

Supreme Court to review lawsuit over Facebook's role in Cambridge Analytica scandal

DJ [dailyjournal.com/articles/379111-supreme-court-to-review-lawsuit-over-facebook-s-role-in-cambridge-analytica-scandal](https://www.dailyjournal.com/articles/379111-supreme-court-to-review-lawsuit-over-facebook-s-role-in-cambridge-analytica-scandal)

U.S. Supreme Court,

Securities,

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Appellate Practice

Jun. 11, 2024

The case involves a shareholder lawsuit filed in the wake of the scandal, alleging that Facebook misled the public about the threat of improper access to data and users' control over their information.

Meta Platforms Inc. will get another chance to duck an investor lawsuit filed in the wake of the 2019 Cambridge Analytica scandal as the U.S. Supreme Court on Monday agreed to reconsider the appellate court's ruling moving the case forward.

"The circuits have split three ways concerning what public companies must disclose in the 'risk factors' section of their 10-K filings" with the U.S. Securities and Exchange Commission and "disagree on the proper pleading standard for the loss causation element of a private securities fraud claim," read the high court's order granting review. Oral arguments are expected in the fall.

After news broke that British political consulting firm Cambridge Analytica collected Facebook users' personal information for several years, shareholders sued the social media platform over allegedly misleading the public about the threat of improper access to data and users' control over their information. In 2019, Facebook agreed to pay \$5 billion in civil penalties to settle charges by the U.S. Federal Trade Commission and SEC over the scandal.

The 9th U.S. Circuit Court of Appeals ruled 2-1 last October that while most shareholder claims were not sufficiently alleged, one securities fraud claim was adequately pleaded. Partially dissenting from his colleagues on the panel -- U.S. Circuit Judges M. Margaret

McKeown and Jay S. Bybee -- Judge Patrick J. Bumatay said Facebook's risk factor statements warned about harm to its reputation and business because of data breaches.

"These statements do not represent that Facebook was free from significant breaches at the time of the filing. And if a reasonable investor thought so based on Facebook's 10-K statements, that 'reasonable' investor wasn't acting so reasonably," wrote Bumatay. *In re: Amalgamated Bank et al. v. Facebook Inc. et al.*, 22-15077 (9th Circ., filed Jan. 19, 2022).

The 6th Circuit has held that companies need not disclose past instances when a risk has materialized while the 1st, 2nd, 3rd, 5th, 10th, and D.C. Circuits have held that companies must disclose that a risk materialized in the past if the company knows that event will harm the business.

Meta Platforms is defended by Gibson Dunn & Crutcher LLP and the plaintiff shareholders are represented by Robbins Geller Rudman & Dowd LLP, Goldstein Russell & Woofert LLC, and Pomerantz LLP. None of the firms responded to an inquiry for comment on the Supreme Court's order granting review.

Calling the 9th Circuit's decision to revive the plaintiffs' claims an "extreme outlier position," Gibson Dunn partner and chief operating officer Joshua S. Lipshutz said requiring companies to disclose past instances of materialized risk that pose no known threat made disclosures less useful to investors and encouraged plaintiffs to plead fraud-by-hindsight. *Facebook Inc. et al. v. Amalgamated Bank et al.*, 23-980 (Supr. Ct., filed Mar. 6, 2024).

Lipshutz added that the appellate panel was wrong to conclude that the plaintiffs plausibly alleged that a single corrective disclosure, following news reports that Cambridge Analytica had misappropriated Facebook data to support the Trump campaign, caused two substantial stock drops. "Until this ruling, no court in any jurisdiction had recognized two loss events resulting from the same disclosure ... If permitted to stand, this untenable holding will encourage plaintiffs to flock to the 9th Circuit in hopes of inflating their recoverable losses, to the detriment of public companies nationwide," the attorney wrote.

In his opposition motion, Goldstein Russell partner Kevin Russell said Facebook's only argument for how the unauthorized disclosure of millions of users' private data supposedly posed no risk of business harm was that by the time Facebook made the challenged statements, the breach had been fully disclosed and the public had not reacted. The 9th Circuit rejected this argument and stressed that companies never have an obligation to disclose immaterial information, the attorney continued. "Instead, it held that a company cannot treat an adverse event as a hypothetical risk when the risk is material and has already materialized," said Russell.

Supreme Court Agrees to Take Up Facebook User Data Disclosure Case

K [dandodiary.com/2024/06/articles/securities-litigation/supreme-court-agrees-to-take-up-facebook-user-data-disclosure-case](https://www.dandodiary.com/2024/06/articles/securities-litigation/supreme-court-agrees-to-take-up-facebook-user-data-disclosure-case)

June 10, 2024



By Kevin LaCroix on June 10, 2024
Posted in Securities Litigation



The U.S. Supreme Court has agreed to take up a case involving risk factor disclosures in connection with the alleged misuse of Facebook user data by Cambridge Analytica. The case will address a Circuit Court split on the question of what

companies must disclose in its risk factors about past instances where risks materialized. As Facebook put it in its petition for writ of certiorari, the question the case presents is whether risk factor disclosures are misleading if they do not disclose past materializations of the risk even if the past event poses no current risk to the company's ongoing or future business.

The case itself is important because it raises important issues about potential securities law liabilities arising from privacy issues, and the Court's consideration of the case could address important continuing concerns about corporate risk factor disclosures. A copy of the Court's June 10, 2024, order in *Facebook, Inc. v. Amalgamated Bank* granting Facebook's petition can be found [here](#).

Background

This case arises out of the Facebook-Cambridge Analytica User Data Scandal. Cambridge Analytica allegedly improperly used Facebook user data to target voters in connection with the 2016 U.S. Presidential election. News reports revealed Cambridge Analytica's use of Facebook user data. However, a subsequent whistleblower-based news report revealed the extent of Cambridge Analytica's use of the data, and its continued use of the data even after Facebook had become aware of the misuse and had asked Cambridge Analytica to destroy the data.

Facebook investors filed several securities class action lawsuits against Facebook (now known as Meta) and certain of its directors and officers. The lawsuits (later consolidated) raised a number of allegations, including, with greatest relevance to the issues the Supreme Court has agreed to take up, that the company in its risk factor disclosures had referred to

the risks to the company of an unauthorized user data disclosure, but had presented the risk as hypothetical when in fact it has already materialized. The district court granted the defendants' motions to dismiss, and the plaintiff appealed.

As discussed here, in an October 18, 2023, opinion, the Ninth Circuit, with Judgeumatay partially dissenting, affirmed in part and reversed in part the district court's dismissal. Of greatest significance, the appellate court reversed the lower court and revived the lawsuit with respect to the plaintiffs' allegations concerning what Facebook had disclosed about what it knew about Cambridge Analytica's misuse of user data. Of greatest significance to the Supreme Court's consideration of the case, the appellate court said that "Because Facebook had presented the prospect of misuse of user data as "purely hypothetical" when it had already occurred, such a statement "could be misleading even if the magnitude of the ensuing harm was still unknown."

The Cert Petition

On March 4, 2024, Facebook filed a petition to the Supreme Court for a writ of certiorari. In its petition, Facebook argued that the Ninth Circuit panel's decision was erroneous, and sought to have the Supreme Court review the following question: "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?" (Facebook also urged the Court to take up a second question having to do with pleading loss causation, but the Court agreed only to take up the first question.)

In seeking to have the Court take up the case, Facebook argued that the Circuit courts have split on the question of what risk factor disclosures are required with respect to prior events. Facebook argued that prior to this case, the Circuit Courts had developed differing approaches: the Sixth Circuit does not require any risk factors disclosures of past events; and six other circuits require risk factor disclosures only if the company knows the past events will harm the business. In this case, Facebook argued, a two-judge panel adopted, according to Facebook, an "extreme, outlier" position, even if past event poses no known threat of business harm.

In addition to arguing that the Ninth Circuit's standard makes no sense and would result in risk factor disclosures becoming less useful to investors as it would drown them in irrelevant information about past incidents with no current relevance, and would also encourage "plaintiffs to plead fraud-by-hindsight by attaching significance after a stock drop to events a company had no reason to know were significant at the time of disclosure."

In their opposition to the petition, the plaintiffs first argued that the question Facebook argues that the case presents is based on a faulty premise that the prior incident involved no known current or future risk. The Ninth Circuit's opinion, the plaintiffs argue, in to the contrary. The

plaintiffs also argued that there is in fact no circuit split, and that in fact the circuit rulings can be reconciled, and that the Ninth Circuit's holding is also consistent – in each case, the plaintiffs argued, the courts held that a risk cannot be presented as hypothetical if it has already occurred.

Several parties filed amicus briefs in support of Facebook's petition. For example, the U.S. Chamber of Commerce argued in an amicus brief that the Ninth Circuit's ruling "all but guarantees that every incident that, with the full benefit of hindsight, can be said to have harmed a public company's business will spawn securities fraud claims alleging that the company should have disclosed the event sooner. As the only way to play defense against that outcome, companies will be forced to bloat their future risk disclosures with descriptions of past events—even those that the company does not believe will have any real world impact on its business."

On June 10, 2024, the U.S. Supreme Court granted the writ of certiorari. The case will be on the Court's docket for its 2024-2025 term, which begins in October.

Discussion

Any time the U.S. Supreme Court agrees to take up a securities case, it is significant. The Court simply does not take up that many securities cases, and any occasion on which the Court will be called upon to weigh in on the securities laws is noteworthy. Also, any time the U.S. Supreme Court takes up a securities case there is always the possibility that that Court will introduce an approach that shakes up the securities litigation world. (Think, for example, of the *Morrison* case and its aftermath.)

The fact that the Supreme Court has agreed to take up this case is of particular significance. It is not an uncommon allegation at all in securities complaints that the defendants presented risks as hypothetical that have allegedly already materialized. It will be interesting to see what the Court makes of these kinds of allegations, in the context of a very high profile lawsuit. The Court's ruling on this case could also have larger significance with respect to risk factor disclosures generally.

There is at least one other reason why the Court's taking up this case could be significant. That is because at its heart this case is about privacy. The fundamental wrong that Cambridge Analytica (and by extension Facebook) allegedly committed is a violation of Facebook users' privacy rights. I have long thought that privacy related issues could represent a significant new area of corporate and securities litigation exposure. This case has been one of the most prominent examples of how privacy-related issues can translate into securities litigation. I know, I know, the Supreme Court case is not going to be about privacy issues as such. However, if any portion of the case survives the Supreme Court's review, it could have important implications about privacy issues as a source of litigation risk.

In any event, this case is now on the Court's docket for its next term, and it will be interesting to watch.

US Supreme Court to hear Facebook bid to scuttle shareholder lawsuit

 [reuters.com/legal/us-supreme-court-hear-facebook-bid-scuttle-shareholder-lawsuit-2024-06-10](https://www.reuters.com/legal/us-supreme-court-hear-facebook-bid-scuttle-shareholder-lawsuit-2024-06-10)

John Kruzel

Figurines with computers and smartphones are seen in front of Facebook logo in this illustration, July 24, 2022. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

WASHINGTON, June 10 (Reuters) - The U.S. Supreme Court agreed on Monday to hear a bid by Meta's (META.O) , opens new tab Facebook to scuttle a private securities fraud lawsuit accusing the social media platform of misleading investors in 2017 and 2018 about the misuse of its user data by the company and third parties.

The justices took up Facebook's appeal of a lower court's decision allowing a shareholder lawsuit brought in California and led by Amalgamated Bank (AMAL.O) , opens new tab to proceed. The court will hear the case in its next term, which begins in October.

The plaintiffs filed a class action lawsuit in 2018 after Facebook's stock fell following media reports that the British political consulting firm Cambridge Analytica had used improperly harvested Facebook user data in connection with Donald Trump's successful presidential campaign in 2016. The Cambridge Analytica breach exposed the data of as many as 87 million users.

The plaintiffs amended their lawsuit in 2018 to add a second stock decline that year on reports that Facebook had shared data with dozens of third parties without the express consent of users. The suit seeks unspecified monetary damages.

The plaintiffs accused Facebook and top company officials of violating the Securities Exchange Act of 1934 by making false and misleading statements in 2017 and 2018, including that user data could be compromised when the company was aware in 2015 that Cambridge Analytica had violated its privacy policies.

U.S. District Judge Edward Davila dismissed the lawsuit by the shareholders in 2021 but the San Francisco-based 9th U.S. Circuit Court of Appeals in a 2-1 ruling restored their claims.

"The problem is that Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired," Judge Margaret McKeown wrote in the 9th Circuit decision.

Facebook urged the justices to take up its appeal, arguing that the 9th Circuit's ruling would "force public companies to inform investors of past incidents that pose no known threat to the business."

The Cambridge Analytica data breach fueled government investigations into Facebook's privacy practices, lawsuits and a U.S. congressional hearing where Meta Chief Executive Mark Zuckerberg was grilled by lawmakers.

Facebook paid more than \$5 billion in penalties to U.S. authorities over the Cambridge Analytica scandal and paid \$725 million to settle a separate class action lawsuit by Facebook users.

Reporting by John Kruzel; Editing by Will Dunham

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Roger McNamee
@Moonalice

...

Important reminder: FB's head of government affairs is best friends with Brent Kavanaugh. This will be an issue each time there is a SCOTUS case that touches Meta.



Jason Kint 🌐 @jason_kint · 7h

I mean my concern here about Justice Kavanaugh being involved in the Facebook and Kaplan matter isn't small.

"We share our families."

And Kaplan was very much involved throughout the matter, his boss Sandberg, Zuckerberg and the board. [wired.com/story/facebook...](https://www.wired.com/story/facebook-justice-kavanaugh/)

Later that year, Kaplan would also help someone else prepare for a congressional grilling. In June, his old friend Brett Kavanaugh was nominated to the Supreme Court. Some in the company knew about the two families' close relationship. ("We share our families," Kaplan's wife, Laura, would say. "We shared our kids' bicycle crashes, their broken bones.") But Kaplan's involvement ran deeper than most realized. The night before Justice Anthony Kennedy announced his retirement, Kaplan

announced his retirement, Kaplan worked the phones in Washington's rarefied legal channels, whipping up support for Kavanaugh, according to the author Ruth Marcus. And around the time Trump announced the nomination, the Kavanaughs went over to stay at the

1:47 PM · Jun 10, 2024 · 1,666 Views



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Post your reply

Reply



Larry Rosenthal @LarryRosenthal · 1h



The bad news, women rights, the good news, lots of beer. Sigh.



6



kevin @kevin97642887 · 1h



that's not an accident- why do you think he was hired



10



Later that year, Kaplan would also help someone else prepare for a congressional grilling. In June, his old friend Brett Kavanaugh was nominated to the Supreme Court. Some in the company knew about the two families' close relationship. ("We share our families," Kaplan's wife, Laura, would say. "We shared our kids' bicycle crashes, their broken bones.") But Kaplan's involvement ran deeper than most realized. The night before Justice Anthony Kennedy announced his retirement, Kaplan worked the phones in Washington's rarefied legal channels, whipping up support for Kavanaugh, according to the author Ruth Marcus. And around the time Trump announced the nomination, the Kavanaughs went over to stay at the Kaplans', two blocks away in Chevy Chase, to avoid notice by the press.

 **Jason Kint**  @jason_kint · 8h

Replying to @jason_kint

Here is the actual first question as written. One immediate item, it's outrageous if Justice Kavanaugh didn't/doesn't recuse seeing his reported best friend, Joel Kaplan, was directly involved in the matter and its cover up. He threw his SCOTUS confirmation party IIRC. /2

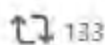
The questions presented are:

1. Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?
2. Does Federal Rule 8 or Rule 9(b) supply the proper pleading standard for loss causation in a private securities-fraud action?

8:04 AM · Jun 10, 2024 · **20.4K** Views



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15





Jason Kint  @jason_kint · 7h

...

If you're wondering about Kaplan's involvement, he's likely the redacted individual on threads showing knowledge ahead of press, he testified to Irish Parliament afterward, he accompanied Zuckerberg to Brussels and DC for testimony. He's as deep as anyone in it. Name everywhere.



↻ 6

♡ 19

📊 1.2K



Darth August West @DarthAugustWest · 7h

...

Id love a [@MeidasTouch](#) breakdown on this, love seeing [@mspopok](#) all riled up about corruption of the highest court in the land



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♡ 1

📊 84



Alexis8.bsky.social  @AlexFTweets · 7h

...

It's a multinational criminal enterprise. cc: [@sarahkendzior](#)



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SH1001 @Stlhd100 · 7h

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Bloomberg Law News 2024-06-10T18:09:57881699893-04:00

Motley Rice Apportioned \$396 Million in Opioid Litigation Fees

By Shweta Watwe 2024-06-10T16:08:32000-04:00

- Motley Rice to get 18.6% of fees, largest share for any firm
- Fee fund is \$2.13 billion, two other firms to get about 8%

A court-appointed panel overseeing the distribution of attorneys' fees in consolidated opioid litigation recommended Motley Rice LLC receive the lion's share of a \$2.13 billion pool.

The firm will receive 18.6% of the fund, or \$396 million, according to the fee panel's order filed June 7 in the US District Court for the Northern District of Ohio.

Simmons Hanly Conroy LLC is set to receive 11.4% of the fund, Napoli Shkolnik PLLC will get 8.4%, and Robbins Geller Rudman & Dowd LLP will get 8.1%.

A consortium of other firms will also receive 11.4% of pool set to be further divvied up according to their own agreement, the order says.

Judge Dan Aaron Polster said firms have until June 21 to appeal the recommendations.

The \$2.13 billion fee fund is part of a larger \$46 billion settlement resolving litigation from local governments over drugmakers, distributors, and pharmacies' roles in fueling the opioid crisis. The settlement doesn't cover bankrupt companies like Purdue Pharma LP, which settled for \$6 billion. The Supreme Court is currently [reviewing](#) the legality of the Purdue settlement.

The case is [In re Nat'l Prescription Opiate Litig.](#) , N.D. Ohio, No. 1:17-md-02804, 6/7/24 .

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Autodesk Board Members Hit With Shareholder Suit Over Late 10-K

By Ufonobong Umanah

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-03451](#)

Bloomberg Law News 2024-06-11T12:04:56677494914-04:00

Autodesk Board Members Hit With Shareholder Suit Over Late 10-K

By Ufonobong Umanah 2024-06-10T19:38:14000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-03451](#)

Executive officers and directors of Autodesk were hit with a shareholder derivative suit alleging that their failure to maintain sufficient control over its financial reporting led to a significant drop in the company's stock price.

Autodesk reported on April 1 that it launched an internal investigation relating to the company's "free cash flow and non-GAAP operating margin practices," and said because of that investigation it would fail to file a 10-K by an initial deadline and, it would later say, an extended deadline.

Alpesh Shah sued after the price of Autodesk stock sunk on April 2, and then "declined further" on April 18, according to the complaint filed in the US District Court for the Northern District of California.

Shah alleged that the board members of the company— that sells 2-D and 3-D modeling software AutoCAD— said they oversaw "a strong system of internal controls and compliance with corporate policies and applicable laws and regulations."

The April notices appear to show that there were undisclosed "material deficiencies in Autodesk's internal controls" relating to two fiscal health measures, the complaint alleges, saying the board members collectively issued false and misleading statements that "omitted to state material adverse facts."

The complaint asserts a federal claim for violation of Section 14(a) the Exchange Act and Rule 14a-9, and five other claims relating to breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, abuse of control, and waste of corporate assets.

Shah seeks damages, including punitive damages, as well as attorneys' fees.

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

Judge Charles R. Breyer is assigned the case.

Wolf Haldenstein Adler Freeman & Herz LLP, Rigrodsky Law PA, and Grabar Law Office represent Shah.

The case is Shah v. Anagnost , N.D. Cal., No. 3:24-cv-03451, complaint 6/7/24 .

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iRobot Directors, Officers Hit With Suit Over Failed Amazon Deal

By Peter Hayes

- **DOCKET:** D. Mass.
- **TRACK DOCKET:** [No. 24-cv-11498](#)

Bloomberg Law News 2024-06-11T12:05:18066107445-04:00

iRobot Directors, Officers Hit With Suit Over Failed Amazon Deal

By Peter Hayes 2024-06-10T14:27:46000-04:00

- **DOCKET:** D. Mass.
- **TRACK DOCKET:** [No. 24-cv-11498](#)

The directors and officers of iRobot Corp. are facing a shareholder derivative action alleging they injured the company by concealing due diligence issues and regulatory red flags with Amazon.com Inc.'s attempted \$1.4 billion buyout of the Roomba vacuum cleaner manufacturer.

The defendants, "in breach of their fiduciary duties owed to iRobot," made false and misleading statements that opened up the company to a securities fraud class action, according to the complaint filed in the US District Court for the District of Massachusetts.

The complaint alleges the defendants didn't disclose to investors that the proposed sale was unlikely to win approval from US and European antitrust regulators. iRobot's stock price fell Jan. 29, 2024 when the companies announced they agreed to terminate the merger, the complaint alleges.

Because of the defendants' actions, the company will need need to conduct internal investigations, and implement adequate internal controls, the complaint alleges. The company has also suffered losses from the waste of corporate assets, and "due to the unjust enrichment" of the individual defendants, according to the complaint. As a result, the complaint alleges, iRobot "will have to expend many millions of dollars."

The derivative action comes three months after the filing of a proposed shareholder class action over the merger seeking damages for the proposed class members.

The complaint states claims for violation of Section 14(a) of the Securities Exchange Act, breach of fiduciary duties, unjust enrichment, waste of corporate assets, gross mismanagement, and abuse of control. And addition claim for contribution under Sections 10(b) and 21D of the Exchange Act is stated against only two defendants.

The complaint seeks declaratory and injunctive relief, an award of damages to iRobot, attorneys' fees, and costs.

The company didn't immediately respond to a request for comment.

The Brown Law Firm PC represents named plaintiff Anthony Wren.

The case is Wren v. iRobot Corp. , D. Mass., No. 24-cv-11498, complaint 6/8/24 .

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Petrobras Unable to Duck Investor Suit After Bribery Scandal (1)

By Matthew Bultman 2024-06-11T11:21:04000-04:00

- Petrobras accused of defrauding investor by hiding bribery
- State-run company's immunity argument rejected by court

A federal appeals court rejected Petróleo Brasileiro SA's effort to dodge a lawsuit in the US from funds that invested over \$220 million in a rig builder involved in the state-owned oil company's bribery scandal.

EIG Energy investment funds can continue with the lawsuit despite a federal law that generally prohibits lawsuits against foreign government entities, the US Court of Appeals for the D.C. Circuit said Tuesday, affirming a lower court's decision.

An exception to the law allows US courts to exercise jurisdiction if a foreign sovereign's commercial activities cause a direct effect in the US. Petrobras engaged the US plaintiff, EIG, in discussions over many months and secured a large investment, causing such an effect, the D.C. Circuit said.

"Nor was the direct effect in the United States the result of happenstance or coincidence," the court said, noting Petrobras pitched the investment opportunity at conferences attended by US investors.

The suit is part of the fallout from "Operation Car Wash"—a probe by Brazilian authorities into systemic bribery at Petrobras. The oil company previously agreed to pay hundreds of millions of dollars in criminal penalties to US and Brazilian authorities.

The EIG funds want to recover a \$221 million investment in Sete Brasil Participações, a company Petrobras created to construct a fleet of drill ships, along with punitive damages. Sete collapsed after its role in the bribery scandal became public and the investment was worthless.

The district court, after denying Petrobras request for judgment based on immunity, found the company was liable for fraud and aiding-and-abetting Sete's fraud on EIG in a 2022 [decision](#). The court didn't decide damages.

The D.C. Circuit declined to hear Petrobras' argument that the district court was too quick to decide liability.

Cases against foreign sovereigns, when allowed, must follow a set sequence. Petrobras said the trial court needed to conclusively rule on the immunity issue before turning to the substance of the case.

The D.C. Circuit said it didn't need to decide that issue now, assuming it even could.

"Neither fairness nor efficiency weighs in favor of" immediate review, the court said. "Petrobras voluntarily briefed the merits and thus invited the district court to rule upon them even if the immunity question were not yet conclusively resolved," the panel noted.

EIG declined to comment. A representative for Petrobras didn't immediately respond to a request for comment.

Hogan Lovells US LLP represents Petrobras. Kramer Levin Naftalis & Frankel LLP represents EIG.

The case is [EIG Energy Fund XIV LP v. Petroleo Brasileiro SA](#) , D.C. Cir., No. 22-07118, 6/11/24 .

(Updates with additional reporting throughout.)

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Bloomberg Law News 2024-06-11T13:23:24790481697-04:00

Battery Recycler Li-Cycle Gets Investor Suit Tossed for Good (1)

By Martina Barash 2024-06-11T12:01:54000-04:00

- Costs mounted for facility to make EV battery materials
- Investors failed to show company made false statements

Li-Cycle Holdings Corp. investors failed to show securities fraud in a proposed class action over cost overruns at a new battery recycling facility, a federal court said in throwing the case out with finality.

To the extent the company's challenged statements about the progress of the facility's construction and two other issues are actionable, the investors didn't adequately allege they were false or misleading, Judge Jed Rakoff said Monday for the US District Court for the Southern District of New York.

The investors also failed to show the necessary level of intent for securities fraud, he said.

The Canadian company, which aims to recycle batteries and battery manufacturing scrap into new lithium-ion batteries for electric vehicles, announced a \$75 million infusion from metals miner Glencore Plc in March in a quest to complete the Rochester, N.Y., plant. Soon afterward, it also announced a management reorganization and job cuts. An 8-for-1 stock consolidation became effective June 3, according to a company [press release](#).

Li-Cycle's hub-and-spoke business model involves reclaiming nickel, cobalt, and lithium in "spoke" facilities—already in operation—and converting the extracted metal powder to battery-grade materials in the Rochester "hub," according to the court.

Hub Progress

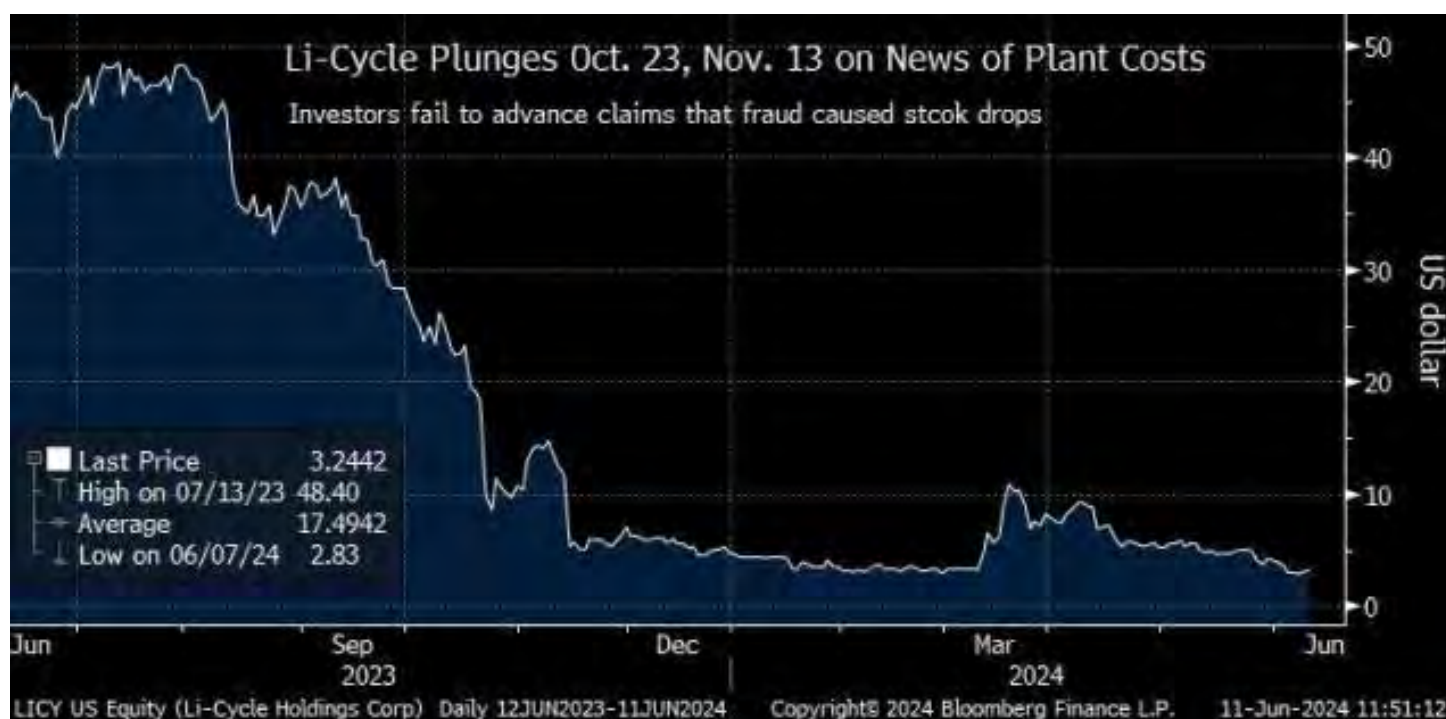
The shareholders [alleged](#) the company touted progress on the hub project starting in June 2022, when it disclosed a \$485 million estimate for total capital investment in the facility and projected it would be completed in phases starting in 2023. In January 2023, Li-Cycle reiterated that the project

was on track in terms of budget and schedule, but by May the company indicated that costs for the project were trending to the higher end of the budgeted range, the investors said.

On Oct. 23, however, Li-Cycle announced that escalating construction costs would exceed its previously disclosed guidance, and that the company's board had decided to pause construction of the Rochester hub pending a review.

That day, Li-Cycle's share price fell 46% to \$1.23, according to the complaint.

Then, in its third-quarter report Nov. 13, Li-Cycle stated that the cost had risen to between \$850 million to \$1 billion, and that it wouldn't be able to receive funds from a conditional US Department Energy loan until it raised additional capital, the investors said. Its stock price fell from \$1.47 to \$0.66 in a day, the complaint says. That 55% loss was the stock's biggest drop ever, according to data compiled by Bloomberg.



Rakoff dismissed the second version of the complaint. The investors failed to show that statements about the hub's construction, the government loan, or Li-Cycle's characterization of a Canadian Stock Exchange requirement directed at a company founder were false or misleading when made, he said.

And an inference that company leadership was "led astray by a feasibility study" that didn't "accurately foresee the difficulties attending the hub's construction" is more likely than an inference of

fraudulent intent, the judge said.

Pomerantz LLP and The Portnoy Law Firm are lead counsel for the investors. Freshfields Bruckhaus Deringer US LLP represented Li-Cycle.

The case is [Hubiack v. Li-Cycle Holdings Corp.](#) , 2024 BL 197289, S.D.N.Y., No. 23-cv-9894, 6/10/24

(Updated with information about stock consolidation in fourth paragraph and price graph after ninth paragraph.)

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Bloomberg Law News 2024-06-11T13:54:50831215922-04:00

E-House's Buyout Statements Fell Short of Fraud, 2d Cir. Says

By Martina Barash 2024-06-10T16:28:42000-04:00

- US investors alleged company undervalued itself pre-buyout
- High court's *Macquarie* ruling used to toss 'omission' claim

E-House Holdings Ltd. investors didn't show the Chinese real estate services company made misleadingly tepid projections in connection with a 2016 take-private buyout, the Second Circuit said Monday in affirming the suit's dismissal.

And the US Supreme Court's [Macquarie Infrastructure Corp. v. Moab Partners, L.P.](#) decision this year bars the investors' theory that E-House's failure to provide alternate projections about its business was an improper omission, the US Court of Appeals for the Second Circuit said in an unsigned, unpublished opinion. Such "pure omissions" are no longer actionable under Rule 10b-5, the implementing rule for Section 10(b)(5) of the Securities Exchange Act, the panel said in what appears to be the circuit's first use of the high court decision.

Altimeo Asset Management, Maso Capital Investments Ltd., Blackwell Partners LLC-Series A, and Crown Managed Accounts SPC sued on behalf of a proposed class of E-House's American depositary shareholders. They claimed they were duped into accepting a management buyout—which took the company briefly private—at an unfairly low price.

They also alleged that the company misrepresented its intention to relist its shares on the Hong Kong stock exchange, which it did just two years later.

Judge Edgardo Ramos of the US District Court for the Southern District of New York [dismissed](#) the complaint in September 2021.

The projection claims can't proceed, the Second Circuit said. The official projections provided by management carried cautionary language, and the investors provided almost no detail about the "parallel" projections that allegedly would have led to a higher valuation at the time of the buyout, the appeals court said.

Without facts about the parallel projections' preparation, "we have no trouble concluding" the investors failed to plead that E-House, its executives, and the buyers believed they were offering inaccurate projections, disclosed untrue facts, or concealed relevant information, the court said.

And the timing of statements about the company's subsequent plans, including denying any contemplated "material changes" to the business, didn't support fraudulent conduct when the company changed course and relisted, the court said. The evidence "relates to *post-merger* pitches to private investors and thus cannot demonstrate that the Defendants had a 'concrete plan' to relist or materially alter the Company *at the time the proxy materials were shared with investors*," the court said.

Judges Denny Chin, Richard J. Sullivan, and Myrna Perez served on the panel.

Labaton Keller Sucharow LLP and Pomerantz LLP represented the investors. Skadden, Arps, Slate, Meagher & Flom LLP represented E-House and the other defendants.

The case is [Maso Cap. Invs. Ltd. v. E-House \(China\) Holdings Ltd.](#) , 2d Cir., No. 22-355, unpublished 6/10/24 .

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Rob Gronkowski Settlement of Voyager Crypto Suit Gets Early Nod

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X71ELQG0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X71ELQG0000000)

Class Action

Rob Gronkowski speaks onstage during G.R.O.A.T The Greatest Roast Of All Time: Tom Brady for the Netflix is a Joke Festival at The Kia Forum on May 5 in Inglewood, California.

(Photo by Matt Winkelmeyer/Getty Images for Netflix)

June 11, 2024, 5:47 AM PDT

Peter Hayes

Reporter

- Gronkowski will pay \$1.9 million of the \$2.4 million total
- Settlement doesn't resolve claims against Mark Cuban, Mavs

A \$2.4 million settlement funded primarily by retired NFL star Rob Gronkowski of claims that he and other athletes helped promote failed cryptocurrency exchange Voyager Digital Holdings Inc. received preliminary approval from a federal judge.

Judge Roy K. Altman of the US District Court for the Southern District of Florida also preliminarily certified a class of US customers who enrolled in a Voyager Earn Program Account or bought one of its VGX tokens between Oct. 23, 2019 and June 10, 2024.

The settlement resolves claims against Gronkowski, basketball player Victor Oladipo, who last played for the NBA's Miami Heat, and NASCAR driver Landon Cassill. The class action alleged the sports stars aided and abetted a conspiracy to sell unregistered securities and misappropriate consumer funds.

Gronkowski will pay \$1.9 million, Oladipo will pay \$500,000, and Cassill will pay \$25,000 under the terms of the agreement.

Mark Cuban and the Dallas Mavericks, who were sued in the same class action, are not part of the settlement.

Mark Migdal & Hayden, Moskowitz Law Firm, and Boies Schiller Flexner LLP represent the named plaintiffs. Phang & Feldman PA and Meister Seelig & Fein LLP represent Oladipo. Bradley Arant Boult Cummins LLP represent Cassill and Gronkowski.

The case is *Karnas v. Cuban*, S.D. Fla., No. 22-cv-22538, 6/10/24 .

Judge tosses school districts' public nuisance claims against social media companies

DJ [dailyjournal.com/articles/379112-judge-tosses-school-districts-public-nuisance-claims-against-social-media-companies](https://www.dailyjournal.com/articles/379112-judge-tosses-school-districts-public-nuisance-claims-against-social-media-companies)

Civil Litigation

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Jun. 11, 2024

The public nuisance claims relied upon in multidistrict litigation against vape manufacturer Juul were not analogous to the social media cases, Judge Carolyn B. Kuhl noted.

Judge Carolyn B. Kuhl

A Los Angeles trial court judge has dismissed public nuisance claims by four school districts accusing Meta and other social media companies of fueling an adolescent mental health crisis that has allegedly disrupted school operations at great expense.

Judge Carolyn B. Kuhl's order sustaining the defendants' demurrer states that defendant's alleged conduct was enabled by a federal statute that withdraws common law remedies for a "favored class of publishers of content." It applies to four cases among hundreds from across the U.S. filed and consolidated in Los Angeles.

Kuhl noted that common law doctrine allows direct victims to be compensated for negligent actions but, in most cases, does not extend liability to those who may be affected by the injury of the direct victim, particularly when the injuries to the third parties are not physical to person or property.

"The school districts cite no cases that would support an expansion of the common law to make a defendant liable, in the absence of any special relationship, for the harmful actions of a third party that result from mental or emotional harm negligently inflicted on that third party by that defendant," Kuhl wrote in her order Friday.

The school districts' theory of liability, that any company that causes mental or emotional harm through interactions with a customer would be liable to any individuals or entities that are then harmed by that customer would cause a deluge of lawsuits that would be hard to prove and difficult to cull early in the proceedings, she noted.

"It is hard to imagine how any business or institution could function-or reasonably insure itself against potential losses-if its liability extends to all those who could reasonably be expected to interact with the individuals that are caused emotional harm by that business or institution," she wrote.

The public nuisance theories that the School Board of Brevard County, Fla; San Diego Unified School District; Vancouver Public Schools; and West Warwick Public Schools successfully relied on against JUUL Labs in the massive multidistrict litigation were not analogous to the social media cases, Kuhl noted.

JUUL Labs was accused of unlawfully marketing its vaping products to minors. JUUL's largest investor, Altria Group Inc. agreed last year to pay \$235 million to settle 6,000 lawsuits. In re: Juul Labs Inc., Marketing, Sales Practices and Products Liability Litigation, 19-md-02913, (N.D. Cal., filed Oct. 2, 2019).

"JUUL and other cases cited by the school districts dealt with a defendant manufacturer that created a physical product and a "market" for that product that ultimately led to the product itself causing harm," Kuhl wrote.

"For example, in JUUL, with respect to the alleged property damage, the plaintiffs there alleged that the defendants' vaping products left 'hazardous waste on school grounds,'" she stated.

"Here, by contrast, there is no allegation that the platforms themselves caused the property damage at the school districts' schools; rather, the operation of the platforms and the destruction of school property are separated by a far more complicated and attenuated chain of events, including the mental and emotional health of third parties and their harmful and willful acts," she continued. Social Media Cases, JCCP5255 (L.A. Super. Ct., filed Oct. 24, 2022).

Meta representatives did not respond to a request for comment.

Brevard, San Diego and West Warwick are represented by attorneys from Wagstaff & Cartmell LLC in Kansas City, among other firms.

Vancouver is represented by attorneys from Keller Rohrbach LLP.

Kuhl in October allowed social media addiction claims to proceed against the technology companies and rejected a First Amendment protection defense against the claims.

The plaintiffs are led by attorneys at Panish Shea Boyle Ravipudi LLP, Beasley, Allen, Crow, Methvin, Portis & Miles PC, and Morgan & Morgan.

The social media companies are defended by Munger, Tolles & Olson LLP, Gibson Dunn & Crutcher LLP, and Covington & Burling LLP.

In December Kuhl announced that discovery for the consolidated lawsuits in Los Angeles trial court will be handled by a federal judge in Oakland presiding similar multidistrict litigation.

#379112

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California seeks company profits in Big Oil climate lawsuit

 [reuters.com/legal/california-seeks-company-profits-big-oil-climate-lawsuit-2024-06-10](https://www.reuters.com/legal/california-seeks-company-profits-big-oil-climate-lawsuit-2024-06-10)

Reuters

Semi trucks drive past a giant U.S. flag displayed at Marathon Petroleum's Los Angeles Refinery in Carson, California, U.S., March 11, 2022. REUTERS/Bing Guan/File Photo
[Purchase Licensing Rights](#) , opens new tab

June 10 (Reuters) - California's attorney general on Monday sought to force the world's biggest oil companies to give up profits the state alleges they made while deceiving consumers about their role in contributing to climate change.

The legal action comes months after a new state law took effect that allows the attorney general to seek profits earned by companies while they violated laws against unfair competition and false advertising.

Attorney General Rob Bonta added the so-called disgorgement remedy to a lawsuit filed last year against Exxon Mobil (XOM.N) , opens new tab, Chevron (CVX.N) , opens new tab, Shell (SHEL.L) , opens new tab, BP (BP.L) , opens new tab, ConocoPhillips (COP.N) , opens new tab and oil and gas industry trade group the American Petroleum Institute (API). The suit, filed in state court in San Francisco, alleges the energy giants have caused tens of billions of dollars in damages and accuses them of deceiving the public.

API said the suit was without merit.

"This ongoing, coordinated campaign to wage meritless, politicized lawsuits against a foundational American industry and its workers is nothing more than a distraction from important national conversations and an enormous waste of taxpayer resources," API General Counsel Ryan Meyers said in a statement. "Climate policy is for Congress to debate and decide, not a patchwork of courts."

Shell also said it did not believe climate change should be addressed in court.

"Addressing climate change requires a collaborative, society-wide approach," the company said in a statement.

ConocoPhillips said it did not comment on pending litigation.

Exxon, Chevron and BP were not immediately available for comment.

The filing comes days after United Nations Secretary-General Antonio Guterres called on countries to ban fossil fuel advertising as many do for tobacco and other products that have

proven harmful to human health.

In recent weeks, major oil and gas companies have fought back against activist shareholders urging more corporate climate action while some U.S. lawmakers have stepped up probes into whether the industry is behaving deceptively.

Reporting by Nichola Groom in Los Angeles and Valerie Volcovici in Washington; Editing by David Gregorio and Rod Nickel

Carmakers face UK dieselgate lawsuits worth at least \$7.6 bln, lawyers say

 [reuters.com/business/autos-transportation/carmakers-face-uk-dieselgate-lawsuits-worth-least-76-bln-lawyers-say-2024-06-11](https://www.reuters.com/business/autos-transportation/carmakers-face-uk-dieselgate-lawsuits-worth-least-76-bln-lawyers-say-2024-06-11)

Sam Tobin

An exhaust pipe is seen as a car sitting in traffic approaches the Blackwall Tunnel in London, Britain, November 18, 2020. REUTERS/Simon Dawson/File Photo Purchase
Licensing Rights , opens new tab

LONDON, June 11 (Reuters) - Some of the world's biggest carmakers are facing 1.5 million lawsuits in Britain for allegedly cheating emissions tests that could cost them at least 6 billion pounds (\$7.6 billion), claimants' lawyers told London's High Court on Tuesday.

The claims, brought by owners of diesel vehicles, highlight the ongoing fallout for automakers from a scandal that erupted in 2015 when Volkswagen admitted to using "defeat devices" to change diesel vehicles' emissions levels during testing.

Manufacturers including Mercedes-Benz (MBGn.DE) , opens new tab and Ford (F.N) , opens new tab are also alleged to have misled customers about certain vehicles' compliance with nitrogen oxide emissions standards – which the companies deny.

A spokesperson for Mercedes-Benz – which faces around 300,000 claims – said in a statement: "We continue to believe that the claims against Mercedes-Benz are without merit and will vigorously defend ourselves against them or any group action with the necessary legal means."

A Ford spokesperson said: "We see no merit in these claims and are robustly defending against them. Our vehicles and engines meet all applicable emissions requirements."

Volkswagen's (VOWG_p.DE) , opens new tab "dieselgate" scandal has cost the carmaker more than 32 billion euros (\$34 billion) in vehicle refits, fines and legal costs.

The German group agreed to pay 193 million pounds in 2022 to settle claims from around 91,000 British drivers without any admission of liability.

Lawyers representing a coalition of claimants said at a preliminary hearing that there were around 1.5 million claimants suing 13 different vehicle manufacturing groups.

Benjamin Williams, one of the claimants' lawyers, said in court documents that the value of individual claims had not yet been determined.

But he said that "even if the claims were valued conservatively" at 4,000 pounds each, it would make the total value of all of the lawsuits "at least" 6 billion pounds.

The legal costs of the litigation will also be huge, with the claimants' lawyers estimating they will need to spend nearly 400 million pounds up to a potential third trial in 2026, with the carmakers' figure being 321 million pounds.

Reporting by Sam Tobin; Editing by Mark Potter

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https://www.law.com/dailyreportonline/2024/06/10/privacy-class-action-against-general-motors-centralized-in-northern-district-of-georgia-mdl-panel-decides/?cmp=share_twitter



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UPDATE

Privacy Class Action Against General Motors Centralized in Northern District of Georgia, MDL Panel Decides

The cases, filed beginning in March, allege that GM and others worked to gather data from drivers using internet-connected sensors in Buick, GMC, Chevrolet and Cadillac vehicles, then sold it to data brokers like LexisNexis and Verisk Analytics. Those companies then created reports of individuals' driving history and sold them to insurance companies to charge higher premiums.

June 10, 2024 at 03:56 PM



Mason Lawlor



The U.S. Judicial Panel on Multidistrict Litigation transferred class action data tracking lawsuits against General Motors and its affiliates to the U.S. District Court for the Northern District of Georgia, the panel announced last week.

The litigation consists of seven cases in five separate districts accusing GM and its subsidiary OnStar, and data broker LexisNexis Risk Solutions, of collecting personal driving information without consent.

The cases, filed beginning in March, allege that GM and others worked to gather data from drivers using internet-connected sensors in Buick, GMC, Chevrolet and Cadillac vehicles, then sold it to data brokers like LexisNexis and Verisk Analytics. Those companies then created reports of individuals' driving history and sold them to insurance companies to charge higher premiums.

Plaintiffs across the multiple actions and potential tagalong actions wished to move the litigation to other districts, including the U.S. District Courts for the Central District of California, Eastern District of Michigan, Middle District of Pennsylvania, District of Minnesota and others. The MDL panel has been notified of 20 potentially-related lawsuits since the motion to centralize was filed.

“Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary,” federal judge and Chair of the MDL Panel Karen K. Caldwell said in the June 7 transfer order.

On the scope of the litigation, plaintiffs asserted that the MDL should include actions naming auto manufacturers other than GM. The panel, however, could not reach that issue, as none of the cases included in the motion for centralization involve other manufacturers.

Only two class actions are currently pending against manufacturers outside of GM, *Vaughn v. KIA Motors* in the Eastern District of Pennsylvania and *Winkelvoss v. Hyundai Motors* in the Central District of California. The panel noted that proponents of an industry-wide MDL have a “heavy burden” to show their actions have significant overlap with the underlying cases.

“The actions appear to involve unique factual issues concerning each automaker’s design and implementation of technology for gathering driver data, its interactions and relationship with LexisNexis and/or Verisk, and its disclosures to drivers about data gathering and dissemination,” the order said.

Georgia was an ideal location, the panel found, because LexisNexis is headquartered in the northern region of the state, allowing relevant documents and witnesses to be easily found. U.S. District Judge Thomas W. Thrash Jr. was also identified as an appropriate judge to preside over the litigation as he already presides over five potentially-related cases and has “a wealth of MDL experience,” according to the panel.

Law firms including Morgan & Morgan, Keller Rohrback, Tycko & Zavareei and Aylstock, Witkin, Kreis & Overholtz have all filed class actions on behalf of GM customers. Counsel for plaintiff Jariya Thongsawang, who moved to centralize the litigation, Tina Wolfson of Ahdoot & Wolfson in Burbank, California, did not return a request for comment.

Counsel for GM, David Balser of King & Spalding in Atlanta, did not respond to a request for comment.

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Bloomberg Law News 2024-06-11T13:53:03729909298-04:00

PFAS Legal Liability Risks and Burdens Point to More Settlements

By Pat Rizzuto 2024-06-11T05:30:34000-04:00

- Proposed settlements by Tyco, BASF portend more to come
- Group of state, tribal, and US territories' claims possible

The number of companies weighing possible PFAS settlements in a nationwide case is likely to grow as a federal court moves into the next phases of litigation.

The first group of lawsuits to move through *In Re Aqueous Film-Forming Foams Products Liability Litigation MDL 2873* involved public water systems on the hook for millions of dollars to remove PFAS from drinking water. Those cases resulted in the 3M Co. offering up to \$12.5 billion and three companies tied historically to E. I. du Pont de Nemours and Co. offering \$1.18 billion in court-approved settlements.

A second group of public water system cases has begun to move through the national case with personal injury, state, and other lawsuits to follow.

Multimillion-dollar deals offered recently by the [BASF Corp.](#) and [Tyco Fire Products LP](#) “foreshadow more settlements to come” in the national case managed by the US District Court for the District of South Carolina and lawsuits in other courts, said Ralph DeMeo, shareholder with Guilday Law PA.

Many of the claims beyond the public water systems' will fall on 3M and the DuPont-related companies, said DeMeo, who represents airports and other plaintiffs in the multidistrict litigation. More companies will be making offers, he said.

Final federal [drinking water](#) and [Superfund](#) rules combined with proposed [waste](#) regulations the Environmental Protection Agency released this year are pushing litigants toward settlements due to the requirements' tremendous compliance costs and liability risks, DeMeo said.

“There’s not enough gold in Fort Knox to pay the damages and the settlements that are gonna come out of this. There’s just literally not enough money,” he said. “There’s a lot of [concern about](#)

[bankruptcy](#).”

Kidde-Fenwal Inc., which manufactured aqueous film forming foam (AFFF), a type of fire suppressant made with per- and polyfluoroalkyl substances (PFAS), [filed for bankruptcy](#) last year due to potential liabilities.

Thousands of individuals who say they’re suffering from illnesses including kidney and testicular cancers have filed claims in the MDL. At least 36 states, US territorial, and tribal governments seek recompense for natural resource and other damages, and additional parties have filed property damage claims.

‘Dozens of Defendants Left’

David Hoyle, a Motley Rice LLC trial lawyer working with the MDL’s Plaintiffs’ Executive Committee, wouldn’t predict whether more settlements are coming. But “there are dozens of defendants left,” he said.

“It’s reasonable to believe the settlement discussions are continuing,” Hoyle said.

3M’s settlement addresses AFFF formulations used for decades and made with perfluorooctane sulfonic acid (PFOS) and similar PFAS the company produced.

These PFAS degraded into substances so persistent they’ve been dubbed “forever chemicals.” 3M stopped producing the PFOS-related chemicals more than 20 years ago after it and the EPA learned they were showing up in people, animals, and water around the world.

The DuPont-related settlement, and the proposed [Tyco](#) and [BASF](#) settlements that plaintiffs have asked the court to preliminarily approve, address AFFF formulations that included other types of PFAS, many of which are called telomers.

BASF, Johnson Controls International-owned Tyco, and some other defendants are named due to activities allegedly made by one or more companies the firms acquired over the years, Hoyle said.

AGC Inc., Daikin America Inc., Deepwater Chemicals Inc., and Dynax Corp. are among the

defendants in the group of telomer cases public water systems have filed that are proceeding next.

EPA rules require water utilities to monitor 29 PFAS in drinking water and remove anything above low parts per trillion amounts of six of the chemicals.

Next Cases

Honeywell International Inc., Phillips 66 Pipeline LLC, Raytheon Technologies Corp., and W.L. Gore & Associates are among the dozens of other defendants in the MDL.

Those companies face allegations they've produced, used, or released AFFF or its ingredients, or have made firefighters' gear that [until recently](#) used PFAS for the chemicals' heat- and water-resistance properties.

"This MDL is historic in nature not only in what it's already achieved in terms of settlements for public drinking water utilities," but in the complexities and range of claims made by other parties, Hoyle said.

"It would take like four federal judges to handle all this in normal circumstances," said Judge Richard M. Gergel, who presides over the MDL, during a status conference in March. Instead, the cases are managed through the MDL process by addressing groups of claims with common issues through court-approved paths, he said.

The focus is now on the [telomer cases](#), and [personal injury cases](#) seem next in line, Hoyle said.

Simultaneously, plaintiffs and the US government are fighting over the government's position that [it's not liable](#) for AFFF damage. Additional motions and briefs are [scheduled](#) this summer.

'Decades' of Litigation

Gergel hasn't ruled on a [request](#) last year from states, tribes, and territorial sovereigns to move forward as a group, but he's left the door open to that possibility, Hoyle said.

During the March status conference, attorneys for both sides agreed to discuss data states could gather that could help determine whether a sovereigns group of lawsuits should be formed. This data could include the percentage of excess PFAS contamination in the roughly 22 million private water wells that plaintiffs said serve about 45 million Americans.

The costs of treating drinking water provided at state-run parks, universities, prisons, and other sites also hasn't been part of the settlements negotiated to date, but could be part of the damage claims sovereigns make, Hoyle said.

No matter what order the MDL cases proceed in, PFAS litigation will continue for decades, DeMeo said. He compared it to tobacco and asbestos cases, with asbestos remaining a battleground more than 40 years after those cases began.

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Google Prevails in South Carolina Subpoena Fight Amid State-Led Antitrust Lawsuit

“When South Carolina, through its attorney general, joined the action against Google, it voluntarily invoked federal jurisdiction,” Judge G. Steven Agee wrote for the U.S. Court of Appeals for the Fourth Circuit. “That invocation, Supreme Court precedent plainly instructs, resulted in a complete and irrevocable waiver of the State’s Eleventh Amendment immunity as to all matters arising in that lawsuit, including the State-endorsed Rule 45 subpoena issued to SCPRT.”

June 10, 2024 at 05:18 PM



Sulaiman Abdur-Rahman



What You Need to Know

- The Fourth Circuit ruled in favor of Google in a subpoena fight related to state-led antitrust allegations.
- The South Carolina tourism department refused to comply with a Google subpoena on 11th Amendment immunity grounds.
- The appeals court decision requires the state agency to produce the documents Google subpoenaed.

Documents that Google subpoenaed to help defend itself against South Carolina’s federal antitrust suit are not subject to 11th Amendment immunity, the U.S. Court of Appeals for the Fourth Circuit has ruled in a decision compelling the South Carolina Department of Parks, Recreation and Tourism (SCPRT) to produce the information.

“When South Carolina, through its attorney general, joined the action against Google, it voluntarily invoked federal jurisdiction,” Judge G. Steven Agee wrote for the appeals court this past Wednesday. “That invocation, Supreme Court precedent plainly instructs, resulted in a complete and irrevocable waiver of the State’s Eleventh Amendment immunity as to all matters arising in that lawsuit, including the State-endorsed Rule 45 subpoena issued to SCPRT.”

Judge Stephanie D. Thacker and Judge William B. Traxler Jr. joined Agee in the 3-0 decision affirming the SCPRT must comply with Google’s subpoena under Rule 45 of the Federal Rules of Civil Procedure.

Jason R. LaFond, senior counsel at Yetter Coleman, argued the cause for Google successfully, while R. Walker Humphrey II of Willoughby Humphrey & D’Antoni argued the appeal for South Carolina unsuccessfully. Neither attorney responded to requests for comment on this story.

Google in recent years has faced a [number of antitrust complaints](#) from states and the U.S. Department of Justice.

South Carolina in 2021 joined more than a dozen other states in the Texas-led antitrust lawsuit against Google. The complaint accuses Google of having “monopoly power” or a “dangerous probability of acquiring monopoly power” in online advertising markets in violation of the Sherman Act and state antitrust laws.

Google subpoenaed South Carolina’s tourism department “seeking documents pertinent to the company’s defense,” but the state agency “refused to comply” and “moved to quash the subpoena” in the U.S. District Court for the District of South Carolina, according to the Fourth Circuit’s decision.

SCPRT claimed immunity under the 11th Amendment to the U.S. Constitution, arguing it had no obligation to comply with Google’s subpoena as a sovereign state agency.

District Judge Joseph F. Anderson Jr. ruled in Google’s favor in July 2023, finding South Carolina’s tourism department “waived such immunity when South Carolina voluntarily initiated suit against Google.”

The Fourth Circuit affirmed Anderson’s order last Wednesday. Meanwhile, the Texas-led lawsuit against Google remains active as the states seek to end Google’s alleged anti-competitive conduct.

Judge Sean D. Jordan of the U.S. District Court for the Eastern District of Texas ordered a trial to begin March 31, 2025.

Other plaintiffs in the case include Alaska, Arkansas, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, North Dakota, South Dakota, Utah, and Puerto Rico, according to the third amended complaint.

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U.S. | LAW

J&J Talcum-Settlement Consent Judgments Filed, U.S. State AGs Say

The proposed settlement doesn't resolve personal-injury lawsuits

By Josh Beckerman

June 11, 2024 2:09 pm ET



Several state attorneys general said consent judgements were filed in connection with Johnson & Johnson. PHOTO: LUCAS JACKSON/REUTERS

Several attorneys general said Tuesday that consent judgments were filed in connection with Johnson & Johnson's **JNJ -0.24% ▼** \$700 million settlement related to marketing of its talcum-based baby powder.

The company and attorney generals in most U.S. states announced a tentative agreement in January.

The settlement is pending judicial approval, the attorneys general said.

J&J no longer sells talc-based baby powder.

The proposed settlement doesn't resolve the personal-injury lawsuits filed by thousands of plaintiffs in various U.S. courts.

Write to Josh Beckerman at josh.beckerman@wsj.com

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BUSINESS

'Anti-Woke' Shareholders Are Going After Corporate Boards

Activists say they want to get politics out of business, but proposals fail to gain much traction

By [Sarah Nassauer](#) [Follow](#) and [Theo Francis](#) [Follow](#)

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This year Target's Pride merchandise is being sold in half of the retailer's nearly 2,000 stores, with some items only available online. PHOTO: MARK HERTZBERG/ZUMA PRESS

A new kind of shareholder activism is rattling companies: "anti-woke" agitators.

Shareholders at dozens of big companies, from GE Aerospace **GE -1.66% ▼** to UPS, are voting on proposals opposing environmental and social initiatives this year. Investors backed by conservative groups are suing Target **TGT -1.61% ▼** and other companies for their progressive stances. And companies are muting their focus on diversity, equity and inclusion initiatives as DEI programs come under legal and political threat.

The activists frame the push as getting politics out of business—and suggest getting used to it.

“We who would prefer corporate behavior without partisan influence have really started to get into the game after years of quiescence,” said Scott Shepard, general counsel at the National Center for Public Policy Research, or NCPPR, a conservative think tank that has proposed dozens of shareholder measures questioning corporate initiatives on climate, diversity and other subjects.

Advocates for more progressive environmental, social and corporate-governance shareholder proposals call the newcomers politically motivated and cite research suggesting more established ESG measures improve long-term financial outcomes at companies.



Among the most successful anti-ESG proposals so far was one asking UPS to report on risks stemming from voluntary carbon-reduction promises. PHOTO: TANNEN MAURY/SHUTTERSTOCK

Supporting ESG work is the right thing to do and “absolutely imperative for your business and the future of your business,” Sarah Kate Ellis, chief executive of Glaad, a nonprofit focused on LGBTQ advocacy, said in an April interview.

Shareholders have voted on 70 measures opposing traditional ESG initiatives at S&P 500 companies through the end of May this year, up from 30 two years ago and seven in 2020, according to data from ISS-Corporate, a unit of proxy adviser Institutional Shareholder Services. Several ask for more corporate oversight of diversity and inclusion efforts and donations to LGBTQ groups.

Shareholders have filed more proxy proposals overall in recent years as the social and political nature of proposal topics increases. But anti-ESG proposal

growth outpaced that of other categories tracked by ISS.

Anti-ESG supporters haven't won over voting investors, however: Most anti-ESG proposals received support from less than 2% of shares voted, and none have passed—among the worst showing of the categories tracked by ISS.

Corporate culture wars

The shareholder proposals are part of a wider conservative activist effort directed at companies in recent years that in some cases have hurt sales by putting firms in the crosshairs of heated cultural and political debates.

Bud Light lost its spot as the top-selling beer in the U.S. last year after controversy over a social-media promotion with a transgender influencer caused a boycott from some shoppers. Target's sales fell last summer after it reduced its Pride-month merchandise displays amid criticism, offending both supporters and detractors. Target also faces a shareholder lawsuit regarding the Pride collection.

Most shareholder proposals fail, whatever the politics. Out of about 470 shareholder proposals voted on this year, a majority of votes supported just three dozen of them: nearly all proposed corporate-governance changes, primarily eliminating supermajority voting requirements. Support from a substantial majority of shares can still spur companies to make changes.

The anti-ESG proposal supporters are using tactics first crafted by ESG proponents—using shareholder pressure to change corporate policies that they say could create financial risk.

“They hang their hat on reputational risk doing damage to firm value,” said Doug Chia, president of consulting firm Soundboard Governance. Their pitch is, “If you do this, then you'll create a PR crisis that will lead to people boycotting your products and the stock goes down.”

Some kinds of ESG proposals once garnered meager support, only to gain steam over time. Today, a quarter to a third of shares at large companies are often voted in support of measures asking companies to disclose or rein in political spending, up from less than 10% in 2005. Occasionally, one wins majority support.

A major factor: Pension funds and other large institutional investors have come to support a variety of ESG proposals on climate change and social issues. Many cite research suggesting that such risks are linked to long-term shareholder returns.



At Best Buy, shareholders won't vote on an anti-ESG proposal because the retailer negotiated with the National Center for Public Policy Research to keep it off ballots. PHOTO: BING GUAN/BLOOMBERG NEWS

'Anti-woke' proposals

Among the most successful anti-ESG proposals so far this year: one asking UPS to report on risks stemming from voluntary carbon-reduction promises, with 7.9% of shares voted in support, and one asking IBM for a report on risks from doing business in China, at 5.6%. A proposal asking Ford for a report on child labor in its supply chain also garnered about 5.6% of votes.

All three were proposed by NCPPR, which made just over half of anti-ESG shareholder proposals in each of the last three years, ISS data show. A half-dozen other groups proposed the rest. NCPPR also requested reports on risks from diversity efforts at a half-dozen companies—including PepsiCo, Coca-Cola and Citigroup—and reports on carbon-reduction risks, similar to the one at UPS, at five other companies, including GE Aerospace.

NCPPR, which receives funding from individuals and several conservative groups, also has proposed oversight of charitable giving and partnerships related to diversity and LGBTQ groups at large retailers including Walmart, Target and Best Buy **BBY -0.34% ▼**.

At Best Buy, shareholders won't vote on the proposal because the retailer negotiated with NCPHR to keep it off ballots. The electronics retailer agreed that "any such contributions would be screened to ensure they do not advocate or support the causes or agendas you have identified as concerning," according to correspondence included in financial filings.

"Nothing has changed in the ways we give to LGBTQIA+ organizations," a Best Buy spokeswoman said. She declined to clarify what causes or agendas the retailer agreed to screen for support.

Many shareholder proposals never make it to a vote, blocked by companies or withdrawn by their sponsors, including after negotiations. Anti-ESG proposals were among the least likely to be withdrawn by their sponsors and the most likely to reach a vote, at about six of every seven such measures through May this year, ISS data show.



Pride merchandise at a Target location. PHOTO: BRANDON BELL/GETTY IMAGES

Target's backlash

As companies work to fend off conservative activists, they sometimes face backlash from customers and workers. After Target said it would downsize its collection of Pride month merchandise last year and further limited the collection this year, disappointed workers signed a letter to leadership and took to internal Slack channels to complain, according to documents viewed by The Wall Street Journal.

In May, during a virtual town hall to discuss this year's collection, some employees were upset that chat functions were disabled and they weren't able to ask live questions, a common occurrence in meetings since last year's Pride conflict. "I really just want to ask 'why did you cave to the haters?'" said one employee in a Slack thread.

Internally, leadership is trying to highlight Target's continued support for LGBTQ communities and company events related to Pride month, according to people familiar with the situation.

The volume of negative feedback around the Pride collection, both internally and externally, is significantly lower this year than last, said a Target spokesman.

This year Pride merchandise is being sold in half of the retailer's nearly 2,000 stores, with some items only available online. The stores carrying Pride merchandise this year accounted for around 90% of such sales in 2023 and 2022, the spokesman said.

Target is committed to supporting the LGBTQ community during Pride month and year-round through donations, internal programs and by supporting Pride events around the country, the spokesman said.

— *Emily Glazer contributed to this article.*

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Videos

As Supreme Court decisions loom, a legal assault is weakening SEC's power

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Chris Prentice, Michelle Price

The headquarters of the U.S. Securities and Exchange Commission (SEC) is seen in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab



WASHINGTON, June 11 (Reuters) - A legal assault on the U.S. Securities and Exchange Commission is chipping away at its powers to oversee Wall Street and is likely to intensify with two imminent Supreme Court rulings.

A U.S. appeals court last week overturned a major SEC rule imposing stricter oversight of private funds, in a fresh blow for Democratic Chair Gary Gensler's ambitious agenda to boost transparency and stamp out conflicts of interest on Wall Street.

The court took the unusual step of denying some of the SEC's authority to oversee investment advisers. That could make its other draft rules on cybersecurity, outsourcing, and predictive data analytics, vulnerable to litigation, lawyers said.

The ruling from the New Orleans-based 5th U.S. Circuit Court of Appeals is another example of how business groups are using conservative-leaning courts to overturn SEC rules, limit its ability to write similar ones and bring enforcement actions.

While the conservative "war on the administrative state" aims to weaken federal agencies across the board, Gensler's ambitious agenda has made the SEC, which oversees around 40,000 entities, a top target.

"It's happening government-wide, and it's quite acute at the SEC," said Satyam Khanna, a former SEC attorney who advised two former Democratic Commissioners as recently as 2021. "The SEC oversees a vast number of entities – funds, public companies, brokers, and more – and the financial stakes can be high."

The agency is facing several other lawsuits from financial firms and their trade groups arguing the agency is overstepping its authority to impose ill-conceived and costly rules.

A Reuters review of Westlaw filings showed a sharp uptick in the number of open appeals against the SEC in the 5th Circuit Court of Appeals from 2019 to last year, although it is facing litigation in other conservative-leaning courts too.

Among the cases: hedge funds are suing in the 5th Circuit to overturn SEC short-selling disclosures and in a Texas district court to kill new Treasuries trading rules, while in March business groups including the U.S. Chamber of Commerce, as well as Republican-led states, sued to block SEC climate change rules.

The Chamber is among the most aggressive groups in litigating regulations. In December, it won a 5th Circuit challenge to SEC rules around stock buybacks and is tracking other draft rules for potential challenges.

"The current SEC has engaged in remarkable amounts of regulatory overreach," said Daryl Joseffer, chief counsel at the Chamber's Litigation Center.

Reform advocates say the industry just wants to protect its profits and that weakening the SEC will hurt everyday Americans.

Speaking to Reuters last Wednesday, SEC chair Gary Gensler did not discuss the private funds ruling but noted that only a handful of dozens of rules adopted under his leadership have been litigated. And the agency has notched some notable wins, including in the 5th Circuit, on diversity rules and proxy voting, legal experts note.

But Gensler also said the agency would adapt to adverse rulings.

"We do everything according to law and how courts interpret law. If the courts interpret law differently than we thought, we adjust, we pivot," he said. He cited as an example the SEC's decision to approve bitcoin products in January after a D.C. appeals court found the agency had been wrong to reject them.

Trump appointed 54 judges to the U.S. appeals courts where many suits against federal agencies are filed and pushed the Supreme Court to a 6-3 conservative majority.

When asked if he felt the courts were stacked against him, Gensler said: "I'm a huge believer in the American democratic system and our constitutional system. We have three co-equal branches of government. And that's a really important thing."

Most of the litigation alleges violations of the 1946 Administrative Procedure Act which requires regulators to justify rules and allow time for, and fully consider, public feedback.

Some cases lean on a 2022 Supreme Court decision which raised doubts over whether federal agencies have the authority to tackle major policy questions. That ruling was among the reasons the SEC scaled back its climate change rule, Reuters previously reported, and was cited in some of the March suits.

Crypto firms have frequently cited that "major questions" doctrine when disputing the SEC's authority to regulate them.

The SEC has made significant changes to other major rules following industry pushback, including on money market funds and activist investor disclosures.

"Vigorous industry pushback in comment files often raises the specter of litigation," said Khanna.

Gensler said the agency takes industry comments "very seriously."

SCOTUS LOOMS

This month, the Supreme Court is also expected to rule on two other cases with major implications for the SEC.

One relates to its authority to use in-house judges with securities law expertise to decide enforcement actions, which is often speedier than going through the courts. Conservative Justices last year expressed concern that it denies defendants a jury trial.

The case follows a 2018 Supreme Court ruling that the SEC's process for selecting in-house judges violated the Constitution. Since then, the SEC has dramatically scaled back its use of the tribunal, SEC data shows.

The other SCOTUS case challenges a legal doctrine known as "Chevron deference" which calls for judges to defer to federal agencies' interpretations of U.S. laws deemed to be ambiguous.

Chevron is a bedrock of agency rulemaking. According to 2017 research [\[1\]](#), opens new tab published in the Michigan Law Review, between 2003 and 2013, Chevron was applied 66.7% of the time when litigating SEC rules in circuit courts and in those cases the agency won just over 81%.

"It's highly likely that the court will overrule Chevron or sharply curtail it," said Joseffer. Consequently, "agencies would succeed less often in defending their interpretation of statutes, and as a result one would hope agencies would be more cautious in their rulemakings," he added.

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Reporting by Michelle Price; additional reporting by Carolina Mandl; Editing by Nick Zieminski

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Sam Alito's Wife Is Absolutely Unhinged In New Secret Recording

A abovethelaw.com/2024/06/sam-alitos-wife-is-absolutely-unhinged-in-new-secret-recording

Kathryn Rubino

June 11, 2024

Courts

And you thought the Samuel Alito tape was bad!

By Kathryn Rubino

on June 11, 2024 at 12:47 PM

Small talk at cocktail parties and events is the worst. How many times can you pontificate about the weather or the local sports ball team to a roomful of single-serving acquaintances? Well, Martha-Ann Alito, wife of Supreme Court justice Samuel Alito, has no such qualms. Indeed, she'll run her mouth so much that even the most mildly introverted person would be second-hand embarrassed. And then we get to the substance of what she said, and that's just plain horrifying.



via DALL-E and the deepest recesses of Martha-Ann Alito's id

The Supreme Court Historical Society's annual dinner earlier this month was an absolute hotbed of news and we didn't even know it at the time. That's because in attendance was documentary filmmaker Lauren Windsor, and at the event she pretended as if she were a religious conservative and asked probing questions of Supreme Court justices. And while Justice Alito's unwillingness to compromise with liberals was certainly noteworthy, it wasn't the only revelation. Windsor also recorded her conversation with his wife, Martha-Ann, and there are some REAL doozies there.

Martha-Ann recently made news when her husband blamed her for flying an insurrectionist flag at their home supposedly in response to a neighborhood tiff, but COINCIDENTALLY was just days after the attempted January 6th coup. (Not to mention that wasn't the only flag favored by insurrectionists flown at Alito residences.)

As reported by Rolling Stone, Windsor's conversation with Martha-Ann absolutely hit on that controversy — a topic that Mrs. Alito jumped into with being prompted by Windsor:

“You know what I want?” Mrs. Alito says. “I want a Sacred Heart of Jesus flag, because I have to look across the lagoon at the Pride flag for the next month.”

Referencing her husband, Mrs. Alito says, “He’s like, ‘Oh, please don’t put up a flag.’ I said, ‘I won’t do it because I am deferring to you. But when you are free of this nonsense, I’m putting it up and I’m gonna send them a message every day, maybe every week, I’ll be changing the flags.’ They’ll be all kinds. I made a flag in my head. This is how I satisfy myself. I made a flag. It’s white and has yellow and orange flames around it. And in the middle is the word ‘vergogna.’ ‘Vergogna’ in Italian means shame — vergogna. V-E-R-G-O-G-N-A. Vergogna.”

“Shame, shame, shame on you,” she adds.

Yeah, Sam Alito is definitely going to vote to overturn *Lawrence v. Texas* just as soon as he can.

Martha-Ann also freely discusses with Windsor — a virtual stranger — her personal list of enemies:

In other points of the conversation with Windsor, Martha-Ann Alito agrees there is no negotiating with the radical Left. She claims “the Femnazis believe that [Justice Alito] should control me,” adding: “So they’ll go to hell. He never controls me.”

Mrs. Alito indicates she is spoiling to “get even” by suing the media. When Windsor expresses her sympathies about the recent media coverage about her family, Mrs. Alito responds, “It’s OK. It’s OK, because if they come back to me, I’ll get them. I’m gonna be liberated, and I’m gonna get them.” She adds, “There’s a five-year defamation statute of limitations.” (Most states have a one- or two-year statute of limitations.)

Mrs. Alito has a long memory: She complains at length about a Washington Post style section item from two decades ago that critiqued her attire.

Who talks like this at an event? Yes, according to former GOP operatives, Supreme Court Historical Society events are touted by conservatives as an opportunity to make connections to SCOTUS justices, but anyone with a \$150 membership to the Society can buy tickets. Martha-Ann has no reason to believe she’s in a room filled exclusively with likeminded individuals. She could be talking to — or overheard by — anyone. But she’s out there discussing her personal vendettas like that’s a totally normal thing to do.

And still not the most disturbing part! When Windsor suggests that Martha-Ann might be receiving undue attention because she’s a synecdoche for the religious right, the conversation takes a turn towards the Nazi.

“Look at me, look at me. I’m German. I’m from Germany. My heritage is German. You come after me, I’m gonna give it back to you. And there will be a way — it doesn’t have to be now — but there will be a way they will know. Don’t worry about it. God — you read the Bible. Psalm 27 is my psalm. Mine. Psalm 27, the Lord is my God and my rock. Of whom shall I be afraid? Nobody.”

Did she just favorably cite the Germans in WW2? I am genuinely flummoxed. WHO DOES THIS IN POLITE SOCIETY? It’s positively wild.

After you get your jaw off the ground, the horror of what the Alitos, in separate conversations, have revealed sets in. The recordings between the Alitos and Windsor provide a disturbing look into the mindsets of some very powerful figures in the far-right political landscape.



Kathryn Rubino is a Senior Editor at Above the Law, host of The Jabot podcast, and co-host of Thinking Like A Lawyer. AtL tipsters are the best, so please connect with her. Feel free to email her with any tips, questions, or comments and follow her on Twitter @Kathryn1 or Mastodon @Kathryn1@mastodon.social.

Topics

Courts, Martha-Ann Alito, Samuel Alito, Supreme Court

Samuel Alito Caught On Tape Saying All The Awful Things You Imagine He Says

A abovethelaw.com/2024/06/samuel-alito-caught-on-tape-saying-all-the-awful-things-you-imagine-he-says

Kathryn Rubino

June 10, 2024

Courts

Alito wants to 'return our country to a place of godliness.' Because of course he does.

By Kathryn Rubino

on June 10, 2024 at 5:47 PM

Samuel Alito has been caught on tape. The worst Supreme Court justice you know attended the Supreme Court Historical Society's annual dinner earlier this month and in attendance was documentary filmmaker Lauren Windsor. Windsor acted as if she were a religious conservative and asked probing questions and we get a stark look into the mind of the justice.



(Photo by Alex Wong/Getty Images)

As reported by Rolling Stone, Windsor asks, "I don't know that we can negotiate with the left in the way that needs to happen for the polarization to end. I think that it's a matter of, like, winning."

"I think you're probably right," Alito answers. "On one side or the other — one side or the other is going to win. I don't know. I mean, there can be a way of working — a way of living together peacefully, but it's difficult, you know, because there are differences on fundamental things that really can't be compromised. They really can't be compromised. So it's not like you are going to split the difference."

And it doesn't get better from there.

Windsor goes on to tell Alito: "People in this country who believe in God have got to keep fighting for that — to return our country to a place of godliness."

"I agree with you. I agree with you," replies Alito, who authored the Supreme Court's 2022 Dobbs decision, which reversed five decades of settled law and ended a constitutional right to abortion.

Is this terrible? Of course. Is it surprising? Not at all. I read the *Dobbs* decision. And the *Hobby Lobby* one. And his *Obergefell* dissent. This is the man who HECKLED THE STATE OF THE UNION. And flies so many insurrectionist flags. No, he's not trying to end the polarization of our nation.

You can compare Alito's scorched earth comments to the more reasonable comments by Chief Justice John Roberts who also spoke with Windsor.

Pressed on whether the court has an obligation to put the country on a more "moral path," Roberts turns the tables on his questioner: "Would you want me to be in charge of putting the nation on a more moral path?" He argues instead: "That's for people we elect. That's not for lawyers." Presented with the claim that America is a "Christian nation" and that the Supreme Court should be "guiding us in that path," Roberts again disagrees, citing the perspectives of "Jewish and Muslim friends," before asserting: "It's not our job to do that. It's our job to decide the cases the best we can."

Alito writes like he's salting the earth. He doesn't believe in compromise or in the functional working of government. He's in it to win it. And he writes prickly dissents in the hope he'll be able to amass enough power and acolytes for those to be the future majority opinions. He's writing to redefine what America is, and if he has to cite a 17th century witch-hunter to do so, well that's not a problem for Alito.

Of course, more terrifying than what Windsor caught Alito saying is what Alito is planning on writing in his next majority opinion.

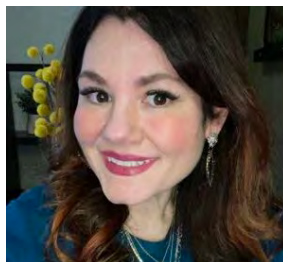
You can take a listen for yourself here.

EXCLUSIVE UNDERCOVER AUDIO:

Sam Alito x John Roberts x The Undercurrent 🎧

1/ Justice Alito admits lack of impartiality with the Left, says: "One side or the other is going to win." pic.twitter.com/b5nmXToZ9z

— Lauren Windsor (@lawindsor) June 10, 2024



Kathryn Rubino is a Senior Editor at Above the Law, host of The Jabot podcast, and

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NOT FOR REPRINT

US Jury Finds Chiquita Liable for Colombia Terror Deaths

Jurors award \$38.3 million to families of eight Colombians who were murdered by death squads that the banana grower paid to protect its business in the South American country.

June 10, 2024 at 05:07 PM

International - Latin America

By Amy Guthrie | June 10, 2024 at 05:07 PM

The original version of this story was published on [Law.com International](#)

A federal court jury in Florida on Monday found [Chiquita Brands International](#) liable for murders committed by death squads that the banana grower paid protection fees to in Colombia.

The ruling marks the first time a U.S. jury has held a major U.S. corporation liable for complicity in human rights abuses committed in another country.

Chiquita has been instructed to pay 17 plaintiffs at least \$2 million each for the deaths of eight of their relatives in a banana-growing region of Colombia. Combined, the company has been ordered to pay \$38.3 million.

“This verdict sends a powerful message to corporations everywhere: Profiting from human rights abuses will not go unpunished,” Marco Simons, EarthRights International general counsel, said in a statement. “These families, victimized by armed groups and corporations, asserted their power and prevailed in the judicial process.”

EarthRights brought the case with plaintiffs firms including Cohen Milstein Sellers & Toll, Searcy Denney Scarola Barnhart & Shipley, and Conrad & Scherer.

“Our clients risked their lives to come forward to hold Chiquita to account, putting their faith in the United States justice system,” said Agnieszka Fryszman, chair of Cohen Milstein’s human rights practice and one of the attorneys leading the case. “I am very grateful to the jury for the time and care they took to evaluate the evidence.”

The verdict is the culmination of a 17-year effort by plaintiffs attorneys to compensate families of Colombians killed by the United Self-Defense Forces of Colombia (AUC).

The class action was filed after a 2007 U.S. criminal case in which Chiquita pleaded guilty to financing the designated global terrorist group and agreed to pay a \$25 million fine. Chiquita voluntarily reported payments, which totaled at least \$1.7 million, to the U.S. Department of Justice in 2003—two years after the U.S. government classified the AUC as a terrorist group.

Blank Rome partner Michael Cioffi led the defense of Chiquita. Cioffi is chair of Blank Rome’s office in Cincinnati, where Chiquita was based until 2012. Law.com International has reached out to Cioffi for comment.

Sends a Message

The AUC was formed by wealthy landowners who armed themselves against the Revolutionary Armed Forces of Colombia, a Marxist guerrilla group known as the FARC, which kidnapped and killed many Colombians over several decades.

Chiquita made payments to the FARC before switching to the AUC. Both armed groups were also heavily involved in the cocaine trade while fighting each other for territory. Chiquita reached an out-of-court settlement in 2018 with families of Americans kidnapped and killed by the FARC in the 1990s.

The class action case heard in West Palm Beach before U.S. District Judge Kenneth Marra of the Southern District of Florida is the result of multiple civil suits filed in federal courts across the United States that sought compensation for hundreds of AUC victims in Colombia.

Florida plaintiffs attorney Jack Scarola, who gained national attention for his representation of victims of convicted pedophile Jeffrey Epstein, delivered the closing argument on behalf of the group.

Scarola painted the relationship between Chiquita and the AUC as a partnership rather than that of an extortioner and its victim.

“Chiquita shook hands with the terrorist devils and made a business deal with them,” Scarola said in his closing argument.

Simons expressed gratitude to the jury, saying he hopes the verdict sends a message to corporations “that lives should not be the cost of doing business.”

“Unfortunately, the language that many corporations understand best is money,” he said. “So significant verdicts can change corporate behavior.”

The six-week jury trial was the first of a series of bellwether trials in the wrongful death lawsuit.

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HF Foods Group Resolves Books And Records And Internal Controls Matter

 fcpaprofessor.com/hf-foods-group-resolves-books-records-internal-controls-matter

June 11, 2024

The Foreign Corrupt Practices Act has always been a law much broader than its name suggests.

Sure, the FCPA contains anti-bribery provisions which concern foreign bribery.

Sure, the FCPA's books and records and internal controls provisions can be implicated in foreign bribery schemes.

However, the fact remains that most FCPA enforcement actions (that is enforcement actions that charge or find violations of the FCPA's books and records and internal controls provisions) have *nothing to do with foreign bribery*. For lack of a better term, these enforcement actions have longed been called non-FCPA, FCPA enforcement actions by this site.

The latest example concerns HF Foods Group Inc., a Nevada-based food service distributor to Asian restaurants in the United States.

In summary fashion, this SEC administrative order finds:

“These proceedings concern violations of the antifraud and other provisions of the federal securities laws by Respondent HF Foods, a Nevada-based food service distributor to Asian restaurants in the United States, resulting from materially false and misleading disclosures and other fraudulent conduct implemented by its former Chairman and CEO Zhou Min Ni and former CFO Jian Ming “Jonathan” Ni.

From August 2018 through 2020, Zhou Min Ni, with the assistance of Jonathan Ni, misappropriated approximately \$3.4 million from HF Foods, through related party transactions and otherwise, for the benefit of himself and his family, including to purchase and maintain a stable of luxury vehicles for the personal use of Zhou Min Ni and his family. Additionally, in anticipation of a 2018 reverse merger between a predecessor entity to HF Foods and a special purpose acquisition company (“SPAC”), Zhou Min Ni and Jonathan Ni schemed to remove \$7.4 million of liabilities from the predecessor company’s books by creating a fictitious line of credit in the name of a purported supplier to conceal future repayments on the liabilities. After the reverse merger, pursuant to which HF Foods became a public company, HF Foods converted the line of credit into promissory notes to continue concealing the fraudulent conduct.

As a result of the above misconduct, from 2018 to 2020, HF Foods’s public filings contained both materially inaccurate financial statements and other false and misleading statements, including materially false statements regarding related party transactions and executive compensation. Zhou Min Ni, as Chairman and CEO of HF Foods, and Jonathan Ni, as CFO of HF Foods, reviewed and signed filings by HF Foods containing materially false and misleading statements.

In 2023, after an internal investigation conducted by a Special Investigation Committee of the Board of Directors (“SIC”), HF Foods announced a restatement of financial statements for fiscal years 2019 and 2020. The company further announced that it had determined, based on factual findings made by the SIC, among other things: certain advances to related parties, including payments for luxury cars, did not occur in the normal course of business, and certain payments should have been counted as compensation for the CEO; the purported supplier to which HF Foods extended a line of credit was not a supplier to HF Foods and there is no evidence that funds from the line of credit were provided to the purported supplier (contrary to what had been represented to the public); and payments to another related party were not commensurate with the services provided.”

Based on the above, the SEC found that HF Foods violated, among other things, the FCPA’s books and records and internal controls provisions.

Without admitting or denying the SEC’s findings, HF Foods consented to a cease-and-desist order and agreed to pay a \$3.9 million civil penalty. (See here for the SEC release).

Hertz Holders Demand \$188 Million Change of Control Payment

By Reshmi Basu and Allison McNeely

- Warrant holders are working with law firm Paul Hastings
- Holders claim share buybacks and new debt trigger redemption

Bloomberg Law News 2024-06-11T12:06:49969833064-04:00

Hertz Holders Demand \$188 Million Change of Control Payment

By Reshmi Basu and Allison McNeely 2024-06-10T16:50:28390-04:00

- Warrant holders are working with law firm Paul Hastings
- Holders claim share buybacks and new debt trigger redemption

Some holders of Hertz Global Holdings Inc. warrants are demanding a payout of about five times the current stock price, arguing the company's debt issuance and share buybacks triggered a change of control event, according to a letter their lawyer sent to the company.

Paul Hastings, a law firm representing holders of around 11% of the warrants, said in a private letter that Hertz's buyback of \$3.4 billion of common stock and borrowing of \$2.2 billion of new debt constituted a recapitalization of the company and equated to a reorganization of its capital stock.

They claim that triggered the change of control clause under the warrants that requires Hertz to redeem the warrants at \$20.47 each, based on a pricing model used to estimate the fair value of option contracts.

Hertz has hired law firm Davis Polk & Wardwell, according to the June 6 letter seen by Bloomberg.

"We view this position as frivolous and not supported by the warrant language or market practice," Hertz said in a statement.

Messages left with Davis Polk and Paul Hastings were not returned.

According to the letter, Hertz bought back 174.8 million shares of its common stock for \$3.4 billion in cash from Nov. 2021 through Dec. 31 of last year, and concurrently incurred \$2.2 billion of debt capital. The warrant holders used the Black-Scholes model for pricing options to come up with the redemption price.

Paul Hastings said the warrant holders are “amenable to an economic resolution” but are “troubled to learn that the Board apparently has declined even to explore a potential opportunity to resolve a sizable dispute that could yield a massive liability.”

Shares of Hertz closed down 2% Monday at \$3.66.

Earlier: Hertz Weighs \$700 Million Sale of Secured Debt, Convertibles

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Matt Levine's Money Stuff: Private Equity Is on Sale

By Matt Levine

Opinion

Bloomberg Law News 2024-06-11T12:07:13814725859-04:00

Matt Levine's Money Stuff: Private Equity Is on Sale

By Matt Levine 2024-06-10T14:04:50761-04:00

Markups

Most people who buy and sell financial assets for a living need to know how much their portfolio is worth at any given time, or at least at the end of the quarter. If you manage investments for clients, you have to send the clients periodic statements saying "your investments are worth \$_____"; you have to know what number to put in the blank. The clients want to know, for one thing, but also, how much you *charge* the clients might depend on the number that you put in the blank. If you charge the clients a percentage of current assets, then you need to know what the assets are currently worth. If you charge the clients a performance fee on unrealized gains, you need to know how much the value of the assets has increased since the last statement. Even if you don't manage client money, your employers will want to know how much your portfolio is worth, so they can keep an eye on risk and pay you for your performance.

Also, though, many people who buy and sell financial assets for a living are fundamentally in the business of looking for *mispriced* assets. Your job is to find some situation with edge, some place where you have more expertise or patience or capacity than the market, some asset that you know is undervalued but that the market will sell to you cheap.

You see the tension here, right? The tension is:

1. You think a thing is worth \$100.
- 2. Someone is selling it for \$80, because they are wrong or weak.
- 3. You buy it at \$80.

- 4. The valuation controller comes to you and says “for various important purposes, I need to know the current fair market value of this thing.”
- 5. “Oh, \$100,” you say. Of course! That’s what it’s worth! That’s why you bought it! (For \$80.)
- 6. You book \$20 of profits, charge performance fees, etc.

And then, oh, you know. Sometimes you sell the thing a week later for \$100 and everything is great. Other times the thing never trades above \$80, you sell it a year later for \$60, and people have some questions about your valuation.

Obviously this more or less never happens with publicly traded stocks or Treasury bonds: When a thing has an active public trading market, everyone understands that you mark the thing to its current trading price, whether or not you think it’s underpriced. If you buy GameStop Corp. stock at \$28.50 and it closes the day at \$28.22, you will mark it at \$28.22, whatever you might think it is actually worth.

And with illiquid hard-to-value things, everyone *understands* this tension, so responsible investment firms (and their accountants, risk managers, auditors, etc.) will have some procedure for determining fair value that is not just “ask the trader and write down whatever she says.” You’ll get an independent third-party valuation, or use a pricing service, or get three quotes from dealers, or something. Also, firms that deal mostly in illiquid hard-to-value things (venture capital, private equity, private credit, etc.) are less likely to charge clients fees based on their valuations. A private equity firm is more likely to charge fees based on committed capital and realized returns — actual cash in and cash out — while a hedge fund that trades public stocks will have an easier time charging fees based on current asset value and unrealized returns.

Still, every so often you get stuff like this, from Jonathan Weil at the Wall Street Journal:

The last day of September 2023 was very good for Hamilton Lane Private Assets Fund. It recorded a 39% gain on a group of investments it bought the day before for \$52 million, giving a quick boost to the fund’s performance.

Of the three dozen investments it bought on Sept. 29, nearly half had more than doubled in value on Sept. 30. The Hamilton Lane fund’s stake in a fund that focuses on Latin America rose eightfold in 24 hours.

Welcome to the obscure secondary market for investments in private-equity funds. The Hamilton Lane fund and others buy stakes in private-equity funds from existing investors. It is a thinly traded market largely out of public view. Secondary market volume for private-equity and similar funds in 2023 was \$112 billion, according to investment bank Jefferies.

The small amount of publicly available data about the market shows buyers often get their stakes at big discounts to the official values set by the private-equity funds’ managers. In many cases, buyers quickly mark up the stakes they acquire to the official value, no matter how little they paid for them. ...

The investment funds that mark up their acquisitions benefit from instant gains, which increase assets and boost fees. Strong performance numbers draw in new investors.

To be fair, it's not like the secondary-market buyers are just making up valuations. They are relying on official outside valuations, rather than their own subjective views:

When the Hamilton Lane fund buys a stake in a private-equity fund, it relies on the valuation provided by the other fund's manager, known as the general partner. "We do not adjust the GP's valuation," said Erik Hirsch, co-chief executive officer of Hamilton Lane. "We would have no basis to adjust that."

No basis? Not *any* basis at all? Weil can think of one:

Did the Hamilton Lane fund's ability to buy a stake for so little raise any question about the higher valuation? "Absolutely not," Hirsch said.

Obviously *market prices* have nothing to do with *value*.

Roaring Kitty

I tell you what: If I could make the price of a publicly traded stock double just by tweeting a cartoon of a guy leaning forward in a chair, and if I could make hundreds of millions of dollars of essentially risk-free instant profits by buying loads of call options on the stock before tweeting that cartoon, I would:

1. Do that, and

- 2. *Not* then go around publicly discussing, on YouTube, at great length, my fundamental case for why the stock is undervalued.

Right? For at least three reasons:

1. I would already have the hundreds of millions of dollars. I would like to think that a single \$300 million score would be plenty for me.

- 2. Posting a picture of a guy in a chair on X (formerly Twitter) is *probably* — not legal advice! — not going to get me into any legal trouble. I am not making any factual representations about the company, the stock, my position, my future plans, anything; it's just a picture of a guy with a headband. Whereas if I go on YouTube and talk in detail about why I like the stock, what I think of the company's strategy, my current holdings, my plans for the future, etc., then I am saying a bunch of stuff that *could be wrong*, or could mislead someone, or could give someone some argument that they were misled, etc. Every factual statement is a risk; the cartoon is a minimal risk.

- 3. Surely telling everyone my fundamental case would make the stock go *down*? I mean, think about it. I have the ability to double the stock with a tweet of a cartoon. Why would I invest any time in researching a compelling long-term bull case? If this stock can be doubled with a tweet, why would there *be* a compelling long-term bull case? If there was a compelling long-term bull case back before the stock doubled, wouldn't it be much less compelling at the higher price? Shouldn't I just stick to my strengths? Where my strengths are inscrutable tweets with magical effects? That's such a good strength!

Bloomberg's Bailey Lipschultz reports:

GameStop Corp. stock tumbled further on Friday after the highly-anticipated return of Keith Gill to YouTube, as well as the video-game retailer unexpectedly releasing earnings and announcing plans to sell up to 75 million additional shares earlier in the day.

The stock sank 39% following Gill's appearance on the "Roaring Kitty" stream, where he reiterated his views on the stock and confirmed that the massive positions posted on his Reddit account are his. The investor, who has sent shares on a wild ride in recent weeks, praised Ryan Cohen, GameStop's chief executive and largest shareholder, and expressed faith in the management team's ability to rework its business. ...

The event alternated between the bizarre and the serious. It started with a video of feisty kittens and eventually showed Gill sitting in a gaming chair wearing sunglasses, stickers on his face and an arm sling he apparently did not need. He drank beer and riffed on viewers' comments at times when he was not discussing GameStop's potential.

"It's a bizarre spectacle," said Steve Sosnick, chief strategist at Interactive Brokers. "At least he's seemed to answer that the positions are really his and that he is indeed still Roaring Kitty.

I watched it for a while. I was first bored (it started late), then bored some more (he began by spending a long time talking nonsense, discussing his beer, and seeming to deliberately frustrate viewers' expectations), then thrilled (I appreciate anticomedie, and I began to enjoy his deliberate frustration of viewers' expectations as an avant-garde bit), then bored again (when he started talking about GameStop), then I turned it off. If you thought he was going to tell you why GameStop would keep going up, or rally the meme-stock crowd into GameStop, or explain why his vague long-term thesis that the management team can eventually rework the business led him to buy tons of *June call options*, you were disappointed. The stock was up 47% last Thursday on news that Gill had scheduled a livestream, and down 39% on Friday on the actual livestream.

To be fair, there was other news on Friday. What an incredible bit of meme-stock finance: GameStop was scheduled to announce earnings tomorrow, but preannounced on Friday morning so that it could go out and do an at-the-market offering of 75 million shares. Did it preannounce earnings and file for the at-the-market offering — two weeks after finishing a \$933 million ATM offering — *because* Keith Gill scheduled a livestream? I mean? Is there some other possible explanation? Lipschultz:

Before Friday's sharp decline, some market watchers characterized GameStop's efforts to raise cash during another meme-stock frenzy as savvy, while others viewed it as exploitative of existing shareholders. If its bankers sell the full offering, it would increase the number of shares outstanding by more than 20%, further diluting investors. Such sales also typically put pressure on share performance in the near-term.

It's obviously savvy and it's obviously exploitative. Not of existing shareholders, I don't think; selling stock above fundamental value is *accretive* to existing shareholders, though who's to say what "fundamental value" is. GameStop was selling stock a few weeks ago at about \$20.74 per share; when Gill pushed the price to \$46.55 last Thursday, how could it *not* sell some more? "When the ducks are quacking, feed them," is the cliché of equity capital markets that was drummed into my head in my former career and, man, those ducks are quacking.

Elsewhere in meme stocks

I didn't find Roaring Kitty's case for GameStop's long-term business prospects all that novel or exciting, but it is *a* case. It's roughly: "GameStop is run by basically competent executives, it is in the basically viable business of selling video games, and it keeps raising big piles of cash; surely it can find something productive to do with all that money."

I'm not sure that's *right*, but it's all normal stuff that you can say. Meanwhile Trump Media & Technology Group is distilled essence of meme stock; it's what you'd get if you took GameStop and replaced its more or less plausible business and management with a tattered pile of conspiracy theories about naked short selling.

Last week, Jason Leopold, at Bloomberg's FOIA Files newsletter, rounded up a bunch of Trump Media shareholder complaints to the US Securities and Exchange Commission, and they are mostly what you'd expect: "The Market Makers in DJT are manipulating the OPTIONS prices," that sort of thing. (DJT is Trump Media's ticker symbol.) But I would not in a million years have predicted *this* complaint:

One person claimed that they would've reaped a windfall from the sale of Trump Media stock on the day it went public, but brokerage Charles Schwab screwed up and botched the sale. They said the value of their securities skyrocketed to \$5.2 million on March 26 and that a person monitoring the stock with them "screamed at me at the top of her voice: 'Sell it all! RIGHT NOW!!!!!!'"

When they tried to unload the stock, however, their account showed they sold their holdings for \$68 a share, not \$15,994 a share, which is what they claimed it traded at when they placed a sell order.

A spokesperson for Charles Schwab explained to FOIA Files what happened.

"On March 26, Nasdaq implemented a symbol change of the SPAC ticker DWAC to DJT," the spokesperson said, referring to Digital World Acquisition Corp., the blank check company formed to merge with Trump Media & Technology Group. "A few of Schwab's platforms displayed a quote for \$DJT (Dow Jones Transport Index) rather than the DJT. This issue only impacted quoting and not trading. Schwab promptly fixed the issue that same morning, and all client orders were filled at the correct price, which that day ranged from \$57.25 to an all-time high of \$79.38," the spokesperson said. ...

"I was so exceedingly devastated by the fact that I wasn't actually a multi-millionaire because of Schwab's website messing up that I simply closed the customer service chat box," the person wrote.

That'll show 'em. We talk sometimes around here about people wanting to buy one stock, being confused by a similar ticker symbol, and buying the wrong stock. This is the first case I have seen of someone wanting to buy a stock, buying the correct stock, selling it, and then demanding to be paid as though they had sold a different stock with a much higher price. The *real* price of Trump Media was \$15,994, but the mainstream media won't tell you that.

Quant, AI

An important story in the development of modern finance was "if you are good at building computers that can process natural language, you can pivot to building computers that can pick which stocks will go up, and get much richer." This is essentially the story of Renaissance Technologies, whose central innovation was to hire computational linguists, because there was not much money in building computers that could talk and lots of money in building computers that could pick stocks.

But that is an old story, and now everyone has a computer that can pick stocks, while there is infinity money in building a computer that can talk. So now the people who got good at building computers that can pick stocks are pivoting to processing natural language:

High-Flyer Capital Management, a Chinese quantitative hedge fund, has grown into a roughly Rmb60bn (\$8bn) asset manager since its launch in 2015, partly using AI and algorithms to identify patterns or variables that could affect stock prices.

Now it has parlayed that knowledge and infrastructure into a powerful AI model that has been released and that experts say is on a par with leading western efforts. DeepSeek-V2 can answer questions, write code and reason. ...

The quant fund got its start in a Chengdu apartment, where founder Liang Wenfeng, a computer science graduate of Zhejiang University, experimented with automated stock trading, according to local media reports. His profile in China's asset management association registry says he was a freelancer until 2013, when he incorporated his first investment firm.

By 2021, all of High-Flyer's strategies were using AI, according to manager Cai Liyu, employing strategies similar to those pioneered by hugely profitable hedge fund Renaissance Technologies. "AI helps to extract valuable data from massive data sets which can be useful for predicting stock prices and making investment decisions," he said during a roadshow that streamed online that year.

It is somewhat mysterious that picking stocks is the crown jewel of the liberal arts, that when you have learned to reason and converse and write convincing prose, you can also pick stocks, and vice versa.

Credentials

When I was in college, my impression of management consulting was that it was an industry that hired people with fancy college degrees but no specific business skill or experience and trained them in the important business meta-skill of hobnobbing with chief executive officers. Now it is apparently the opposite? Sarah Kessler reports at the New York Times that all the elite employers are getting more interested in skills than in degrees:

The idea, as the consulting firm BCG described it, is putting “competence over credentials,” meaning that companies should stop looking for the right degree and instead focus on who has the right skills, regardless of how they acquired them.

The pitch is basically meritocracy. And it’s everywhere. McKinsey has developed a video game to assess candidates’ cognitive skills, which it says gives it “insight beyond the résumé or conventional interview.” And it has published an interview prep website that a spokesperson said was necessary “so exceptional candidates from any source can succeed in our interviews, regardless of whether they have access to resources like a consulting club, active career services support, or an alumni network that’s well-connected within the consulting industry.” Bank of America has partnerships with 34 community colleges, and says it has hired and trained thousands of employees from these schools. Goldman Sachs switched to doing interviews for entry-level jobs virtually instead of only at a few top-level schools. “We now encounter talent from places we previously didn’t get to,” its global head of human capital wrote in 2019.

There is a link to the video game, which as far as I can tell does not involve putting covers on manholes or filling 747s with ping-pong balls. There is a strange arc in certain professions, which go from being (1) real jobs where people with particular skills and interests get hired to do particular sorts of work, to (2) general-purpose finishing schools for ambitious but directionless Ivy League graduates, back to (3) real jobs again. In my day, investment banking and consulting were at their peak as finishing schools, but that has changed, and the transition is awkward.

BNB

Changpeng Zhao had some good news and bad news last week:

The BNB token, a cryptocurrency linked to Binance and its incarcerated co-founder Changpeng Zhao, surged to a record high in the first week of his four-month jail sentence in the US.

Its rally underscores Zhao’s status as the richest person ever to do time in a US federal lock up. Zhao reported to a prison in California on Tuesday to begin a four-month sentence for failing to properly safeguard the world’s largest crypto exchange against money laundering.

The price of BNB climbed to a peak of \$717.48 on Thursday, lifting its market capitalization to \$109 billion, according to data from CoinGecko. The token has more than doubled in price since the start of the year.

It's not entirely clear how much BNB Zhao owns, but it's probably in the tens of billions; Bloomberg estimates his wealth at \$38.5 billion, and BNB is likely a majority of that. BNB was up about 15% over Zhao's first three days in prison, though it has given back most of those gains. It's still up more than 2% as I type this, though, suggesting that Zhao has gotten richer by an average of perhaps \$50 million per day that he's been in prison. I occasionally hear from readers with hypotheticals of the form "would you do [some white-collar crime] if it meant that you'd serve [some time in prison] but keep [some dollar amount of proceeds]," and here is that hypothetical brought to life.

Parking lots

If you are an auditor, and you call up the chief financial officer of the company you are auditing and ask "hey when is a convenient time for me to come to your office to review the books," and he replies "no, no office, parking lot," and you say "okay I'll drive to your office and you'll come down—" and he says "oh no, not *our* parking lot, a different parking lot," and you meet him in a parking lot 40 miles from his office, and he hands you printouts of the financial statements and drives away, how should you begin your audit? Which of the financial statements is most likely to contain red flags or discrepancies to be addressed? I feel like the answer is "the parking lot"? If I were auditing those financial statements, most of my questions would not be about technical accounting matters but "why are we meeting in a parking lot again?"

Here is a story about the CFO of the Detroit Riverfront Conservancy, William Smith, who was arrested last week for allegedly stealing \$40 million from the nonprofit:

Mr. Smith's grip on the nonprofit's finances was so tight that even the nonprofit's accountant, charged with tracking spending, could not log into one of the group's bank accounts. Only Mr. Smith had the password. He gave her the bank statements on paper and met her only four times a year, in the parking lot of a Honey Baked Ham store 40 miles from the office. ...

Brian Mittendorf, a professor who studies nonprofit accounting at Ohio State University, said that the conservancy's official documents show that it took steps to safeguard its finances — including oversight from its board of directors and annual audits.

"All these things sound as if it's an organization with a pretty robust review in place. On the other hand, only one person can access the money, and provides paper copies in a Honey Baked Ham parking lot?" Mr. Mittendorf said. "Those sound like the opposite of a robust governance mechanism."

As it happens, Smith allegedly altered the bank statements by "[removing] the payments to himself and [replacing] them with fake payments to other vendors." I still don't fully understand the parking lot, though? Like you can meet the accountant in your office to hand over the doctored paper financial statements; just unplug your computer first. I just feel like meeting in the parking lot sends a pretty strong message of "I AM DOING CRIME" that you might want to avoid, if you are doing crime.

Things happen

Wall Street Backers See Breakthrough Moment for Carbon Offsets. Elliott Takes Big Stake in Southwest Airlines. As Banking Moves Online, Branch Design Takes Cues From Starbucks. The Shortcut That Allows Risky Startups to Raise Billions From Rookie Investors. LME Aluminum Queue Jumps to Five Months After Trafigura Delivery. Assumable mortgages. Dispersion trade. WeWork's Former NYC Headquarters Taken Over by Coworking Rival. Tesla Pay Fight Gives Elon Musk Taste of Karma. Dentist loses money on private real estate investment. Little Jackson Hole. Florida man allegedly tells police he is 'Mr. Monopoly,' goes directly to jail. Sphere Unbans Phish Fan Who Snuck In His Bong.

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- 1. A variation on this is that you say "\$85," and then when they ask you next month you say "\$90," etc., bleeding in the profit over time. This is, in most respects, worse.
- 2. One case I'm fond of is the Pacific Investment Management Co. odd-lots trade, where Pimco's BOND exchange-traded fund (1) bought odd lots of bonds at cheap prices, (2) marked them up to the round-lot price, and (3) eventually sold them at pretty close to their marks. The Securities and Exchange Commission brought a case against Pimco for mismarking the bonds, and Pimco settled for almost \$20 million, but grumbled a little that its marks were actually fine. Another is the DRW Investments LLC interest rate swaps case, where DRW (1) noticed that standard market convention mispriced some swaps, (2) bought a bunch of the swaps and (3) kept bidding them up until they were correctly priced. The Commodity Futures Trading Commission sued DRW for market manipulation, but DRW won.
- 3. Not legal or investing advice! But would I do that? Yes.
- 4. Meanwhile everyone who has emailed me to say "actually there's a good business case for Trump Media" has gone on to say "it would be a good way for foreign governments to bribe Donald Trump if he becomes president again," which is true, but also kind of a conspiracy theory.
- 5. My answer is always no, for what it's worth, but empirically other people seem to have different utility functions.

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Matt Levine's Money Stuff: Tax Deals Can Cause Conflicts

By Matt Levine 2024-06-11T14:16:24082-04:00

TRAs

One strange piece of market inefficiency is that public markets supposedly undervalue tax assets. So a private equity firm will sometimes take a company private and then run it in a way that generates lots of tax deductions, lots of tax credits and net operating losses and depreciation and amortization that will offset future taxable income. And they will look at the company and see that it has, say, an operating business worth \$100 and tax assets that will generate \$5 per year of tax savings, and they will be happy.

But then they will want to take it public, and they will go to public investors and say “how much would you pay us for this company,” and the public investors will say “\$100,” and the private equity firm will say “sure the business is worth \$100, but we’ve got all these tax benefits, like \$5 per year of tax benefits, surely that’s worth like \$125 total?” And the public investors will say “no, we don’t understand taxes, we don’t care about that stuff, we’ll pay you \$100.”

And so the private equity owner will say “Okay fine look. If you don’t care about the tax benefits, we will keep them. We’ll sell you part of the company — we’ll do an initial public offering and sell stock that entitles you to a share of the business’s profits — but we’ll keep all of the tax benefits. The company will just run its business normally and calculate its pretax profits without considering all of the tax benefits that we’ve baked into the company, and then it will set aside 21% of those profits for taxes. If the company makes \$40 in a year, it will set aside \$8.20 for taxes. And then it will use its tax deductions and figure out the tax it *actually* owes, and it will pay that to the government, and pay the rest to us. If the actual tax bill is \$3.20, we’ll keep the other \$5.” And the public investors will say “sure that’s fine, we don’t want the tax benefits anyway, we’ll pay you \$100 for the company without them.” The tax benefits will stay with the people — the private equity firm — who value them.

This trade — paying the tax benefits to the pre-IPO owners — is called a “tax receivable agreement,” or TRA. Ordinarily the way it works is that, before the IPO, the company identifies some existing tax assets that will reduce its taxable income in the future, and it agrees to pay some large fraction — often 85% or 90% — of those benefits to the pre-IPO owner for some period of time, often 15 years.

(The company keeps some of the benefits, to align incentives.) We have talked about TRAs a few times before. Last year, we talked about a takeover battle involving Sculptor Capital Management Inc., a hedge fund firm. Before it went public, Sculptor was a partnership, and when the partners converted their partnership interests into public-company shares they (1) owed taxes personally but (2) generated tax deductions for the company; Sculptor signed a TRA agreeing to give them 85% of those tax deductions back. And earlier this year we discussed Parallaxes Capital, an investment firm that buys TRAs, sometimes from people who didn't know they even had a TRA.

As I mentioned when we discussed Parallaxes, most TRAs are paid out early if the company is acquired. If the company goes public, and three years later it is acquired, it can't really keep paying the tax benefits to the pre-IPO owner, so it will just pay them all out at once in a lump sum. The lump sum is something like "if we save \$5 of taxes each year for the remaining 12 years of the TRA, that's \$60 of savings over 12 years, and discounted at 6.5% it's about \$40." So the company will cash out the TRA for \$40.

This is generally quite favorable for the TRA holder. For one thing, the payments tend to be discounted at a pretty favorable rate, making the lump sum more valuable than getting the payments over time. Also, though, the calculation is normally made using favorable assumptions: In particular, it normally assumes that the company will be able to *use* all of the tax benefits. (If in fact the company loses money in Year 12, it will not get any tax benefits and won't pay anything out on the TRA, but the lump-sum calculation just assumes that the company will make plenty of income in all of the future years.)

And so an acquisition is *better* for the TRA holder than it is for all the other shareholders. If the company sells itself, then the public shareholders get paid for their shares, but the pre-IPO shareholder will get paid for its shares and will *also* get cashed out for its TRA. The TRA payment can be more valuable than the payment for the shares. And in many cases the TRA holder — the company's founder, perhaps, or the private equity firm that took it public — will also be a big shareholder of the public company, often with board seats and control of the company. And so the TRA holder might want to sell, and it might have the ability to *make* the company sell. It might not care that much about the price. Even if the company is worth more *to other shareholders* on its own, it might be worth more *to its TRA holder* in a sale.

In particular, starting in 2018, the US federal corporate tax rate [went down](#) from 35% to 21%, which made TRA payments less valuable: A \$1 tax deduction would now generate only 21 cents of tax savings, rather than 35 cents. This was good for companies — they would pay less tax, *and* pay less under their TRAs — but bad for the TRA holders, who would get paid less on their TRAs.

Accelerating the TRA — getting the cash now, rather than waiting 15 years — became more attractive.

Did that cause private equity firms to dump their public portfolio companies to accelerate their TRAs? Eh, maybe a little. Here is a Cleary Gottlieb Steen & Hamilton LLP [client memo](#) from last week:

In a May 31, 2024 opinion, the Delaware Court of Chancery denied a motion to dismiss a complaint challenging the sale of a public company with a controlling private equity sponsor to an unrelated, arms-length buyer, finding that the sale was potentially tainted by conflicts of interest. In particular, the court found that it was reasonably conceivable that the private equity sponsor's receipt of an early termination payment under a tax receivable agreement put into place upon the target company's initial public offering was a material nonratable benefit, which may have led the sponsor to push for a sale (which would trigger the early termination payment), even if remaining a standalone company would have been better for the minority stockholders.

Here is [the opinion](#). Lone Star Funds, a private equity firm, bought Foundation Building Materials in 2015. In 2017, it [took Foundation public](#) again, with a TRA giving Lone Star 90% of the benefits from its pre-IPO tax assets. The TRA provided that, if Foundation was acquired, Lone Star could terminate the TRA and get a lump-sum payment calculated (1) using a low discount rate and (2) assuming that Foundation could use all of the tax benefits every year. Lone Star held a majority of the stock and board seats after the IPO.

Later in 2017, the corporate tax rate was cut from 35% to 21% and, says the judge:

It is reasonable to infer that after the Tax Act, Lone Star recognized that it could generate more value for itself by selling the Company and triggering an Early Termination Payment than by managing the Company as an independent entity, receiving annual payments under the Tax Agreement, and selling off its position over time. Consistent with that inference, in early 2018, Lone Star began to explore its options for exiting the Company.

The company looked for buyers. Understanding that the TRA was a conflict of interest, it set up a special committee of independent directors to make sure that any deal was fair to shareholders, but the judge concluded it wasn't good enough:

Well after the sale process was underway, the board created a special committee to address the conflict created by the early termination payment. The board charged the committee with determining

whether a sale was advisable and gave the committee the power to say “no.” Despite those powers and its charge, the committee was passive. Its members repeatedly went months without convening, including during busy periods when the fund’s representatives were negotiating the terms of a sale. The committee also took specific actions that smack of deference to the fund.

The sale process actually seems fine — they contacted a bunch of potential buyers, got multiple bids, played them off against each other and ultimately took the highest one, \$19.25 per share in cash, [a 27% premium](#) to the stock’s trading price — but the judge decided that *the decision to sell itself* could have been conflicted. “Under this theory, Lone Star must prove that the Merger was entirely fair relative to the alternative of operating the Company as a standalone entity.” It’s possible that the company was worth more than \$19.25 per share *to shareholders*, but that Lone Star took the deal to cash out its TRA. Lone Star was Foundation’s biggest shareholder, but it didn’t just own Foundation’s business. It also owned its tax savings, and it apparently valued those more than the other shareholders did.

GameStop cash

I wrote yesterday that GameStop is a meme stock, yes, but it is also an operating business with an experienced successful chief executive officer and a bunch of stores that sell videogames. You could, and people do, have some thesis about how it will transform its business to become profitable and growing. Fine. On the other hand, [the Financial Times reports](#):

GameStop’s ecommerce strategy has faltered, its bricks-and-mortar store count is shrinking and its sales are in a multiyear slide. But one measure of the video game retailer is a picture of health: the amount of cash in its accounts.

The company at the centre of the 2021 meme-stock frenzy has once again captivated Wall Street after its shares soared in the past month on little more than the re-emergence of the influential social media fan known as Roaring Kitty.

Management took advantage of its sudden increase in valuation to sell 45mn shares and raise \$933mn. Last Friday GameStop alerted investors to a potential sale of another 75mn shares, which at Monday’s closing price would be worth \$1.9bn.

In doing so, the company followed a well-worn meme stock playbook of recent years, using their

shortlived popularity to raise cash. The mystery is where it will put all the money, which stands at \$2bn.

That \$2 billion, though, is before [the offering](#) it launched last Friday. Last week, GameStop [released its financial statements](#) as of May 4, which included almost \$1.1 billion of cash and marketable securities. Add the \$933 million it raised by selling stock in May and you get to about \$2 billion. It has a new at-the-market offering of 75 million shares going on, starting last Friday, and my assumption is that it is selling that stock as fast as possible. Which is pretty fast: GameStop traded 279 million shares on Friday and 131 million yesterday; if it's selling 10% of volume GameStop could be more than halfway done by now. On aggressive but plausible assumptions, GameStop could have sold about 41 million more shares for about \$1.3 billion by the end of yesterday. That would give it a cash pile of about \$3.3 billion, and a market capitalization, as of yesterday's close, of \$9.7 billion. If it finishes selling all 75 million shares in the next few days, at around the current stock price, it will have about \$4.2 billion of cash and a market cap of about \$10.6 billion.

Yesterday's closing price was \$24.83 per share. The stock closed at a high of \$48.75 on May 14, shortly after Roaring Kitty (Keith Gill) returned to social media. Before that, though, it was lower. It closed as low as \$10.01 per share in April. At \$10.01 per share, GameStop's market capitalization would be about \$4.3 billion.

My point here is that \$4.2 billion and \$4.3 billion are not *that* different? One thing that GameStop could do with its pile of cash is *buy (almost) all of its own stock*.

Obviously I'm kidding. You can't do that, for various reasons, the main one being that if GameStop tried to buy all of its own stock that would push the price up a lot. On the other hand ... like, kind of, right? Here is a scenario that I do not think is *that* crazy:

- 1. Keith Gill stops posting, and/or his posts stop having much effect. His Friday YouTube livestream seems to have been *bad* for GameStop's stock price. Since then, his posts on X have included a [man with a duffel bag](#) (and a cat's head?) seeming to slump away down a city street, and a [cartoon man](#) looking in a mirror saying "You *were* a billionaire." Maybe he will give up, quietly sell his stock and enjoy his wealth? I am certainly not predicting this; I'm just saying it is a thing that *could* happen.
- 2. GameStop will *not* announce any transformative business initiatives or huge profits. It preannounced earnings last week, and they [were disappointing](#).

- 3. Without any new catalysts from Roaring Kitty or the company, the stock will slide to roughly where it was in April.
- 4. GameStop will announce a stock buyback, buy back all 120 million shares it sold this year for less than it sold them for, bank probably hundreds of millions of dollars of profit and support the stock price.
- 5. Repeat this every year or so and you have a profitable business of selling stock to people during moments of euphoria and buying it back cheaply when they lose interest.
- 6. Never mind the videogames.

This is so stupid, I'm sorry. This can't really work. Except that it can? This, I suppose, is the end state of meme stocks: Turn the stock into a pure trading token, unrelated to any actual business of the company, and turn *the company* into a pure vehicle for trading the stock. Sell stock when it's high, buy it back when it's low, forget about the business and drift on the waves of social media sentiment.

This won't happen, though. Probably they'll spend all that cash on something — doing an acquisition, building out an online platform, buying crypto, something. But will that strategy be *better* than spending the money on buying back the stock when the price goes down?

Joonko

How many tech startups do you think do stuff [like this](#)?

Raz also touted the quantity and quality of Joonko's customer base on public media websites while she was raising money for Joonko. For example, on January 6, 2023, Raz claimed in a public YouTube video that Joonko was now working with over 200 customers and highlighted Purported Customers A, B, and C as Joonko's exemplary customer companies.

Raz's public LinkedIn profile as of June 28, 2023 listed several Fortune 500 companies as part of Joonko's customer base. ...

Joonko had far fewer than 200 customers and its customer base did not include Purported Customers A, B, or C, or the companies listed in Raz's LinkedIn profile.

Or this?

In an email to Investor B and likely others in November 2019, Joonko stated, with Raz's knowledge, that it had "more than 40,000 candidates in [its] talent pool." ... Joonko had significantly fewer, if any, candidates on its platform in 2019.

Or this?

The Round B Presentation also included the following fake testimonials:

- a. a fake testimonial from Purported Customer A stating, "Joonko has been immeasurably effective in helping our team attract more diverse candidates, by bringing them directly to our recruiters and keeping track of our hiring progress while advancing these candidates";
- b. a fake testimonial from Purported Customer C stating, "Diversity is at the heart of our culture and Joonko helped us turn this aspiration to a successful reality"; and
- c. a fake testimonial from Purported Customer D stating, "I love the fact that I don't need another dashboard and that relevant candidates are simply flowing into our [Applicant Tracking System], saving me so much time on sourcing. Because of Joonko, I was able to get back to what really matters – hiring great talent."

Those are all from [the complaint](#) in a US Securities and Exchange Commission [lawsuit](#) against Ilit Raz, the founder of a startup called Joonko, which purportedly used artificial intelligence to help companies hire diverse job candidates. Federal prosecutors also [brought a criminal case](#). There is plenty of egregious stuff here; from the criminal case:

In or about 2023, a Joonko investor ("Investor-1") became suspicious about Joonko's performance and requested certain information from Joonko, including bank statements. In response, on or about April 3, 2023, RAZ emailed Investor-1 a purported Joonko bank statement, which depicted that the company had an average balance of over \$5,000,000. In truth and in fact, and as RAZ well knew, the bank records that RAZ emailed to Investor-1 were forged, and the actual bank records showed that Joonko's true account balance was millions of dollars lower. Less than a week later, on or about April 8, 2023, RAZ emailed Investor-1 a set of purported purchase orders for Joonko customers. RAZ knew that many of the purchase orders she emailed to Investor-1 were fictitious, contained forged signatures, and were executed on behalf of purported customers that had no business relationship with Joonko.

You can't forge bank statements or signatures on purchase orders! That's bad. On the other hand, is Raz the first startup CEO to write fake customer *testimonials*? Is she the first startup CEO to be a bit aspirational *on her LinkedIn profile*?

My sense has always been that, if you are a public company, everything is securities fraud: You have to be scrupulously truthful in all of your public communications, and if investors can find the slightest arguable misstatement they will sue you for securities fraud. And if you are actually *lying about your customers and revenue*, you will go to prison.

At private startups, on the other hand, the rules have usually been a bit laxer. Not as a legal matter, but as a practical matter. Fewer people see your statements, for one thing. (They're not public.) Those people are more likely to be sympathetic venture capitalists, who probably won't sue you or turn you in to the authorities if you're lying. Also, your stock does not trade continuously, so nobody can say "I was deceived by that interview you did and bought your stock." The stock only trades when you sell it in defined fundraising rounds, so you can take some liberties on your LinkedIn as long as you walk them back in the official investor presentations. (Not legal advice!)

But my sense is also that private markets are the new public markets: As startups raise millions of dollars from institutions and individuals, and stay private longer, it does make more sense that the rules of public markets increasingly apply to private ones. These days, if you puff up your LinkedIn as a startup CEO, that can get you in just as much trouble as it would if you were a public-company CEO.

Things happen

Edgar Bronfman Eyes \$2 Billion-Plus Bid for Company That Controls [Paramount](#). UK poised to approve biggest overhaul of [listing regime](#) in 40 years. Bond Investors Are Paying Up Again for [Active Fund Managers](#). GM Approves \$6 Billion Buyback on Growth in EV Business. Frontier emerging markets lure investors back with [high yields](#). White House Prepares to Tap Derivatives Regulator to [Oversee FDIC](#). Former Allianz Fund Manager [Pleads Guilty](#) to Defrauding Investors. The US [bankruptcy scandal](#) playing out in a Texas border town. Moelis places banker on leave as it investigates [New York scuffle](#).

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- 1. This sounds weird, but as far as I can tell it really is the main rationale for tax receivable agreements: that private owners are better able to value tax attributes than the public. Here is a [2018 Vanderbilt Law Review article](#) about TRAs by Gladriel Shobe, noting that “those who defend TRAs claim that without a TRA, public shareholders actually ‘rip off’ pre-IPO owners because, the argument goes, the public does not pay full value for tax assets in an IPO. In other words, the argument in favor of TRAs is that they are an efficient means of ‘assuring [pre-IPO owners] receive a fair price for their business.’” And: “Practitioners claim that tax assets are not priced into IPOs because public company valuations are often based on earnings before interest, taxes, depreciation, and amortization (‘EBITDA’), which excludes both tax assets and tax liabilities.” And an Evercore presentation cited in the [Foundation opinion](#) (discussed below) said: “There is limited evidence that public shareholders typically adjust the price they are willing to pay for shares in a public company due to the presence of a TRA. ... Pre-IPO shareholders generally believe investors tend to ignore tax attributes ... [so a TRA] enables the selling shareholder to retain those benefits.” To be fair, as in the Sculptor case, there is another rationale for TRAs, which is basically that if you own partnership units in an Up-C company then your conversion to corporate shares generates taxes for you and tax assets for the company, and the TRA sort of makes you whole.
- 2. Don’t take this too seriously. What I mean is something like “a business that is worth \$100 to equity holders on an after-tax basis assuming full taxation of future income, plus tax benefits that will in fact reduce the taxation of that future income by \$5 per year.”
- 3. This simplifies things — particularly the timing; they didn’t convert to corporate shares at the IPO — but that’s the basic idea.
- 4. Parallaxes, for instance, reportedly [gets about a 15% yield](#) on its TRA investing, so getting paid out at 6.5% yield is a big windfall.
- 5. This came up in Sculptor: Its founder, Dan Och, had a TRA, and the other side in the takeover battle argued that he was favoring the deal that cashed out his TRA more favorably rather than the one that was better for public shareholders.
- 6. The lower of 6.5% or Libor plus 100 basis points, which would be around 2.8% when the merger closed.
- 7. That’s assuming that GameStop sold 10% of volume throughout the day on Friday (279.1 million shares traded) and Monday (131.6 million), and that it sold at the volume-weighted average price each day (\$35.73 on Friday, \$25.51 on Monday, per Bloomberg). That gets you 41.1 million shares sold for \$1.33 billion.

- 8. I assume (1) the 305.9 million shares it [reported](#) as of May 4 plus (2) the 45 million shares it [sold in May](#) plus (3) the 41.1 million shares that I just calculated it might have sold this month, for a total of 392 million shares. And then multiply that by Monday's \$24.83 closing price and you get \$9.73 billion.
- 9. That assumes it sells the remaining 33.9 million shares (the 75 million ATM program minus the 41.1 million shares I guessed it might have sold already) at a price of \$24.83 (yesterday's closing price), for a total of \$840 million or so of cash, leaving it with 425.9 million shares outstanding.
- 10. That's assuming a share count of 425.9 million shares, accounting for the full ATM. Back in April the market cap was lower, because it has sold a lot of shares since then. Of course it had less cash, too, and it's not entirely reasonable to assume the stock would fall back to \$10.01 per share as long as it has all this cash.
- 11. Again, this is the weakest link in the argument: If you thought the stock was worth \$10 per share in April, then adding \$3 billion of cash — something like \$7 per share — should make it worth \$17 today, even if the fundamentals are otherwise unchanged. I don't know how seriously you should think about fundamental valuation here though. And even \$17 is significantly below the current price.

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Digital assets and DAOs: new theories of liability

 [reuters.com/legal/legalindustry/digital-assets-daos-new-theories-liability-2024-06-10](https://www.reuters.com/legal/legalindustry/digital-assets-daos-new-theories-liability-2024-06-10)

Alex Drylewski, Stuart Levi, Daniel Michael

FILE PHOTO: Physical representations of the bitcoin cryptocurrency are seen in this illustration taken October 24, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

June 10, 2024 - Decentralized autonomous organizations (or "DAOs") are often seen as a critical component of a truly decentralized digital asset project. While there is no single definition for a DAO, the term typically refers to a system of project governance where holders of "governance tokens" can make and vote on proposals relating to governance of a digital asset protocol.

A recent and developing legal theory posits that persons holding governance tokens in a DAO can be considered "partners" in a "general partnership" or "unincorporated association." Under this theory, those token holders are subject to joint and several liability as partners for any legal violations committed by the DAO and other participants on behalf of the DAO.

The question of whether DAOs are legally cognizable entities, including partnerships, is a novel one that is currently working its way through the courts and has been the subject of certain state legislation. The answer could potentially deter individuals and entities from participating in DAOs, and therefore significantly impact the viability of decentralized governance structures.

DAO liability

The earliest case to contend with theories of DAO liability was *Commodity Futures Trading Commission v. Ooki DAO*. In ruling on the CFTC's motion for alternative service, a judge in the U.S. District Court for the Northern District of California analyzed whether Ooki DAO had the capacity to be sued under the Federal Rules of Civil Procedure and whether it was a "person" subject to suit under the Commodity Exchange Act.

The CFTC argued that Ooki DAO could be sued because it was an "unincorporated association" comprised of token holders who used their tokens to vote on governance proposals during a particular time period.

The court agreed with the CFTC and arguably went one step further: In determining whether Ooki DAO could be sued, the court explained that it did not matter whether token holders voted or gave away their voting rights during the time period in question. Thus, for the purpose of the CFTC's service motion (as to which the Ooki DAO did not appear or contest)

the court held that the CFTC sufficiently alleged that Ooki DAO was an unincorporated association under California law. The court subsequently entered a default judgment against Ooki DAO after it failed to appear.

Since then, private plaintiffs have begun asserting securities and other claims against DAOs premised on the idea that DAOs are partnerships. In *Sarcuni v. bZx DAO*, filed in the U.S. District Court for the Southern District of California, the plaintiffs brought a class action against the DAO for the bZx Protocol and token holders who participated in creating the protocol.

The plaintiffs alleged that the defendants were negligent in operating the protocol when the plaintiffs lost millions of dollars in cryptocurrency following a hack. According to the plaintiffs, bZx DAO was a general partnership, all persons holding BZRX tokens were its partners, and each partner was jointly and severally liable for the DAO's alleged negligence. In ruling on the defendants' motion to dismiss, the court assessed whether the plaintiffs adequately pleaded the existence of a partnership under California law.

Accepting the plaintiffs' allegations as true, as the court was required to do at the pleading stage, the court held that the complaint adequately alleged that bZx DAO was an association of token holders that generates profits; that token holders possessed governance rights over the DAO because they could suggest and vote on governance proposals; and that token holders shared in the DAO's profits because they could vote to distribute assets from the DAO's treasury among themselves and through their receipt of an interest-generating token.

As a result, the court denied the defendants' motion to dismiss and allowed the case to proceed. It later settled.

In *Houghton v. Leshner*, the plaintiffs brought a class action in the U.S. District Court for the Northern District of California against Compound DAO and certain other defendants, asserting a claim under Section 12(a)(1) of the Securities Act of 1933 for the alleged sale of unregistered securities.

The complaint alleged that Compound DAO sold or solicited the plaintiffs' purchase of COMP tokens, the governance token of the Compound DAO. The plaintiffs also alleged that Compound DAO is a general partnership under California law, and that, because the defendants owned more than 50% of the outstanding COMP and actively participated in governance proposals for the DAO, they were its partners. The defendants maintained that Compound DAO is not a juridical entity capable of being sued and that none of the alleged "partners" could be liable for any securities violations by Compound DAO. The authors' firm represents one of the non-DAO defendants in this case.

On Sept. 20, 2023, the court denied the moving defendants' motion to dismiss and permitted the action to proceed, explaining that the "exact contours of liability, whether it flows from the acts of 'Compound DAO' or flows from the acts of one or more [defendants], cannot be determined at this juncture." Compound DAO has neither appeared nor been found to have been served in the action.

Finally, in *True Return Systems LLC v. MakerDAO*, the plaintiff filed a patent infringement action in the U.S. District Court for the Southern District of New York against MakerDAO, which it alleged is a partnership under New York law. The plaintiff alleged that the holders of MKR Tokens jointly control MakerDAO's governance and that MakerDAO shares its profits with MKR token holders.

In its motion to dismiss, MakerDAO argues that it cannot be sued under Rule 17 of the Federal Rules of Civil Procedure [↗](#), opens new tab because it is not a partnership or unincorporated association under New York or federal law. Among other things, MakerDAO highlighted New York law that provides that partnerships dissolve with every admission or withdrawal of a partner. Thus, any "partnership" would be dissolved by each transfer of MKR on secondary platforms, which occurs thousands of times per day. The motion to dismiss remains pending.

Considerations

The legal liability of DAOs and their token holders represents uncharted waters. Although certain of the cases above survived the defendants' motions to dismiss, no court affirmatively endorsed the plaintiffs' theories of liability against DAOs. The only case to meaningfully progress beyond the motion-to-dismiss stage was the Ooki DAO case. But there, the defendant did not appear, so the court entered a default judgment, where, like at the motion-to-dismiss stage, the allegations were accepted as true.

Given the decentralized nature of the blockchain technology on which DAOs operate, the theory that DAOs are partnerships or unincorporated associations is likely to face significant obstacles.

At the outset, given that most DAOs have no real jurisdictional nexus, it will be difficult to determine which jurisdiction's partnership laws apply. This is critical, as the tests for determining the existence of a partnership or unincorporated association vary among jurisdictions. Some state laws may make pleading the existence of a partnership more difficult. For instance, California law provides that a person may become a partner only with the unanimous consent of all other partners. Many states also require sufficient allegations of mutual consent among the partners to jointly run a business.

Even where pleaded with enough detail to satisfy pleading standards, these elements may ultimately be difficult to prove. Indeed, many DAOs consist of thousands of globally

dispersed token holders. As the Securities and Exchange Commission noted in its "DAO Report," this reality makes it unlikely that token holders know each other, much less meaningfully communicate with one another and/or agree to jointly run a business. U.S. Sec. & Exch. Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO [\[link\]](#), opens new tab, Release No. 81207 (July 25, 2017). Moreover, the scope and contours of this theory have not been fully articulated and, in many instances, may lead to absurd results. If the DAO is a "partnership," who, exactly, are its partners? All token holders? At what point in time? Many governance tokens are traded on exchanges thousands of times per day — does this mean a new "partnership" forms from each transaction? If so, individual token holders would be "partners" as well, and thus face significant obstacles to suing other "partners" for the DAO's alleged wrongdoing.

If only some subset of token holders can be considered "partners," how is that determined? If the partnership consists of only those token holders who voted in governance proposals, are those token holders liable as partners if the proposals they voted on have nothing to do with the alleged violations at issue? And what if the token holder voted against a proposal that led to the alleged violations? These questions remain unanswered by the pending litigations.

States like Wyoming have passed laws that recognize DAOs as legal entities while limiting the in terrorem effect of potentially open-ended liability of DAO participants. Miles Jennings and David Kerr, "The DUNA: An Oasis for DAOs [\[link\]](#), opens new tab," a16z Crypto (Mar. 8, 2024).

It remains uncertain whether and to what extent decentralized projects will embrace these new laws. Nevertheless, as courts continue to grapple with how to adjudicate allegations brought against DAOs, companies and individuals contemplating holding and utilizing governance tokens should consider the potential legal implications of these theories and consult with experienced counsel.

Alex Drylewski is a regular contributing columnist on Web3 and digital assets for Reuters Legal News and Westlaw Today.

Andrew Parks, an associate in the firm's complex litigation and trials group, contributed to the article. The firm represents one of the defendants in the Houghton v. Leshner case discussed in this article.

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Tesla must face California's false-marketing claims concerning Autopilot

 [reuters.com/legal/tesla-must-face-californias-false-marketing-claims-concerning-autopilot-2024-06-10](https://www.reuters.com/legal/tesla-must-face-californias-false-marketing-claims-concerning-autopilot-2024-06-10)

Jonathan Stempel

Tesla Chief Executive Officer Elon Musk gets in a Tesla car as he leaves a hotel in Beijing, China May 31, 2023. REUTERS/Tingshu Wang/File Photo Purchase Licensing Rights , opens new tab

June 10 (Reuters) - A California administrative judge rejected Tesla's (TSLA.O) , opens new tab bid to dismiss claims by a top state regulator accusing the automaker led by billionaire Elon Musk of overstating its vehicles' self-driving capabilities.

In a decision on Monday, Judge Juliet Cox of the state Office of Administrative Hearings (OAH) said the accusations by California's Department of Motor Vehicles would if true support an enforcement action against Tesla.

The DMV had in July 2022 accused Tesla of misleading consumers about vehicles with Autopilot and Full Self-Driving technology, saying they "could not at the time of those advertisements, and cannot now, operate as autonomous vehicles."

It sought remedies that could include suspending Tesla's license to sell vehicles in California, and requiring Tesla to make restitution to vehicle owners.

Neither Tesla nor its lawyers immediately responded to requests for comment. The DMV declined to comment on the judge's decision, but said its claims will be formally reviewed before the OAH on Sept. 9.

On May 15, a San Francisco federal judge rejected Tesla's bid to dismiss a proposed nationwide class action claiming it misled consumers into believing their vehicles would soon have self-driving capabilities.

Tesla, based in Austin, Texas, has also for many years faced federal probes into whether its self-driving technology might have contributed to fatal crashes.

Federal prosecutors are separately examining whether Tesla committed fraud by misleading investors about self-driving, according to three people familiar with the matter.

Tesla has said Autopilot lets vehicles steer, accelerate and brake in their lanes, and Full Self-Driving lets vehicles obey traffic signals and change lanes.

But it has admitted that neither excuses drivers from paying attention to the road, and the technologies "do not make the vehicle autonomous."

In her five-page decision, Cox said it was premature to dismiss the DMV case before a formal hearing. Tesla had said a hearing was unnecessary because Cox already had enough documents from which to rule.

California is Tesla's largest U.S. market and accounts for about 10% of global deliveries, but year-over-year sales have fallen for two straight quarters.

Tesla's electric-vehicle market share in the state fell to 55.4% in the first quarter from 61.8% a year ago.

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Reporting by Jonathan Stempel in New York Editing by Matthew Lewis

Longtime Tesla Holder Baillie Gifford Backs \$56 Billion Musk Pay

By Loukia Gyftopoulou and Dana Hull

- Scottish fund house has held the stock for more than a decade
- Norway's \$1.7 trillion wealth fund will vote against the award

Bloomberg Law News 2024-06-11T12:03:23231805319-04:00

Longtime Tesla Holder Baillie Gifford Backs \$56 Billion Musk Pay

By Loukia Gyftopoulou and Dana Hull2024-06-10T12:56:27574-04:00

- Scottish fund house has held the stock for more than a decade
- Norway's \$1.7 trillion wealth fund will vote against the award

One of Tesla Inc.'s longest-standing holders, Scottish asset manager Baillie Gifford, will vote in favor of Elon Musk's \$56 billion pay package, according to a person familiar with the matter.

The asset manager supports the controversial pay award across its funds because the targets tied to it were extremely ambitious and aligned with shareholder returns when they were set in 2018, the person said, asking not to be identified discussing private information.

Baillie Gifford declined to comment.

Tesla's shareholders endorsed Musk's pay six years ago, but in January a Delaware Chancery Court judge struck down the plan and said investors weren't fully informed of key details. Tesla is bringing the pay package before investors for a second time at this week's annual general meeting.

Some large shareholders have already come out against the large pay award, and proxy advisers Institutional Shareholder Services and Glass Lewis & Co. recommended that investors reject the proposal.

Read More: Tesla Shareholders Should Reject Musk's Pay, Glass Lewis Says

Norway's \$1.7 trillion sovereign wealth fund Norges Bank Investment Management said last week it would oppose the package as it was still "concerned about the total size of the award, the structure given performance triggers, dilution, and lack of mitigation of key person risk."

Read More: Musk's \$56 Billion Tesla Pay Deal Opposed by Norway Wealth Fund

Baillie Gifford was once Tesla's second-largest shareholder, after Musk, and has held the stock for more than a decade. It started reducing its stake around 2020 and now holds only about 0.5% of the company across several of its funds, according to data compiled by Bloomberg.

The asset manager's largest fund — the Scottish Mortgage Investment Trust — said in May it would support the package, but it was unclear at the time how the company would vote as a whole.

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BUSINESS | C-SUITE

The Vote on Elon Musk's \$46 Billion Pay Package Is Coming Down to the Wire

Musk himself has joined meetings with key Tesla investors to get out the vote

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

June 11, 2024 11:56 am ET



In recent meetings, Tesla CEO Elon Musk has pitched investors on why the company's future relies on his presence. PHOTO: APU GOMES/GETTY IMAGES

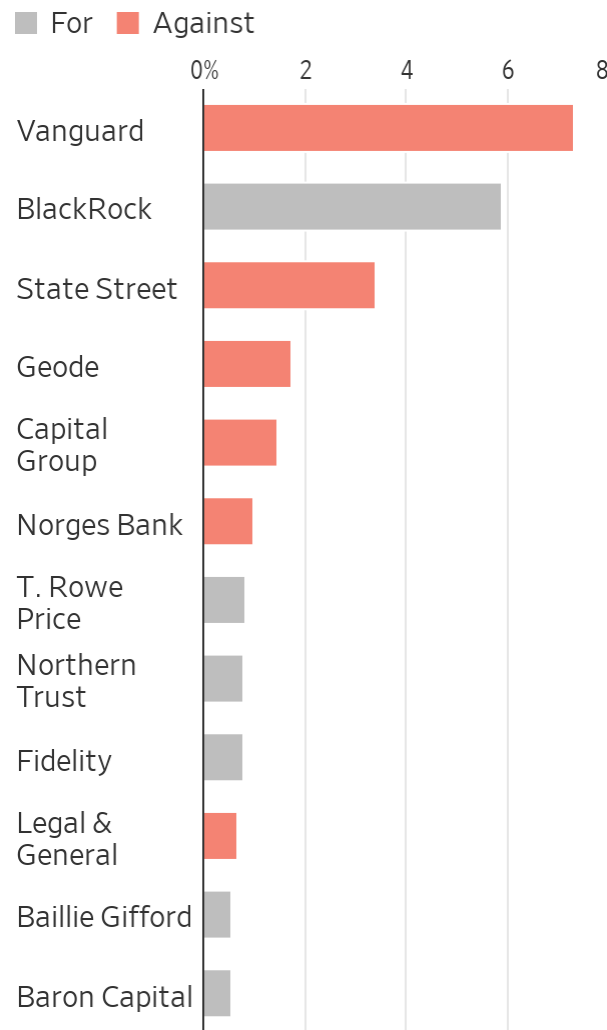
The vote on Elon Musk's \$46 billion Tesla TSLA -2.26% ▼ pay package this week is so far too close to call, with the automaker and billionaire racing to drum up support in recent days.

Tesla shareholders are expected to finish voting Thursday on a 2018 pay package that was set to award Musk stock options worth billions of dollars after he led Tesla to significant growth in the last five years.

Votes have been trickling in for weeks but it isn't yet clear if shareholders will sign off on the package, according to people familiar with the matter. It will come down to how many of Tesla's individual investors cast ballots, and how big institutional investors vote at the last minute, the people said.

Musk himself has been campaigning to get the vote out, tweeting on his X platform and even attending meetings with some large investors that he usually skips.

How Tesla outside shareholders, by current stake, voted in 2018 on Musk's pay package



Note: T. Rowe Price split but said "the bulk" of its shares voted for approval

Sources: Diligent Market Intelligence I Voting; S&P Global Market Intelligence (shares)

The chief executive has joined recent meetings with proxy adviser Glass Lewis, and investors including Vanguard, State Street and BlackRock, alongside Tesla Chair Robyn Denholm and others, the people said.

Musk was supposed to talk about the future of Tesla, not lobby for his compensation in those meetings, some of the people said. But when asked, Musk has addressed the compensation debate and pitched investors on why Tesla's future relies on his presence, according to some of the people.

The campaign is an unusual one. Musk's pay package had easily passed a vote in 2018, with 73% of voted shares supporting it. But a Delaware judge this year ordered the package rescinded, saying the board's process wasn't acceptable. To try to overcome the judge's

objections, Tesla put the package up for a fresh vote.

Tesla also plans to appeal the ruling. It says Musk deserves the compensation because he successfully hit the goals and shareholders shouldn't go back on the original deal.

The result could impact Tesla's shares, with some investors worried it could weigh on Musk's willingness to focus on Tesla compared to his other businesses.

Big institutions, who normally sway the outcome, were split in 2018 and most aren't expected to change their votes. The vote is expected to come down to individual investors who have flocked to the stock often thanks to Musk himself.

'A deal is a deal'

So far individuals are backing Musk in big numbers. Tesla has historically won more than 80% approval from individual shareholders.

"I'm an over-the-top capitalist. That's my bias," said Paul Melihercik, a retired human-resources executive who purchased about 200 shares of Tesla a few years ago through his financial adviser and is supporting the package. "If the board at the time signed off on it, a deal is a deal."

Others worry about what Musk would do if he lost.

"Musk appears in the media as a little bit of a loose cannon, so there is a fear that if he doesn't win this he could do something erratic," said William Gannon, an ophthalmologist who lives in Dothan, Ala. and plans to vote his nearly 40 shares for the package.

To get individuals voting, the company offered a raffle for fans of Musk: a chance for a tour of its Texas production plant, the Gigafactory, with Musk on the day of the annual meeting.

Offering incentives is rare for shareholder votes, and proxy experts couldn't recall another offer like Tesla's. Prudential Financial, the insurer, has offered shareholders a choice between a free tote bag or planting a tree. (A company can't simply buy votes.)

Last week, Tesla tried a new tactic to capture the attention of Musk's fans. The company launched a video of voting instructions featuring Optimus, the

humanoid robot Musk has touted as part of Tesla's future.

Tesla needs a majority of voted shares to approve the pay package. Shareholders are also voting on moving the company's incorporation to Texas from Delaware. That measure faces an uphill climb because it requires approval from a majority of all shares outstanding.

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

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Hwang's Top Trader Says He Was Told to Do Opposite of 'Normal'

By Bob Van Voris

- Tomita to testify against ex-boss in market manipulation trial
- He had more direct contact with Hwang than other star witness

Bloomberg Law News 2024-06-11T12:04:05718192016-04:00

Hwang's Top Trader Says He Was Told to Do Opposite of 'Normal'

By Bob Van Voris2024-06-10T19:12:58625-04:00

- Tomita to testify against ex-boss in market manipulation trial
- He had more direct contact with Hwang than other star witness

Bill Hwang's top trader at Archegos Capital Management gave damning testimony against the boss, telling a jury Hwang told him to do "the opposite" of what a "normal fund" would.

William Tomita took the stand Monday for what's expected to be several days of testimony as the prosecution's star witnesses in a criminal case against Hwang over the spectacular implosion of Archegos in 2021.

He immediately admitted committing "financial crimes, namely market manipulation and lying to banks," then implicated Hwang. "I was directed to do so by my former boss," Tomita said, identifying Hwang in court. Of the major witnesses, Tomita worked most directly with Hwang himself and is therefore key to connecting the Archegos founder to the charged conduct.

Tomita said Hwang told his traders to use tactics that would maximize the effect on share prices, rather than gradually building their positions at the lowest cost and trying to minimize the impact of their own trading on the market.

At Archegos, Tomita said, he could see the effect of the volume of the firm's trades versus others and knew he was moving the market. "I could see that it was me that generated the stock price," he testified.

Another key government witness, former chief risk officer **Scott Becker**, has already told the jury he duped banks into believing the firm's positions were far less risky than they were. In the end, Archegos' meltdown would cost banks including Morgan Stanley \$10 billion and help bring down Credit Suisse Group AG.

Hwang and his co-defendant, former Chief Financial Officer **Patrick Halligan**, have pleaded not guilty and are in the fifth week of testimony against them in their trial in lower Manhattan.

Hwang's legal team claims he used multiple counterparties to minimize risk, not to improperly maximize leverage or conceal the nature of their trading as the government contends. Halligan, the CFO, had no role in trading but is charged in connection with Archegos' alleged lies to bank counterparties.

Tomita, who handled the trading on which the case against his former boss turns, provided a window into the tactics that catapulted Hwang's fortune from \$1.5 billion to \$36 billion in the year before the firm's collapse.

The former head trader described an October 2020 selloff in GSX Techedu Inc., one of the biggest stocks in Archegos' portfolio. Tomita said he was driving in Westchester when Hwang called him and told him to pull over.



William Tomita exits federal court in New York on June 10.

Photographer: Jeenah Moon/Bloomberg

QuickTake: The Criminal Case Against Bill Hwang Explained

Hwang wanted to find more capacity with trading partners to buy more GSX and other Archegos holdings, at the same time selling highly liquid stocks like Amazon.com Inc. and Facebook, Tomita recalled. The goal was to use "capacity at the critical time of the close to push these stocks back up," Tomita testified.

Like Becker, Tomita agreed to plead guilty and testify against Hwang and Halligan in hopes of leniency. During cross-examination, the defense has pressed Becker and other prosecution witnesses on how much direct interaction they had with Hwang. The general answer has been not a lot.

As head trader, Tomita told the jury he had significantly more. He has already emerged in others' testimony as a heavier hitter than Becker, closer to the top of the firm.

Tomita said he made efforts to conceal from Archegos' counterparties what the family office was doing. He said he lied to them at a "big picture" level, concealing the level of risk of the Archegos portfolio.

"If the banks knew the full picture of the level of risk and the size of our positions, they would have essentially fired us as a client immediately and liquidated the entire portfolio," Tomita testified.

Hwang was hands-on in instructing his traders, saying things like "take it to this price" or "move it to this price." Knowing he "needed to get the stock trading at that price," Tomita said he used "very aggressive" algorithmic trading techniques to ensure Archegos accounted for a very large percentage of the trading volume. After a while, Hwang's instructions became more succinct. "You know what you need to do," Tomita recalled his boss saying.

Bill Hwang

Source: Bloomberg

Tomita focused on economics and international studies at Northwestern University and graduated in 2006. He worked briefly at Lehman Brothers before the investment bank's 2008 failure but spent most of his Wall Street career working for Hwang after joining him at age 24. Away from the office, he could be found playing polo. One player who practiced with him said he came across as unusually polite and deferential for the hard-charging sport.

Like Halligan and Becker, Tomita joined Hwang's inner circle at his previous hedge fund, Tiger Asia Management, which he set up after working for Julian Robertson's Tiger fund empire.

Then, in 2012, Tiger Asia pleaded guilty to wire fraud related to illegal trading in Chinese stocks, agreed to pay \$60 million to resolve an insider trading probe, and shut down.

It was at Tiger Asia that the seeds of the Archegos debacle were planted, prosecutors say. Back in 2008 and 2009, Hwang taught his traders, including Tomita, how to "mark the close" by placing large orders just before the end of the trading session, according to the government.

The Last-Minute Trade

More than a decade later at Archegos, Tomita used the same playbook under Hwang's direction, the US claims.

He and his team allegedly marked the close and deployed other deceptive trading practices to pump up the value of the swaps contracts Archegos was buying for its concentrated and highly leveraged portfolio.

In addition to hammering at Archegos' trading practices, prosecutors have taken pains to lay out the raft of lies they say the firm fed its counterparties to maintain or expand its trading capacity. They kept Becker, the risk chief, on the stand for more than four days describing how Archegos lied to Credit Suisse, UBS Group AG, Jefferies Financial Group, Bank of Montreal, Nomura Holdings and other banks about the diversity and liquidity of its positions.

The case is US v. Hwang, 22-cr-00240, US District Court, Southern District of New York (Manhattan).

--With assistance from **Ava Benny-Morrison**.

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MuddyWatersResearch ✓

@muddywatersre

...

Please let this a—hole be convicted

06/10 16:14 ET

Hwang told his traders they needed to save capacity in GSX for the close to fight off “bad actors” -- meaning short sellers like Muddy Waters -- that were trying to drive its price down, Tomita says.

He explains that Hwang wanted to use “the capacity at the critical time of the close to push these stocks back up.”

Chris Dolmetsch Legal Reporter

1:25 PM · Jun 10, 2024 · 41K Views



21



32



194



17



Post your reply

Reply



Breakout Point ✓ @BreakoutPoint · 17h

...

"Bad actor"?

We were expecting something more dramatic, perhaps even with a biblical reference, from Hwang in describing you



1



6



2.1K



MuddyWatersResearch @muddywatersre · 16h
"Vengeance is mine...saith the the Lord" - Romans 12:19-21

1 1 12 1.5K

YoloXing of \$TSLAQ (Supervised) @yolooption · 16h
And it was written: "Diversify thy dealings among many prime brokers, for by spreading thy wagers, thou shalt confound the markets and bring forth great profit." - Speculations 3:16

1 7 219

MuddyWatersResearch @muddywatersre · 16h
"Thou shalt not de-lever"

1 3 277

YoloXing of \$TSLAQ (Supervised) @yolooption · 16h
"When we create good companies through the capitalism that God has allowed, it enhances people's lives....God delights in those things" - Bill Hwang, 2019

youtube.com
Faith & Work _Bill Hwang (영어자막본)
Faith & Work _Bill Hwang (영어자막본) 오늘을 살아가는 크리스천에게 전하는 Faith & Work!

1 2 248

BigBaller @Bigba11r · 14h
This honestly happens on a good day in markets. Regs just don't have the manpower to track it all. Particularly algorithmically.

420

MuddyWatersResearch @muddywatersre · 4h
100%. The really interesting thing is that an algo that learns to do peg stocks has no mens rea that could be imputed to the coders. More to the point, how many good data scientists would work for lawyers at the SEC to try to help them make manipulation cases?

2 261

BigBaller @Bigba11r · 21m
All have been requisitioned by the HF community. Extremely useful. Anyway, thanks Carson. Look forward to seeing you next on Bloomberg in the future.

1 8



rocky ✓ @chamathsintern · 14h
there is no reason to be upset

💬 ↺ ❤️ 📊 361 📌 ↗



PredeterminedInsiderSales10b5-1 ✓ @ReadingTheTape4 · 17h
the very definition of marking the close

💬 ↺ ❤️ 5 📊 910 📌 ↗



Analyzed Investing ✓ @analyzedinvest · 17h
Sheesh

💬 ↺ ❤️ 📊 741 📌 ↗



ESG Hound @ESGhound · 17h
telling your accomplices "hey make sure you do these crimes EXTRA HARD"
during your multi billion dollar crime spree is certainly a sign of the times

💬 ↺ ❤️ 10 📊 698 📌 ↗



Deep Throat (TOTALLY A PARODY) @DeepThroatIPO · 14m
"...you will likely be shocked and dismayed if/when you find out who is
funding his 'traders'..."

Sincerely,
Xi

💬 ↺ ❤️ 📊 148 📌 ↗



Fusa @GrapefruitGL · 15h
"defied scathing reports." Maybe @jingyanghk will write a follow up on what
happened next.

and an SEC Investigation

No stock has been more heavily attacked by
activist short sellers than GSX Techedu, but the
Chinese tutoring company has so far come out
on top





Sixteen months ago, GSX was valued at \$2.5 billion after completing a \$216 million initial public offering on the New York Stock Exchange. (Photo: Richard B. Levine/Zuma Press)

By [Jing Yang](#) [+ Follow](#) and [Xie Yu](#)

4 215

Montana Bunker Guy @Troutslayer7272 · 16h ...

I was fighting that battle alongside you. It was rough for a while, but worked well eventually. Thanks

1 314



Fusa @GrapefruitGL · 14h ...

If only someone had done a statistical analysis showing that [\\$GSX](#) was ramped into the close in a manner that defied any explanation other than market manipulation & shared that with govt regulators as it was happening...

6 252



Larry Hagman @hagmansliver_ · 16h ...

So - painting the tape is OK but being short is not?

1 311



Jake Tiley @justtradin · 15h ...

I had puts signaled to 20B AUM and provided the GSX short at \$100 to \$75 the next day to an UNHN investor...
[\\$GSX](#) fell to 3.00 within 1.5 years

226



Dead Crow @tradingcrows · 4h ...

banging the close, eh

44



Jon Bryant @JonBryant421 · 16h ...

Just incredible how those conducting illegal trades call others bad actors. The absurdity.

1 5 242



Fortress Capital @DeepValue3 · 15h ...

JFC

171



MuddyWatersResearch ✓

@muddywatersre

...

The latest absurd example of academics who don't understand markets getting waaaay too much credence by regulators is in the Archegos trial where the SEC "expert" in-house economist admitted on the stand to not knowing what Melvin Capital was. Mitts, however, is the most egregious example - the fraud that launched a thousand billable hours.



ESG Hound @ESGhound · Jun 9

Josh Mitts and Robert Jackson have yet to respond to inquiries about their garbage study on the "Hamas Shortseller"

I sent an email to Dr Jackson in December, pointing out the numerous statistical and logical errors. He has not responded. Papers is still up...

[Show more](#)

8:47 AM · Jun 9, 2024 · **33.9K** Views



6



8



51



5



Post your reply

Reply



Andreas Schulz ✓ @ASchulz888 · Jun 9

Wow... Speechless...

...



810



freeq @humanfreqtrader · Jun 9

Hacks. Hacks everywhere.

...

Justices To Hear Meta Investor Suit Over Risk Disclosures

By **Sarah Jarvis**

Law360 (June 10, 2024, 10:53 AM EDT) -- The U.S. Supreme Court on Monday agreed to hear Meta Platforms' petition regarding the Ninth Circuit's decision to partially revive investors' claims over the Cambridge Analytica data abuse scandal, after the tech giant argued the appellate panel adopted "extreme outlier positions."



Meta won its bid for Supreme Court review Monday after the Ninth Circuit partially revived claims from investors over the Cambridge Analytica data abuse scandal. (AP Photo/Tony Avelar)

In its March **petition for a writ of certiorari**, Meta Platforms Inc. told the court that the Ninth Circuit's **decision to partially revive** the securities class action over the political consulting firm's data abuse scandal — which the district court **dismissed** three times — deepened divides between the circuits, including what public companies have to disclose in risk-disclosure statements.

The lawsuit centers on a 13% share price drop, equal to about \$50 billion in Facebook's market value at the time, that followed revelations in March 2018 that political consulting firm Cambridge Analytica, which had ties to former President Donald Trump's 2016 presidential campaign, misused the data of up to 87 million unwitting Facebook users.

The scandal led to a Federal Trade Commission investigation that ended with Facebook agreeing to pay a \$5 billion fine and set up a board-level committee to oversee its future privacy efforts. Facebook has since

been renamed Meta.

The high court's grant of certiorari was limited to one of two questions from Meta's petition, specifically a question of whether risk disclosures are false or misleading when they don't disclose that a risk has materialized in the past, "even if that past event presents no known risk of ongoing or future business harm?"

In other words, the question concerns whether company disclosures that warn of possible risks can pass legal muster if those risks have already materialized.

Meta's other question in its petition — which the Supreme Court did not agree to hear — concerned the pleading standard for loss causation in private securities fraud actions. The high court didn't explain its reasoning for not taking up the second question.

In October 2023, a split Ninth Circuit panel held that shareholders adequately pled the falsity of "risk statements" issued by Meta. According to the opinion, the "essence" of this allegation is that although Facebook knew Cambridge Analytica had improperly accessed and used Facebook users' data, the social media platform misrepresented in its 2016 Form 10-K, filed with the U.S. Securities and Exchange Commission, that there was only a hypothetical risk of improper third-party misuse of such data.

The district court held that these risk statements are not actionable because Cambridge Analytica's misconduct was already public knowledge when Facebook made the statements, according to the opinion.

But the appellate panel said "this approach overlooks the reality of what Facebook knew," and pointed to the Ninth Circuit's 2021 ruling in [In re Alphabet Inc. Securities Litigation](#) , which held that falsity allegations can survive dismissal if a complaint plausibly alleges that a company's SEC filings warned that risks "could" occur when those risks had already materialized.

The panel also revived shareholders' allegations that Facebook made false statements about users' control over their personal data and said the shareholders have adequately pled loss causation for a revelation that occurred before the company's March 2018 stock price drop.

In its petition to the high court, Meta told the justices that Facebook warned investors in the 2016 filing that if third parties improperly access or disclose user data, the social media company could suffer harm to its business. The investors allege the statements were false because they framed the risk as hypothetical when Cambridge Analytica had misused data in the past even though the past events didn't harm Facebook's business or stock price, the petition stated.

Meta also argued the Supreme Court should grant review of the case to resolve a circuit split over the proper pleading standard for loss causation, saying the Ninth Circuit panel "straddled both sides of the split" when it first held that Rule 8 governed and then swapped in citations of Rule 9(b) in its revised opinion without changing its analysis.

The company argued the Ninth Circuit's ruling adopted "extreme outlier positions" that would "light a beacon" for similar actions that would be dismissed elsewhere.

In an April brief before the Supreme Court, the shareholders argued that Meta mischaracterized the Ninth Circuit's decision and that the problem the company "hypothesizes" doesn't actually arise in the case because "courts recognize that events that pose no risk of harm to a business are not material to investors and therefore need not be disclosed."

Meta replied the following month, arguing the Ninth Circuit decision adopted a rule that "is both anomalous and unworkable, and future plaintiffs will use it as a cudgel to extract high-dollar settlements for meritless claims."

The U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association filed an **amicus brief** in April backing Meta's bid for certiorari and arguing that the risk disclosures that form the basis of the investors' claim are supposed to cover potential future risks to the business and not past events.

Collin Walke, head of Hall Estill's cybersecurity and data privacy practice, said in a statement that shareholders have a right to know whether their company is "playing fast and loose with the rules," because violating privacy rules can negatively impact the company.

"Facebook's argument that the Ninth Circuit's ruling would 'force public companies to inform investors of past incidents that pose no known threat to the business' is bizarre because it means that tech companies could pilfer users' privacy and break internal and external policies with impunity, so long as it did not result in a negative stock price," Walke said.

Counsel for Meta and the shareholders didn't immediately respond to requests for comment Monday.

Meta and its executives are represented by Joshua S. Lipshutz, Katherine Moran Meeks, Trenton Van Oss, Brian M. Lutz, Michael J. Kahn and Raena Ferrer Calubaquib of Gibson Dunn & Crutcher LLP.

The shareholders are represented by Kevin K. Russell of Goldstein Russell & Woofter LLC and attorneys from Bernstein Litowitz Berger & Grossmann LLP and Robbins Geller Rudman & Dowd LLP.

The case is Facebook Inc. et al. v. Amalgamated Bank et al., case number 23-980, in the Supreme Court of the United States.

--Additional reporting by Lauren Berg and Jessica Corso. Editing by Daniel King.

Update: This story has been updated with additional information about the case and the Supreme Court's grant of certiorari, as well as comment from Collin Walke.

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2nd Circ. Remands Malpractice Suit Against DLA Piper

By **Katryna Perera**

Law360 (June 10, 2024, 4:57 PM EDT) -- The Second Circuit on Monday sent back to state court a Chinese smart car technology company's malpractice suit against DLA Piper that accused the firm of mishandling a shareholder suit, with the appeals court panel saying federal court does not have jurisdiction over the suit.

A three-judge panel for the Second Circuit said in an **opinion** written by U.S. Circuit Judge Reena Raggi that the federal law standing question the district court identified as central to plaintiff Link Motion Inc.'s malpractice claim against DLA Piper does not fall within the narrow category of "disputed and substantial" questions of federal law that allow the exercise of federal jurisdiction over a state law claim.

The district court dismissed Link Motion's suit in May 2023 as time-barred and denied the company's bid to remand the action to state court. The suit arose from DLA Piper's alleged negligent representation of Link Motion and its executives in a shareholder suit launched by Wayne Baliga in 2018.

DLA Piper withdrew from its representation of Link Motion in the Baliga action in March 2019, "citing LKM's failure both to pay the firm's overdue legal fees and 'to cooperate in the [firm's] representation by failing to respond to [counsel's] inquiries.'"

Link Motion initiated the current malpractice suit in September 2022, alleging that DLA Piper acted without the company's informed consent in the Baliga action. The company further alleged that the firm failed to argue to the district court that Baliga lacked standing to bring his claims and failed to state the elements of a federal securities law claim, all of which DLA Piper knew or should have known based on its prior representation of Link Motion.

In dismissing Link Motion's malpractice suit, the district court found it had jurisdiction because the question of Baliga's federal law standing was central to the suit. However, according to Monday's order, the U.S. Supreme Court has identified only a "specific and small" category of state claims over which federal court can exercise jurisdiction.

To fall under this "slim" category, the state law claim must have an "embedded" federal issue that is "necessarily raised, actually disputed, substantial and capable of resolution in federal court without disrupting the federal-state balance approved by Congress."

To fall under this "slim" category, the state law claim must have an "embedded" federal issue that meets four factors as outlined in the 2013 Supreme Court case, **Gunn v. Minton**. The federal issue must be "necessarily raised, actually disputed, substantial and capable of resolution in federal court without disrupting the federal-state balance approved by Congress."

The Second Circuit panel said Monday that the first two factors support Link Motion's malpractice claim, but not the latter two.

The malpractice claim does have a "necessarily raised" federal issue since the federal law question of whether Baliga had standing to pursue his federal securities claims is central to the suit.

"[Link Motion] alleges that DLA Piper 'breache[d] ... the duty of care owed to the company' by, 'failing to advise the company that Baliga lacked standing,'" the opinion states.

This federal issue is also "actually disputed" because it is a "central point of dispute" in the malpractice suit. However, the federal issue is not "substantial," the panel said.

"Upon 'careful, case-specific consideration, most federal law questions raised in connection with state law claims will not be deemed substantial.' That is the case here," the opinion states. "The federal law standing issue embedded in LKM's state malpractice claim, however important to DLA Piper in this particular action, lacks the sort of significance to the federal system as a whole warranting the exercise of federal jurisdiction."

Additionally, because the federal issue is not "substantial" it follows that it disrupts the "appropriate balance of federal and state judicial responsibilities."

"Because the established federal-state balance expects for legal malpractice actions to be heard in state court, this final Gunn factor also weighs against the exercise of federal jurisdiction in this case and in favor of the return of LKM's malpractice action to the New York Supreme Court," the opinion states.

According to the opinion, DLA Piper had also argued that the district court held supplemental jurisdiction over Link Motion's malpractice suit due to the action's overlap with the federal Baliga action. However, the panel said Monday that this argument is "foreclosed" by the federal removal statute, which only allows for federal jurisdiction over removed civil actions in which the district court had original jurisdiction.

In this case, the district court had no original federal jurisdiction over Link Motion's malpractice action, the panel noted.

In a statement to Law360 on Monday, counsel for Link Motion from Felicello Law PC said they are pleased with the court's ruling and look forward to litigating the case in state court.

Kevin Rosen of Gibson Dunn & Crutcher LLP, counsel for DLA Piper, told Law360 the court's decision "addresses a very narrow issue regarding federal court jurisdiction, but it is nevertheless fully consistent with the fact that the substantive allegations are frivolous and sanctionable."

"Those conclusions remain operative in a related case in federal court, and we look forward to presenting those same facts to the state court if this plaintiff makes the grievous mistake of pursuing this parallel action there instead of dropping it," he added.

U.S. Circuit Judges Pierre N. Leval, Reena Raggi and Joseph F. Bianco sat on the panel for the Second Circuit.

Link Motion is represented by Rosanne E. Felicello and Michael James Maloney of Felicello Law PC.

DLA Piper is represented by Nancy Hart, Katherine Moran Meeks, William John Moccia, Kevin S. Rosen and Peter Wade of Gibson Dunn & Crutcher LLP.

The case is Link Motion Inc. v. DLA Piper LLP (US), case number 23-944, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Emily Sawicki. Editing by Jay Jackson Jr.



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Fat Brands Faces Investor Suit Over \$47M Loan Scheme

By **Gina Kim**

Law360 (June 10, 2024, 8:38 PM EDT) -- Fat Brands and its executives face a proposed class action in California federal court alleging that they falsely claimed to be cooperating with governmental probes into their CEO's spending \$47 million on company loans while skirting taxes, leading stock prices to plunge last month when criminal charges were announced.

In a 22-page **complaint** filed Friday, Fat Brands shareholder Mitchell Kates accused the global restaurant franchiser of making materially false and misleading statements in earnings reports filed with the U.S. Securities and Exchange Commission over a two-year period stemming from investigations by U.S. Attorney's Office for the Central District of California and the SEC into the company's financial dealings and potential fraud.

The filing also names as defendants Fat Brands' former CEO Andrew Wiederhorn, former co-CEO and CFO Kenneth J. Kuick, and current co-CEO Robert G. Rosen.

The complaint alleges that the defendants falsely certified in their SEC reports pursuant to the Sarbanes-Oxley Act and other filings that Fat Brands was intending to assist the SEC and federal prosecutors who informed the company in December 2021 that they had opened investigations relating to the company and Wiederhorn. The agencies sought records concerning Fat Brands' 2020 merger with Fog Cutter Capital Group, transactions between those companies and Wiederhorn, credit loans and other payments and perks that Wiederhorn or his family members received.

In its securities filings from March 2022 to May 10, Fat Brands claimed that it was working with the government on those issues and that it believed it wasn't a current target of the government's criminal probe, but Kates alleged that those statements were false because Fat Brands didn't "meaningfully" cooperate with those investigations and downplayed the risk of liability and litigation.

Nor did the company and its co-defendants ever disclose in its securities filings that Wiederhorn received improper benefits and payments from Fat Brands, exposing Fat Brands to criminal liability, Kates alleged.

"The [Sarbanes-Oxley Act] certifications were false because defendant Wiederhorn was not cooperating with a governmental investigation, concealing fraud whereby he used the company's cash on his personal expenses, including on private jets, first class airfare, luxury vacations, rent and mortgage payments, shopping and jewelry," Friday's filing said.

In one particular Form 10-K filed February 2023, Fat Brands certified that it established a "special review committee" made up of directors, excluding Wiederhorn, to oversee the issues raised in the investigations, and to make conclusions and subsequent recommendations to its board of directors regarding those issues, according to the suit.

The 10-K went on to falsely state that Fat Brands was continuing to actively respond to inquiries and requests by the SEC and federal prosecutors, and again reiterated that it didn't believe Fat Brands was a current target.

"Further, the statement was materially false and misleading because it gave the impression that the special review committee was empowered to meaningfully review the issues raised by the DOJ and SEC investigations," Kates' suit alleged.

Kates' suit also challenges Fat Brands' statements in its Form 8-K claiming that several directors were removed from its board and several individuals were appointed to fill those openings, while expanding the size of its board. Some of the vacancies were filled by Wiederhorn's children, while Wiederhorn was appointed board chair, the suit alleged.

Fat Brands left out the fact Wiederhorn himself removed from the board independent directors who tried to cooperate with the federal investigations into his conduct and that of Fat Brands, Kates alleged. By March 28, 2023 — after board members communicated with the government regarding criminal probes into Wiederhorn and Fat Brands' financial dealings — Wiederhorn had removed each member of the company's board other than himself while reconfiguring it to have a majority of nonindependent directors under his control, Kates alleged.

On May 10, Fat Brands filed its 10-Q report reiterating that it maintained a special review committee comprised of directors other than Wiederhorn to oversee issues raised in the federal government's investigations and that it planned to work with the agencies regarding those issues.

That same day, news broke regarding criminal charges and a separate SEC action filed against Wiederhorn and several others stemming from a scheme to hide \$47 million paid to Wiederhorn in the form of shareholder loans, the suit said.

The SEC accused Fat Brands of violating federal securities laws, including a prohibition on extending company credit to CEOs in the form of personal loans under the Sarbanes-Oxley Act. The SEC's complaint additionally named the company's former CFO Rebecca D. Hershinger and its senior vice president of finance, Ron Roe, alleging that they made it appear as if Wiederhorn's compensation came in the form of loans for business expenses to a Fat Brands affiliate controlled by Fog Cutter.

The loan scheme stripped Fat Brands of 40% of its revenue from July 2018 through December 2020, leaving the company without enough cash to pay its bills, the commission alleged.

The criminal indictment levied by the U.S. Attorney's Office indicted Wiederhorn, Hershinger and an outside certified public accountant and attorney, William Amon, on criminal charges in connection with the loans.

Wiederhorn caused \$47 million in compensation and distributions to be extended and periodically forgiven starting in 2010, allowing him to pose as both lender and borrower, the indictment said. Fat Brands and Fog Cutter would extend and forgive the supposed loans while paying no income tax on the distributions, instead using them to generate losses to benefit Fat Brands' tax treatment.

Amon and Hershinger falsely labeled the distributions as shareholder loans and didn't disclose them to the IRS. Amon — who prepared Wiederhorn's taxes, advised the company and was a managing director at the global tax firm Andersen — advised Wiederhorn to submit fraudulent filings to the IRS, the government alleged.

Once news dropped of the criminal charges and the SEC action, Fat Brands' Class A common stock prices fell \$2.08 per share, or by nearly 28%, to close at \$5.42 on May 10, the suit alleged, while Class B common stock fell by \$2.02 per share, or nearly 29%, to close at \$4.98 that same day.

"Fat Brands 8.25% Series B Cumulative Preferred Stock fell by \$1.08 per share or 7.24%, to close at \$13.82 on May 10, 2023," the suit said. "Fat Brands warrants fell by \$1.05 per warrant, or 21.6%, to close at \$3.80 on May 10, 2024."

Kates seeks relief in the form of class certification, attorney fees and costs, damages and a jury trial against the defendants. He also asks the court to tap him as class representative and his attorneys at The Rosen Law Firm PA as class counsel.

When reached for comment Monday afternoon, a spokesperson for Fat Brands Inc. directed Law360 to the company's May 10 announcement, in which the company's counsel, Brian Hennigan of Hueston Hennigan LLP, called the DOJ's charges "unprecedented, unwarranted, unsubstantiated and unjust," saying they were based on conduct that ended three years ago and ignore Fat Brands' cooperation with the investigation.

"Fat Brands will take all necessary action to defend itself, while seeking a just resolution to these charges," the May 10 statement said. "Since becoming a public company, Fat Brands has grown at a remarkable pace to encompass 18 brands with \$2.5 billion in global sales and 2,300 locations worldwide, benefitting franchisees and investors alike. The company will continue executing on its operating plans and growth strategy."

Representatives for the investors did not immediately respond to inquiries seeking comment Monday.

Kates is represented by Laurence M. Rosen of The Rosen Law Firm PA.

Counsel information for the defendants was not immediately available.

The case is Mitchell Kates v. Fat Brands Inc. et al., case number 2:24-cv-04775, in the U.S. District Court for the Central District of California.

--Additional reporting by Anna Scott Farrell. Editing by Rich Mills.

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Chancery Retains Most Healthcare Tech Merger Suit Claims

By **Jeff Montgomery**

Law360 (June 10, 2024, 8:21 PM EDT) -- Nearly all the allegations of fraud, breach of contract and related claims lodged by healthcare technology venture Trifecta Multimedia Holdings Inc. against acquirer WCG Clinical Services have survived dismissal challenges and will move toward trial, a Delaware vice chancellor ruled Monday.

Vice Chancellor J. Travis Laster fully dismissed only one of four counts — alleging breach of the implied covenant of good faith and fair dealing — in Trifecta's Delaware Court of Chancery complaint. The suit was filed in July 2023 following more than two years of allegedly mounting company concern over WGC's intentions after the November 2020 merger.

Trifecta, an early adopter of video-based training for clinical pharmaceutical trials, accused WCG of causing nearly \$210 million in damages for failure to meet merger, equity and earnout promises made before closing.

Trifecta founder Dave Young and his spouse owned 100% of the company's equity. Under the deal, in addition to \$20 million for WCG's equity, Young, his spouse and the company received \$125 million in cash, \$25.5 million for company employees and the right to receive earnout payments if revenues exceeded milestones.

WCG "allegedly structured its deals for minimal up-front consideration and large backend payments with the expectation that the backend payments would never be made," the vice chancellor summarized in his decision Monday. "The healthcare company believes it fell victim to that scheme."

"Shortly after closing, WCG began to engage in conduct that Young viewed as contrary to its pre-closing promise," Vice Chancellor Laster added. "Young came to believe that WCG was trying to stifle the company's growth and prevent it from achieving the revenue milestones."

Sent forward in full were counts alleging breach of contract and asserting a right to indemnification by WCG, as well as some claims in a count asserting fraud based on material representations and omissions during negotiations.

Left behind from the fraud claim, the court said, were assertions found to be non-actionable "puffery," with each one being "classically vague statements that a commercial party routinely makes during deal-making courtship," the vice chancellor said.

Other fraud claims were carried forward, the court said. The opinion noted that, despite upbeat representations during negotiations, WCG split Trifecta's business into two separate lines and, within 60 days, cut its full-time sales staff to one employee, contradicting alleged promises to support more than 100 sales and marketing positions.

The lone remaining sales employee, the ruling said, "could devote, at most, 30 hours per week to the company's products — less than 12.5% of the time the sales team devoted before the acquisition."

WCG also interfered with Trifecta's ability to secure business from AbbVie, according to the decision. Young had been pursuing the biopharmaceutical company's business for years, and Trifecta had conducted two prior studies with AbbVie. But instead of going after AbbVie as a client for Trifecta, WCG funneled AbbVie's training business to competitor UL EduNeering, Vice Chancellor Laster said.

Rejected in the decision, however, were claims that Trifecta justifiably relied on WCG's assurances

"The sellers have not pled facts sufficient to support an inference that WCG's attorneys had knowledge that their statements about the implied covenant were false," the vice chancellor wrote. "WCG's attorneys may have been mistaken about the state of the law."

WCG initially argued that Trifecta's indemnification claim was premature because the claim is only proper once there is a final adjudication of claims to be indemnified, according to the decision.

During oral argument, Vice Chancellor Laster said that "the defendant responsibly conceded that this argument made no sense in light of the plain language" of the agreement.

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

Trifecta and Young are represented by Bradley R. Aronstam, Roger S. Stronach and Holley Newell of Ross Aronstam & Moritz LLP, and David S. Flugman, Lauren J. Zimmerman and Korey Boehm of Selendy Gay PLLC.

WCG is represented by Susan W. Waesco and Emily C. Friedman of Morris Nichols Arsht & Tunnell LLP, and William C. Jackson, Ashley Moore Drake, Ariel E. Rogers and Lauren E. Jackson of Goodwin Procter LP.

The case is Trifecta Multimedia Holdings Inc. and Dave Young v. WCG Clinical Services LLC, case number 2023-0699, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Catching Up With Delaware's Chancery Court

By **Jeff Montgomery**

Law360 (June 10, 2024, 2:15 PM EDT) -- Big players and big moves dominated much of the past week in Delaware's Court of Chancery, as Tesla in particular and big corporations in general showed their pique over rulings that went toward stockholders or against conventional expectations.

What followed was more than the usual, background saber-rattling by state-chartered businesses unhappy over losses or setbacks in the nation's premier business court. Of particular concern: Vice Chancellor J. Travis Laster's decision in *West Palm Beach Firefighters' Pension v. Moelis & Co.*, which found the investment bank's concessions to its controller could only be granted through charter amendments rather than pacts and board actions, and even then within existing law.

Top News

Tesla on Friday blasted a stockholder-led bid for an unprecedented, \$5.6 billion stock-based fee award after Chancellor Kathaleen St. J. McCormick's **Jan. 30 jettisoning** of a multiyear, stock-based pay plan for CEO Elon Musk once pegged at \$56 billion.

The company's objections arrived just ahead of stockholder **votes set for Thursday** on reincorporating the clean energy and electric-vehicle company in Texas and reapproving the pay deal. Musk and Tesla argued the fee would make the investors' counsel Tesla's third-largest non-institutional shareholder and equate to a more than \$288,000-per-hour attorney fee based on the \$191.59 closing stock price as of Jan. 30.

Rewriting the Rules

Also on Friday, law school professors from **27 universities** including Yale, Harvard, the University of Michigan and Columbia posted their shared opposition to a fast-tracked Delaware General Corporation Law amendment package that, among other terms, would allow boards to cede some governance rights to big stockholders and Delaware court oversight for some corporate actions to other jurisdictions.

In a letter posted to the Harvard Law School Forum on Corporate Governance, the group said the revisions "would be the most consequential changes to Delaware corporate law of the 21st century, and they should not be made hastily — if at all." A Delaware Senate committee was slated to vote on sending the bill to the full chamber on Tuesday, with supporters aiming to push it through the state House and on to Gov. John Carney before June 30.

Return Fire

Just a day earlier, **Tesla stockholder Donald Ball** filed a suit challenging the company's attempt to resuscitate Musk's pay award and the company's attempted flight from Delaware. Ball's suit, among other points, accused Tesla of punching up its argument with threats of reincorporation and propping up its prospects by seeking approval under an improper simple-majority vote, rather than what the suit said should have been a two-thirds majority.

Decisions

Delaware's top court on Tuesday let stand the dismissal of a Chancery Court suit accusing Chicago-based factory and automotive parts venture **Distribution Solutions Group Inc.** of failing to disclose costs and conflicts surrounding a three-way merger in late 2021.

Justice N. Christopher Griffiths, writing for the full court on Tuesday, said the justices accepted Vice Chancellor J. Travis Laster's finding that DSG secured business judgment protections for its decisions by deferring to an independent special board committee and an approval vote by a majority of the independent minority directors.

The CEO, controlling investor and board members of specialty building product maker **Foundation Building Materials Inc.** must face breach of fiduciary duty claims filed by stockholders after a \$1.4 billion company sale, Vice Chancellor J. Travis Laster ruled on Dec. 3 in a 142-page decision.

At issue in part was a deal with private equity firm Lone Star Funds under terms that included a \$74.8 million accelerated payout to Foundation Building Materials' controlling shareholder, an affiliate of Lone Star Fund IX US LP.

New Cases

Family trust investors in hormone optimization company **Biote Corp.** have sued Cooley LLP and the company's top brass over the \$700 million merger Biote completed with a special-purpose acquisition company. The complaint, filed on June 5, said the deal was a "disastrous transaction to divert approximately \$70 million of merger consideration to themselves and gain control of an enterprise they did not build." Cooley is named as a defendant because it was retained by Biote for guidance through the merger, according to the complaint.

Former stockholders of the blank-check company that took electronic sports and entertainment company **FaZe Clan** public in a \$725 million transaction in July 2022 sued B. Riley Financial and others behind the deal on Friday in Delaware's Court of Chancery, alleging disclosure failures and breaches of fiduciary duty. Lead stockholder Nathan Carter, an investor in B. Riley Principal 150 Merger Corp., or BRPM, said in his proposed class complaint that shortly after the merger closed, the trading price of BRPM "crashed to a small fraction of its redemption value, thereby confirming that the merger was neither entirely fair nor anywhere close to it."

Two public stockholders of global customer experience outsourcing consultant **StarTek Inc.** sued four company directors and its private equity controller in Delaware's Court of Chancery on Wednesday, alleging an unfair and conflicted \$4.30-per-share buyout of the company's remaining public shares. In the complaint, attorneys for the shareholders pointed to possible intentional efforts to drive down the price of StarTek's stock before the transaction to benefit the controller, private equity firm Capital Square Partners Pte Ltd.

A stockholder of global payments and spending management venture Corpay Inc. sued the business in Delaware's Court of Chancery on Tuesday, challenging an "irrevocable resignation requirement" obliging stockholders who seek a board seat through the company's open proxy access bylaw to resign if information they submit for nomination is untrue or misrepresented. The resignation mandate does not extend to incumbent directors.

A Sangamo Therapeutics Inc. stockholder challenged the company's voting plan for a 50% increase in authorized shares on Monday, accusing the biotherapeutics venture of telling stockholders the measure could pass with a majority of votes cast despite a charter provision specifying a majority of authorized shares. Stockholder Trevor Sell said in his complaint that California-based Sangamo has failed to act despite repeated objections. The company had a \$123 million market capitalization at the time of the suit, with the business focused on cell and gene therapy for hemophilia and other genetic diseases.

Ongoing disputes

Vice Chancellor Lori W. Will ordered a hefty, 10% security from dissenting members of the LLC sponsor for the blank-check company that took **Trump Media & Technology Group** public in March. The decision focused on more than 1.5 million shares — now trading at \$46 — snarled in a sponsor control dispute.

The vice chancellor issued the decision midway through litigation tied to an announced bid by some sponsor members to remove Patrick Orlando as ARC Global Investments II LLC's original managing

member. Orlando had warned the dispute and potential lockup of ARC's TMTG shares could lead to substantial losses if the stock falls before resolution of the case.

Never Ending Story

A Delaware federal judge has tossed **TransPerfect Holdings LLC's** lawsuit alleging misrepresentations by a now-retired Skadden Arps Slate Meagher & Flom LLP partner and Credit Suisse Securities USA LLC led it to pay too much for language translation company TransPerfect Global Inc., finding the claims, arising from more than a decade of litigation, are time-barred.

In an 18-page opinion Tuesday, U.S. District Judge Jennifer L. Hall dismissed with prejudice TransPerfect Holdings' securities fraud suit against Robert Pincus and Credit Suisse. Both Pincus and Credit Suisse had moved to dismiss, and in an accompanying order on Tuesday, the judge granted both requests. The forced sale of TransPerfect Global came amid an ongoing dispute between founders Philip Shawe and Elizabeth Elting, who co-owned the translation company before "their relationship deteriorated," the opinion says.

Quotable

"They did astoundingly little, approved an inherently conflicted compensation arrangement for their financial adviser, and acted as if a sale of the company was a fait accompli. The record includes real-time indications of excessive deference to the fund," Vice Chancellor J. Travis Laster, on sending toward trial breach of fiduciary duty claims against top officials of **Foundation Building Materials Inc.** in connection with a \$1.4 billion company sale.

--Editing by Philip Shea.

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Apple iPhone Antitrust MDL Heads To NJ, Where DOJ Is Suing

By **Gina Kim**

Law360 (June 10, 2024, 8:07 PM EDT) -- Apple customers accusing the company of locking in iPhone users through anticompetitive agreements will have their cases consolidated in New Jersey, the U.S. Judicial Panel on Multidistrict Litigation ruled Friday, finding the parties can coordinate with the U.S. Department of Justice's enforcement action there to avoid duplicative discovery and inconsistent rulings.

In a four-page order June 7, the JPML transferred a host of lawsuits **accusing** Apple of anticompetitive conduct to the Garden State, over the objections of another group of plaintiffs who sought to keep the cases centralized in California, where Apple is headquartered.

Friday's JPML order sending the cases to the District of New Jersey stems from competing consolidation **bids filed last month** by plaintiffs steered by Jennifer B. Chiuchiarelli, in the wake of the DOJ's **landmark monopolization suit against Apple** in March.

While the Chiuchiarelli plaintiffs said in their April consolidation motion that all private actions belong in California, a separate group of customers headlined by Deborah Collins said that while they first filed in Apple's home turf, their suits should at least join the DOJ's related civil antitrust enforcement action in New Jersey.

"On the basis of the papers filed and the hearing session held, we find that these actions involve common questions of fact and that centralization in the District of New Jersey will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation," the June 7 order from the JPML said. "The actions share common questions of fact arising from allegations that Apple has monopolized or attempted to monopolize the smartphone market by controlling the creation and distribution of apps compatible with the iPhone and suppressing technologies that would make the iPhone more compatible with competitors' devices."

The JPML judges also rejected a request by plaintiff Joseph Giamanco, who filed his own action against Apple in Illinois on behalf of Apple Watch owners to be excluded from any MDL, since the claims regarding the smartwatches concern a different product and market, and accordingly, will have little overlap.

"This argument is not persuasive," the JPML judges said. "The iPhone and Apple Watch claims are based on the same premise: that Apple has designed the iPhone and the Apple Watch to be fully compatible only with one another. All actions — including Giamanco — allege that Apple limits the functionality of third-party smartwatches when paired with iPhones in order to lock users into Apple's 'ecosystem.'"

Furthermore, there will be substantial overlap in discovery and facts, as most Apple Watch wearers also carry iPhones, the judges pointed out. The New Jersey court is the appropriate venue to hear the consolidated matters, as 26 of 41 total actions are pending there before U.S. District Judge Julian X. Neals, which includes a related civil antitrust enforcement suit by the DOJ, which is joined by several attorneys general.

"Centralization of the private litigation in the District of New Jersey before Judge Neals will provide opportunities for coordination with the government action, avoid duplicative discovery, and minimize the risk of inconsistent rulings on overlapping issues," the June 7 JPML order said. "Judge Neals is an

accomplished jurist, and we are confident that he will steer this matter on an efficient and prudent course."

The DOJ's enforcement action was filed on March 21, alleging Apple used "shapeshifting rules and restrictions" on app developers to "throttle competitive alternatives" and allow for Apple's high commissions. Through a slew of anticompetitive deals, the DOJ and a coalition of attorneys general allege, Apple not only stifled competition in the phone market, but has left a mark on the financial services, gaming and social media industries.

Days after the DOJ filed its sweeping antitrust suit against Apple in New Jersey, a group of iPhone owners launched their own separate proposed class actions, accusing the tech giant of suppressing innovation in the digital apps, wearables and payments industries through anticompetitive agreements.

Steve W. Berman of Hagens Berman Sobol Shapiro LLP, who represents the Collins plaintiffs, issued the following statement Monday to Law360 in an email: "We supported New Jersey as the appropriate venue so we are pleased."

Plaintiffs Jennifer B. Chiuchiarelli, April H. Yamaichi, Kiyomi Ishii and Richard K. Hopper are represented by Joseph W. Cotchett, Adam Zapala, Elizabeth Castillo, Grace Park and Karin B. Swope of Cotchett Pitre & McCarthy LLP.

Plaintiffs Deborah Collins, Hunter Collins and Henry Morales are represented by Ben M. Harrington and Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Eamon P. Kelly, Joseph M. Vanek and Phillip F. Cramer of Sperling & Slater LLC.

Apple is represented by Theodore Boutrous of Gibson Dunn & Crutcher LLP and Devora Allon, Craig Primis, Winn Allen and Matt Reilly of Kirkland & Ellis LLP.

The proposed multidistrict litigation is In Re: Apple Inc. Smartphone Antitrust Litigation, case number 3113, before the Judicial Panel on Multidistrict Litigation.

The California cases are Deborah Collins et al. v. Apple Inc., case number 3:24-cv-01796, Jared Schermer v. Apple Inc., case number 3:24-cv-01815, Chiuchiarelli et al. v. Apple Inc., case number 5:24-cv-01895, Dwyer et al. v. Apple Inc., case number 3:24-cv-01844, Miller et al. v. Apple Inc., case number 3:24-cv-01988, and Loewen v. Apple Inc., case number 3:24-cv-02006, all in the U.S. District Court for the Northern District of California.

The New Jersey cases are Shoshi Goldfus v. Apple Inc., case number 2:24-cv-04108, Kolinsky et al. v. Apple Inc., case number 2:24-cv-04232, Levine v. Apple Inc., case number 2:24-cv-04284, and Kurtz v. Apple Inc., case number 2:24-cv-04355, all in the U.S. District Court for the District of New Jersey.

--Additional reporting by Bryan Koenig. Editing by Jay Jackson Jr.



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Baltimore Lands \$45M Deal With Allergan In Opioid Litigation

By **Hailey Konnath**

Law360 (June 10, 2024, 7:37 PM EDT) -- Baltimore has put to rest its claims that Allergan played a part in the opioid crisis, reaching a \$45 million settlement with the pharmaceutical company, an amount the city called "unprecedented" in an announcement on Monday.

The deal with Allergan Finance LLC, which is owned by AbbVie, comes after the city opted out of broader nationwide settlements Allergan reached in recent years. Had Baltimore settled as part of those deals, it would have only come away with about \$7 million spread over seven years, the city said in a statement. Now, Baltimore will get the full \$45 million immediately in one lump sum payment, it said.

Baltimore's settlement is also bigger than what many states secured in their own deals with Allergan, the city said. For instance, in February, Maryland settled its claims against Allergan for \$38 million, which will be spread over seven years, according to the statement.

"The city's deal with Allergan is an unprecedented recovery in the nationwide opioid litigation and confirms that the city was prudent in opting out of the global settlements that opioid defendants reached with nearly every other state, county and city in America over the past few years," the city said.

Baltimore will spend at least \$10 million of its settlement funds on community programs aimed at addressing the opioid epidemic in the city, per the statement. Mayor Brandon Scott also plans to create a board to oversee how the settlement funds are spent, the city said.

The city's claims centered on two of Allergan's drugs, Kadian and Norco, which made up less than half a percent of the opioids sent to pharmacies in Baltimore, it said.

The city is still pursuing similar claims against Johnson & Johnson, McKesson, Cardinal Health, AmerisourceBergen, Walgreens, CVS, Teva and former Insys CEO John Kapoor, according to the statement. The remaining defendants were responsible for more than 80% of the opioids "targeted at Baltimore pharmacies," the city said.

Scott said in the statement, "We are committed to ensuring that every penny of this and any other amount recovered is put to its most effective and best use to combat the opioid epidemic in Baltimore city at all levels."

Ebony Thompson, Baltimore city solicitor, added that: "Our legal team is confident in the value of our case, and we will not be settling for anything that does not take into account the significant resources needed to overcome the widespread effects of the defendants' actions."

Allergan didn't immediately respond to a request for comment late Monday.

Baltimore is represented by Sara Gross and Thomas Webb of the Baltimore City Department of Law and Bill Carmody, Seth Ard and Sy Polky of Susman Godfrey LLP.

Counsel information for Allergan wasn't immediately available Monday.

The case is Mayor & City Council of Baltimore v. Purdue Pharma LP et al., case number 24-C-18-

000515, in the Circuit Court of Maryland for Baltimore City.

--Editing by Dave Trumbore.

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Prudential Financial Hit With Data Breach Suit In NJ

By **Emilie Ruscoe**

Law360 (June 10, 2024, 3:03 PM EDT) -- Prudential Financial Inc. faces a negligence suit alleging the company failed to protect the personal information of nearly 37,000 clients after it acknowledged that certain of its systems were compromised in a February hacking incident involving so-called social engineering.

In a complaint filed Friday in Newark federal court, Prudential client Constance Boyd claimed the financial services company was obligated to protect the personal information it collected in the course of its business and tens of thousands of people were left vulnerable to exploitation after their data was exposed in a Feb. 4 hacking incident.

According to Boyd, Prudential only sent out its initial notice letter about the breach to the plaintiff at the end of May, nearly four months after an "undoubtedly nefarious third party" gained access to private client information collected and held by Newark-headquartered Prudential.

Boyd claimed in the suit that despite the monthslong lag between the breach and the notification letter, Prudential clients are still "even today in the dark regarding what particular data was stolen, the particular malware used, and what steps are being taken, if any, to secure their [personal identifying information] going forward."

The company disclosed the breach in a Feb. 21 public filing with the U.S. Securities and Exchange Commission and said at the time that it believed that a "cybercrime group" was responsible for the cyberattack.

The company's SEC disclosure also stated that the unauthorized parties got ahold of "limited data," noting that it had reported the matter to law enforcement and relevant regulators and adding that in addition to stealing certain client data, the unidentified hackers had also "accessed a small percentage of company user accounts associated with employees and contractors."

In a data breach notification dated March 29, Prudential told the office of Maine's attorney general that the breach had been a hack involving social engineering, or the manipulation of certain individuals such as a company's employees to act on behalf of unauthorized parties in service of a scheme like accessing sensitive client information.

A total of 36,545 individuals were affected by the breach, the company told the state attorney general, which also noted in that disclosure that the information obtained by the purported hackers included Prudential clients' names and the serial numbers associated with identification records such as their driver's licenses and non-driver identification cards.

According to Prudential, it discovered the hack the day after the third parties first accessed its systems.

Boyd, a Minnesota resident, said in the action that the personal data Prudential held included, "without limitation: name, address, date of birth, email, phone number and Prudential ID number," adding later that the "the data involved, including Social Security numbers, is highly sensitive and presents a high risk of identity theft or fraud."

"It is likely, given defendant's clientele, that some of the [allegedly injured clients'] information that has been exposed has already been misused," Boyd added.

Boyd seeks to represent a class of all those who saw their information compromised in the breach and aims to hold the company liable for negligence, breaching its implied contract with its clients and unjustly enriching itself.

On Monday, a representative for Prudential told Law360 in an emailed statement, "We take the February cybersecurity incident and our responsibility to safeguard personal information extremely seriously. We have taken, and will continue to take, proactive measures to enhance our security protocols, and protect our systems and data."

Counsel for Boyd declined to comment Monday.

Boyd is represented by Andrew J. Sciolla of the Sciolla Law Firm LLC and Kevin Laukaitis of Laukaitis Law LLC.

Counsel information for Prudential wasn't immediately available Monday.

The case is Boyd v. Prudential Financial Inc, case number 2:24-cv-06818, in the U.S. District Court for the District of New Jersey.

--Editing by Patrick Reagan.

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Bloomberg's Utility Bond Changes Hurt Consumers, Suit Says

By **Sydney Price**

Law360 (June 10, 2024, 8:01 PM EDT) -- Bloomberg LP was hit with a proposed class action by California and Texas electricity customers who claim the company reclassified certain bonds issued by utility companies to elevate their perceived risk and hike interest rates, a move they say benefited institutional investors but imposed increased costs on electricity customers.

According to the suit filed Friday in New York federal court by three utility customers, Bloomberg reclassified recovery bonds — which are issued by utility companies to fund infrastructure projects — from corporate assets to asset-backed securities. Because recovery bonds are generally perceived as low-risk investments, Bloomberg knew that reclassifying them would limit the number of potential investors and thus decrease liquidity and increase the interest rates for these bonds, the complaint claims.

Bloomberg's "dominant market position" in the fixed-income index universe gives it the power to dictate how bonds will be classified, the suit states. The recovery bonds differ from asset-backed securities in several ways, which the complaint asserts Bloomberg itself has previously acknowledged by consistently classifying them as corporate bonds.

The plaintiffs are customers of Southern California Edison, Electric Reliability Council of Texas and Pacific Gas & Electric Co. They contend the reclassification resulted in higher investment returns for the investors and higher monthly recovery bond repayment charges for the electricity customers.

According to the complaint, the bonds at issue in the suit are intended to help rebuild from the damage caused by California wildfires and Winter Storm Uri, which hit Texas in 2021.

The complaint claims Bloomberg was influenced by its biggest institutional investor customers to reclassify the bonds from corporate to asset-backed securities, so investors would profit off of the interest.

"Bloomberg's misclassification improperly increased the monthly electric utility payments for tens of millions of people in California and Texas for the next approximately twenty years," the suit states.

The customers claim Bloomberg made announcements in 2022 to indicate that recovery bonds would be reclassified in advance of the then-upcoming issuances by SCE, PG&E and ERCOT, which the plaintiffs say they are responsible for repaying.

On June 8, 2022, Bloomberg announced a "highly unusual" mid-year review of corporate bonds, and on July 7, 2022, it made another announcement signaling recovery bonds would be classified as asset-backed securities, the suit contends.

"The timing of the announcements was intended to increase the interest rate on recovery bonds issued even before formal reclassification," the complaint states.

The plaintiffs propose three classes for SCE, PG&E and ERCOT customers and accuse Bloomberg of negligence and interference with contracts.

Counsel for the utility customers and a representative of Bloomberg did not immediately respond to requests for comment Monday.

The plaintiffs are represented by Sahil S. Koul, Richard M. Paul III and Michael Schrag of Paul LLP, Roger N. Heller of Lieff Cabraser Heimann & Bernstein LLP, and Michael G. King of Hennelly & Grossfeld LLP.

Counsel information for Bloomberg was not immediately available on Monday.

The case is Skolarus et al. v. Bloomberg LP et al., case number 1:24-cv-04375, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.

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Voyager Crypto Investors Get Initial OK For \$2.4M Deal

By **Katryna Perera**

Law360 (June 10, 2024, 9:44 PM EDT) -- A Florida federal judge gave the first green light on Monday to a \$2.4 million settlement reached between retired football star Rob Gronkowski, NBA player Victor Oladipo and NASCAR driver Landon Cassill and a class of Voyager Digital Holdings Inc. investors over claims that the men helped promote the failed cryptocurrency exchange.

U.S. District Judge Roy K. Altman issued an **order** saying the **settlement** is the result of good faith negotiations and is fair and reasonable. He also certified a class of investors that includes all individuals in the United States who enrolled in a Voyager Earn Program Account or purchased VGX Tokens from Oct. 23, 2019, to the date of the deal's preliminary approval.

The deal states that Gronkowski will pay the biggest share of \$1.9 million, Oladipo will pay \$500,000 and Cassill will shell out \$25,000. All three men agreed to the settlements without admitting or denying any of the investors' accusations.

Although the settlement has received preliminary approval, Judge Altman's order states that formal notice of the deal will be deferred until the investors' claims against the remaining defendants — billionaire Mark Cuban and his former NBA team, the Dallas Mavericks — are resolved.

"The court agrees that this is the most practical path forward. Deferring notice will save money for the settlement class because, at the end of this litigation, the plaintiffs will be able to provide notice of all of the settlements at once," the order states. "Therefore, in the interest of judicial and litigative efficiency, dissemination of notice shall be stayed until the plaintiffs' claims against the remaining non-settling defendants have been resolved."

Last week, Cuban **objected** to the investors' request to incorporate a recent decision from the Western District of Texas into their suit.

Last month, the U.S. Securities and Exchange Commission **scored a partial win** in its suit accusing an influencer of unlawfully reselling and promoting cryptocurrencies to followers on social media, with a judge finding the tokens were unregistered securities and the promoter could not escape liability in the lawsuit.

U.S. District Judge David Alan Ezra also denied influencer Ian Balina's assertion that the SEC had no jurisdiction over the conduct it described because the promotion, offer and sale of the virtual assets in question occurred outside the U.S. and no domestic transaction took place.

However, Cuban said in his objections that Judge Ezra's decision has no bearing on his current dismissal motion since he did not argue that the Voyager investors failed to allege a domestic transaction.

Additionally, the "non-binding summary judgment decision in Balina is distinguishable," Cuban said. The Balina decision held the tokens in question were securities, but in the Voyager suit, the investors do not allege that Cuban promoted tokens.

"Lead plaintiff Edwin Garrison unequivocally testified that on the one time Cuban spoke about the Mavericks-Voyager agreement, he did not promote Voyager's token. Voyager's at-issue product — its interest-bearing cryptocurrency accounts — were not tokens, but rather were akin to savings accounts," the filing states.

"Moreover, whereas the Balina defendant was held to have 'sold' [Sparkster Ltd.] tokens, as he allocated tokens to his paid subscribers, thus arguably passing title, and purchased 433.3 million SPRK Tokens, giving him a financial interest in the tokens' success, the Mavericks received flat, annual fees for advertising and neither defendant passed title of anything to plaintiffs," the filing further states.

The Voyager investors launched their suit in 2022 claiming Cuban and the others tricked them into buying unregistered securities and furthered Voyager's "false and misleading promises" of large profits.

Other suits since filed by Voyager investors against the NBA, the law firm McCarter & English and public relations company Ketchum Inc. have been consolidated into the original lawsuit and set on a separate track.

In March, the investors moved to certify nationwide classes on what they say are the two central, dispositive questions in the case: whether Voyager tokens are securities under the New Jersey Uniform Securities Law, which governs the case, and whether Cuban and the Mavericks could be considered statutory sellers under the New Jersey law.

Voyager filed for Chapter 11 protection in July 2022 following a run on the lender and the default of a \$650 million loan to defunct crypto hedge fund Three Arrows Capital. The company received purchase offers from FTX and Binance.US before both companies' own massive problems scuttled hopes for a sale.

Counsel for Oladipo declined to comment on Monday, and counsel for the other parties did not immediately respond to requests for comment.

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

Gronkowski and Cassill are represented by R. Craig Mayfield, Alexis Buese and Charles E. Elder of Bradley Arant Boult Cummings LLP.

Oladipo is represented by Jonathan S. Feldman of Phang & Feldman PA.

Cuban and the Mavericks are represented by Christopher E. Knight, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett PA, Paul C. Huck Jr. of The Huck Law Firm PA, and Stephen A. Best, Rachel O. Wolkinson, Daniel L. Sachs and Jonathan D. White of Brown Rudnick LLP.

The case is Karnas et al. v. Cuban et al., case number 1:22-cv-22538, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Sydney Price. Editing by Vaqas Asghar.



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Gemini Says Jury Must Weigh Alleged 'Omissions,' Not Judge

By Aislinn Keely

Law360 (June 10, 2024, 9:17 PM EDT) -- Gemini Trust Co. has told a Manhattan federal judge that the U.S. Commodity Futures Trading Commission's claims that the crypto exchange omitted key information related to a proposed bitcoin futures contract isn't ripe for a pretrial decision because the claims involve "hotly disputed factual questions."

The crypto exchange led by Tyler and Cameron Winklevoss pushed back on the CFTC's bid for summary judgment in a Friday **brief** arguing that the only question ripe for summary judgment is whether the exchange is liable for information provided through Cboe Futures Exchange, the proposed listing exchange for the contract. Whether Gemini knowingly left out material details to obscure risks related to the contract would require fact-finding and a jury decision, the exchange said.

"The only real question on summary judgment goes to the scope of the upcoming trial — namely, whether Gemini legally made the statements over which [Cboe] had ultimate authority and actually transmitted to the CFTC," said Gemini. "At trial, the government faces a genuine factual dispute on literally every element of every claim."

Gemini faces claims that it knew there were gaps in its self-trading prevention procedures, failed to disclose it had extended loans and advances in some cases when it told the agency that all transactions on its platform were prefunded and didn't tell the CFTC about certain rebates and discounts for market makers.

But the crypto exchange argued that the regulator's burden is heightened by the fact that these claims all center on omissions, since it has to show that "a particular fact is so overwhelmingly essential that its absence transforms an otherwise true statement into falsehood."

Gemini wasn't able to obtain documents related to the CFTC's deliberations on the bitcoin futures contract to assess what facts the agency found material during its review after a February 2023 **discovery ruling**, and the crypto exchange argued that the lack of insight into the agency's review limits the court's ability to assess whether Gemini's alleged omissions were material.

"Having successfully refused any discovery into whether the purportedly false statement could or did actually influence the CFTC's decision, the CFTC cannot now claim that the absence of probative evidence transforms this question into a pure matter of law reserved for the court," Gemini said.

According to the crypto exchange, the loans extended to traders couldn't have led to market manipulation, and though it permitted self-trading on its platform at one point, it had prevention mechanisms in place when it proposed the futures contract. It also stands by its statement that it didn't have a market maker program in place, since it said any rebates occurred on a one-off, case by case basis rather than a formal program.

Gemini argued that whether the lack of additional information rendered its statements misleading is far from a matter of law, since a reasonable jury may not side with the CFTC in finding the gaps were key to assessing the product's risk.

"Put simply, a reasonable jury could readily find that the CFTC has not met its burden of proving that Gemini made false or misleading statements; that Gemini's statements were material to the CFTC's

decision-making; and that Gemini knew or reasonably should have known that its statements were false or misleading," said Gemini.

The firm also argued that Cboe, not it, was the source of the contested statements to the CFTC. Gemini first made this argument in its own motion for partial summary judgment, telling the Manhattan federal court that it didn't have "ultimate authority" over those statements. The CFTC **disagreed**, saying Gemini can't pin the alleged misstatements on an intermediary. Cboe is not a party in any of the proceedings.

Neither Gemini nor the CFTC immediately responded to a request for comment on Monday.

The CFTC is represented by its own K. Brent Tomer, Alejandra de Urioste, David Oakland, Katherine Rasor, Diana Wang, Andrew J. Rodgers, Peter Janowski and Manal M. Sultan.

Gemini Trust Co. is represented by John F. Baughman, Daniel A. Schwartz, Elizabeth J. Lee and Ernest E. Butner IV of Baughman Kroup Bosse PLLC.

The case is Commodity Futures Trading Commission v. Gemini Trust Co. LLC, case number 1:22-cv-04563, in the U.S. District Court for the Southern District of New York.

--Editing by Rich Mills.

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Ontrak CEO Had Anxiety Over Souring Cigna Deal, Jury Told

By **Gina Kim**

Law360 (June 7, 2024, 10:50 PM EDT) -- A former Ontrak Inc. consultant testified Friday in the trial of its founder who's accused of trading on insider information about Ontrak's souring relationship with Cigna Healthcare in 2021, telling California federal jurors he frequently expressed anxiety, saying that Ontrak must "save Cigna" and describing the situation as a nightmare.

On Friday, jurors presiding over the securities trial for Ontrak founder Terren Peizer heard from government witness Shona Seifert, a former Ontrak consultant who gave Peizer strategic counseling in business growth and dealing with challenges. Peizer is accused of executing two so-called Rule 10b5-1 trading plans to start selling company shares using material nonpublic information in May and August 2021.

In her job, Seifer would communicate frequently with Peizer by phone, email and text about anything related to the success of Ontrak, she said.

In early 2021, when Aetna Inc. announced its plans to end its customer relationship with Ontrak, Peizer was worried about the effect it'd have on his company, Seifert said.

Ontrak executives, including Peizer, also knew the company was starting to have problems with Cigna in the spring of 2021, she testified. Cigna was concerned about the amount of money in the \$90 million contract budget Ontrak was spending and about not seeing a return on its investment.

Peizer consulted with Seifert on these issues on a regular basis, expressing anxiety and calling the situation a "nightmare," jurors heard. From March to August 2021, the number one thing he cared about was Cigna, Seifert testified.

Jurors saw a slew of text messages between Seifert and Peizer in April through June 2021. Messages from Peizer included "We just need to save Cigna and we are on our way" and "save Cigna," and he commented that if Ontrak's team could pull together to save the relationship, the company would be fine.

Friday ended the first week in a novel securities fraud trial for Peizer, who is charged with three counts of insider trading on claims **he used the stock selling plans** to trade using material nonpublic information that Ontrak was in jeopardy of losing its \$90 million behavioral health services contract with Cigna.

Prosecutors say Peizer knew what was going on with Ontrak's diminishing relationship with Cigna in the spring of 2021, not long after Aetna bowed out of its own agreement with Ontrak that March and Ontrak's stock price plunged more than 40%.

The government said in **opening statements Tuesday** that Peizer was fixated on Cigna, focused on saving Ontrak's relationship with the company and described the circumstances as closely resembling Aetna's termination. Peizer executed his first trading plan about a week before Ontrak was set to have a meeting with Cigna on May 18, 2021, which was the day Cigna said it intended to end their contract by the end of the year, prosecutors say.

Equipped with nonpublic information, Peizer set up his trading plan again in August 2021 to start selling shares, several days before Cigna's termination of the contract became official and was made

public on Aug. 19, the government says. Peizer ended up selling \$20 million in company shares after falsely certifying in his trading plans he had no insider information, prosecutors say.

The defense has maintained that Peizer simply sought to sell warrants for more than 1 million shares set to expire later that year that he'd otherwise lose, and did so gradually, over time. Peizer also made his trading plans in good faith, and had expressed intentions to do so in January 2021, long before Cigna aired any problems with Ontrak, the defense says.

On Friday, Seifert testified Cigna was also often discussed in weekly meetings between Peizer and Ontrak executives, who'd update him on the status of the company's relationship with Cigna and negotiations. Peizer was also closely involved in correspondence between Cigna representatives and Ontrak's executives, jurors heard.

He also had a role in reviewing and signing off on certain correspondences or proposal plans in emails, Seifert testified. While Ontrak did bring in new CEO Jonathan Mayhew in April 2021, Peizer's role and involvement didn't change very much in practice, Seifert testified, and company executives, including Mayhew, Chief Financial Officer Brandon LaVerne and general counsel Rob Newton, would report directly to him.

After Seifert told him in April 2021 that Ontrak's staff overseeing the Cigna account had met with Cigna the day before, Peizer texted her, "This feels eerily like Aetna."

"I understood [the message] to mean it felt like another customer had fired Ontrak, and the same situation was unfolding because Aetna had fired Ontrak from their business" a few months earlier, Seifert testified.

Peizer sent another text to Seifert that day expressing pessimism about his "baby" Ontrak: "Baby is losing his hair from chemo." Through early May 2021, Peizer would send texts to Seifert expressing his pessimism and anxiety about Ontrak's relationship with Cigna, Seifert said.

"What a nightmare," Peizer said in one text to Seifert on May 1, 2021, when she gave him another update on Cigna.

"Did you know he had entered into a trading plan to sell his shares with Ontrak?" assistant U.S. attorney Ali Moghaddas asked Seifert. Seifert said she had no idea. She did affirm that she knew Peizer was the majority shareholder of Ontrak at the time.

Moghaddas asked if Seifert was aware that by the end of May 2021, Peizer was selling 10 shares a day of his holdings in Ontrak. Seifert said she did not know.

Jurors saw another message between the two on May 25, 2021, where she wrote to Peizer that a Cigna representative responded to some proposals to the agreement that Ontrak had sent over for review, and that Peizer was upset. He texted her that he'd "personally lost 700 million" of share value.

Testimony resumes Tuesday.

The government is represented by Matthew Reilly and Della G. Sentilles of the U.S. Department of Justice and Ali Moghaddas of the U.S. Attorney's Office for the Central District of California.

Peizer is represented by David K. Willingham, Yelena Kotlarsky and Jamie A. Lang of King & Spalding LLP and Stephen A. Best, Angela M. Papalaskaris and Stephen R. Cook of Brown Rudnick LLP.

The case is U.S. v. Terren Peizer, case number 2:23-cr-00089, in the U.S. District Court for the Central District of California.

--Editing by Brian Baresch.