual investors, according to Stanger.

The funds also were very popular when interest rates were low because they paid dividends in the 5% range. Sold through financial advisers, they also gave small investors the opportunity to participate in what was then a hot commercial-property market.

But investors started to bolt as interest rates jumped and commercial real-estate values fell. In late 2022, Sreit and others began limiting redemptions to as much as 2% of their net asset values a month and up to 5% a quarter.

New fundraising also has dropped sharply as some analysts have criticized the structure of the funds and financial advisers have raised warnings. Sreit's new fundraising has dwindled to about \$15 million a month, down from more than \$600 million a month in the first half of 2022.

Sreit's ability to make redemptions will help determine whether the funds will be a long-term feature of the real-estate market or fade away. Some analysts believe that the funds are proving themselves through a tough commercial-property market. Others say the funds are showing major problems.

Because it can't raise enough new funds to make up for even its limited redemptions, Starwood has been considering a number of difficult options, say people familiar with the firm's thinking.

The fund could borrow more, but that would be costly at today's high interest rates. Sreit's current debt is already equal to 57% of its assets, which is more than many comparable real-estate funds. Sreit's target leverage is 50% to 65%.

The fund could sell assets. Sreit owns hundreds of properties throughout the country, mostly warehouses and rental apartment buildings in the Sunbelt. But the value of most commercial real estate has been hammered by high interest rates, which drive up costs in the high-leverage business. Rental apartments have also been hurt by overbuilding in many markets.

Most rental-apartment owners who bought in the years just before the interest-rate spike "would prefer not to sell in this market," said Matthew Werner, managing director with asset manager Chilton Capital Management.

Finally, Sreit could halt or limit further investor redemptions. But analysts believe that would be a last resort because it would make it even harder to raise new money. One of the main selling points of Sreit has been that investors would be able to redeem their shares, subject to the 2% and 5% restrictions.

A redemption halt “would be fatal,” Stanger’s Gannon said. “You wouldn’t be able to raise another dime.”

Sreit was launched in 2018 by Starwood Capital, a private-equity firm headed by Barry Sternlicht, the storied real-estate investor and founder of the Starwood Hotels chain. Sreit raised more than \$13.5 billion in equity, which it used to buy more than \$25 billion in real-estate assets.

The fund attempted to sell properties last year as the redemption queues began to lengthen. Sreit sold a portfolio of single-family rental homes to Dallas-based Invitation Homes for \$650 million, including debt.

But more recently, the fund has slowed sales because of depressed prices. Like other owners, Sreit is hoping prices will rebound later this year, especially if the Federal Reserve begins to cut interest rates.

Instead, Sreit has relied on its line of credit. But that won’t last much longer at the rate the fund is drawing it down. The line has \$275 million of capacity, down from its original size of \$1.55 billion.

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Japan's Inexperienced Investors Fall for Scams 'Like Babies'

By Eddy Duan and Yui Hasebe

- Japan saw sevenfold increase in money lost in latest quarter
- Government to announce measures to counter scams next month

Bloomberg Law News 2024-05-20T10:51:14358360097-04:00

Japan's Inexperienced Investors Fall for Scams 'Like Babies'

By Eddy Duan and Yui Hasebe2024-05-19T20:26:02762-04:00

- Japan saw sevenfold increase in money lost in latest quarter
- Government to announce measures to counter scams next month

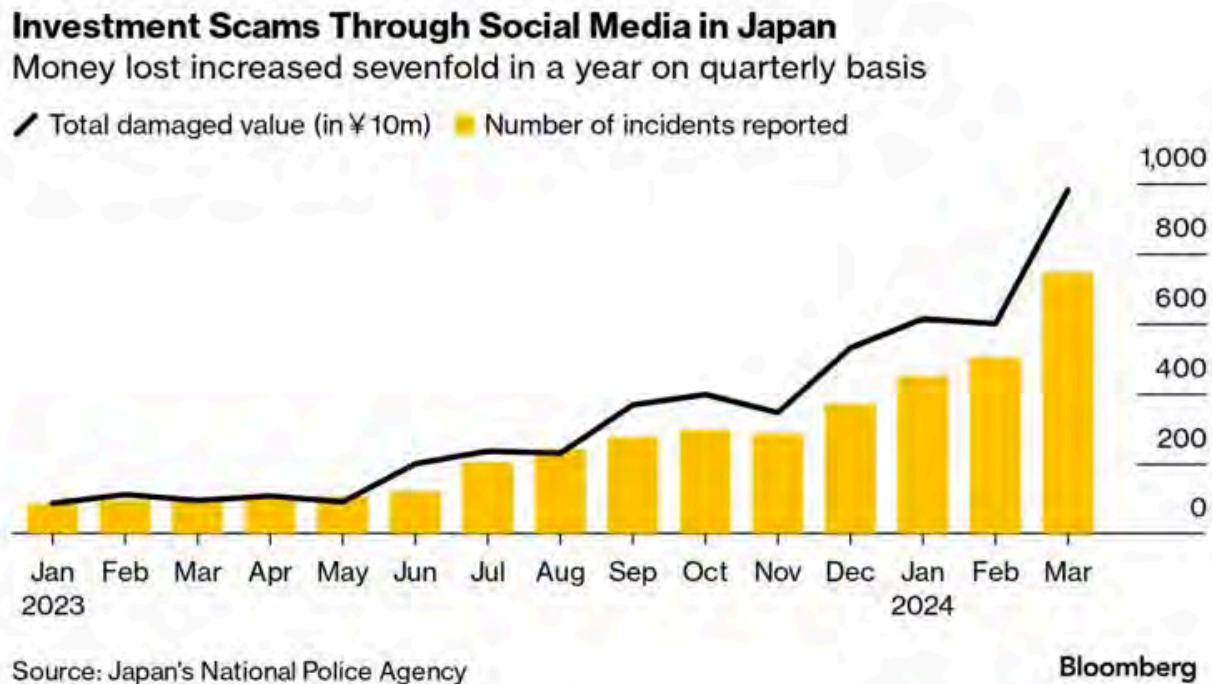
As Japan's stock market booms, something else is also on the rise in the nation: investment scams.

Criminals have been quick to exploit the paradigm shift that's seen a relatively financially inexperienced population turn to investing, spurred by rising consumer prices and government encouragement to find higher returns for their savings.

In the first quarter, Japan saw a sevenfold increase in money lost to investment scams from a year earlier, according to the National Police Agency. The agency began tracking the data in January last year, and the latest statistics show there were 1,700 scams reported in the first three months of 2024, with an average of ¥13 million (\$83,500) lost in each case.

"For the scammers, it's no risk, high return," said Kazuhide Saijo, the president of a Organization of Investment Scam Victims. "Japan has only taught people to work hard and save money. In terms of investment, people are like babies."

While investment scams have proliferated around the world in recent years, Japan had been comparatively unscathed, protected by a deflationary environment that led consumers to simply hoard cash. But the return of inflation, which hit a four-decade high last year, combined with the government's measures to entice people to invest in Japanese stocks has created an environment for fraud to flourish.



For Endo, who is in her early 60s, the realization that her savings were inadequate for a comfortable retirement made her look for other ways to boost her nest egg. An ad on Meta Platforms Inc.'s Facebook for free investment seminars caught her attention last summer, so she clicked on it and was invited to join a group on the social media platform. Slowly she was won over, and little by little she began investing on an app the group sent her.

Then the pressure increased. In a classic scam tactic, she was constantly encouraged to invest more for a bigger return and ended up borrowing money. In total, she invested 20 million yen, stopping when her trading app showed a ¥100 million balance.

The civil servant was initially able to take out small amounts from the trading account, but in December when she tried to withdraw the balance of her account she discovered she couldn't. The app turned out to be a fake — her money had ended up in someone's pocket, not in stock markets.

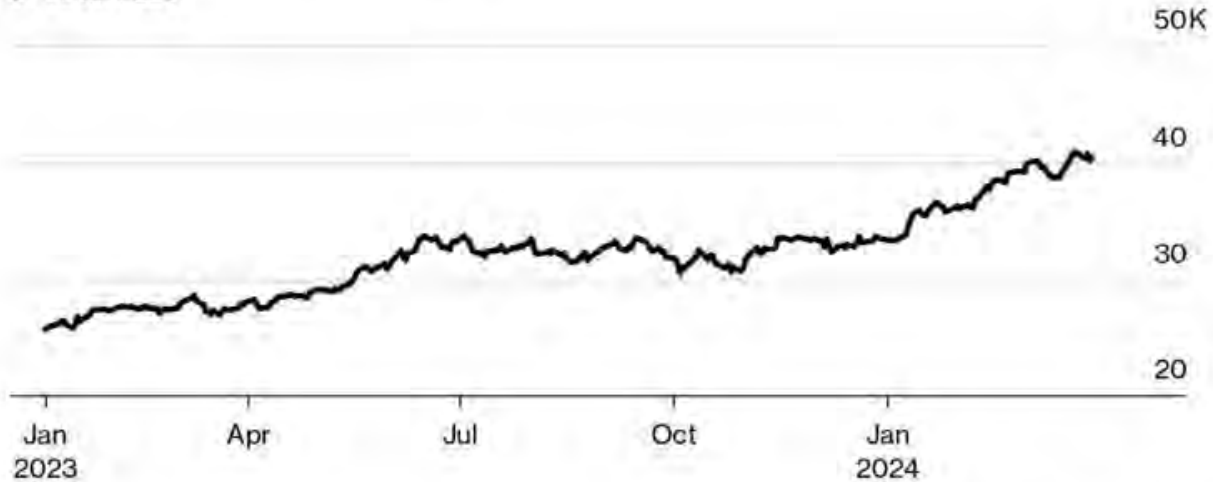
Stock Craze

Endo is far from alone from in having a sudden interest in investing. Japanese households have rapidly increased their stock investments, which rose an annual 29.2% in December 2023 compared with 1% increase in cash savings, according to Bank of Japan survey released in March.

Nikkei Hit the Record High in 2024

For the first time since 1989

✓ Nikkei 225



Source: Bloomberg

Note: Data range "2023-01-04 - 2024-03-29"

Bloomberg

Still, cash savings make up more than half of household assets in Japan — far higher than 12.6% of the US and 35.5% in the euro area, according to another BoJ survey released last August. The Japanese government is trying to tap into that pool of liquidity, encouraging a shift from saving to investment by expanding the tax-exempt retirement savings accounts known as NISA.

Read more: Japanese Still Have a Quadrillion Yen in Cash Stashed Away

Scammers, though, also have their eyes on the money and many Japanese people are easy prey due to their lack of financial education. Mayuko Suzuki, a professor of consumer education at Osaka Kyoiku University, said Japanese schools have traditionally taught little about building wealth or investing, focusing instead on saving and spending.

"If people understood the principle that no stock guarantees you continuous returns, maybe they wouldn't get scammed so much," Suzuki said.

In 2022, the country introduced enhanced financial education in its curriculum guidelines for high schools. It aims to teach the risk and reward of investment to help people plan their financial future.

While the number investment scams in Japan is still a fraction of what other countries are experiencing, their sudden appearance has made the top levels of government pay attention. Prime Minister **Fumio Kishida** last month said measures will be announced in June to counter the rise of the scams, with an emphasis on arresting criminals.

The country's lawmakers are demanding a swifter response from Meta's local unit, as a growing number of online ads featuring celebrity images attempt to swindle people out of their money, former Digital Transformation Minister Takuya Hirai said in an interview last month. He has criticized Meta for being "the most non-compliant platform owner," and said the company should suspend all Facebook ads in Japan until they find a better way to combat fraud.

Read more: Facebook Scams Demand Stricter Online Rules, Japan Lawmaker Says

"Facebook is profiting off of advertising for scammers in Japan," said Kokufu Taido, a lawyer representing a group of victims of investment scams suing Meta for damages totaling ¥23 million. Kokufu also pointed to the anonymity of some messaging apps that make it difficult for investigators to find criminal groups, while limited cooperation internationally also prevents recovering damages.

A representative for Meta said the firm is taking seriously information that there are victims of scams among its users.

"This has spread concerns among the people in Japan. Meta has invested over \$20 billion in teams and technology to secure our platform since 2016, and we will continue to focus on combating fraudulent advertising," the representative said, declining to comment on the ongoing cases against the company in Japan.

For Endo, none of the attempts to get her money have been successful. Instead, her plan to retire at 65 is in tatters.

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US Audit Board Member Backs Investor Demand for More Disclosure

By Amanda Iacone

Bloomberg Law News 2024-05-20T10:28:5457654274-04:00

US Audit Board Member Backs Investor Demand for More Disclosure

By Amanda Iacone 2024-05-17T13:16:40000-04:00

Auditors should give more details about how they vet the revenues and liabilities of listed companies amid increased demand from investors who rely on those checks, a member of the US audit board said Friday.

"An audit firm whose ears were blocked or not attuned to the voices of investors is at risk of losing its balance and stumbling," George Botic, a member of the Public Company Accounting Oversight Board, said in remarks before an accountants' liability conference in Washington.

A small but growing trend of shareholder votes against auditor ratification during annual corporate meetings are a warning shot that auditors can't ignore, Botic said. "The auditing profession needs strong voices to emerge from their ranks," he said. "Ones that have the courage to acknowledge shortcomings and call on peers to rally in a commitment to take action, find solutions to improve audit quality, and put investors first."

- The board, which has centered its work on protecting the interest of investors, issued a proposal in April that would offer more insight into how firms manage their resources and staff their audits.
- The PCAOB is also considering updates to its 2017 standard requiring auditors to discuss the most challenging aspects of the audit in their reports to investors—known as critical audit matters.

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Cantor, Lutnick Strike Deal With Window SPAC Investors

By **Leslie A. Pappas**

Law360 (May 17, 2024, 5:36 PM EDT) -- Shareholders of a special purpose acquisition company that took a now-bankrupt smart window manufacturer public have reached a tentative agreement to settle their proposed Delaware Chancery Court class action against Cantor Fitzgerald LP and its billionaire chair and CEO Howard Lutnick.

In a letter to Delaware Vice Chancellor J. Travis Laster late Thursday, counsel for the investors reported that the parties had "reached an agreement in principle" to settle the action and not file any further briefs on a pending motion to dismiss.

"The parties will work expeditiously to submit a stipulation of settlement and related papers, and will contact chambers for the court's availability for a hearing to approve the proposed settlement," Christine M. Mackintosh of Grant & Eisenhofer PA, an attorney representing stockholders Mariano Siseles and Zalmon Uvaydov, wrote in the letter.

The document did not elaborate on specifics of the deal.

The settlement announcement arrived a little over a month after San Jose, California-based View Inc., a maker of smart office windows that automatically darken in response to sunlight, **petitioned for Chapter 11 protection** in Delaware. The company disclosed at the time it had \$359.4 million in debt and an agreement to hand the business over to senior lenders, including Cantor Fitzgerald.

Cantor Fitzgerald is one of two existing lenders that provided the window company with **\$17.5 million** in debtor-in-possession financing.

The Chapter 11 reorganization followed years of litigation that View has been embroiled in since it went public through a merger in March 2021 with a blank-check company overseen by Lutnick.

The Chancery Court case, **filed in November 2023**, accused Lutnick and others related to the de-SPAC merger of breaching their fiduciary duty, aiding and abetting breaches, and unjust enrichment. The investors sought hundreds of millions of dollars in damages.

The lawsuit said the SPAC's architects pushed through an "abysmal deal" for public stockholders so that Lutnick and others who held preferred "founder" shares in the SPAC could get "a financial windfall."

A SPAC, also known as a blank-check company, is a shell entity that raises money through an initial public offering, usually at \$10 per share, then uses the funds to buy a private company and take it public.

If the blank-check company does not find a merger target within a set time frame, typically within two years, it must return each \$10 investment to public shareholders with interest. Founding investors in a SPAC can lose their entire stake if 24 months pass without a deal, so SPAC architects have a strong incentive to find a merger target and get a deal done.

Lutnick was the chair and CEO of the SPAC that merged with View from September 2019 to the close of the combination, and controlled its sponsor through his majority stake in CF Group Management Inc., the managing partner of Cantor, which was the sponsor's managing member.

The SPAC, CF Acquisition Corp. II, **revealed in 2020** that it would merge with the Silicon Valley-based window maker in a roughly \$800 million deal, backed by \$500 million that the blank-check company **raised** in an August 2020 initial public offering.

The merger agreement included a \$300 million PIPE component — a private investment in public equity — and the sale of common shares to public investors for \$10 each. In January 2021, the two companies announced that one of Singapore's sovereign wealth funds had agreed to commit **an additional \$200 million** to the PIPE component.

In the run-up to the reverse-merger, the business combination was touted as having a \$1.6 billion value. But after the transaction closed, View came under scrutiny by the U.S. Securities and Exchange Commission, which alleged the company made misstatements about its finances.

The SEC said in July 2023 it had **settled certain charges** against View for failing to disclose millions of dollars in projected warranty liabilities, and was charging the company's former Chief Financial Officer Vidul Prakash with financial reporting and accounting fraud.

Later that month, View announced a 60-to-1 reverse stock split to avoid being delisted from the Nasdaq.

None of the parties immediately responded Friday to Law360's requests for comment.

Siseles and Uvaydov are represented by Christine M. Mackintosh, Kelly L. Tucker and David Wissbroecker of Grant & Eisenhofer PA, Christopher H. Lyons, Tayler D. Bolton, Randall J. Baron, Benny Goodman and Erik Luedeke of Robbins Geller Rudman & Dowd LLP, Brian J. Robbins, Gregory Del Gaizo and Mario D. Valdovinos of Robbins LLP, and Leonid Kandinov of Morris Kandinov LLP.

Cantor Fitzgerald, Lutnick and others are represented by Eric Leon, Blair Connelly and Nathan Taylor of Latham & Watkins LLP, and C. Barr Flinn, Paul J. Loughman, Alberto E. Chávez of Young Conaway Stargatt & Taylor LLP.

The case is Siseles et al. v. Lutnick et al., case number 2023-1152, in the Court of Chancery of the State of Delaware.

--Additional reporting by Benjamin Horney, Jeff Montgomery, Alex Wittenberg and Henrik Nilsson. Editing by Covey Son.



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Judge Reluctantly Dismisses FirstEnergy Shareholder Suit

By **Jessica Corso**

Law360 (May 17, 2024, 9:22 PM EDT) -- An Ohio federal judge said Friday that he had no other choice but to dismiss a shareholder lawsuit filed against scandal-plagued utility FirstEnergy Corp., though his reluctance to do so was underscored by a lament that a \$180 million settlement brokered in another courtroom left a "shroud of darkness" over a \$1 billion bribery scandal.

U.S. District Judge John Adams "reluctantly" dismissed a derivative lawsuit brought by FirstEnergy investors in the wake of revelations that the company bribed former Ohio House Speaker Larry Householder and others to secure a bailout for two faltering nuclear power plants.

Judge Adams said he was "legally required" to dismiss the case because the Sixth Circuit had approved a \$180 million settlement in a similar lawsuit in a separate Ohio courtroom.

But the dismissal was not granted happily, as the judge had a lot to say about the continued fallout from the scandal, including **state charges** against the now federally convicted Householder and **three more** recent indictments against two former FirstEnergy Corp. executives and the onetime chair of Ohio's utility regulator.

All of that information and more has come to light since the settlement was proposed, the judge said.

"The people of Ohio — the ultimate victims of the FirstEnergy bribery scheme — deserved much, much more, but the law does not allow this court to compel further proceedings," he said.

Judge Adams has been critical of the way the lawsuit in his Akron court has been run ever since investors **moved to dismiss** the case in 2022 on the basis that the \$180 million settlement resolved their claims.

The judge **rejected** that dismissal bid, saying the deal had been reached with almost no discovery conducted, and appointed new lawyers to oversee the case based on his belief that the original attorneys had failed to diligently prosecute it.

Those lawyers and their client, Todd Augenbaum, objected to the settlement, but the objection **was thrown out** by the Sixth Circuit in February. Judge Adams said the circuit court's endorsement of the settlement meant the case before him could no longer move forward.

But he continued to assert that the parties prosecuting the case before him chased "the path of least resistance" by settling their case before another judge in Columbus who appeared less reluctant to push through a settlement without any testimony from board directors.

That judge, U.S. District Judge Algenon L. Marbley, **approved the settlement** in 2022. Judge Marbley couldn't immediately be reached for comment Friday evening.

"The people of Ohio deserved to have sunlight cast upon all aspects of the FirstEnergy bribery scheme," Judge Adams said. "Instead, the public is left with proceedings that allowed a shroud of darkness to remain in place covering many of the details surrounding FirstEnergy's bribery scheme to occur — a shroud that is only slowly being lifted by an aggressive media and subsequent criminal proceedings."

Representatives for FirstEnergy and the settling investors didn't immediately respond to a request for comment.

The investors are represented by Saxena White PA, Bernstein Litowitz Berger & Grossmann LLP, Cohen Milstein Sellers & Toll PLLC and Edelson Lechtzin LLP.

The defendants are represented by Debevoise & Plimpton LLP, Jones Day, Giffen & Kaminski LLC, Tucker Ellis LLP, BakerHostetler, Brouse McDowell, McDermott Will & Emery LLP, Lape Mansfield Nakasian & Gibson LLC, Kohrman Jackson & Krantz LLP, Morgan Lewis & Bockius LLP, Ballard Spahr LLP and Skadden Arps Slate Meagher & Flom LLP.

The case is Miller v. Anderson et al., case number 5:20-cv-01743, in the U.S. District Court for the Northern District of Ohio.

--Editing by Emily Kokoll.

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Kohl's Directors' Aversion To Sale Was Self-Serving, Suit Says

By **Sydney Price**

Law360 (May 17, 2024, 8:46 PM EDT) -- A Kohl's shareholder has hit the retailer's brass with a derivative suit alleging they covered up the results of a disastrous shift in business strategy and takeover offers, all in a bid to protect their own positions.

Shareholder David Kelley's Thursday suit in Wisconsin federal court alleges Kohl's board and management worked together to preserve their positions by adopting a "poison pill" strategy to dissuade potential buyers. The suit also alleges they artificially inflated share prices by mischaracterizing the offers of willing buyers and the success of a newly implemented growth plan.

The suit's individual defendants include 13 current and former Kohl's board members, including Peter Boneparth, who stepped down from his position as chair in November, effective this month.

The suit's relevant period begins Oct. 20, 2020, the day Kohl's announced a new strategic plan to "drive top-line growth." A group of activist investors led by Macellum Capital Management responded to the announcement in February 2021, saying Kohl's had issues within the retail competition space that were "fixable" but required a more experienced board of directors, according to the suit.

The letter included criticisms of the board's approval of incentive plans that "effectively awarded executives targeted bonuses for declining sales results," the suit says.

According to the complaint, in April 2021, Kohl's and the investor group agreed two of the investor group's directors would join the Kohl's board and two existing board members would retire by 2022.

On Jan. 18, 2022, Macellum announced it was nominating its own director candidates for election at the annual shareholder meeting. The same day, Macellum also informed the market that Kohl's had received multiple offers from potential buyers, but Kohl's responded by calling Macellum's announcement "unfounded speculation," the suit says.

The suit alleges the defendants attempted to maintain their positions by adopting a poison pill strategy to dissuade further unsolicited offers, claiming changes to the board would hamper a potential sale. For instance, on Feb. 4, 2022, Kohl's said that the **buyout offers** received, including one worth nearly \$9 billion, were inadequate.

Poison pills are typically put in place to fend off buyers attempting a hostile takeover of a business at a low valuation. However, the suit alleges the reported offers represented more than a 30% premium to the preoffer share price.

"In reality, the board adopted the poison pill to ward off any unsolicited offers (no matter how favorable), rather than protecting the rights of shareholders, who may have benefited from other, higher offers or increased competition in the bidding process," the suit says. "Indeed, the board had no intention of accepting any offer."

The suit claims the truth "fully emerged" on July 1, 2022, when Kohl's announced it was no longer in negotiations for a sale to holding company Franchise Group Inc., which had been announced the previous month.

"Once FRG conducted its due diligence and thus the problems associated with the failed strategic

plan, it reduced its offering price drastically, such that there was no longer a deal to be made," the suit says.

On this news, Kohl's shares fell approximately \$7.01, or about 20%, to close at \$28.68 per share at market close on July 1, 2022, according to the suit.

The suit accuses the defendants of breaching their fiduciary duties and unjust enrichment.

The complaint states Kelley served a prelitigation demand to the board seeking an investigation into possible wrongdoing but "has received no substantive response."

"The board's failure to investigate the allegations in the demand and take even the most basic steps to preserve the company's claims, demonstrates the board's unwillingness to evaluate the demand in good faith. As such, this shareholder derivative action should proceed," the suit states.

Counsel for Kelley and a representative for Kohl's did not immediately respond to requests for comment Friday.

Kelley is represented by James M. Ficaró and John J. Gross of The Weiser Law Firm PC.

Counsel information for Kohl's and the individual defendants was not immediately available.

The case is Kelley v. Boneparth et al., case number 2:24-cv-00604, in the U.S. District Court for the Eastern District of Wisconsin.

--Editing by Drashti Mehta.



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Peloton Says Investors Are 'Manufacturing' Bike Recall Suit

By **Katryna Perera**

Law360 (May 17, 2024, 8:13 PM EDT) -- Fitness equipment company Peloton urged a New York federal judge on Friday to toss a suit alleging it overstated the safety of its bikes before the U.S. Consumer Product Safety Commission recalled roughly 2.2 million Peloton products over a bike seat defect, saying the investors are trying to "manufacture" a case from a voluntary recall.

In a dismissal **motion**, Peloton Interactive Inc. argues the investor's nearly 100-page complaint fails to allege a single actionable misrepresentation or omission and fails to show that any of the individual defendants acted with knowledge of wrongdoing.

Peloton says the complaint only relies on inactionable statements that were accurate when made, such as the challenged risk disclosures that warned against product recall risks.

"The fact that these risks 'eventually happened' does not make the risk disclosures actionable — it 'means that they were true,'" the motion states.

According to the motion, the investors also claim Peloton did not disclose the amount of future losses it would face related to the recall, but the company argues in its Friday filing that securities laws "do not demand clairvoyance," and the complaint still does not allege that any of the reported estimated expenses were inaccurate when made.

The other challenged statements in the complaint also fail because they are forward-looking, accompanied by meaningful cautionary language or statements of optimism, the motion contends.

Peloton further argues that the complaint's scienter allegations are generalized "about what defendants purportedly must have known as a collective group," which is insufficient to state a claim.

According to the motion, the investors rely on roughly 11 customer reports about issues with Peloton's bike seats to show that the individual defendants knew of the issue. However, Peloton argues that the reports are "vague and imprecise" and can't demonstrate scienter because it is not alleged that they were shared with the individual defendants or anyone else at Peloton.

"Plaintiffs' remaining allegations of scienter are red herrings that have nothing to do with the seat post recall, such as misleading allegations about a program for addressing a cosmetic rust issue; claims about a different recall involving a different Peloton product; and allegations about stock transactions that were neither unusual nor suspicious," the motion states. "None raise the required 'strong inference' of scienter."

The investors shoot back at the dismissal motion in a response filed Friday, saying the complaint alleges the defendants' fraud with "exacting particularity."

The investors argue the individual defendants knew of the issues with Peloton's bike seat because customer reports were analyzed and summarized monthly to the defendants.

"But defendants knew that if the [bike] defect was disclosed, Peloton would need to recall the bike. Thus, rather than disclose the looming safety issue, defendants hid the problem" for personal financial gain, the response asserts.

Plaintiff Sam Solomon launched the suit last **June**, claiming the bike seat recall caused the company's stock to decline by nearly 9% and that Peloton downplayed the need for additional reserves for future product recall expenses.

Peloton attributed recall expenses to its treadmills, telling shareholders in a May 2022 letter that voluntary recalls of its Tread and Tread+ products from the prior year reduced revenue for actual and estimated future returns for the quarter, according to the complaint. But Solomon contends the company knew its bike seats were prone to break or detach during use, which would likely lead to another recall of millions of products.

In May 2023, shortly before the bike recall was announced, Peloton stopped attributing product recall expenses to its treadmill products as it had done in prior quarters, the complaint states. The company instead attributed product recall expenses to adjustments and charges associated with more generalized "product recall related matters" while failing to tell investors what charges were associated with its bikes, the complaint says.

On May 11, 2023, the CPSC recalled nearly 2.2 million Peloton bikes, stating that "the bike's seat post assembly can break during use, posing fall and injury hazards to the user," according to the complaint.

The suit is on behalf of a proposed class of Peloton investors who purchased or otherwise acquired Peloton securities between May 10, 2022, and May 10, 2023.

Counsel for the investors declined to comment on Friday, and counsel for Peloton did not immediately respond to requests for comment.

The investors are represented by Shannon L. Hopkins, Gregory M. Potrepka, Rachel A. Berger and Amanda D. Foley of Levi & Korsinsky LLP, and Jeremy A. Lieberman, Emma Gilmore, Justin D. D'Aloia and Villi Shteyn of Pomerantz LLP.

Peloton and the individual defendants are represented by Mark P. Gimbel and Jordan S. Joachim of Covington & Burling LLP.

The case is Solomon v. Peloton Interactive Inc. et al., case number 1:23-cv-04279, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Sydney Price. Editing by Kristen Becker.



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Aramark Spinoff Faces Investor Action Over Slow Growth

By **Sydney Price**

Law360 (May 17, 2024, 11:04 PM EDT) -- Uniform supplier Vestis Corp. was hit with a proposed class action on Friday alleging that it concealed years of underfunding prior to being spunoff by Aramark last year, leaving it unable to grow its revenue and retain customers.

According to the suit filed by Plumbers, Pipefitters and Apprentices Local No. 112 Pension Fund in Georgia federal court, Aramark had "chronically underinvested" in its uniform division for years leading up to its October 2023 spinoff. The investment deficiencies left the business with outdated facilities and an underperforming sales force, and it is now unable to deliver on growth it had previously told investors it was well-positioned to deliver, the suit alleges.

In addition to Vestis, its CEO Kimberly Scott and Chief Financial Officer Rick Dillon are named as individual defendants in the suit.

The class period begins Oct. 2, 2023, the first day Vestis began trading on the New York Stock Exchange. Throughout the class period, the defendants praised the execution of their business strategy, the suit states. For example, in February the company told investors that it expects to continue delivering revenue growth in the range of 4% to 4.5%, the suit states.

The defendants also told investors it was seeing "great feedback" from its customers regarding Vestis' customer experience initiatives, according to the suit. When asked about problems with customer retention, Scott cited an "uptick in business closures," the complaint states.

The truth emerged on May 2, the suit alleges, when Vestis announced that its quarterly revenues were \$705 million, a 0.9% increase year-over-year. Scott said during the investor call that day that the underperformance was due to "short-term challenges related to sale productivity and deliberate moderated pricing actions."

During the call, the defendants also told investors that problems with customer retention were not the result of "business closures" as they had previously stated, the suit said.

Scott said that "we know that more than 70% of the [customer] cancellations are due to causes that are within our control."

The suit says that analysts had an overwhelmingly negative response to Vestis' announcements. According to the complaint, JPMorgan Chase downgraded the stock, citing "company specific challenges." Barclays reported "the need for further investment is more apparent than ever," the suits states. Baird questioned management's reliability, noting "credibility is low," according to the suit.

Vestis shares fell \$8.31, or about 45%, to close at \$10.16 on May 2, according to the suit.

The pension fund says the defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. The suit claims the defendants' statements aren't covered by the safe harbor provisions of securities laws and seeks damages on behalf of the proposed class.

Counsel for the pension fund and a representative of Vestis did not immediately respond to requests

for comment on Friday.

Plumbers, Pipefitters and Apprentices Local No. 112 Pension Fund is represented by W. Thomas Lacy of Jr. of Lindsey & Lacy PC and Rachel A. Avan and Marco A. Dueñas of Saxena White PA.

Counsel information for Vestis and the individual defendants was not immediately available on Friday.

The case is Plumbers, Pipefitters and Apprentices Local No. 112 Pension Fund v. Vestis Corporation et al., case number 1:24-cv-02175, in the U.S. District Court for the Northern District of Georgia.

--Editing by Emily Kokoll.

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Dolce & Gabbana Sued Over 'Worthless' Digital Outfit NFTs

By **Katryna Perera**

Law360 (May 17, 2024, 6:48 PM EDT) -- Luxury fashion brand Dolce & Gabbana has been hit with a shareholder class action in New York federal court, alleging it sold consumers "essentially worthless" non-fungible tokens that it misrepresented as high-value and abandoned the project while retaining over \$25 million that was used to fund it.

Plaintiff Luke Brown filed a **complaint** Thursday against the luxury fashion retailer, saying the digital assets that were sold "did not have the characteristics, uses, or benefits defendants advertised and promoted."

According to the complaint, Dolce & Gabbana and NFT marketplace UNXD Inc., which is also named as a defendant, jointly created and marketed a digital asset project in 2022 called the DGFAMILY, based on the Dolce & Gabbana brand.

The DGFAMILY project was used to sell NFTs that customers were told would secure a set of allegedly "high value" benefits and were supposed to be delivered over two years at a rate of once per quarter.

The benefits included a combination of digital outfits for use in a future metaverse called "Decentraland," physical clothing from Dolce & Gabbana and tickets to live events, according to the complaint.

However, Brown says Dolce & Gabbana and UNXD failed to provide the complete set of benefits promised to himself and other customers.

"Defendants never provided a complete set of products plaintiff secured through his purchases of digital assets, despite repeatedly promising him the products would be delivered, while inevitably continuing to push back the delivery date," the complaint states.

Brown says the defendants misrepresented the status of the DGFAMILY project to "cajole" investors and the public into purchasing the NFTs while enriching the project's founders, promoters, managers and affiliates.

The complaint also states that the defendants manipulated the price of the NFTs by using investors to buy DGFAMILY products, driving up demand and price, and eventually executed a "rug pull" on the entire project — a term used to describe a scheme in which an NFT developer solicits funds from customers promising them certain benefits.

"Once the purchasers' funds are used to purchase the NFTs, the developers abruptly abandon the project and fail to deliver the promised benefits all while fraudulently retaining the purchasers' funds," the complaint states.

According to the complaint, after selling the NFTs, the defendants transferred millions of dollars worth of customers' cryptocurrency to their own wallets and then abandoned the project.

"When the magnitude of defendants' failure to provide the benefits promised and support the project were revealed, the trading price of DGFAMILY products plummeted," the complaint states.

Brown says he invested \$6,000 in DGFAMILY products and lost \$5,800 due to the defendants' alleged

misconduct.

His suit is on behalf of a proposed class of all individuals and entities who purchased or had an initial transfer of digital assets from the DGFamil project from April 24, 2022, through the filing of the suit.

He seeks damages, civil penalties and attorney fees.

In a statement to Law360 on Friday, Tom Kherkher of Attorney Tom & Associates, counsel for Brown, said, "We believe the defendants pocketed more than \$25 million with the DGFamil cryptocurrency project."

"The project was abandoned shortly after the defendants received the money, leaving consumers without anything close to what they were promised," he added.

Representatives for Dolce & Gabbana did not immediately respond to requests for comment on Friday, and UNXD could not immediately be reached.

Brown is represented by Jarrett L. Ellzey, Leigh S. Montgomery and Alexander G. Kykta of Ellzey & Associates PLLC, Tom Kherkher of Attorney Tom & Associates and Alex P. Clavering.

Counsel information for the defendants was not immediately available.

The case is Brown v. Dolce & Gabbana USA Inc. et al., case number 1:24-cv-03807, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.

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Co-Lead Counsel Named In Baby Food Toxins MDL

By **Henrik Nilsson**

Law360 (May 17, 2024, 9:39 PM EDT) -- A California federal judge has tapped attorneys from Wisner Baum LLP and the Wagstaff Law Firm PC to lead multidistrict litigation alleging products from baby food manufacturers and distributors, including Walmart Inc. and Gerber Products Co., contain toxic metals and caused children to develop autism spectrum disorder and other conditions.

U.S. District Judge Jacqueline Scott Corley appointed R. Brent Wisner of Wisner Baum and Aimee Wagstaff of the Wagstaff Law Firm on Thursday to co-lead counsel the recently consolidated litigation targeting the alleged presence of toxins in commercial baby food products. The defendants include manufacturers and sellers such as Beech-Nut Nutrition Co., Hain Celestial Group Inc., Sprout Foods Inc. and Nurture LLC, among others.

The judge also appointed Wisner Baum attorneys Monique Alarcon and Pedram Esfandiary as liaison counsel and steering committee member, respectively. The committee consists of lawyers from 14 other law firms representing clients across the country.

Brooke K. Kim of DLA Piper was named the defendants' liaison counsel, according to the order.

In a Friday statement, Wisner said the attorneys have collected "compelling" evidence over the past two years to secure justice for the families affected by toxins in baby food products.

"This litigation is not just about compensation; it's about protecting the health and future of our children. When food companies make billions selling food containing poison — food that is simply unfit for human consumption, let alone a baby's consumption — there needs to be accountability," Wisner said. "This litigation is a first step in dealing with a generation of babies that have been poisoned and now face an epidemic of autism."

The plaintiffs, all of whom are minors, claim they were exposed to high levels of heavy metals such as arsenic, lead, cadmium and mercury after consuming the defendants' baby food products. As a result, the children allegedly suffered brain injury that led to autism spectrum disorder and attention deficit hyperactivity disorder.

The cases consist of actions pending in Arizona, California, Missouri, Nevada, Louisiana and Washington federal courts.

The Judicial Panel on Multidistrict Litigation **consolidated the suits** on April 11. Wisner Baum said in a statement that at least 24 similar cases throughout the country will be added to the mass tort.

The companies **fought against consolidation**, arguing the JPML should follow its own example from **three years ago** when it decided the companies' marketing and manufacturing were too different to warrant consolidation.

The manufacturers, who maintain there are no scientific studies supporting the claim that heavy metals lead to ASD, ADHD or other such conditions, argued many of the same factors that led the JPML to reject consolidation before still apply. They said centralization won't prompt efficient conduct of the litigation because presuit discovery is already 98% complete, and there are already agreements to share evidence between the suits.

The "MDL represents a critical opportunity to address the gross negligence of the baby food industry, which has led to widespread harm," Esfandiary said in a statement Friday.

Counsel for Beech-Nut, Walmart, Gerber, Hain Celestial, Sprout Foods Inc. and Nurture did not respond to requests for comment Friday.

The suits were filed following a **report issued** in February 2021 by an economic and consumer policy subcommittee of the U.S. House of Representatives that found some commercial baby foods are tainted with significant levels of toxic metals, including arsenic.

The plaintiffs are represented by Wisner Baum, Wagstaff Law Firm, Ben Crump Law, Motley Rice LLC, Moore Law Group PLLC, Peiffer Wolf Carr Kane Conway & Wise LLP, The Russo Firm, DiCello Levitt LLP, Pendley Baudin & Coffin LLP, Douglas & London PC, Levin Papantonio Rafferty, Simmons Hanly Conroy LLC and Lieff Cabraser Heimann & Bernstein LLP, among others.

Beech-Nut is represented by Livia M. Kiser of King & Spalding LLP.

Walmart is represented by Michael L. Resch of King & Spalding LLP.

Gerber is represented by Bryan A. Merryman of White & Case LLP.

Hain Celestial is represented by Michael X. Imbroscio of Covington & Burling LLP.

Sprout Foods Inc. is represented by Nancy Erfle of Gordon Rees Scully Mansukhani LLP.

Nurture is represented by Brooke K. Kim of DLA Piper.

The case is In Re: Baby Food Products Liability Litigation, MDL number 3101, in the U.S. District Court for the Northern District of California.

--Additional reporting by Lauren Berg and Mike Curley. Editing by Drashti Mehta.

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