

Bloomberg Law News 2024-06-25T14:16:35031581071-04:00

Mallinckrodt Officers Move Closer to Ending Securities Case

By Ufonobong Umanah 2024-06-25T13:41:46000-04:00

Top officers at Mallinckrodt Public Limited Co. have reached an agreement in principle over a settlement amount in a securities class action that alleged the officers weren't forthright about problems relating to H.P. Acthar Gel.

Mallinckrodt allegedly knew that Acthar's prior owners had improperly tried to save money on rebate payments it owed the government, according to a [Dec. 2022](#) order of the US District Court for the District of New Jersey. Mallinckrodt agreed to fix the discrepancy and pay the government \$260 million in a settlement, the court said. The officers allegedly also failed to disclose the company was negotiating a different settlement with the federal government over false claims allegations that it illegally marketed Acthar as off-label, the court's opinion also said.

- The parties are still negotiating non-monetary terms, according to a letter to the court from counsel for the plaintiffs filed Monday. The parties are working toward filing a motion for preliminary approval of the settlement by mid-August, the letter also said
- Mallinckrodt filed for Chapter 11 bankruptcy, and was [removed](#) as a defendant in the lawsuit in Dec. 2022
- Counsel for the parties didn't immediately respond to a request for comment

Judge Robert Kirsch is assigned the case.

Carella Byrne Cecchi Brody & Agnello PC and Robbins Geller Rudman & Dowd LLP represents lead plaintiff Canadian Elevator Industry Pension Trust Fund. Hogan Lovells represents the Mallinckrodt officers.

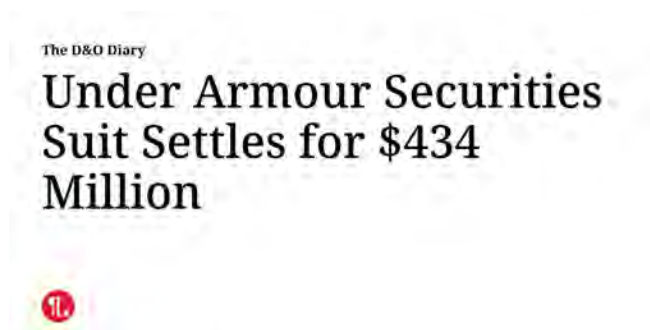
The case is [Strougo v. Mallinckrodt Pub. Ltd. Co.](#) , D.N.J., No. 3:20-cv-10100, letter from counsel 6/24/24 .

To contact the reporter on this story: Ufonobong Umanah in Washington at uumanah@bloombergindustry.com

Under Armour Securities Suit Settles for \$434 Million

K [dandodiary.com/2024/06/articles/securities-litigation/under-armour-securities-suit-settles-for-434-million](https://www.dandodiary.com/2024/06/articles/securities-litigation/under-armour-securities-suit-settles-for-434-million)

June 25, 2024



By Kevin LaCroix on June 25, 2024

Posted in Securities Litigation



Just weeks before trial in the case was scheduled to being, the parties to the Under Armour securities class action lawsuit have agreed to settle the case for \$434 million, according a company SEC filing. The case had recently survived the defendants' motion for summary judgment. According to the lead plaintiffs' counsel, the settlement represents the second-largest securities suit settlement in the Fourth Circuit. The settlement is subject to court approval. A copy of

the company's June 21, 2023, filing on Form 8-K can be found [here](#). Plaintiffs' counsel's June 21, 2024, press release about the settlement can be found [here](#).

The securities class action lawsuit against Under Armour and certain of its directors and officers was first filed in 2017. The complaint, as subsequently amended, alleged that the defendants had used a variety of techniques – such as pulling sales from subsequent periods forward to early periods or convincing retailers to take product early – to mask the company's declining sales volume after years of growth. The case had a convoluted procedural history that, among other things, included a trip to the Fourth Circuit. The district court ultimately denied the defendants' motion to dismiss. More recently, on February 26, 2024, the district court denied the defendants' motion for summary judgment. Trial in the case was scheduled to commence on July 15, 2024.

However, on June 21, 2024, the company filed a statement with the SEC on Form 8-K in which the company reported that the case had been settled in exchange for the company's agreement to pay \$434 million.

Readers learning of this sizeable settlement may well ask where the money is coming from to fund the deal. In its 8-K filing, the company said:

The Company presently expects to pay the settlement amount using balance sheet cash and/or borrowings under its revolving credit facility. However, the Company currently expects a portion of this amount (less than 20%) to be offset by director and officer liability insurance policies. As previously disclosed, the Company remains in ongoing litigation with certain of its insurance carriers regarding this matter, and there is no guarantee that the litigation with the insurance carriers will be resolved in the Company's favor.

As I noted above, lead plaintiffs' counsel said in their press release about the settlement that that this settlement represents the second largest ever settlement of a securities suit in the Fourth Circuit. (The case is pending in the District of Maryland.) As for where this settlement ranks on the overall list of securities settlements, it appears that this settlement, if it were to be finalized, would be among the top 50 largest settlements ever, approximately the 43rd largest or so. (It is a remarkable observation that even a settlement this large does not even appear to break into the top 40 all-time settlements.)

This settlement is noteworthy on many levels, including the fact that it was accomplished so close to the trial date. Another feature of this settlement that is noteworthy to me is the fact that the company appears to be funding the majority of the settlement out of its own resources. While D&O insurance apparently will be making some contribution toward the settlement (subject to the outcome of pending coverage disputes), the D&O insurance is funding only a small portion of the settlement. I have added this observation to my general file notes about securities litigation, as a data point to use to respond to the cynics who say that securities litigation is a fight solely about the D&O insurance that doesn't otherwise signify anything.

Under Armour reaches possible \$434 million settlement in investor class action | Secondary Sources | National

 today.westlaw.com/Document/la527f28d324711ef8921fbef1a541940/View/FullText.html

(June 24, 2024) - A long-running securities class action against Under Armour Inc. is on the verge of settling, with the sportswear company agreeing to pay \$434 million to resolve allegations that it concealed a sales slump in 2015.

Under Armour Inc. Form 8-K, 2024 WL 3081981 (June 21, 2024).

The proposed agreement would also require Under Armour to separate the chair and CEO roles for three years and place performance-based vesting conditions on restricted stock units granted to top executives, according to a Form 8-K filed June 21 with the Securities and Exchange Commission.

The company said it is preparing a stipulation of settlement in the consolidated shareholder suit pending in the U.S. District Court for the District of Maryland.

Alleged accounting scheme

The 2016 lawsuit involves Under Armour's alleged practice of "pulling forward," or borrowing sales from future reporting periods at a financial quarter's end.

The company's accounting maneuvers allowed it to maintain a façade of consistent sales growth amid declining demand, according to the suit.

Under Armour's founder and CEO, defendant Kevin Plank, reaped more than \$138 million from stock sales in late 2015 and early 2016 before the company gradually disclosed declining margins, the suit says.

The District Court dismissed the suit for failure to plead deceptive intent but reinstated it based on new evidence of federal probes of Under Armour.

The plaintiffs filed a third amended complaint that extended the proposed class period to Nov. 1, 2019, the last trading day before a Wall Street Journal report disclosed the investigations.

The District Court certified an investor class in 2022 and appointed Robbins Geller Rudman & Dowd LLP as lead counsel for class representatives Aberdeen City Council as Administrating Authority for the North East Scotland Pension Fund, Monroe County Employees' Retirement System, and KBC Asset Management NV.

U.S. District Judge Richard D. Bennett denied the defendants' motion for summary judgment in February, and the case was scheduled for trial in July 2024.

Forthcoming settlement

According to the current report, Under Armour agreed to pay \$434 million to purchasers of its Class A and C shares between Sept. 16, 2015, and Nov. 1, 2019.

The company said it has nearly \$859 million in cash and equivalents on hand and a \$1.1 billion revolving credit facility as of March 31, 2024. Less than 20% of the settlement amount will be offset by officer-and-director liability insurance, the report said.

Under Armour also consented to two nonmonetary provisions requiring it to separate the chair and CEO roles for three years after the settlement's approval date.

The company also agreed to place a performance-based vesting condition on any restricted stock or stock units granted to the CEO, chief financial officer and chief legal officer during the three-year period, the report said.

The parties expect to file a memo seeking preliminary settlement approval in the District Court in the coming weeks, according to the report.

G. Stewart Webb Jr. of Venable LLP, Barry H. Berke of Kramer Levin Naftalis & Frankel LLP and James D. Wareham of Fried Frank Harris Shriver and Jacobson LLP represent Under Armour in the class action.

Scott R. Haiber of Hogan Lovells US LLP represents Plank.

By Nicole Banas

Related articles

Related Articles from Westlaw Securities Enforcement & Litigation Daily Briefing:

Article: 4th Circuit remands Under Armour investor fraud suit 2020 SECDBRF 0230

Date: August 17, 2020

Under Armour Inc. shareholders will get a chance to present what they say is "highly incriminating" new evidence in a dismissed federal court lawsuit claiming the sportswear company and its founder and former CEO engaged in accounting fraud.

End of
Document

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

Councils pension fund settles legal claim

ABN aberdeenbusinessnews.co.uk/councils-pension-fund-settles-legal-claim

24 June 2024

LAWYERS representing a pension fund for employees in Aberdeen, Aberdeenshire, and Moray have successfully negotiated a £343 million payout from a US sportswear company, Under Armour.

The North East Scotland Pension Fund (NESPF) manages a plan for 71,000 members, which includes staff from Aberdeen, Aberdeenshire, and Moray councils. The fund had put millions into Under Armour's stock but accused the company of making misleading claims about its products after experiencing financial losses.

The BBC reports that the settlement, which is awaiting court approval, is just weeks before a jury trial was scheduled to start in the US. NESPF has been leading the charge in a class-action lawsuit against Under Armour.

A class-action lawsuit involves one individual representing a larger group of people who have experienced a similar issue. The case was managed by the US law firms Robbins Geller Rudman and Dowd LLP. Mark Solomon, a partner at the firm and legal advisor to NESPF as the lead plaintiff, stated to the BBC:

"This is an important win for investors and a strong message to the directors and officers of public companies.

Prior government enforcement efforts yielded a modest \$9m penalty. Obtaining a recovery almost 50 times greater underscores the critical role pension funds can play in holding companies accountable."

North East Scotland Pension Fund settles Under Armour lawsuit

 [insider.co.uk/news/north-east-scotland-pension-fund-33101086](https://www.insider.co.uk/news/north-east-scotland-pension-fund-33101086)

25 June 2024

Class action suit wins \$434m settlement on behalf of several claimants

Lawyers acting for the North East Scotland Pension Fund (NESPF) have secured a \$434m settlement from Under Armour.

The fund, which administers pensions for 71,000 staff at Aberdeen, Aberdeenshire and Moray councils, invested around £6m in the US sportswear company's stock, but accused it of making false statements about products.

The BBC reported that the proposed settlement, pending court approval, comes weeks before a jury trial was due to begin in the US.

The suit was handled by the US firm Robbins Geller Rudman and Dowd, whose partner Mark Solomon said: "This is an important win for investors and a strong message to the directors and officers of public companies.

"Prior government enforcement efforts yielded a modest \$9m penalty, so obtaining a recovery almost 50 times greater underscores the critical role pension funds can play in holding companies accountable."

The announcement included a comment from NESPF: "We are pleased to have helped secure this exceptional outcome.

"We decided that stepping forward to lead the litigation and hold defendants accountable was an appropriate exercise of our stewardship role, and we welcomed the opportunity to do so."

Under Armour is listed on the New York Stock Exchange and has a market capitalisation of more than £2bn.

A statement on the company's website said it had consistently denied the accusations and had "entered into this agreement in principle, which is not an admission or finding of fault or wrongdoing, given the costs and risks inherent in litigation".

It will pay \$434m to settle claims brought on behalf of purchasers of publicly-traded shares from 16 September 2015 to 1 November 2019.

Under Armour's chief legal officer and corporate secretary Mehri Shadman commented: "We firmly believe that our sales practices, accounting practices and disclosures were appropriate, and deny any wrongdoing in this case.

"Today's announcement allows us to move past this more than seven-year-old matter so we can avoid the ongoing distraction of litigation and provide certainty to the business at a time when we are executing on important strategic priorities."

Don't miss the latest headlines with our twice-daily newsletter - sign up here for free.

Related Articles

Scottish local authority pension funds have £1.2bn invested in polluting companies

North East Scotland Pension Fund expands partnership with BlackRock

More On

- Pensions
- Law
- Aberdeenshire Council
- Aberdeen City Council
- Moray Council

Scottish pension fund wins \$434m settlement from Under Armour

[scottishfinancialnews.com/articles/scottish-pension-fund-wins-434m-settlement-from-under-armour](https://www.scottishfinancialnews.com/articles/scottish-pension-fund-wins-434m-settlement-from-under-armour)

24 Jun 2024

Reading time: 2 minutes

A Scottish pension fund, representing 71,000 council workers, has secured a \$434 million (around £342m) settlement from US sportswear giant Under Armour.

The North East Scotland Pension Fund (NESPF), which administers the pensions of Aberdeen, Aberdeenshire and Moray council staff, led a class action lawsuit, alleging Under Armour made false statements about its products, leading to significant losses for investors.

The settlement, pending court approval, comes weeks before a scheduled trial in the US. Under Armour agreed to the settlement to avoid further litigation costs and distractions, stating the settlement does not constitute an admission of fault.

“We firmly believe that our sales practices, accounting practices, and disclosures were appropriate, and deny any wrongdoing in this case,” said **Mehri Shadman**, Under Armour’s chief legal officer and corporate secretary. “Today’s announcement allows us to move past this more than seven-year-old matter so we can avoid the ongoing distraction of litigation and provide certainty to the business at a time when we are executing on important strategic priorities.”

US law firm Robbins Geller Rudman and Dowd LLP handled the lawsuit on behalf of NESPF.

“This is an important win for investors and a strong message to the directors and officers of public companies,” said **Mark Solomon**, a Robbins Geller partner and counsel to the lead plaintiff.

He added: "Prior government enforcement efforts yielded a modest \$9 million penalty. Obtaining a recovery almost 50 times greater underscores the critical role pension funds can play in holding companies accountable."

If approved by the court, the settlement here will represent the second largest ever securities class action recovery in the Fourth Circuit and one of the top 50 largest such recoveries in US history.

"Our trial team was looking forward to trying the case to a jury. The readiness of our team to try the case and do so effectively was instrumental in helping us obtain this outsized recovery," said **Robert R. Henssler Jr**, Robbins Geller partner and lead trial counsel.

A spokesperson for the pension fund, which served as lead plaintiff for the class of investors, said: "We are pleased to have helped secure this exceptional outcome. We decided that stepping forward to lead the litigation and hold defendants accountable was an appropriate exercise of our stewardship role, and we welcomed the opportunity to do so."

Pension fund secures \$434m settlement

[lgcplus.com/finance/pension-fund-secures-434m-settlement-24-06-2024](https://www.lgcplus.com/finance/pension-fund-secures-434m-settlement-24-06-2024)

By Caitlin Webb

24 June 2024

The North East Scotland Pension Fund has secured a \$434m settlement from US leisurewear company Under Armour.

The lawsuit launched by the pension fund for council staff from Aberdeen, Aberdeenshire and Moray local authorities claimed Under Armour manipulated its financial results.

Their case, alleged that the company made materially false and misleading statements and masked their decline in sales by pulling them forward to future quarters.

Investors had been repeatedly assured, according to the allegations in the suit, that company's revenue growth streak was "safely intact," when demand for the company's products was in decline.

Under Armour publicly revealed a drop in quarterly revenue growth of over 30% for the first time in 26 quarters in 2017, the resignation of its chief finance officer followed shortly after and its shares fell by 25%.

This lawsuit was filed in 2017 and the jury trial for the case was scheduled for 15 July 2024.

If you would like to ask your own question you just need to login, register or subscribe.

If this settlement is approved by the District Court in Maryland it would be the second largest securities action recovery in the region and one of the 50 largest recoveries in US history.

Mark Solomon, counsel to the lead plaintiff from Robbins Geller said: "This is an important win for investors and a strong message to the directors and officers of public companies."

He added that "obtaining a recovery" of this size "underscores the critical role pension funds can play in holding companies accountable".

A spokesperson for the North East Scotland Pension Fund, which served as lead plaintiff for the class of investors, said: "We are pleased to have helped secure this exceptional outcome.

"We decided that stepping forward to lead the litigation and hold defendants accountable was an appropriate exercise of our stewardship role, and we welcomed the opportunity to do so."

A statement on the Under Armour website denies the accusation and states that this settlement is "not an admission or finding fault or wrongdoing, given the costs and risks inherent in litigation".

Mehri Shadman, Under Armour's chief legal officer and corporate secretary said: "We firmly believe that our sales practices, accounting practices, and disclosures were appropriate, and deny any wrongdoing in this case."

She added: "Today's announcement allows us to move past this more than seven-year-old matter so we can avoid the ongoing distraction of litigation and provide certainty to the business at a time when we are executing on important strategic priorities."

Under Armour To Settle Financial Misconduct Lawsuit For \$434 Million

 [whatjobs.com/news/usa/us-business-news/under-armour-to-settle-financial-misconduct-lawsuit-for-434-million](https://www.whatjobs.com/news/usa/us-business-news/under-armour-to-settle-financial-misconduct-lawsuit-for-434-million)

June 24, 2024

Home » Business News • US business news » Under Armour To Settle Financial Misconduct Lawsuit For \$434 Million



By Nithya Bose in Business News, posted June 24, 2024



Under Armour has agreed to pay \$434 million to settle a years long lawsuit over claims co-founder Kevin Plank misled investors about the company's financial health.

The federal probe started in 2017.

It investigated whether the sportswear giant manipulated sales figures to conceal declining demand.

Under Armour had enjoyed 26 consecutive quarters of at least 20 percent year-over-year revenue growth.

However, the streak ended in late 2016 when the company missed its sales targets.

On Friday, June 21, Under Armour announced the settlement is not an admission of wrongdoing.

If approved by the US District Court for the District of Maryland, the settlement would resolve all shareholder claims.

According to a filing with the Securities and Exchange Commission (SEC), Under Armour has agreed to keep the CEO and chair roles separate for at least three years as part of the settlement.

Mehri Shadman: “We firmly believe that our sales practices, accounting practices, and disclosures were appropriate, and deny any wrongdoing in this case”

Plank, who founded Under Armour in 1996, served as CEO until 2019 when he stepped down.

He remained executive chairman and brand chief.

In March, the company announced Mohamed El-Erian would become **chairman** when Plank returned as CEO.

Plank resumed the top role in April.

He succeeded Stephanie Linnartz, who had joined Under Armour in 2023 and served as CEO for about a year.

Chief Legal Officer Mehri Shadman said: “We firmly believe that our sales practices, accounting practices, and disclosures were appropriate, and deny any wrongdoing in this case.”

The **lawsuit** accused Plank of knowingly or recklessly concealing material facts about consumer demand for Under Armour products and the company's financial and operating results.

Former executives told The Wall Street Journal in 2019 the company had been shifting sales between quarters to mask slowing demand in 2016.

The Baltimore-based company allegedly pressured retailers to take products early.

It redirected goods intended for factory stores to off-price chains to book sales at the end of a quarter.

Need Career Advice? Get employment skills advice at all levels of your career

These tactics were used to maintain the appearance of consistent sales growth.

In 2021, Under Armour paid \$9 million to settle regulatory claims.

It was accused of failing to disclose the practice of pulling forward orders from future quarters.

Mark Solomon, a Robbins Geller partner and counsel to the lead plaintiff, said: "This is an important win for investors and a strong message to the directors and officers of public companies.

Under Armour plans to fund the settlement through cash and/or its \$1.1 billion revolving credit facility.

As of March 31, the company had \$859 million in cash and cash equivalents.

The company expects to end fiscal 2025 with about \$500 million in cash and no borrowings under its revolving credit facility following the payment.

The settlement comes about a month after Plank warned that sales would drop more than 10 percent this fiscal year.

He added the company would undergo another round of **layoffs as part of a restructuring plan**.

Under Armour To Settle Lawsuit Alleging Fraud for \$434 Million

 members.asicentral.com/news/industry-news/june-2024/under-armour-to-settle-lawsuit-alleging-fraud-for-434-million

June 24, 2024

NEWS June 24, 2024

Shareholders accused the apparel maker and its CEO of intentionally misleading investors about the strength of the publicly traded company's sales.

Under Armour has agreed to pay \$434 million to settle a class action lawsuit brought by investors who accused the publicly traded athletic apparel company of deceiving shareholders in an effort to make the firm's sales seem stronger than they were.

A filing with the U.S. Securities and Exchange Commission (SEC) indicated that Under Armour, whose products sell at retail and in the promotional products market, will pay the money using cash on hand and by drawing on its \$1.1 billion revolving credit facility. As of March 31, Under Armour had \$858.7 million in cash and cash equivalents.



A federal judge still needs to approve the settlement. A trial had been scheduled for July, but will no longer be going forward.

“This is an important win for investors and a strong message to the directors and officers of public companies,” said attorney Mark Solomon of the firm Robbins Geller Rudman & Dowd, who was representing the lead plaintiff on the case.

Filed in 2017, the lawsuit alleged that Under Armour and CEO Kevin Plank violated U.S. securities law by making materially false and misleading statements and failing to disclose adverse information about Under Armour’s business and operations to investors.

The suit accused Under Armour of a revenue recognition scheme that masked declining demand for its products. In effect, the company manipulated financials results by pulling sales forward from future quarters and other suspect sales practices, the lawsuit said.

In 2021, Under Armour reached an agreement with the SEC to pay \$9 million in relation to a separate legal case tied to the purported misdeeds. The alleged practice of pulling sales forward occurred for six consecutive quarters starting in the third quarter of 2015, the SEC said at the time.

While agreeing to settlements, Under Armour has neither admitted nor denied any wrongdoing. Plank isn’t facing any enforcement actions from the SEC.

In addition to the \$434 million payout tied to the settlement with shareholders, Under Armour has agreed to continue to separate the roles of board chair and chief executive officer for a period of at least three years.

Get the most important news by subscribing to PromoGram.

Under Armour to pay US \$ 434 million to settle lawsuit over sales reporting disclosures

 apparelresources.com/business-news/retail/armour-pay-us-434-million-settle-lawsuit-sales-reporting-disclosures

June 24, 2024

Image Courtesy: cdn.mainlinemenswear.co.uk

Under Armour has announced an agreement to pay US \$ 434 million to settle a 2017 class action lawsuit alleging that the sports apparel maker defrauded shareholders by misrepresenting its revenue growth to meet Wall Street forecasts.

The proposed settlement, pending court approval, would avert a scheduled 15th July trial in Baltimore federal court. The lawsuit claimed that Under Armour and CEO Kevin Plank intentionally misled shareholders about the company's financial health.

In 2021, Under Armour, based in Baltimore, agreed to pay US \$ 9 million to settle Securities and Exchange Commission (SEC) charges that it misled investors about its revenue growth. The SEC investigation found that Under Armour had failed to disclose to investors its practice of accelerating or "pulling forward" US \$ 408 million in existing orders during the second half of 2015.

Mark Solomon, lead counsel for the shareholders and a partner at litigation firm Robbins Geller Rudman & Dowd, described the proposed settlement as an "important win" that highlighted the crucial role of pension funds in holding companies accountable.

Under Armour stated it plans to pay the US \$ 434 million settlement using cash on hand and by drawing on its US \$ 1.1 billion revolving credit facility. Additionally, the company said in a regulatory filing that it would continue to separate the roles of chair and chief executive officer for at least three years.

Under Armour has consistently denied the accusations, asserting that the settlement is not an admission of fault or wrongdoing. The company expects its total accrual in legal proceeding contingencies related to the lawsuit to reach US \$ 434 million in the first quarter of fiscal year 2025, up from US \$ 100 million at the end of fiscal 2024.

US law firm Motley Rice appeals \$396 mln opioid fee award

 [reuters.com/legal/litigation/us-law-firm-motley-rice-appeals-396-mln-opioid-fee-award-2024-06-24](https://www.reuters.com/legal/litigation/us-law-firm-motley-rice-appeals-396-mln-opioid-fee-award-2024-06-24)

Brendan Pierson



The logo of law firm Motley Rice LLC is seen in their office in Cherry Hill, New Jersey, U.S., September 3, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

June 24 (Reuters) - U.S. law firm Motley Rice is appealing its award of \$396 million for its work on litigation against the drug industry over the opioid crisis that resulted in \$46 billion in nationwide settlements.

The firm said it would appeal the award, which represents 18.6% of a \$2.13 billion pool of fees to be divided among dozens of law firms, in a notice filed Friday in Cleveland federal court. It did not say how much it was asking for or on what basis it was challenging the award.

Motley Rice had already won a bump in fees after objecting earlier in the allocation process, up from 17.2%, or \$366 million, according to a June 7 court filing , opens new tab. The firm did not immediately respond to a request for comment.

Several other firms have secured awards in the hundreds of millions of dollars and have not appealed them.

Other firms that filed notices of appeal are Spangenberg Shibley & Liber; Kelley Ferraro; Crueger Dickinson; Stranch, Jennings & Garvey; and Weisman, Kennedy & Berris. All of those firms received less than 2% of the funds.

The fees stem from settlements that local and Native American tribal governments have reached with drugmakers Johnson & Johnson (JNJ.N) , opens new tab, AbbVie (ABBV.N) , opens new tab and Teva Pharmaceutical Industries (TEVA.TA) , opens new tab; distributors Cencora (COR.N) , opens new tab, McKesson (MCK.N) , opens new tab and

Cardinal Health (CAH.N) [↗](#), opens new tab; and pharmacies CVS (CVS.N) [↗](#), opens new tab, Walgreens Boots Alliance (WBA.O) [↗](#), opens new tab and Walmart (WMT.N) [↗](#), opens new tab.

They do not include a settlement of up to \$6 billion with bankrupt OxyContin maker Purdue Pharma, which is funded by that company's Sackler family owners in exchange for a shield from future lawsuits. The U.S. Supreme Court is currently weighing whether that settlement is legal.

Opioid settlements, including both the nationwide deals and separate agreements negotiated by individual states, now total well over \$50 billion. However, many state and local governments have yet to develop detailed plans for how they will spend the money to remedy the harms caused by opioids.

More than 800,000 people in the United States died of opioid overdoses from 1999 through 2023, according to data from the U.S. Centers for Disease Control and Prevention. Plaintiffs in the lawsuits say that drugmakers downplayed the drugs' risks, and that distributors and pharmacies ignored red flags that they were being diverted into illegal channels, fueling an epidemic of addiction.

Read more:

Top law firms in US opioid lawsuits to get hundreds of millions in fees

US Supreme Court torn over Purdue Pharma bankruptcy settlement

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

In FTX litigation, feud escalates between bankruptcy and class action lawyers

 [reuters.com/legal/legalindustry/column-ftx-litigation-feud-escalates-between-bankruptcy-class-action-lawyers-2024-06-24](https://www.reuters.com/legal/legalindustry/column-ftx-litigation-feud-escalates-between-bankruptcy-class-action-lawyers-2024-06-24)

Alison Frankel

FTX logo is seen in this illustration taken, November 8, 2022. REUTERS/Dado Ruvic/Illustration Purchase Licensing Rights , opens new tab

June 24 (Reuters) - An increasingly nasty tussle is underway for control of billions of dollars in claims arising from the 2022 implosion of crypto exchange FTX.

The dispute is pitting lawyers who are pursuing claims within the confines of FTX's Chapter 11 bankruptcy in Delaware against attorneys who are leading consolidated class actions on behalf of FTX's customers in Miami federal court.

It is a complicated jurisdictional fight, not just an exchange of barbs by competing sets of lawyers. Ultimately, the tug-of-war between lawyers in the Miami consolidated litigation (or MDL) and in the FTX bankruptcy boils down to a critical question of law: Which court — and which lawyers — should be in charge of claims by FTX's defrauded customers?

And just to make things even more complex, there's yet another court to consider. Onetime FTX executives, including former CEO Sam Bankman-Fried, were prosecuted in Manhattan federal court. After Bankman-Fried was convicted by a jury last fall, the judge who presided over his criminal trial, U.S. District Judge Lewis Kaplan, ordered the former CEO to forfeit \$11 billion to repay victims of his fraud.

Both FTX bankruptcy lawyers and lawyers from the Miami MDL told the Manhattan judge earlier this month that they should be in charge of distributing some or all of the forfeited money to victims of Bankman-Fried's fraud.

FTX lawyers said in a June 14 brief , opens new tab that the now-bankrupt exchange owns a lot of the money misappropriated by Bankman-Fried, so some of the forfeited funds should be disbursed to FTX's creditors through the bankruptcy process.

But MDL lawyers said in their own June 14 brief , opens new tab that FTX's customers have a stronger interest than FTX in recovering the money they deposited with the exchange before it went bust. That money, they argued, belongs to the customers who were fraudulently induced into opening accounts at the exchange — not to the exchange itself. Somehow, three judges — Kaplan in the criminal case, U.S. Bankruptcy Judge John Dorsey in FTX's Delaware Chapter 11 and U.S. District Judge Michael Moore in the Miami-based MDL — are going to have to hash out which court ought to be in charge and how FTX

customers should be repaid. And they're going to have to do that amid ugly allegations from each side about their counterparts.

Broadly speaking, lawyers in the FTX bankruptcy contend that MDL lawyers have hijacked claims that properly belong to FTX and should be resolved in the Chapter 11. FTX's bankruptcy lawyers allege [FTX's bankruptcy lawyers allege](#), opens new tab that lead counsel in the MDL are undermining their efforts in bankruptcy court to return stolen money to the exchange's onetime customers. FTX's bankruptcy counsel from Sullivan & Cromwell and Quinn Emanuel Urquhart & Sullivan asked the bankruptcy judge earlier this month to bar the MDL lawyers from attempting to settle [FTX's bankruptcy counsel from Sullivan & Cromwell and Quinn Emanuel Urquhart & Sullivan asked the bankruptcy judge earlier this month to bar the MDL lawyers from attempting to settle](#), opens new tab claims against former FTX executives, including Bankman-Fried. They argue that the proposed settlement, in which FTX insiders would pay no cash but would cooperate with MDL lawyers in their cases against other defendants, would release former FTX executives from claims the company could assert against them in its Chapter 11. The bankruptcy lawyers also want to prohibit their MDL counterparts from continuing to litigate class actions against several venture capital funds that helped FTX expand, arguing that those claims belong to FTX. (FTX lawyers suggested that they may eventually ask for an injunction to bar MDL lawyers from proceeding with class actions against other defendants as well.)

Sullivan & Cromwell and Quinn Emanuel contend in their filings that the MDL lawyers are operating with their own financial interests in mind. If those lawyers succeed in persuading Kaplan to allow them to distribute forfeited money, FTX's lawyers said, they will seek one-third of the funds as legal fees under their proposed settlement with Bankman-Fried and other former executives. That would be a windfall for the MDL lawyers, FTX said, at the expense of their clients.

MDL co-lead counsel Adam Moskowitz of The Moskowitz Law Firm told me in an email that it is the bankruptcy lawyers who are worried about fees, not he and his colleagues.

FTX "has already paid out over one billion dollars to these hourly professionals," Moskowitz said. "None of the MDL lawyers have been paid anything and all such fee requests will only be made after we recover for the class."

Moskowitz and co-lead counsel David Boies of Boies Schiller Flexner have not yet directly responded in court filings to attacks by lawyers in the FTX bankruptcy. But they have repeatedly said [Moskowitz and co-lead counsel David Boies of Boies Schiller Flexner have not yet directly responded in court filings to attacks by lawyers in the FTX bankruptcy. But they have repeatedly said](#), opens new tab in related briefs in other proceedings that the FTX bankruptcy is riddled with conflicts and that the lawyers handling the case can't be trusted to maximize customers' recovery.

MDL lawyers have even filed a class action accusing FTX law firm Sullivan & Cromwell — one of the firms now trying to block other parts of their case — of helping FTX insiders defraud customers. Sullivan & Cromwell has denied wrongdoing and moved to dismiss the class action.

Moskowitz and Boies Schiller have also objected [\[link\]](#), opens new tab to FTX's proposed bankruptcy reorganization plan, arguing (among other things) that FTX is misleading customers about their proposed recovery and how it will be affected by settlements in the MDL. At the very least, they told the bankruptcy judge, FTX's notice to customers must include robust disclosures about the MDL and the prospect that their recovery from the bankruptcy will be offset by settlements in the Miami case.

Last week, the MDL lawyers asked [\[link\]](#), opens new tab the judge in their case, Moore, to hold a hearing on this deepening dispute. Neither Sullivan & Cromwell nor Quinn Emanuel responded to my email query on this latest development.

Moskowitz said he is confident that Moore, Dorsey and Kaplan can coordinate to decide who's in charge.

With billions of dollars in recovered money — and hundreds of millions in legal fees — at stake, let's hope he's right.

Read more:

FTX seeks to stop outside litigation against insiders, VC firms

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

FTX files amended reorganization plan, expects \$14.5 bln-\$16.3 bln for distribution

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

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

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

Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

- 
- 

Toyota, Executives Hit With Investor Suit Over Safety Test Data

By Thomas Gleason

Documents

 [Complaint](#)

 [Docket](#)

-
- **COURT:** C.D. Cal.
 - **TRACK DOCKET:** [2:24-cv-05284](#)

Bloomberg Law News 2024-06-25T09:26:00806741778-04:00

Toyota, Executives Hit With Investor Suit Over Safety Test Data

By Thomas Gleason 2024-06-24T16:39:08000-04:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [2:24-cv-05284](#)

Toyota Motor Corp. and several of its executives misled investors by covering up the company's car certification errors, which caused a drop in its stock price once they came to light, a proposed class action alleges.

The Japanese automaker submitted inaccurate data to Japanese regulators for protection tests on three of its current models and for crash tests for four of its discontinued models, Toyota admitted in a June 3 securities filing. Toyota also said it was halting sales of the three current models.

The company's stock fell over 2% on the news that day, and continued to decline for the next three weeks, investors said in a lawsuit filed Monday in the US District Court for the Central District of California. The lawsuit names the company's chief executive officer, chief financial officer, and board chairman among the defendants.

“Toyota understated its malfeasance relating to certification of its cars and issues relating to overall legal compliance,” the complaint said. “Defendants’ statements about its business, operations, and prospects were materially false and misleading and/or lacked a reasonable basis at all times.”

Investors are seeking damages for losses they incurred as a result of the allegedly misleading statements and subsequent stock price drop.

Toyota couldn’t immediately be reached for comment.

The Rosen Law Firm P.A. represents the plaintiff.

The case is Abeed v. Toyota Motor Corporation et al , C.D. Cal., Docket No. 2:24-cv-05284, 6/24/24 .

To contact the reporter on this story: Thomas Gleason in Washington at tgleason@bloombergindustry.com

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Page Printed From:
<https://www.law.com/therecorder/2024/06/25/live-nation-entertainments-board-of-directors-hit-with-securities-complaint-tied-to-doj-antitrust-suit/>



NOT FOR REPRINT
NEWS

Live Nation Entertainment's Board of Directors Hit With Securities Complaint Tied to DOJ Antitrust Suit

The complaint, filed by Bottini & Bottini in California's Central District Court last Friday, argues that the defendants, including Live Nation CEO Michael Rapino, breached their fiduciary duties by failing to prevent antitrust violations and defying a 2010 consent decree prohibiting anti-competitive conduct.

June 25, 2024 at 09:59 AM

Securities Litigation



Kat Black



What You Need to Know

- Live Nation Entertainment's board of directors was slapped with a shareholder derivative complaint last Friday.
- The suit alleges that Live Nation's board failed to disclose its noncompliance with a 2010 consent decree prohibiting the company from engaging in anti-competitive conduct.
- The claim was filed just one month after the DOJ sued Live Nation for antitrust violations.

Live Nation Entertainment’s board of directors was slapped with a shareholder derivative suit just one month after the company was sued by the Department of Justice for allegedly engaging in anti-competitive practices to monopolize the concert industry.

The [complaint](#), filed by Bottini & Bottini in California’s Central District Court last Friday, argues that the defendants, including Live Nation CEO Michael Rapino, breached their fiduciary duties by failing to prevent antitrust violations and defying a 2010 consent decree prohibiting anti-competitive conduct. Other listed causes of action include abuse of control, unjust enrichment and violation of Section 14(a) of the Securities Exchange Act.

The suit was brought on behalf of Live Nation by shareholder John Williams and echoed similar accusations made by another shareholder derivative [claim](#) filed against Live Nation’s board last November. The plaintiff is seeking damages for Live Nation, a Delaware corporation based in Beverly Hills that trades on the New York Stock Exchange.

The case was surfaced by [Law.com Radar](#).

Live Nation Entertainment, a live events promotion and ticketing company, was bound to a consent decree by the DOJ following its merger with Ticketmaster in 2010. The decree bars Live Nation from retaliating against concert venues for contracting with other ticket companies. In 2020, the DOJ entered an [amended final judgment](#) asserting that Live Nation

and Ticketmaster had “repeatedly violated the Final Judgment [2010 consent decree] since at least 2012.” As a result, Live Nation paid \$3 million to settle with the U.S. government.

The complaint alleges that Live Nation’s board both failed to disclose its noncompliance with the consent decree and consistently made “false and misleading statements” to the U.S. Securities and Exchange Commission, securities analysts, money and portfolio managers, and institutional investors. It accuses the board of being directly responsible for the antitrust [lawsuit](#) filed by the DOJ against Live Nation in May.

“These statements were misleading because the Individual Defendants failed to disclose that a material factor driving the Company’s financial performance in the Concerts and Ticketing segments was the Company’s anticompetitive conduct, which was unsustainable due to regulatory scrutiny and investigations of the Company’s violations of antitrust and unfair competition laws,” wrote Bottini & Bottini attorneys, who did not respond to requests for comment.

Andy Sumner, a securities litigation attorney at Alston & Bird in Atlanta, said that the derivative complaint “repackages” elements of both the DOJ’s antitrust suit and an ongoing [securities class action](#) against Live Nation.

“In addition to ... violating antitrust laws, the exact same type of conduct violates their fiduciary duties as a company,” he said. “They say, in addition to violating these antitrust laws, you have defrauded shareholders or investors or potential investors by failing to disclose that you were engaging in this sort of conduct. So there’s really two pieces of it—it’s the actual anticompetitive practice and it’s the disclosure piece of the shareholders.”

Mark Foster, a partner at Skadden, Arps, Slate, Meagher & Flom, said it’s likely that additional shareholder derivatives claims will follow in its wake.

“This highlights the kind of nature of risk that companies face—either when they experience some disappointing news or a government investigation—it’s just very commonplace to see a whole host of shareholder litigation. And that’s what they’ve got here. They’ve got a class action as well as a shareholder lawsuit, and they’ll likely see similar or more of the same as various shareholders react to the news and the allegations that have been filed by the government.”

Live Nation Entertainment did not immediately respond to a request for comment.

This action was surfaced by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. [Click here](#) to get started and be among the first to act on opportunities in your region, practice area or client sector.

NOT FOR REPRINT

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

Bloomberg Law News 2024-06-25T14:20:34189106566-04:00

Moelis Sued Over 'Sham' SPAC Deal to Take Archer Aviation Public

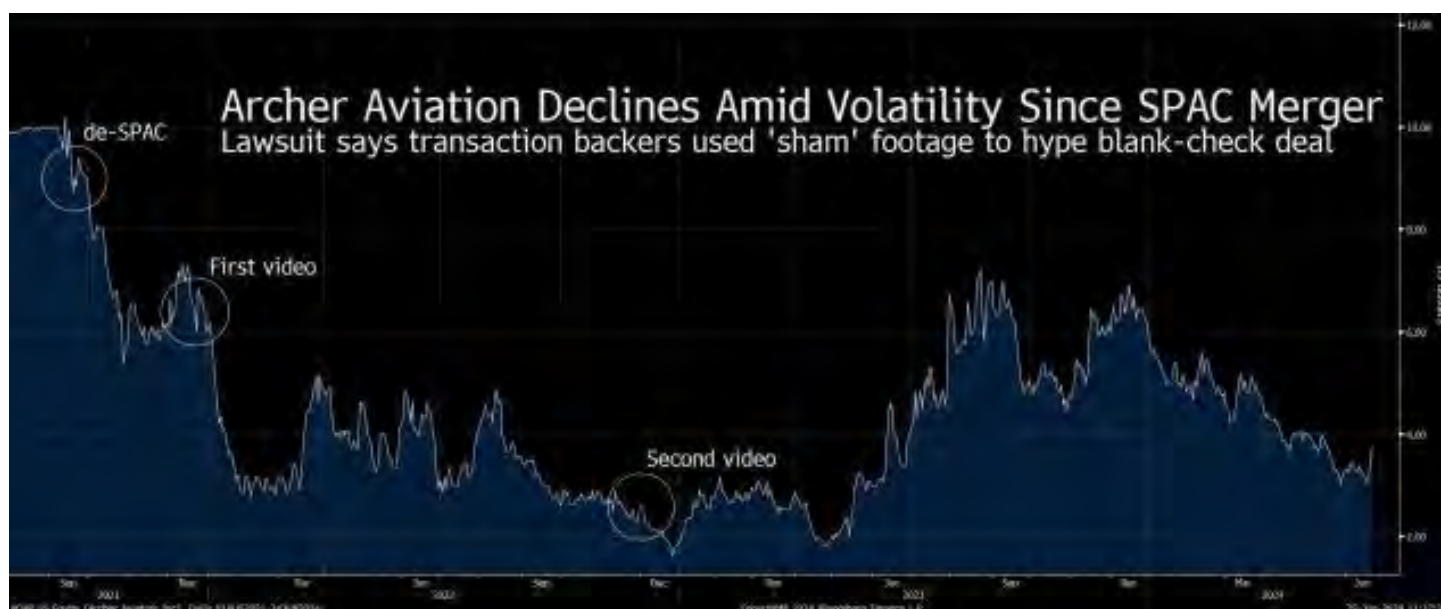
By Mike Leonard 2024-06-25T12:16:26000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0665](#)

Ken Moelis and other architects of the deal that took [Archer Aviation Inc.](#) public used “wildly misleading” footage to hype the air-taxi startup’s capabilities before the blank-check transaction, a newly unsealed lawsuit says.

An investor is suing the billionaire, his investment bank, and other backers of the merger between Archer and a special purpose acquisition company, a type of publicly traded shell entity. SPAC deals—designed to let startups bypass initial public offerings—have receded from a boom in 2020 and 2021, with scores landing in court after the sector underperformed in the open market.

Moelis allegedly stood by while Archer’s executives claimed in the run-up to the merger that it was months from testing an electric, vertical-launch prototype capable of flying 60 miles at up to 150 mph. “Instead, the prototype aircraft was a sham,” according to the proposed class action made public Monday.



"It could hardly hover a few feet off the ground for less than one minute, thus revealing the pre-merger representations to be pure fiction," the lawsuit says. "The projected timeline for test-flying the aircraft prototype was so wildly misleading that Archer resorted to 'sleight-of-hand' video editing ploys to create the guise of meaningful progress."

Moelis and Archer didn't immediately respond to requests for comment Tuesday.

Suspiciously Edited Video

The case in Delaware's Chancery Court—the leading US forum for merger disputes—echoes a wave of litigation targeting lopsided incentives that allegedly drove SPAC sponsors to dupe investors into doomed deals that gave insiders a windfall.

The shareholder cases generally take aim at a standard feature of blank-check transactions: "founder shares" costing fractions of a penny that soar in value by a factor of thousands if a merger closes. Those shares, given to insiders, become worthless if no transaction is found, if investors vote one down, or if they exercise their right to cash out.

Read More: [Billionaire SPAC Kings Get Taken to Court After Boom Goes Bust](#)

Court rulings have [zeroed in on](#) that final safety valve: the right of shareholders to redeem their initial ante even after a transaction is signed. Although conflicts of interest alone aren't a basis for liability, deal insiders will be on the hook if they try to trick investors into participating, Delaware's judges [have repeatedly said](#).

That's what happened before the Archer deal, according to the new court complaint, which was originally filed under seal June 19. The truth began to emerge after company executives posted a series of promotional videos in 2021 and 2022 that appeared to show underwhelming progress from suspiciously edited angles, the lawsuit says.

A short-selling report issued by Grizzly Research LLC in August 2023 backed up many of the concerns about Archer, according to the heavily redacted court filing.

The investor leading the litigation, Josh Wortman, is represented by Cooch & Taylor PA and Levi &

Korsinsky LLP. Moelis, Archer, and the other deal sponsors haven't yet made court appearances.

The case is [Wortman v. Atlas Crest Inv. LLC](#) , Del. Ch., No. 2024-0665, complaint unsealed 6/24/24 .

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

1-800-Flowers Investor Scores Revival of Short Swing Trade Suit

By Mike Vilensky

- 2nd Cir. says short swing trades are like a fiduciary breach
- Derivative suit seeks over \$4 million in profit disgorgement

Bloomberg Law News 2024-06-25T09:25:22659005843-04:00

1-800-Flowers Investor Scores Revival of Short Swing Trade Suit

By Mike Vilensky 2024-06-24T14:51:18000-04:00

- 2nd Cir. says short swing trades are like a fiduciary breach
- Derivative suit seeks over \$4 million in profit disgorgement

A 1-800-Flowers.com Inc. stockholder can proceed with a lawsuit on behalf of the company accusing other Flowers.com stockholders of short-swing trading, the Second Circuit ruled Monday in a reversal.

Judge Jose A. Cabranes, of the US Court of Appeals for the Second Circuit, said company insiders' alleged violation of a statutory short-swing trade ban confers Brad Packer's standing to sue, reviving the case after a district court said Packer lacked standing under recent US Supreme Court precedent.

Section 16(b) of the Securities Exchange Act of 1934 imposes a fiduciary duty on 10% shareholders in a company, conferring on other shareholders "an enforceable legal right to expect [the fiduciary] to refrain from engaging in any short-swing trading," the judge said. Cabranes cited a 2012 Second Circuit decision in *Donoghue v. Bulldog Investors Gen. Partn.* with the same holding.

Here, Packer alleged 10% Flowers.com shareholders, Raging Capital Management LLC, Raging Capital Master Fund, Ltd., and William C. Martin, engaged in short-swing trading—or buying and selling the stock within six months—and thus, Packer has standing to sue, Cabranes said.

The Second Circuit said short-swing trading by a major shareholder is a concrete injury under the high court standard because it's equivalent to a fiduciary breach, which has historically conferred standing.

Exscientia Investors Sue Over CEO Misconduct After 23% Selloff

By Alexis Waiss

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 1:24-cv-07181](#)

Bloomberg Law News 2024-06-25T09:27:45283701546-04:00

Exscientia Investors Sue Over CEO Misconduct After 23% Selloff

By Alexis Waiss 2024-06-24T16:13:16000-04:00

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 1:24-cv-07181](#)

An AI drug-discovery company faces claims that it ripped off investors by failing to quickly address and disclose its CEO's inappropriate work relations.

The suit against Exscientia Plc, an Oxford, England-based company, regards damages in shares acquired between March 23, 2022 to Feb. 12, 2024. The plaintiffs, including Frank Campanile and other investors, say they "would not have purchased or otherwise acquired said securities" from Exscientia if they had known the truth about its leadership, said a complaint filed June 21 in a US district court in the District of New Jersey.

CEO Andrew Hopkins was terminated nearly two years after Exscientia touted its ethical standards and the qualifications of former board of directors chair David Nicholson, who resigned after it was revealed he was aware of Hopkins' misconduct and did not report it to the board.

Exscientia's stock fell 23% to \$5.79 per share after the company issued a press release announcing Hopkins' termination and Nicholson's resignation on Feb. 13. As a result, investors say that the "true value of Exscientia securities was substantially lower than the prices paid" by the class starting mid-2022.

Hopkins was removed as CEO because he "engaged in relationships with two employees that the Board determined were inappropriate and inconsistent" with company policy, the investors said, quoting a disclosure filed February. The filing did not disclose further details about the former CEO's work relations.

By the time Nicholson resigned, investors learned that Nicholson “had prior knowledge” of Hopkins’ first relationship and “addressed the situation directly, and with the involvement of other outside counsel, rather than in consultation with the Board,” they said.

Exscientia’s code of conduct states that all employees, officers and directors “must act and perform their duties ethically, honestly and with integrity – doing the right thing even when ‘no one is looking,’ the class said, citing a company filing from 2021. The filing also emphasizes that company success relies on its ability “to retain key executives and to attract, retain and motivate qualified personnel.”

Dave Hallett, Exscientia’s chief science officer, was appointed as CEO and Elizabeth Crain, a Nokia Corp. board member and the company’s audit committee chair, took on Nicholson’s position for the interim.

Exscientia didn’t immediately respond to request for comment.

This is the second securities class action filed this year against the company over the selloff.

The case is *Campanile v. Exscientia PLC et al*, D.N.J., No. 1:24-cv-07181, 6/21/24 .

To contact the reporter on this story: Alexis Waiss in Washington at awaiss@bloombergindustry.com

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

US judge rejects Visa, Mastercard \$30 billion swipe fee settlement

 [reuters.com/legal/us-judge-rejects-visa-mastercard-30-bln-swipe-fee-settlement-2024-06-25](https://www.reuters.com/legal/us-judge-rejects-visa-mastercard-30-bln-swipe-fee-settlement-2024-06-25)

Jonathan Stempel

A screen displays the company logo for Mastercard Inc. on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., February 29, 2024. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, June 25 (Reuters) - A U.S. judge on Tuesday rejected a \$30 billion antitrust settlement in which Visa (V.N) , opens new tab and Mastercard (MA.N) , opens new tab agreed to limit fees they charge merchants who accept their credit and debit cards.

U.S. District Judge Margo Brodie in Brooklyn said she was not likely to grant final approval to the settlement, and therefore denied the request by a group of merchants, primarily small businesses, for preliminary approval.

Many merchants and retail trade groups opposed the accord, saying fees would remain too high and that Visa and Mastercard would retain too much control over how card transactions are handled.

The decision could force Visa and Mastercard to negotiate a settlement more favorable to merchants, or go to trial. Brodie will issue a written opinion explaining her reasoning after letting merchants, Visa and Mastercard propose redactions.

Visa did not immediately respond to requests for comment. Mastercard said it was disappointed, believing the settlement was fair and would help businesses manage card transactions.

The settlement announced on March 26 was intended to resolve most litigation that began in 2005 over so-called swipe fees, also known as interchange fees, that merchants pay to accept Visa and Mastercard, and which the card networks set.

Those fees, typically 1.5% to 3.5%, totaled about \$72 billion in 2023 according to the Nilson Report. They generate profits for bank and other card issuers, which funnel many fees into rewards programs that encourage consumers to spend more.

The settlement called for the average swipe fee to fall at least 0.04 percentage points for three years, and stay at least 0.07 percentage points below the current average for five years.

Visa and Mastercard also agreed to cap rates for five years and remove anti-steering provisions, while merchants got more discretion to offer discounts or impose surcharges.

OBJECTIONS

But many merchants said the lowered fees remained excessive. They also objected to rules forbidding them from telling customers why some cards cost more than others, and steering them toward cheaper cards.

Some critics also said the fees lead to higher prices for consumers, who are now sometimes charged less for using cash.

Trade groups including the National Retail Federation complained that the settlement would have provided only small and temporary relief for merchants, and made it difficult for them to mount future legal challenges.

"It didn't address the problem of Visa, Mastercard and banks forming a cartel to issue credit cards and set fees, such that merchants have to accept all cards or none," Doug Kantor, general counsel of the National Association of Convenience Stores, said in an interview.

"The next step, presumably, is a trial," he added.

Brodie had signaled at a June 13 hearing that rejection of the accord was likely. Some U.S. senators have promoted legislation, the Credit Card Competition Act, to let merchants use other payment networks to process Visa and Mastercard transactions.

The judge's decision does not affect a separate \$5.6 billion class action swipe fee settlement among Visa, Mastercard and about 12 million merchants.

A federal appeals court in Manhattan upheld that accord in March 2023, seven years after throwing out a \$7.25 billion settlement that short-changed some retailers.

The case is *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, U.S. District Court, Eastern District of New York, No 05-md-01720.

Reporting by Jonathan Stempel in New York, editing by Deepa Babington

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

Bloomberg Law News 2024-06-25T14:25:59710376096-04:00

Visa, Mastercard \$30 Billion Swipe-Fee Deal Blocked by Judge

By Paige Smith2024-06-25T11:05:11148-04:00

A federal judge in Brooklyn formally rejected a \$30 billion settlement between Visa Inc., Mastercard Inc. and retailers to cap credit-card swipe fees after telegraphing earlier this month that such a setback in the two-decade long litigation could be expected.

US District Judge Margo Brodie issued the ruling Tuesday, and ordered the parties to confer and respond to the ruling by June 28.

Brodie said at a hearing earlier this month that nothing she heard had changed her mind that the settlement should be approved. The settlement would have permitted retailers to charge consumers extra in transactions involving Visa or Mastercard credit cards, and allowed the merchants to adopt pricing tactics that steer consumers to lower-cost cards.

Following the June 13 hearing, the credit-card companies said they were disappointed by the judge's stated intention to reject the deal. But some merchant groups applauded Brodie's comments.

"We appreciate that there was recognition of the fatal flaws that would have made the settlement a bad deal for Main Street rather than a correction of credit-card industry violations of the antitrust laws," Christopher Jones, an executive committee member of the Merchants Payments Coalition, said in a [statement](#) after the hearing.

To contact the reporter on this story:

Paige Smith in New York at psmith494@bloomberg.net

To contact the editors responsible for this story:

Sally Bakewell at sbakewell1@bloomberg.net

Anthony Aarons, Misyrlena Egkolfopoulou

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

Page Printed From:

<https://www.law.com/2024/06/25/mdls-make-up-more-than-half-of-u-s-cases-whether-its-65-or-71/>NOT FOR REPRINT
NEWS

MDLs Make Up More Than Half of U.S. Cases, Whether It's 65% or 71%

According to fiscal year 2023 statistics from the Administrative Office of U.S. Courts, and the U.S. Judicial Panel on Multidistrict Litigation, multidistrict litigation now makes up 65% of the federal civil caseload, a far bigger share than the 38% a decade ago.

June 25, 2024 at 01:36 PM

By by Amanda Bronstad | June 25, 2024 at 01:36 PM



What You Need to Know

- The statistics came up this month, when the Committee on Rules of Practice and Procedure voted to approve the new multidistrict litigation rule.
- Lawyers for Civil Justice estimates a much higher figure, claiming that multidistrict litigation made up 71.3% of the docket.
- U.S. District Judge Karen Caldwell, chairwoman of the MDL panel, said at a conference this year that the numbers are skewed by 3M's earplug docket.

Multidistrict litigation makes up an increasing percentage of the federal civil caseload, prompting much debate over its impact on the federal judiciary.

But the data isn't quite that simple.

The statistics came up this month, when the Committee on Rules of Practice and Procedure voted to approve the new multidistrict litigation rule. [Rule 16.1](#), which is not expected to be effective until next year, recommends some upfront procedures in multidistrict litigation that could help address the influx of what many in the defense bar characterize as insufficient claims.

That is important because, according to the fiscal year 2023 statistics from the Administrative Office of U.S. Courts and the U.S. Judicial Panel on Multidistrict Litigation, multidistrict litigation now makes up 65% of the federal civil caseload. It is a far bigger share than the 38% a decade ago. Meanwhile, Lawyers for Civil Justice estimates a much higher figure, claiming that multidistrict litigation made up 71.3% of the docket.

Why Do the Numbers Matter?

"Because first of all, a lot of the claims that are reflected in this number, claims of MDLs, we know are insufficient claims, or non-meritorious claims, that are just sitting on the federal dockets without anybody looking into whether there's any merit to them," said Alex Dahl, general counsel of Lawyers for Civil Justice, one of the biggest proponents of the rule. "In

this way, the number of claims in the federal system is really a red light going off that there is a need for improved procedures for handling these cases.”



That’s not exactly how U.S. District Judge Karen Caldwell, of the Eastern District of Kentucky, would characterize the caseload. She is the chairwoman of the U.S. Judicial Panel on Multidistrict Litigation, which decides whether to create new multidistrict litigation dockets.

At Western Alliance Bank’s Class Action Law Forum in San Diego earlier this year, Caldwell put the rising number of multidistrict litigation cases into context. She noted that most of the multidistrict litigation cases are in a single proceeding: the 3M combat earplug multidistrict litigation created in 2020 in Florida’s Southern District. And 3M agreed to pay \$6 billion to settle those cases last year.

“We’re probably going to see a drop in that because 3M has settled in principle, but it takes a long time to wind down an MDL,” she said at the conference. Without the 3M earplug cases, she said, multidistrict litigation actually takes up about 48% of the federal civil dockets—about the same that it has been for the past 10 years.

Whatever the numbers, the data has been at the center of the debate over multidistrict litigation’s impact on the federal judiciary, assigned to manage the cases, along with a regular docket.

“The reason you’re hearing a lot about the size and volume of MDL cases on the federal docket is because size drives a lot of the current problematic trends that we are seeing in MDLs,” said Gary Feldon, of Hollingsworth in Washington D.C.

‘You’ll See New High Water Marks Set’

According to the MDL panel, the number of pending MDL cases has steadily risen in the past decade, from 127,704, in fiscal year 2014, to a peak of 417,137 in fiscal year 2023, which ended Sept. 30. The number is likely even higher, Dahl said, given that many judges in multidistrict litigation do not require the filing of all claims at first. “By that measure,” he said, “these statistics probably significantly understate the number of claims involved in MDL proceedings today.”

Feldman attributed much of the growth to litigation financing, which is moving into multidistrict litigation.

“The total number of cases centralized in MDLs will fluctuate over the short time, but if you look at the underlying trends, both decisions and the trend of third-party litigation funding driving this high volume approach to mass tort litigation, the overall trend will continue to assert itself, and you’ll see new high water marks set.”

Another judge on the MDL panel who spoke at the conference, U.S. District Judge Roger Benitez of the Southern District of California, said the concern about litigation financing has some merit.

“If you have a third-party funder who either refuses to participate in the settlement discussion or is uncooperative, that puts the settling lawyers into a real bind,” he said. “That can create delays, and some unwanted problems in the litigation.”

But Caldwell, at the conference, said litigation financing is not an issue—at least, not yet.

“The panel reached out to MDL judges to gauge the impact of third-party financing on MDLs,” she said. “Most judges have said their case is completely unaffected by it.”

The concern about unsubstantiated claims is not new in multidistrict litigation. In 2016, U.S. District Judge Clay Land, of the Middle District of Georgia, threatened sanctions against plaintiffs’ lawyers in cases over Mentor ObTape slings if they had no good-faith basis for pursuing cases through summary judgment. He said multidistrict litigation “does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.”

The data on insufficient claims, however, is hard to find. Lawyers for Civil Justice cited “tens of thousands” of cases dismissed in multidistrict litigation over Ethicon Inc.’s pelvic mesh, Zofran and paraquat, in which U.S. Chief District Judge Nancy Rosenstengel, of the Southern District of Illinois, issued a series of orders during the past year amid concern that “a significant number of plaintiffs” couldn’t sufficiently allege exposure to the herbicide. Lawsuits have linked herbicides to Parkinson’s disease.

‘Those Statistics Are Obviously Misleading’

Lawyers for Civil Justice has slightly different numbers because it follows the 2014 methodology of Duke Law School’s Bolch Judicial Institute, which excludes non-death penalty prisoner petitions and Social Security cases. That means that, for fiscal year 2023, the total number of federal cases would be 584,986, rather than 642,013. Dahl said the cases that are eliminated do not take up much of a judge’s workload.

“The difference between the raw number and the adjusted number isn’t really that significant: It’s a few percentage points, and it’s a forest for the trees problem,” he said. “What’s important, as a matter of policy and understanding the judiciary, is that well over half of the civil claims pending in the federal docket have been consolidated into MDLs, and

that was never contemplated by anybody when the MDL statute was passed.”

Zachary Clopton, a professor at Northwestern University’s Pritzker School of Law, who sits on the Advisory Committee on Civil Rules, countered that the statistics reflect the fact that multidistrict litigation cases take longer to resolve, making up a larger percentage of the overall civil docket for any given year. Also, there are limited types of lawsuits that can be brought as a class action, which counts as only one case in the numbers. The numbers also do not reveal the merits of each individual case, he said.

“There’s no doubt that MDLs are a lot of work, but those statistics are obviously misleading,” he said. “It just can’t be true that the judge who has 3M earplug cases is doing two-thirds of all the work federal judges do on civil litigation.”

Judges in multidistrict litigation, including U.S. District Judge M. Casey Rodgers, in the 3M earplug cases, often coordinate and manage the cases differently, sometimes creating registries for unfilled claims.

“Our experience is that judges always have to deal with these claims,” Dahl said. “Even if these claims are ignored for a while, eventually, they all have to be dealt with in one way or the other.”

Dahl predicted the rule, despite not addressing all the concerns about multidistrict litigation, could end up reducing the number of unsubstantiated claims. But that does not mean another case the size of the 3M earplug docket doesn’t come around.

“Individual MDLs can get big enough to really sway the entire federal judiciary, and I don’t think 3M is going to be the last one,” Feldman said. “I don’t know what the next one will be, or when it will happen, but the overall trend certainly suggests we’ll be seeing more MDLs and larger MDLs than we have in the past.”

NOT FOR REPRINT

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

Exxon, Suncor units lose bid to escape Boulder, Colorado's climate case

 [reuters.com/legal/government/exxon-suncor-units-lose-bid-escape-boulder-colorados-climate-case-2024-06-24](https://www.reuters.com/legal/government/exxon-suncor-units-lose-bid-escape-boulder-colorados-climate-case-2024-06-24)

Nate Raymond

The logo of American multinational oil and gas corporation ExxonMobil is seen during the LNG 2023 energy trade show in Vancouver, British Columbia, Canada, July 12, 2023.

REUTERS/Chris Helgren Purchase Licensing Rights , opens new tab

June 24 (Reuters) - ExxonMobil (XOM.N) , opens new tab and subsidiaries of Suncor Energy (SU.TO) , opens new tab have lost their bids to dismiss a lawsuit by Boulder, Colorado, alleging the energy companies contributed to climate change by concealing from the public the dangers of unchecked fossil fuel use.

Boulder County District Court Judge Robert Gunning on Friday largely rejected , opens new tab the companies contention that Colorado's courts lacked jurisdiction over them and that federal law trumped the state-law claims asserted by the city and its surrounding county.

Gunning disagreed with arguments by Exxon and the Suncor subsidiaries that federal law including the Clean Air Act preempted their state-law claims to the extent they were seeking to regulate emissions and global oil production.

"The energy companies are arguing against a case the local governments did not plead," Gunning said. "Through this action, the local governments are not attempting to litigate a policy solution to global climate change, limit fossil fuel use or production, or control greenhouse gas emissions."

He said instead, they were seeking damages under Colorado tort law for harms and costs caused by the energy companies' actions and the remediation of the hazards they say were caused by a public nuisance they created in their communities.

Representatives for Exxon, Suncor and Boulder did not respond to requests for comment.

The ruling came after the U.S. Supreme Court last year rejected the companies' efforts to move Boulder's 2018 lawsuit, to federal court. It is one of many such cases by state and local governments oil companies are facing nationally.

Boulder's lawsuit alleges the companies knew for decades that burning fossil fuels would lead to climate change but concealed from consumers in Colorado and elsewhere the truth about the dangers of their products and carbon emissions.

The lawsuit accuses the companies of violating Colorado's consumer protection law and various state tort laws and creating a public nuisance that they should be held responsible for helping to mitigate.

Texas-based Exxon and Canada's Suncor deny wrongdoing and argued their connections to Colorado were too remote for the state's courts to have jurisdiction over them in a case seeking to force them to compensate the city and county government for the effects of climate change on their communities.

Exxon's lawyers argued that the global oil company could not have anticipated that in producing and selling fossil fuels it could be sued over alleged harms caused by its products in Colorado.

Gunning, though, said the U.S. Supreme Court rejected a similar argument in 2021 when it ruled against Ford Motor's bid to avoid facing product liability lawsuits filed in Montana and Minnesota, states in which it marketed its products.

The judge agreed with Suncor's lawyers that only some of its U.S. subsidiaries involved in refining petroleum in Colorado and not the Canada-based parent company itself could be sued in the state, citing a lack of jurisdiction over it.

The case is Board of County Commissioners of Boulder County v. Suncor Energy (USA) Inc, Boulder County District Court, Colorado, No. 2018CV30349.

For Boulder: Richard Herz of EarthRights International

For Exxon: Theodore Wells of Paul Weiss Rifkind Wharton & Garrison

For Suncor: Hugh Gottschalk of Wheeler Trigg O'Donnell

Read more:

Republican-led states ask Supreme Court to quash Big Oil climate lawsuits

US Supreme Court rebuffs Exxon, Chevron appeals in climate cases

10th Circuit hands Boulder's climate lawsuit the home court advantage

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

Nate Raymond

Thomson Reuters

Nate Raymond reports on the federal judiciary and litigation. He can be reached at nate.raymond@thomsonreuters.com.



US judge rejects settlements in chemical price-fixing class action

 [reuters.com/legal/litigation/us-judge-rejects-settlements-chemical-price-fixing-class-action-2024-06-25](https://www.reuters.com/legal/litigation/us-judge-rejects-settlements-chemical-price-fixing-class-action-2024-06-25)

Mike Scarcella

U.S. one dollar banknotes are seen in this illustration taken February 8, 2021.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

June 25 (Reuters) - A U.S. judge has refused to approve class action settlements worth \$38.5 million that would resolve allegations that a U.S. subsidiary of Formosa Plastics (1301.TW) , opens new tab and others artificially inflated the cost of a chemical used in detergents and other products.

Citing uncertainties over who would share in the settlement, Chief U.S. District Judge Elizabeth Wolford in Rochester, New York, ruled , opens new tab on Monday that she would not sign off on the deals between a proposed class of commercial purchasers of sodium hydroxide, or “caustic soda,” and chemical makers Formosa USA, Westlake (WLK.N) , opens new tab and Shintech.

The purchasers, including New York-based wholesale chemical distributor Amrex Chemical Co Inc and Pennsylvania-based Main Pool and Chemical Co Inc, alleged a years-long conspiracy to fix caustic soda prices beginning in 2015.

Formosa, Westlake and Shintech did not immediately respond to requests for comment on Tuesday. Attorneys for the plaintiffs did not immediately respond to similar requests.

Formosa last year said it would pay \$7.5 million to exit the case, marking the first settlement since the litigation began in federal court in Rochester in 2019. Houston-based Westlake said it would pay \$19 million, and Shintech, a subsidiary of Tokyo-based Shin-Etsu Chemical (4063.T) , opens new tab, agreed to settle for \$12 million. None of the defendants admitted wrongdoing.

Caustic soda is sold as a solid or liquid and is used in soaps and detergents, pharmaceuticals and other industries.

Wolford said in her ruling that there were obstacles in determining whether certain companies, based on purchasing history, were members of the settlement class. She said that “fundamental barrier” meant she could not approve the three accords.

Wolford also said the plaintiffs had not shown “common proof to demonstrate antitrust injury on a classwide basis.”

Non-settling defendants include U.S. chemical maker Olin Corp (OLN.N) [↗](#), opens new tab and Occidental Petroleum's OxyChem (OXY.N) [↗](#), opens new tab. Neither company immediately responded to a request for comment. Both have denied any wrongdoing. Wolford set a hearing for July 19 to discuss the next steps in the litigation.

The case is In re Caustic Soda Antitrust Litigation, U.S. District Court, Western District of New York, No. 1:19-cv-00385- EAW-MJR.

For direct purchasers: Solomon Cera of Cera LLP; Robert Kaplan of Kaplan Fox & Kilsheimer

For Formosa: Alan Unger of Sidley Austin

For Westlake: William Merrill of Susman Godfrey

For Shintech: John Briggs of Axinn, Veltrop & Harkrider

Read more:

Chemicals maker Formosa reaches 'icebreaker' settlement in price-fixing lawsuit
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Mike Scarcella

Louisiana law places new rules on litigation funders

 [reuters.com/legal/government/louisiana-law-places-new-rules-litigation-funders-2024-06-24](https://www.reuters.com/legal/government/louisiana-law-places-new-rules-litigation-funders-2024-06-24)

Sara Merken

REUTERS/Guadalupe Pardo Purchase Licensing Rights , opens new tab

June 24 - Litigation funders face new restrictions in Louisiana after its governor signed a bill to regulate the growing industry, joining a small list of other states that have considered or approved similar laws.

Under the legislation, which Republican Governor Jeff Landry signed on June 19, funding in civil actions by litigation funders from a “foreign country of concern” must be disclosed to the state attorney general.

Third-party litigation funders under the bill , opens new tab are also prevented from influencing or directing the parties in cases in which they invest. The measure also makes the existence of a litigation funding contract subject to discovery in civil actions. It is set to take effect on Aug. 1.

Litigation funders invest in lawsuits or other legal claims in exchange for a cut of any recoveries. The U.S. litigation funding industry has grown over the past decade, with funders that invest in commercial litigation in the U.S. market reaching a combined \$15.2 billion in assets under management in 2023.

Critics argue the practice promotes unnecessary litigation and undermines transparency in the legal system, and the U.S. Chamber of Commerce and others have long pushed for tighter regulation.

The industry's backers counter that it can level the playing field and promote access to justice.

A spokesperson for the International Legal Finance Association, a trade group launched in 2020 that represents commercial litigation funders, said in a statement that mandatory disclosure proposals “are a solution in search of a problem that does not exist.” Investors in commercial legal finance do not direct what cases are invested in or control litigation decisions, the statement said.

Rachelle Mortimer, director of legislative affairs at the Chamber's Institute for Legal Reform, in a statement said the Louisiana legislation brings “much-needed transparency into Louisiana courts.”

The Chamber and some lawmakers since at least 2022 have raised concerns that foreign actors could use investments in U.S. lawsuits to undermine national security.

Louisiana is among a handful of U.S. states that have in recent years introduced bills governing the litigation finance industry.

Indiana and West Virginia are among states that recently enacted such laws, while measures in states including Florida and Kansas stalled in their legislatures this year.

Like in Louisiana, the Indiana law prevents funders from influencing a case or any settlement. It also bars foreign entities from directly or indirectly funding commercial litigation.

Louisiana's legislature last year passed a bill that would have more broadly required the disclosure of litigation funding agreements in civil cases, but then-Governor John Bel Edwards, a Democrat, vetoed the bill.

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

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

MMTLP Tried Squeezing the Shorts

Published: Tue Jun 25 14:17:33 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

MMTLP

One of the leading financial conspiracy theories of recent years is MMTLP. I am not sure I can explain the theory very clearly, because it is the nature of conspiracy theories to be sprawling and slippery, but the central idea is that short sellers ganged up on a public company, and stock exchanges and regulators took the side of the short sellers at the expense of ordinary shareholders.

Today the US Securities and Exchange Commission brought fraud charges against Meta Materials Inc., the public company whose preferred stock, MMTLP, is at the center of a conspiracy theory, and its former chief executive officers, John Brda and George Palikaras. (Meta settled the case for a \$1 million fine; Brda and Palikaras will fight it.) Here is the story, as alleged in the SEC's complaint against Brda and Palikaras.

There was an oil company called Torchlight Energy Resources. By early 2020, "it had sold all of its revenue-generating oil and gas assets," and was left only with speculative exploratory properties. It needed to drill those properties to keep its leases, but the drilling would not be profitable, and it needed money. Its stock fell below \$1, and it was in danger of being delisted from Nasdaq.

Like the CEOs of many unprofitable public companies, Torchlight's CEO, John Brda, had conceived a dislike for short sellers, who borrowed the stock and sold it to bet against the company. And technology existed to take revenge on short sellers.

When you sell stock short, you have to borrow it from a stock lender, and your deal with that lender is that you eventually have to return (1) the stock and (2) any dividends on the stock. If a company pays a \$1 cash dividend, you pay \$1 to your stock lender. If the company dividends out a share of preferred stock, you have to go buy that preferred stock and return it to your lender.

In 2019, Overstock.com, whose CEO Patrick Byrne had spent years fighting short sellers, made a plan to distribute a weird blockchain preferred stock to its shareholders that *would not be tradable*. This was meant to trap short sellers: They *couldn't* go buy the preferred stock to return to their lenders, because it didn't trade. They would have to close out their shorts — by buying back the stock — before the dividend was paid out, because afterwards they'd be stuck and would get in trouble.

There would be a short squeeze: Before the dividend, the shorts would rush to buy back the stock, and they'd have to do it at very high prices.

Or this is the theory; it did not work for Overstock, mostly because the SEC considers it manipulation and told them not to do the dividend. Byrne was not pleased. ¹

I don't know if Brda was inspired by Byrne's example or what, but he allegedly developed an improved version of the idea. It goes like this (quotes from the SEC complaint):

- Torchlight would do a reverse merger with some other company that “desired Torchlight’s Nasdaq listing but *not* its oil and gas leases.” He found a good partner in Metamaterial Inc., a Canadian company that “focused on research and development of early-stage, applied materials technology.” (After the merger, the combined company changed its name to Meta Materials Inc., and I will refer to it that way.)
- Because Meta didn’t want the oil and gas assets, it would spin them back out to the pre-merger Torchlight shareholders. Meta would end up with a US public listing, and Torchlight’s shareholders would get (1) a stake in Meta *plus* (2) their oil and gas assets back, in the form of the spun-off company. ²
- Except instead of just spinning out the Torchlight assets as a new *company*, Brda found a more complicated structure. At the closing of the merger, Torchlight shareholders would get, not *actual shares of legacy Torchlight*, but rather a new preferred stock representing a claim on the value of those assets. (This stock came to be called MMTLP, its ticker symbol.) Meta would put the Torchlight assets in a box and try to sell them after the merger. When it eventually sold them for cash, it would pay the cash out to the holders of MMTLP.
- Crucially, the plan was that Torchlight and Meta “would not register [MMTLP] or make [it] available for immediate trading on any exchange.” It would be a dividend of a non-tradable preferred, which means, in theory, that Torchlight’s short sellers would not be able to buy it to deliver to their stock lenders.
- The plan was, says the SEC, to “market and promote the Preferred Dividend to spread the narrative to select investors that short sellers would not be able to obtain the Preferred Dividend, thus pressuring short sellers to close their positions, leading investors to believe a short squeeze would occur, and artificially inflating the price of Torchlight common stock on a temporary basis.”
- And *then*, the plan was to take advantage of that inflated price by *selling stock*: Torchlight would “capitalize on Torchlight’s inflated common stock price by, among other things, raising capital through an ATM Offering,” that is, an at-the-market offering of shares directly to investors on the stock exchange, just before the closing of the merger. And then it would “use capital raised through the ATM Offering to drill wells required to maintain Torchlight’s oil and gas leases.”

So the plan was to punish short sellers with a short squeeze, *and* to use the short squeeze to raise money at an inflated price.

Brda and Palikaras set out to market that plan. Sort of. The SEC alleges that they went around telling investors that the shorts would get squeezed. Palikaras said, on a call with some shareholders:

And there is one more element to add here, which is the, let's call the x-factor. If you notice the **Torchlight stock is massively shorted ... This deal is set up not to give a [cash] dividend at closing**. So, in order for the short positions to cover, they have to have the stock on their hand because the dividend will be paid out as a preferred share, not cash. As a result, there is **no physical way for the shorts to cover the stock when the time to close**, and we believe ... there will be **a potential jump towards the close, it's called a short squeeze**... (emphasis added).

But they couldn't market the plan *too* explicitly, because, you know, this really is market manipulation. You can't go around saying "we structured this merger to do a short squeeze"; you have to have some corporate finance reason for it. So the SEC *also* complains that they *didn't* mention the short squeeze in their official communications to shareholders:

Specifically, Brda failed to disclose, and failed to cause Torchlight to disclose, the following in Torchlight's proxy statements and other public filings and statements: (1) that the Preferred Dividend was intended to cause, and to lead investors to believe, that there would be a short squeeze and an increase in Torchlight's stock price; (2) that Brda believed the Preferred Dividend would cause a short squeeze and/or temporarily inflate Torchlight's stock price; (3) that the potential for a short squeeze and/or temporary inflation of Torchlight's stock price were reasons that Brda and Torchlight considered in approving the merger and Preferred Dividend and recommending that shareholders approve the same; (4) Brda's plan to, and/or the potential that Torchlight would, deploy the ATM Offering; and (5) that, in connection with negotiations over the merger and Preferred Dividend, Torchlight and Meta I discussed the Preferred Dividend's potential to cause a short squeeze, its potential to temporarily inflate Torchlight's stock price, and Brda's plan to use an ATM Offering to raise funds from investors.

That is, it was market manipulation for Brda and Palikaras to go around telling some shareholders that they had concocted a short squeeze, but it was also fraud for them *not* to tell other shareholders that. Also, to be fair, they were telling shareholders this *on Twitter*, but subtly. Sort of:

On June 13, 2021—the day before Torchlight announced its Preferred Dividend Record Date—Palikaras tweeted a graphic of shorts-in-flames, kicking off a series of tweets designed to promote the short squeeze theory and encourage investors to purchase

Torchlight's common stock. ...

Palikaras testified during the SEC's investigation that his tweet had nothing to do with the concept of a short squeeze, but the timing, circumstances, and content of his tweet imply that he intended to tout that the Preferred Dividend would set Torchlight's "shorts" on fire by triggering a short squeeze.

Here is that picture:

This all basically worked. Torchlight and Meta Materials signed their merger agreement in December 2020; the merger closed on June 28, 2021. On June 14, two weeks before closing, Torchlight announced the record date for the MMTLP dividend: People who held Torchlight shares as of June 24 would get shares of MMTLP. The theory was that short sellers would have to buy back their Torchlight shares by June 22 (for T+2 settlement: If you buy on June 22, you get the shares on June 24), or else be stuck with no way to get MMTLP. So the short squeeze should peak on June 22. The SEC says:

Following the announcement of the Record Date on June 14, 2021, the price of Torchlight stock surged. The price at closing jumped from \$3.58 per share on June 14 to \$5.07 per share on June 15 to \$5.99 per share on June 16. Torchlight stock price peaked at \$10.88 per share on June 21—an increase of over 200% from its price at closing on June 14.

Torchlight did its at-the-market offering between June 18 and June 24, selling 16.2 million shares at an average price of \$8.50 and raising \$137.5 million. By June 28, after the merger closed, the stock had fallen to \$1.99.³ Torchlight's marketing of the short squeeze worked to prop up its stock for a bit, and Torchlight took advantage to raise money.

But *how* did it work? *Why* did the stock go up? One possibility is that the shorts were in fact squeezed and had to buy back their Torchlight shares. Another possibility is that the shorts were fine — they were able to close out easily, or they rolled their Torchlight shorts into new MMTLP shorts — and what drove the stock was not a short squeeze but a meme-stock effect. Torchlight shareholders got Brda's and Palikaras's somewhat coy message — that there would be a short squeeze peaking on June 22 — and rushed to buy the stock to profit from the short squeeze.⁴ Even if the short squeeze never materialized, if people *believed* that it would, that would push up the price.

Surprisingly, the SEC doesn't know which explanation is right:

Torchlight's stock price artificially increased as a result of Defendants' scheme. However, the evidence available at this time is inconclusive as to whether, or to what extent, the trading volume was attributable to short sellers covering their positions versus defrauded investors purchasing Torchlight's stock to "burn the shorts" or obtain the Preferred

Dividend that they believed was worth \$1–\$20.

The SEC thinks that either of these is fraud. If the scheme succeeded in burning the shorts, then it is market manipulation: Brda and Palikaras artificially drove up the price of the stock by secretly engineering a short squeeze. If the scheme failed to burn the shorts, then it is still market manipulation: They artificially drove up the stock by *openly claiming* they were engineering a short squeeze. There is something logically inconsistent about this, but you get the idea. Brda and Palikaras were coyly half-marketing the short squeeze, both concealing it and advertising it, and either way it would be fraud.

Now, I will go ahead and guess that the answer is *mostly* the latter, and that in fact the Torchlight shorts mostly were *not* burned, and that instead the victims were Torchlight shareholders who believed in the short-squeeze theory. I am not confident about this, but it's my best guess.

And here's why. This story has taken us through June 2021, when the merger closed and Torchlight/ Meta raised all this money from shareholders. But there is a long subsequent history of MMTLP, which the SEC only hints at in its announcement today, saying: "A separate Commission investigation regarding subsequent events related to Meta Materials (MMTLP) remains ongoing."

But when we talked about MMTLP last year, it was mostly about post-2021 events. Meta never did sell those old Torchlight oil and gas assets. The SEC now says that it never planned to, that the properties were hard to value and nobody would want them, and that Brda's claims that they'd be worth between \$1 and \$20 per MMTLP share were far too optimistic.

Instead — as the SEC says they planned to do all along — Meta ultimately announced that it would spin those assets out, in a separate company, to holders of MMTLP, to replace their MMTLP shares. The new company is called Next Bridge Hydrocarbons, and it is extra-super-duper non-tradable.

Because it turns out that MMTLP, which was intended not to be tradable, traded anyway: Meta never got it a listing on a stock exchange, but it traded in over-the-counter markets. *And there were short sellers*. Or at least, people thought there were. Maybe the short sellers had actually borrowed and shorted MMTLP, or maybe they were just old Torchlight short sellers whose short positions had transformed, by operation of the dividend, into MMTLP short positions. Or maybe they were imaginary. But in any case, by 2022, "many investors were convinced that short sellers had placed massive, hidden bets against MMTLP."

This suggests that the 2021 MMTLP short-squeeze plan didn't work: It turned out short sellers could still be short MMTLP. But the *short-squeeze conspiracy playbook* worked great: Torchlight was able to pump its stock in 2021 by predicting a short squeeze.

So they apparently tried it again. Replacing MMTLP with Next Bridge shares was a way to make the

shares *even more non-tradable*, to squeeze the shorts even more. Unlike MMTLP, Next Bridge shares, by design, would “not be eligible for electronic transfer through the Depository Trust Company or any other established clearing corporation,” so there is essentially no way at all to trade them, even over the counter. In its prospectus, Next Bridge *very explicitly promised that this would cause a short squeeze*:

If any investors have sold shares of MMTLP short, then in connection with the Distribution such investors may feel compelled to buy shares of MMTLP to cover such sales before the Distribution. If this were to occur, given the potential high demand from buyers with a relatively low supply of MMTLP shares available for sale on the OTC market, the MMTLP price per share as shown on the OTC market may rise significantly but not be representative of the value of the underlying shares of our Common Stock that you will receive in the Distribution.

And, again, the plan worked. Not necessarily in the sense of causing a short squeeze — who knows — but in the sense of causing retail shareholders to *believe* in the short squeeze and buy the stock. In June 2023, the Wall Street Journal’s Alexander Osipovich reported:

In their last weeks of trading, buzz mounted that the shares were poised for a short squeeze, a phenomenon in which short sellers exit their bets against a stock, causing its price to rally. Fueled by such chatter, MMTLP surged more than 650% from the start of October [2022] to Nov. 21. That put a peak valuation of about \$2 billion on the underlying assets—even though some oil and gas analysts have dismissed them as worthless.

But then the Financial Industry Regulatory Authority stepped in:

On Dec. 9, 2022, Finra halted trading in MMTLP. Such halts are part of Finra’s tool kit for preventing market disruptions. But the halt surprised adherents of the short-squeeze theory, who expected two more days of trading in which to realize their gains.

Some investors had poured tens of thousands of dollars into MMTLP expecting big profits. Instead, they were stuck with shares they can’t sell.

“Given the lack of drilling success, production or cash flow at Orogrande, it is certainly possible the preferred stock transaction was simply a means to create the perception or reality of a short squeeze,” said Jeff Davies, a former energy hedge-fund manager.

If you bought MMTLP in November 2022, expecting it to surge in December as short sellers hit their deadline for getting out of the stock, and then you held on a bit too long, you were stuck with — exactly what you were promised, non-tradable shares in Next Bridge. You’ve still got them. There is “substantial doubt about the Company’s ability to continue as a going concern,” said Next Bridge, in

its most recent 10-Q, from last September.

What have we learned? I want to emphasize how intense the MMTLP conspiracy theory is. Osipovich wrote last June:

MMTLP investors have formed a noisy protest movement, wielding hashtags such as #FinraFraud. They allege that Finra's halt covered up a conspiracy among hedge funds and market makers to suppress the price of Torchlight, and later MMTLP, through naked short selling. ...

Some Finra employees and market veterans caught up in debate around MMTLP have received death threats. In one anonymous message to a market veteran seen by The Wall Street Journal, the sender alluded to mass shootings and vowed to come "piss on your casket."

But what the SEC's case today makes clear is that MMTLP was not a grass-roots movement of retail investors on social media who were aggrieved about short sellers. The whole thing was concocted by the CEO of Torchlight to pump up the stock to raise money. There really *was* a conspiracy against Torchlight/MMTLP investors, but it was not the short sellers who were conspiring, it was the CEOs of Torchlight and Meta Materials.

Because if you run an unprofitable publicly traded oil company with lots of cash needs and no proven oil reserves, a short-selling conspiracy theory is very valuable to you! If you can get shareholders to believe that (1) all your problems are caused by short sellers, (2) you have found a way to punish the short sellers and (3) your scheme will also push the stock price up, then those shareholders will buy a lot of stock and you can make a lot of money.⁵ This is all just as cynical as can be, tricking people into believing that the public markets are rigged against them by shadowy short sellers, in order to take their money yourself.⁶

Or, of course, all of this is wrong, and the SEC is in on the conspiracy too. Always possible.

Hunterbrook

As a person who works in media and writes about finance, I continue to be fascinated by Hunterbrook, the newspaper that is also a hedge fund, the intersection of my interests. When Hunterbrook launched earlier this year, my assumption was that it would look more or less like an activist short fund: It would investigate companies, find out bad stuff about them, short their stocks, publish its findings, and profit when the stocks went down. And in fact that has often been its model.

But, from the beginning, Hunterbrook emphasized that there were other possibilities. One thing it

could do, sometimes, is just be a newspaper: It could investigate companies, find out bad stuff about them, *not* short their stocks, publish its findings, and, you know, afflict the comfortable and comfort the afflicted. Sometimes the crack reporters that you hire for their ability to find scandals will find a scandal, but it won't be a scandal you can *trade* on; sometimes the market doesn't care about a company's labor practices in faraway countries. And then you publish the story anyway, to build credibility as a news source and to make your crack reporters feel good about what they're doing. A number of Hunterbrook's stories so far have looked like this: Activist short reports but without the shorting.

A third model that Hunterbrook has emphasized is that it could trade *commodities* based on its reporting. The form is something like: You hire the only foreign correspondent in a faraway country that is the leading producer of unobtainium, she learns that a coup is in the offing and the new military junta will ban unobtainium exports, you go long unobtainium futures, you publish her story, the price of unobtainium spikes, you profit.⁷

This strikes me as a pretty good model, when you put it like that, but how often are your crack reporters really going to get advance notice of market-moving coups in commodity-exporting countries? If you could industrialize that it would be pretty cool, for you, but pretty bad, for the commodity-exporting countries. Your investor letter would be like "we had a great quarter, driven by continuing strong coup activity."

Anyway Hunterbrook's latest report yesterday isn't *quite* that, but it does begin with a secret flight that might disrupt nickel supplies:

Over the weekend, a jet departed New Caledonia, the French territory midway between Australia and Fiji. But it was nowhere to be found on public flight trackers, according to transponder data examined by Hunterbrook Media.

The plane seems to have crept into the night sky with its transponder off, reportedly carrying detained pro-independence activists secretly bound for mainland France.

As news broke of the flight, independence activists sparked fresh riots in New Caledonia. The conflict threatens to disrupt the fragile peace of recent weeks after months of protests and uncertainty in the global nickel market. ...

That conflict impacted nickel production on the island. Due to New Caledonia's significant output, commodity analysts cited the unrest as a factor contributing to the spring surge in global nickel prices.

There are some images of buildings on fire. Hunterbrook is long nickel.

Nice deal perk

I guess:

Goldman Sachs has appointed oil tycoon John Hess to its board of directors, the firm announced on Monday, just as the Wall Street investment bank advises his company on its \$53bn takeover by Chevron.

The move comes as Goldman stands to make as much as \$80mn in fees for helping Hess sell the family-run oil business in a contentious deal that has created a stand-off with ExxonMobil. ...

“Advising companies and their management teams is a core part of our business, and we’re thrilled to have John Hess, a long-standing client, join our board,” the firm said in a statement.

A senior Wall Street adviser said it was “very rare” for a senior executive who picked the adviser for the sale of his company to later join the board of an investment bank helping him in the sale process.

I feel like if John Hess was *just* the CEO of Hess Corp., putting him on Goldman’s board before the deal closed would feel like a weird conflict of interest. As it is, his name is on the door, he owns about 9.3% of Hess’s stock, and it seems like a stretch to suggest that he was, like, bribed into choosing Goldman as the company’s financial adviser with the promise of a board seat. Probably he wanted the best deal for Hess, and also liked Goldman’s work.

It’s funny, there is an old-timey model of investment banking in which *of course* the *banker* would serve on the *client’s* board. The banker was a trusted adviser, expert in financial matters, who could give the company’s managers good advice. Having her on the board would be valuable, and not a conflict of interest, because it’s not like the company was going around *bidding out* investment banking services. The company’s trusted investment banker would be on the board, and *other* investment bankers wouldn’t matter. Now of course every company is covered by every bank, so it would be weird favoritism to put *one* banker on the board, and unwieldy to put them all on. Plus investment bankers probably do not qualify as independent directors, and companies want to have independent directors. And so the old-time relationship between banker and company has broken down. But there are occasional throwbacks.

Corporate rap

Sure whatever:

Victoria Banks, a country musician who has written hits for Reba McEntire and Sara Evans, strummed her guitar and began humming a melody as she encouraged a group of about 16 software consultants in hoodies and jeans to throw out more rhymes. They tried.

“Stress?” “Process?” “Make your Salesforce the best?”

Within an hour, the group—one of four teams spread out on the first two floors of Nashville’s Virgin Hotel—had written a twangy number about cloud software, complete with two verses, a bridge and a chorus that referenced the business apps Notion and TaskRay. ...

Thanks to a wealth of musicians and dwindling opportunities for them to make a living, the city has become a hot spot for employees of America’s biggest companies to bond while writing lyrics about corporate values and new product lines. ...

The crowd split into four teams, each assigned a Kicksaw corporate value. Banks led her team to a hotel balcony, where they hammered out the words and melody for their song about the value “Keep It Simple.”

The process was halting at first, but a chorus started to take shape. They needed a lyric to insert between the first and last lines, and employees threw out suggestions. “Partner for success,” said one. “Help us help you,” was another. More phrases followed. ...

Eventually the group settled on a chorus: “Gonna get you through it, Kick that cloud to Kicksaw, and keep it simple, stupid.”

It’s not actually corporate rap, though it does feature the sentence “I love the combination of country and beatbox.” They sing the songs for a panel of judges (“mostly Kicksaw investors”), but then do they just throw them away? So many corporate songs are just played to internal audiences, or sometimes to criminal juries, but if you are writing songs that are notionally addressed to potential clients, *shouldn’t you be singing them to the clients?* Like you show up to pitch your software consulting services and you burst into song? *That* is the corporate singing I’d like to see. I guess Blackstone does it.

Things happen

The giant Exxon project that could create the world’s last petrostate. The Clock Is Ticking on Jane Fraser’s Citigroup Turnaround. Meet the Highest Paid CFOs of 2023. Glen Point’s Neil Phillips Avoids

Prison for FX Manipulation. “JPMorgan Chase has attracted more than \$15bn in assets from wealthy clients to its nascent tax strategy business.” GM Withdraws Bank Application for Deposit Insurance. Microsoft Risks EU Fine After Antitrust Warning Over Teams. Even Your Plumber Wants to Meet on Zoom Now. Now We All Speak Phone.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

1. “Now, after 15 years of being scofflaws,” he wrote on his blog, “the shorts are crying because they are getting sucked into a black hole they created themselves. If you call ‘Bazoomba!’ for them now, I am going to use this website to vaporize you with information I give the public.”
2. This is reasonably normal. We talked last week about QXO Inc., another reverse-merger company, which went public by merging with a software consulting company and planned to spin the consulting company’s business back to its original shareholders. Eventually it changed its mind, but that was the plan, and it’s pretty normal: QXO, like Meta, wanted the target’s listing but not its legacy business.
3. Actually \$3.98, after accounting for a 2-for-1 reverse stock split at closing.
4. That is: much like GameStop Corp. shareholders did in January 2021.
5. The SEC explains how Brda personally profited: “On June 24, 2021, immediately after the ATM Offering and one day before the merger closed, Brda urged Torchlight’s Compensation Committee to award him a \$1.5 million bonus. He presented the Committee with a ‘Top Ten 2 Reasons to Pay Bonus to John Brda,’ which touted his achievements in conceiving and executing the Torchlight-Meta I merger. ... He also wrote that he ‘[c]onceived the timing of the shareholder meeting with windows to raise additional equity and filing of the shelf S3 for \$240 million along with the ATM—raising full amount of \$133 million on ATM.’ He explained that he ‘[h]andled all investor calls and fund calls during the process.’ For these reasons, Brda requested a ‘bonus of \$1.5 million in cash.’ He got it.
6. We talked a few months ago about how the CEO of Trump Media & Technology Group Corp. is going around telling anyone who will listen about how naked short sellers are somehow

conspiring to suppress that company's stock price. Something to think about!

7. Either by selling the futures after the story comes out, or by waiting for the coup and the export ban. Depends on your level of confidence I guess.

**Bloomberg
Law**

Request a Demo

Login

[Securities Law News](#)

June 24, 2024, 11:30 AM PDT

Matt Levine's Money Stuff: Boomer Candy Business Is Booming

By Matt Levine

Opinion

Bloomberg Law News 2024-06-25T09:28:55234269881-04:00

Matt Levine's Money Stuff: Boomer Candy Business Is Booming

By Matt Levine 2024-06-24T14:30:52668-04:00

Risk, returns

Here is a simple, bad financial product:

1. You give me \$100.

- 2. In a year, I give you back the return on the S&P 500 stock index, but (1) if the index is *down*, you don't lose any money and just get your \$100 back, and (2) if the index is up more than 5%, you only get the first 5% of returns. If the S&P goes up 3%, you get \$103 back. If it goes up 5%, you get \$105. If it goes up 37%, you get \$105. If it goes down 5%, you get \$100. If it goes down 37%, you get \$100.

You have bought 100% downside protection by giving away the upside above 105%.

How do I manufacture this product? That is, how do I make sure that I have enough money in every scenario to pay you back? Well, I could probably do some stuff with options. But the simplest and most obvious approach is:

1. I use your \$100 to buy a one-year Treasury bill, which pays roughly 5.1% interest.

- 2. In a year I have \$105.10.
- 3. At that point, I look at the return on the S&P. If it's 5% or more, I give you \$105 and keep the remaining \$0.10. If it's zero or negative, I give you \$100 and keep the remaining \$5.10. In between, I give you \$100 plus the S&P's return and keep the rest.

This is, like I said, a very bad product. You should not buy it; you should just buy the Treasury bill yourself instead. But the point I want to make is that three years ago I could not have offered you even this product. Back then, the one-year Treasury rate was something like 0.08%. If I had wanted to offer you a product that was “the S&P return, but you can’t lose money and your upside is capped,” the cap on your upside would have been, you know, 0.08%, which is even less exciting than 5%.

The point is that for a long time interest rates were very low, which means that if you wanted to make a return on your money you needed to take stock-like risks: You could buy the S&P 500, make money if it went up, and lose money if it went down. But now interest rates are considerably higher, which means that if you want to make a (nominal) return on your money you can do that without taking any risk at all.

One thing this means is that you can just buy bonds, but that’s boring. Another, much more fun thing that it means is that *financial product designers* have a lot more to work with. My product above is absurd, but you could use options to build more plausible products, and if you do that, the fact that the risk-free rate is 5% makes your product much more attractive than it would have been at 0%. So the Wall Street Journal reports:

Even as signs of cooling inflation have powered major indexes to new highs, investors have poured billions into exchange-traded funds that use derivatives to produce extra dividend income or protect against losses.

Such funds, which were almost nonexistent four years ago, give retirees and other investors the chance to chase stock returns while also protecting against a potential market slide. The funds have taken in at least \$31 billion of new investor money over the past 12 months, according to FactSet, bringing their total assets to almost \$120 billion. ...

Buffer funds, another popular strategy that uses derivatives, claim to guard against investor losses, up to a point, while limiting potential gains as well. A similar class of funds even advertises 100% downside protection, when certain conditions are met.

“We like to call this kind of stuff ‘boomer candy,’ ” said Eric Balchunas, senior ETF analyst at Bloomberg Intelligence. “They like being in the stock market but want the protection that helps you sleep at night. A good chunk of the ETF industry is in the lab trying to design more of these funds as we speak.”

We talked about the 100% downside protection funds last summer. Schematically, the way to get 100% downside protection is to (1) take \$100, (2) invest \$95 in Treasury bills that will pay off \$100 in a year, and (3) spend the remaining \$5 buying options on the S&P 500 that will pay off if the index goes up. This gives you some of the return of the S&P 500, but with a guaranteed return of your principal. But when rates were zero, that sentence would have read “(1) take \$100, (2) invest \$100 in Treasury bills that will pay off \$100 in a year, and (3) that’s it, you’re out of money, there’s no way to get anything like equity returns with no downside risk.” Now there is.

In some sense this is all sleight of hand. "You always get your money back" is a very *optically* attractive pitch, and it is possible now in a way that it wasn't three years ago. But it is less *economically* attractive now than it was three years ago, because now the risk-free alternative is not "you put in \$100 and get back \$100" but rather "you put in \$100 and get back \$105." And with risk-free rates high, expected stock returns should also be high, so giving up upside is more costly:

One such fund [retired financial adviser Craig Morningstar] owns from First Trust tracks the Nasdaq-100. Over a rolling one-year period, the fund aims to protect against the first 10% slide in the index, meaning that if Nasdaq-100 dropped 15%, the fund would be down about 5%. Investor gains are capped at roughly 20%.

But with the Nasdaq-100 up 37% over the past 12 months, buffer fund investors have missed out on substantial returns.

Still, you can see why the ETF industry is in the lab. The lab was so boring for so long, and now it isn't. Investors got used to the idea that the only way to get a return was by owning stocks, so now they want to own stocks, but with less risk. And with interest rates higher, there are ways to do that.

CEO school

You could have a model of Harvard Business School that is like:

1. Harvard Business School teaches you skills that would make you good at running a company.
- 2. There are lots of companies that could use those skills.
- 3. But you don't want to run those companies, because they make, like, ball bearings.
- 4. *You* want to run a *fancy* company; you want to run a hedge fund or a tech startup or something.
- 5. Meanwhile, the people currently running the ball bearings company would not be all that excited about *you*, a fresh-faced business school graduate who has never run anything, coming in to run their company, even if you did learn a lot of useful skills at Harvard.
- 6. Therefore various industries exist whose principal business is *laundering* ball bearings companies into opportunities that appeal to Harvard Business School graduates. You wrap the ball bearings company in a name like "private equity" and suddenly it is legible to the Harvard students, so they flock to it.
- 7. Those industries are also in the business of getting the ball bearings companies to accept the Harvard Business School graduates, which in practice means not so much "make the ball bearings company excited about its new Harvard CEO" but rather "buy the ball bearings company and install new management."

I don't think this model is exactly right or anything, but I think there's something to it. We have talked a few times about "search funds," which are a cool way for graduates of prestigious business schools to say "I'm going into pest control." And I have suggested that "private equity is sort of the industrial-scale version of this," in which top business school graduates get prestigious financial jobs that involve acquiring and running unglamorous industrial companies.

So here's a good Business Insider story from last week about how the most sought-after job at Harvard, Stanford and Wharton is running a plumbing company in Jackson, Mississippi:

Data reviewed by Business Insider suggests San Francisco-based Alpine Investors is quickly becoming one of the most sought-after places to work for graduates of top business schools. Driving the demand is Alpine's CEO-In-Training program, which places MBAs in leading positions at companies within just a few weeks and promises to turn them into actual CEOs in a few years.

For ambitious MBA students, the program offers the chance of a lifetime, although getting in is not easy. For the 2024 CIT program, which starts this summer, Alpine received 750 applications for just 12 slots, giving it an acceptance rate of 1.6%. Harvard, by contrast, has an acceptance rate of about 3.6%. ...

Success stories include David Wurtzbacher, who went from Harvard Business School to CFO of Alpine Investor's dental business to founding an Alpine-backed company that is rolling up local CPA firms in six years.

In an interview with BI, Wurtzbacher described the program as "turbocharged entrepreneurship." He said he received hands-on leadership training, but with the backbone of guaranteed funding, a large support network, and lessons on how to lead a business.

And:

The firm assesses potential hires' intellectual curiosity, emotional intelligence, and, perhaps most importantly, their ability to handle adversity. It does this through a series of short interviews, followed by a day-long interview for those who make it past the first round.

Grit is prized above all because even with the "sexy" job title of CEO or CFO, these jobs aren't stereotypically sexy. Instead of power lunches at posh Manhattan steakhouses, Alpine's CEOs in training may be sent to small towns in rural America where they have to get their hands dirty.

"You're moving from Yale Law School and Harvard Business School to Jackson, Mississippi, to run a plumbing company," Anderman said as an example.

What are you doing after business school? Ah, I'm joining a prestigious private equity firm in San Francisco, to run their plumbing company in Mississippi.

FTX claims

One story about crypto is that it does away with the need for trust. Code is law, everything happens on a public immutable blockchain, and you don't need to trust any central intermediary: You can *prove* that you own your Bitcoins by pointing to the blockchain.

This was never quite true, as a practical matter. Some crypto investors do organize their lives around not having to trust anyone, but that is very inconvenient, and lots of crypto investors end up trusting people: You hold your crypto on a centralized exchange, not directly on a blockchain, and you trust the exchange to hold it for you. Or you *do* hold your crypto on a blockchain, and use it in decentralized applications, and you trust that the smart contracts you use do what they say they will, without carefully auditing their code yourself.

But it is possible that the philosophical trustlessness of crypto is somehow corrosive to actual trustworthiness. A lot of crypto exchanges turned out *not* to be all that trustworthy. If a stock exchange collapsed and took customer money with it, people would go around saying “where were the regulators” and “we need better rules to prevent that.” When a crypto exchange collapses, some people go around saying those things, but other people go around saying things like “not your keys not your coins” or “if you didn’t know that that exchange was shady then really it’s your fault.” Or when Avi Eisenberg spotted a profitable opportunity to manipulate the Mango Markets token, he did that, because he was philosophically committed to an ethos of code-is-law and trustlessness, though now he’s in jail.

Similarly, if you are used to anonymous, trustless international transactions, and if you think of those transactions as being subject not to any nation’s laws but to “code is law,” and if you are used to transactions settling instantly on the blockchain, might you become ... untrustworthy? Might you agree to a trade, and then renege on the trade when prices move in your favor, and say “well, that’s not a real trade, it wasn’t even on the blockchain”? I don’t know. The Wall Street Journal reports:

Since FTX’s 2022 implosion, hedge funds had scooped up the rights to customers’ frozen accounts for pennies on the dollar, with five firms alone buying claims with a combined face value of about \$2.4 billion. That meant a huge payday was in store.

But collecting these winnings won’t be straightforward. Investors are mired in legal battles with some of the original owners of the claims. They allege those former FTX customers abruptly reneged on trades and are suffering from an age-old affliction: seller’s remorse.

The FTX case has thrust investment firms, some for the first time, into the Wild West of crypto. Compared to typical bankruptcy cases—where investors buy claims from relatively staid corporate creditors—firms this time are instead cutting deals with crypto traders.

“We have sellers from all over the world that are interfacing with buyers and the bankruptcy court for the first time and have never experienced a U.S. Chapter 11 case,” said Andrew Glantz, chief strategy officer of Xclaim, a platform that has facilitated more than \$200 million of FTX claims transactions. ...

Many sellers, including some sophisticated crypto players, are now demanding bigger payouts, according to court documents and people familiar with the matter. Others have tried to back out entirely, or have tried to find other buyers to take their claims.

FTX claims were trading at close to zero cents on the dollar when FTX first went bankrupt, and are now likely to pay back at least 118 cents on the dollar. If you agreed to sell your claim at 30 cents on the dollar, but there was a long delay between the verbal agreement and finalizing the paperwork, then *arguably* you had a free option: If the claim's value fell to 20 cents, you'd close the deal and sell it for the 30 cents you agreed to, but if it rose to 50 cents, you'd find a problem with the paperwork and get out of the deal. And in fact it rose to 118 cents, and a lot of sellers seem to be trying to get out of their deals. Also:

Tom Braziel, a claims broker, sold tens of millions of dollars of FTX claims to big investment firms like Oaktree Capital, Attestor and Silver Point Capital.

He said many of the sellers don't have lawyers and "don't realize that a verbal contract to sell a claim is binding under New York law, where most of these hedge funds are based."

Yes, right. One is tempted to say "if only these trades took place on the blockchain, then there would be no dispute about who owned them: Settlement would be instantaneous, and the claims would be tradeable tokens whose ownership could be proven based on an open, tamper-proof blockchain." But of course people *have* tried to build tokenized platforms for trading crypto bankruptcy claims. Most notably, the guys from Three Arrows Capital, the famously imploded crypto hedge fund, were building one! Surely you trust them, right?

AMC

It's a little surprising that they are still doing this:

AMC Entertainment Holdings Inc. is holding confidential talks with some of its lenders about lowering its debt load and extending near-term maturities, according to people with knowledge of the matter.

The discussions come as AMC, the world's largest movie theater chain, is staring down a debt load of about \$4.5 billion of long-term borrowings. As of March 31, it had more than \$2.8 billion of maturities due in 2026, according to regulatory filings, including a \$1.9 billion term loan and nearly \$1 billion of second-lien notes.

Negotiations are ongoing and no final decision has been made, the people said. A representative with AMC declined to comment, while messages left with Gibson Dunn & Crutcher, which is representing first-lien lenders, were not returned.

I have been writing for *years* about how AMC is constantly using its meme-stock status to do big at-the-market stock offerings at surprisingly high prices and using those offerings to pay down debt. (Or exchanging debt for equity, at those high meme-stock valuations.) And yet there's still so much debt.

The worst-case outcome for a meme stock is Bed Bath & Beyond Inc.: You take a fundamentally nonviable business with a negative net worth, you get a meme-stock lift, and you sell as much stock as you can to meme-stock investors to raise money to hand directly to creditors. At the end of the process, the meme-stock investors get nothing, and the creditors get (1) the company, for whatever that's worth, plus (2) the piles of cash raised from the meme-stock investors. My assumption is that AMC will use its long run as a meme stock to *solve* its financial problems, but the alternative is bad.

VC AI

It would be extremely funny if the first business automated out of existence by artificial intelligence is venture capital, but Business Insider reports:

Silicon Valley has been enraptured by AI for the past two years, with VCs racing to fund all manner of AI startups. Now, AI is changing VC itself, making what was already a hard field to break into for young associates that much more difficult and impacting how early-stage startups are funded. ...

James Currier, general partner at NFX, wrote a much-discussed column last year laying out why he thinks the use of AI will level the playing field for venture investors in the next decade, just as software did for stocks and bonds the last 40 years.

"Let's be honest: Much of what a typical venture capitalist does—reading, summarizing, and ranking—is what large language models already do extremely well," Currier wrote. "We are in the final 10 years of venture capital as we have come to know it. A.I. is going to remake the startup industrial complex, from its core. Venture firms will have to remake themselves into a combination of people and A.I."

A lot of what is happening is that some of the lower-level analysis, targeting and tracking work, which used to be done by junior venture capital associates, can now be done by AI. Instead of a few analysts doing the grunt work for a partner who is out befriending founders and leading investments, now a robot does the grunt work and the partner does the deals and makes more money. Though, counterpoint:

"They're already so small," said a partner at a large firm who asked to not be identified, speaking in a vast conference room in their sleek and mostly empty San Francisco office. "Could you have fewer people? To what end? You're making so much money as it is."

But give it time! What value is the partner adding? Well:

At its heart, venture is not about finding the best deals but winning them. That comes down to a personal connection between founder and investor, [Point72 Ventures' Sri] Chandrasekar said.

"The No. 1 reason a founder chooses you is they want to work with you, specifically," he said. "You spend time building a relationship with them. You have dinner with them. You meet their family — whatever it is you need to do to make them feel like they really want to work with you for what you hope is a 10-year marriage."

But we talked a few years ago about how (1) venture capitalists, to stand out in a competitive field, “have to build parasocial relationships with founders” by being cool on Twitter (now X), because “Twitter is the new social club,” and (2) therefore VCs hire ghostwriters to write cool tweets for them. Surely a large language model could write tweets too. Venture capital is a process of funneling money from big institutions to promising founders with good business ideas, and then helping those founders build their companies. If a robot can find the promising ideas and advise the founders, maybe that process can be automated.

Things happen

Nvidia Sales Grow So Fast That Wall Street Can't Keep Up. Jain Raises \$5.3 Billion in Biggest Hedge Fund Debut Since 2018. Private equity sale of can maker reaps rare windfall from buyout boom. With Pen and Paper in Hand, Car Dealers Improvise as Cyber Outage Persists. Real Estate Bets Gone Wrong Roil \$1.24 Trillion Canadian Funds. Brookfield's Plan to Turn Malls Into Minicities Falls Short. Riot Seeks Three Bitfarms Board Seats in Bitcoin Miner Takeover Fight. 'We're like gears grinding until they break': Chinese tech companies push staff to the limit. How Legos went from humble toy to criminal black market item fueled by L.A. heists. How 'Healing' Crystals Are Painful to Mine. Mortgage company Guaranteed Rate changing its name to Rate. Looking for a man in finance. Wall Street Shoeshiners Embrace Cleaning Sneakers to Survive. Dog Food Is So Fancy Now That I Ate Some.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. I mean, obviously, you take inflation risk.
- 2. Typically buying a call spread: Buy a call struck at the current price of the S&P, and sell a call struck at, say, 115% of that price.
- 3. Is this problem symmetrical? It's possible that the sellers are systematically crypto traders who don't know that verbal contracts are binding, while the buyers are systematically claims traders who are used to this system and always close their deals. But it's also the case that FTX claims went pretty monotonically up, and I suppose it's possible that if they had instead gone down some of the sellers would be suing reluctant buyers now.

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Company Accounting Error Fixes Return to Pre-SPAC Boom Levels

By Avani Kalra

Documents

 [Ideagen report](#)

Bloomberg Law News 2024-06-25T09:24:24394341344-04:00

Company Accounting Error Fixes Return to Pre-SPAC Boom Levels

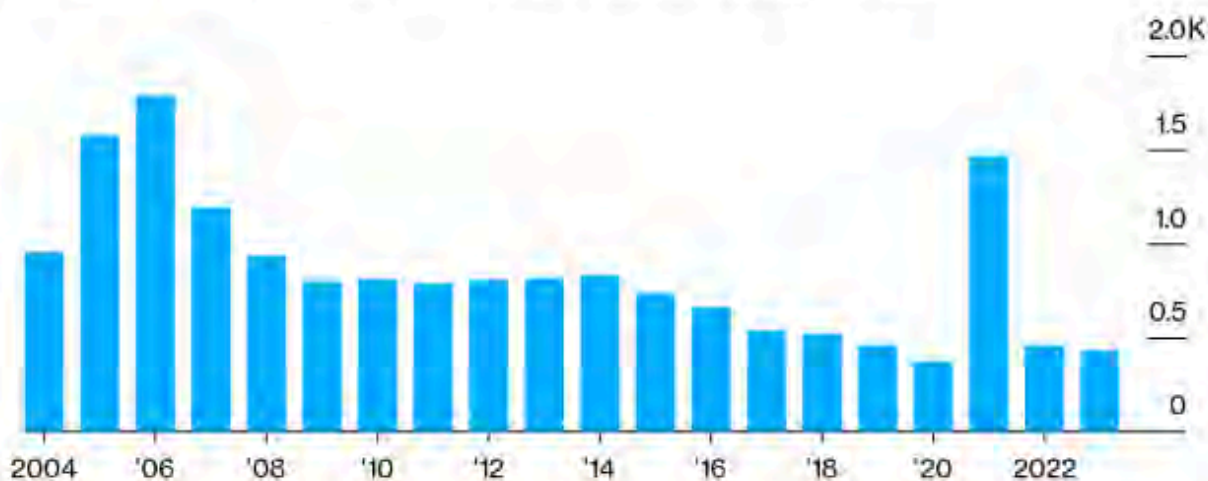
By Avani Kalra 2024-06-24T19:01:14000-04:00

Corporate financial restatements have plateaued at levels close to those seen before 2021, when they rose to a 15-year high driven by a boom in blank-check companies correcting accounting errors, a new report shows.

Companies issued 430 financial statement corrections for accounting mistakes in 2023, according to Ideagen Audit Analytics' latest annual financial restatements report released Monday. That represents a 6% decrease from 458 restatements issued in 2022, but both figures are less than one-third of the nearly 1,470 corrected financial statements recorded in 2021.

Accounting Restatement Numbers Level Off

Numbers return to levels seen before dramatic 2021 increase



Source: Ideagen Audit Analytics, Financial Restatements Report, June 2024

Bloomberg Tax

When companies uncover an accounting error, they must alert investors and formally restate their results to correct the problem. However, companies frequently also rely on informal corrections known as revisions, quietly tucked into routine securities filings, to fix what companies consider to be immaterial errors.

On average, each restatement cites fewer than two accounting issues annually, according to the report, but some companies far exceeded that. Tupperware Brands Corp., for instance, corrected 19 accounting issues in a single restatement last year.

Tupperware's corrected issues included a lack of account reconciliations and improper accounting for expenses, discontinued operations, and more.

The company may be part of a larger pattern of companies revealing multiple problems in a single restatement, the report said. The percentage of restatements flagging just one issue decreased to 54% in 2023 from 70% in 2020, according to Ideagen.

The number of overall restatements has likely fallen since 2021 as a result of a decreasing number of special purpose acquisition companies, or SPACs, the report said. Those companies accounted for more than 75% of 2021 restatements after the Securities and Exchange Commission released guidelines on accounting for warrants and redeemable shares.

SPACs continue to restate at higher rates than traditional companies, according to Ideagen, though the number of SPAC restatements has decreased significantly in the two years since the IPO market boom.

To contact the reporter on this story: Avani Kalra in Washington at akalra@bloombergindustry.com

Delaware law to allow big investors greater sway over US boards

 [reuters.com/markets/us/delaware-law-allow-big-investors-greater-sway-over-us-corporate-boards-2024-06-25](https://www.reuters.com/markets/us/delaware-law-allow-big-investors-greater-sway-over-us-corporate-boards-2024-06-25)

Tom Hals

Item 1 of 2 The seal of the Court of Chancery for the State of Delaware is seen on the Sussex County Court of Chancery in Georgetown, Delaware, U.S., June 9, 2021. REUTERS/Andrew Kelly/File Photo

[1/2]The seal of the Court of Chancery for the State of Delaware is seen on the Sussex County Court of Chancery in Georgetown, Delaware, U.S., June 9, 2021. REUTERS/Andrew Kelly/File Photo [Purchase Licensing Rights](#)  , opens new tab

- Bill allows contracts giving some shareholders more power
- Critics warn of rushed legislation without understanding potential impact
- Court rulings prompted bill to address stockholder agreements

WILMINGTON, Delaware, June 25 (Reuters) - Delaware is poised to adopt changes to its widely used corporate law that critics argue could weaken U.S. boards of directors in favor of influential investors such as private-equity firms.

State lawmakers last week approved a bill that gives a corporation the authority to enter into contracts with one or more shareholders that give the investors power over key board decisions.

The approval followed an unusually contentious debate that included warnings from state judges and academics, who said legislators were rushing ahead without understanding the potential impact.

"This is a radical change in Delaware law," Usha Rodrigues, a law professor from the University of Georgia, one of more than a dozen opponents who spoke at a senate hearing on June 11.

Governor John Carney has said he will sign Senate Bill 313, which addresses three recent rulings by the Delaware Court of Chancery. It will become law Aug. 1.

The court plays a key role in interpreting the state's corporate law. Most U.S. public companies are chartered in the state and related fees provide around one-third of Delaware's general budget revenue.

The bill comes at a difficult moment for the court, which has been criticized repeatedly by Tesla CEO Elon Musk for voiding his compensation and by political conservatives for allegedly emphasizing social issues above investment returns.

The bill enshrines a common practice known as stockholder agreements that a court ruling called into question.

In February, Travis Laster, a Court of Chancery judge, invalidated a stockholder agreement that gave Ken Moelis veto power over nearly every significant decision by the board of Moelis & Co, an investment bank he founded.

"The directors only manage the company to the extent (Ken)Moelis gives them permission to do so," Laster wrote in his 133-page opinion.

Laster said the agreement violated a bedrock principle of Delaware law that directors manage the business using their best judgment for the benefit of all investors.

The ruling can be appealed and the bill excludes pending cases.

Laster's ruling cast doubt on thousands of stockholder agreements struck by venture capital and private-equity investors and touched off a scramble in Delaware to amend the law.

"Investors have invested millions of dollars in corporations and they don't know if the rights they have are valid," Srinivas Raju, a Delaware corporate lawyer who helped draft the bill, told lawmakers.

The agreements are common among private companies and around 20% of corporations that have gone public in recent years have done so subject to a stockholder agreement, Gabriel Rauterberg, a law professor at the University of Michigan, told Reuters.

Critics argue the agreements can be adopted without public shareholder approval or consent.

Supporters said shareholders in public companies are on notice because such agreements are disclosed in securities filings and annual reports.

In addition, similar arrangements can be achieved by including them in a certificate of incorporation or through preferred stock.

The court's chief judge, Chancellor Kathaleen McCormick, who wrote two of the rulings that prompted the bill, and Laster have both spoken against the rush to pass the legislation, in an unusual break with tradition.

In response, William Chandler, a former chancellor on the court and now with the Wilson Sonsini law firm, urged Delaware House members to ignore academics and judges and follow the state bar, which drafted the bill.

"At the moment the corporate market is not feeling too good about Delaware because of the uncertainty and unpredictability of a few decisions by just two judges," Chandler told lawmakers on June 20. "Judges don't need to intrude upon the process of making law."

Get a look at the day ahead in U.S. and global markets with the Morning Bid U.S. newsletter. [Sign up here.](#)

Reporting by Tom Hals in Wilmington, Delaware; Editing by Noeleen Walder and Rod Nickel

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

Tom Hals

Thomson Reuters

Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

- 
- 
- 

BUSINESS | AUTOS

Tesla Recalls Thousands of Cybertrucks Over Trunk, Wiper Issues

Electric-vehicle maker issued two other recalls of truck this year

By [Alyssa Lukpat](#) [Follow](#) and [Don Nico Forbes](#) [Follow](#)

June 25, 2024 1:05 pm ET



The Cybertruck, Tesla's newest electric vehicle, hit the market in November. PHOTO: AGUSTIN MARCARIAN/REUTERS

Tesla TSLA **2.34%** ▲ is recalling its Cybertruck. Again.

The electric carmaker issued two recalls for more than 11,000 of its futuristic-looking trucks over issues with the trunk and the windshield wiper, according to filings with the National Highway Traffic Safety Administration. Tesla had two recalls earlier this year.

Tesla told the NHTSA that a trim attached to the trunk bed of certain 2024 Cybertrucks could fall off, creating a road hazard. The motor for the front windshield wiper could fail and reduce visibility on the road, according to Tesla's report. Tesla said it wasn't aware of any collisions, injuries or deaths related to either issue.

it would replace the wiper motor free of charge and either apply more adhesive to the trunk part or replace it.

The Cybertruck, Tesla's newest electric vehicle, hit the market in November. The unusual-looking vehicle isn't nearly as ubiquitous as other Tesla models but has been driven by some celebrities, including Kim Kardashian and Lady Gaga.

Tesla Chief Executive Elon Musk has said the Cybertruck is unlikely to generate significant cash flow before the end of the year. The vehicle has been plagued by several recalls, with drivers sometimes discovering issues with the Cybertruck in real time.

Tesla didn't immediately return a request for comment.

In April, Tesla delayed Cybertruck deliveries to buyers without saying why. The carmaker later issued a recall for the Cybertruck's accelerator pedal, which can get trapped and cause the vehicle to accelerate, according to the NHTSA. In January, Tesla issued a recall because the font size of warning lights on the instrument panel was too small, according to the NHTSA.

The Cybertruck is currently available for order on Tesla's website for delivery next year. The most expensive version listed is about \$96,000.

Earlier this month, Tesla recalled certain Model 3, Model S, Model X and Model Y vehicles because of seat-belt issues. And in February, the company announced a recall affecting nearly all the electric vehicles sold in the U.S.—about 2.2 million vehicles sold between 2012 and 2024—because the font for some visual warnings was too small.

Separately, Ford Motor **F -1.51% ▼** said it was recalling more than half a million F-150 pickup trucks from the 2014 model year. The transmission can unexpectedly downshift into first gear no matter how fast the cars are moving, possibly making the driver lose control, according to a filing with the NHTSA. Ford will notify affected owners in the mail and dealers will update the car's software free of charge.



Ford is recalling more than half a million F-150 pickup trucks from the 2014 model year. PHOTO: BILL PUGLIANO/GETTY IMAGES

Ford said Tuesday it expected less than 1% of the recalled vehicles to be affected. In some cases when the transmission downshifts, it could recover but in other cases the car would need to be stopped.

The auto industry overall continues to grapple with a cyberattack that has forced thousands of car dealers across the U.S. to radically change how they sell cars. Many have returned to workarounds such as spreadsheets and pen-and-paper to keep track of sales, repairs and orders after an attack on software provider CDK Global hurt the systems used by car dealers.

Write to Alyssa Lukpat at alyssa.lukpat@wsj.com and Don Nico Forbes at don.forbes@wsj.com

Videos



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

Boeing Says Turbulent Securities Suit Should Be Dismissed

By **Sydney Price**

Law360 (June 24, 2024, 6:45 PM EDT) -- Boeing has moved to dismiss a proposed securities fraud suit in Virginia federal court accusing it of misleading investors about the overall safety of its 737 Max jets, saying that the plaintiffs' "kitchen-sink" approach falls short of pleading requirements.

According to the most recent version of the suit filed in May by New York-based retirement fund Local No. 817 IBT Pension Fund and the Employees' Retirement System of Rhode Island, Boeing's nearly two-decade focus on prioritizing profits over safety "led to poor quality control standards in the production of its commercial aircraft such as the 737 Max, resulting in a heightened risk of manufacturing flaws which could render the company's new airplanes unsafe."

Boeing **said in a memorandum** Friday that the majority of challenged statements in the suit are general statements regarding the value Boeing places on safety and quality, which are not specific enough for a reasonable investor to depend on them alone, and therefore inactionable.

The suit was filed weeks after the **Jan. 5 midair blowout** of a midcabin panel and subsequent rapid depressurization aboard Alaska Airlines flight 1282 shortly after it took off from Portland, Oregon, on its way to Ontario, California. The 737 Max 9 jet involved in the incident was delivered to Alaska Airlines in October 2023.

The Federal Aviation Administration temporarily grounded the Max 9 jets, mandated in-depth inspections and **launched a formal investigation** into Boeing.

Boeing's stock price dropped from \$249 on Jan. 5 to \$201.88 on Jan. 25, representing an 18.9% decline, according to the complaint.

The company claimed Friday the investors did not sufficiently explain how risk disclosures in its quarterly filings with the U.S. Securities and Exchange Commission — the earliest of which came more than seven months into the **global grounding** of the Max 9 after an October 2018 crash and a March 2019 crash — were misleading.

"By that time, Boeing had disclosed, and the market clearly understood, that Boeing faced 'operational challenges,'" Boeing said in its memorandum.

The suit takes aim at Boeing, its president and CEO David Calhoun, former president and CEO Dennis Muilenburg, and Chief Financial Officer Brian West. It accuses Boeing's executives of repeatedly making false and misleading statements about the integrity of the design, engineering and certification process for its 737 Max line.

According to the memorandum, the executives said their positions at Boeing do not support a strong inference of scienter and that the investors do not identify the safety reports they allege were acknowledged by senior management.

"Plaintiffs instead ask this court simply to assume that some unidentified information was reported up to Boeing's CEO and CFO in unidentified ways that put those individuals on notice that their public statements were false or misleading," the company said.

It also said the investors' failure to plead loss causation is an independent reason for dismissal. The

suit does not even attempt to show a causal link between the defendants' alleged corrective disclosures and share declines, Boeing said.

"Instead, they merely recite a litany of bad news over a five-month period that coincided with stock-price declines, no matter how small," Boeing added.

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

The Rhode Island fund is represented by Carol C. Villegas, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP, and Steven J. Toll and S. Douglas Bunch of Cohen Milstein Sellers & Toll PLLC.

Local No. 817 IBT Pension Fund is represented by Chad Johnson, Noam Mandel, Jonathan Zweig, Desiree Cummings and Brent E. Mitchell of Robbins Geller Rudman & Dowd LLP, and Craig C. Reilly of The Office of Craig C. Reilly.

Boeing and the individual defendants are represented by Richard C. Pepperman II and Judson O. Littleton of Sullivan & Cromwell LLP, and Benjamin L. Hatch of McGuireWoods LLP.

The case is *In re The Boeing Co. Securities Litigation*, case number 1:24-cv-00151, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Lakshna Mehta.

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



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

Missed Forecasts 'Not Fraud,' Advance Auto Tells Investors

By Hayley Fowler

Law360 (June 24, 2024, 6:01 PM EDT) -- Advance Auto Parts Inc. and its top brass are looking to exit a proposed class action alleging they misled investors about the failure of a new pricing strategy and purposefully inflated the impact of price reductions, saying that missed forecasts and accounting errors "are not fraud."

In a **motion** to dismiss filed Friday in North Carolina federal court, Advance Auto, former CEO Thomas R. Greco, former Chief Financial Officer Jeffrey W. Shepherd and former Controller and Chief Accounting Officer William J. Pellicciotti Jr. argued that the alleged reporting errors that led to a sudden stock drop last year don't rise to the level of securities fraud under federal law.

"The court should dismiss this action because the complaint here, stripped of its mischaracterizations, hyperbole, and unsupported legal conclusions, points solely to missed forecasts and accounting errors and does not come close to satisfying the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995," the motion states.

Investor Miguel Suarez first sued Advance Auto on behalf of a proposed class of shareholders in October alleging the company withheld the negative impacts from its "strategic pricing initiative," which Greco had announced in November 2022 with the aim of boosting margin growth.

According to the complaint, the company told investors at the end of 2022 that the pricing initiative had succeeded. Advance Auto also allegedly downplayed the effects of inflation on sales, creating the false impression that inflation and other economic factors didn't have a real impact on the company's margins.

Suarez said the truth finally emerged on May 3, 2023, during an earnings call where Advance Auto disclosed that its financial results for the first quarter of the year were well under expectations. The company's stock price subsequently plummeted 35% in a single day, he said.

Another investor then filed a second proposed class action against Advance Auto asserting similar allegations in December. U.S. District Judge James C. Dever III consolidated the two cases on Feb. 9 and appointed the City of Southfield General Employees' Retirement System as lead plaintiff, court documents show. The proposed class then filed its consolidated complaint in April.

In seeking an early exit from the suit on Friday, Advance Auto and its former executive team said the shareholders' forecast allegations are barred by the safe harbor provision in the Private Securities Litigation Reform Act, which prevents claims based on forward-looking statements.

They also argued that the consolidated complaint made no attempt at showing Advance Auto and its leadership knew the forecast allegations were incorrect or otherwise had a motivation to mislead investors.

"The only cogent and compelling inference arising from the facts alleged in the complaint is that the company believed the 2023 guidance was appropriate when published, reassessed and adjusted the 2023 guidance over the course of the year, and ultimately was simply incorrect when it initially projected its 2023 performance," Advance Auto said.

According to the motion, the investors' allegations pertaining to accounting errors are "equally

flawed" because there's no evidence to suggest the mistakes had a material impact on Advance Auto's financial disclosures.

Advance Auto said its cost of sales expenses were understated by .482% in 2022 and .572% in the first three quarters of 2023. Its selling, general and administrative expenses were only off by .330% and .067% for the same time periods, and an independent auditor ultimately confirmed the errors weren't material, according to the company.

The investors also again failed to show anyone at Advance Auto knew about the accounting mistakes when they were made, the motion states.

"The complaint, at its core, argues nothing more than 'accounting errors = fraud.' But courts have long recognized that accounting for large public companies is complex and that errors happen," Advance Auto said.

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

The proposed class is represented by Christopher M. Wood, Ashley M. Price and Henry S. Bator of Robbins Geller Rudman & Dowd LLP, Robert N. Hunter Jr. of Higgins Benjamin PLLC and Thomas C. Michaud of VanOverbeke Michaud & Timmony PC.

Advance Auto and the executives are represented by William M. Regan and Allison M. Wuertz of Hogan Lovells US LLP and Clifton L. Brinson of Smith Anderson Blount Dorsett Mitchell & Jernigan LLP.

The case is Suarez v. Advanced Auto Parts Inc. et al., case number 5:23-cv-00563, in the U.S. District Court for the Western District of North Carolina.

--Additional reporting by Donald Morrison. Editing by Patrick Reagan.



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

Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (June 24, 2024, 4:24 PM EDT) -- Amendments to Delaware's General Corporation Law topped the news out of the Court of Chancery again last week, as the hotly contested measure sailed through the state's legislature. Tesla and its shareholders continued their tug-of-war over attorney fees for Chancery litigation about Elon Musk's pay package, and new cases were filed involving biotechs, car rental companies, workout platforms, telecom towers, and a cargo ship fire in Brazil.

In case you missed it, here's all the latest from Delaware Court of Chancery,

Top News

Delaware's legislature passed amendments to the General Corporation Law, after a divided House committee **sent the measure** to a full House vote.

The bill, S.B. 313, attracted interest in legal communities and among law schools across the country. It went to its last hearing on a busy legislative day, with House Democratic leaders limiting each side to one witness each.

The measure, in addition to carving out protection for stockholder agreements, would also allow court approval of provisions in less-than-final form and allow penalties for failures to consummate a merger agreement, among other changes.

Critics of the measure called its changes "problematic" and demanded more debate. Former Delaware Chancellor William B. Chandler III, who spoke in favor of the bill, **criticized** without naming Chancellor Kathaleen St. J. McCormick and Vice Chancellor J. Travis Laster for publicly challenging the proposal, saying that "judges need to stay in their own lane."

The House **approved the measure** 34-7 late Thursday evening after more than an hour of testimony.

A spokesperson for Gov. John Carney told Law360 on Friday that the measure is expected to be signed into law "soon."

Decisions

Delaware Vice Chancellor Nathan A. Cook on Friday **dismissed a suit** from former Anaplan Inc. stockholders that claimed company officers "squandered" roughly \$400 million in value for stockholders in the company's \$10.4 billion sale to private equity firm Thoma Bravo.

New Cases

Pittsburgh global paint supplier PPG Industries Inc. **accused** chemical supplier Westlake Corp. of breaching a 2012 agreement to accept liabilities related to a cargo ship fire that happened off the coast of Brazil in 1998.

Two investment affiliates of Discovery Capital Management LP **sued** Hertz Global Holdings Inc., alleging willful failure to redeem warrants issued in 2021 as part of the company's Chapter 11 and demanding at least \$187 million plus interest.

A Mexico City resident who invested in a Delaware limited partnership that builds and operates

telecommunications towers in Brazil **sued the partnership** for injunctive relief, seeking to ensure that any litigation takes place in the First State and not Brazil. Sebastián Miralles Acuña claims he was **threatened with a defamation lawsuit** after expressing concerns about purported accounting violations involving Brazil Tower Co. LP and its related entities.

A shareholder **alleged** that the board of clinical-stage biotechnology firm Omega Therapeutics entered into an "unfair" agreement with controlling private equity stockholder Flagship Pioneering Inc. that was heavily tilted in favor of the majority holder and other Omega insiders.

The ex-CEO of Navidea Biopharmaceuticals Inc., who was ordered in 2021 to pay a dollar for breaching his fiduciary duties to the biopharma's subsidiary Macrophage Therapeutics Inc., **sued** for attorney fees and court costs.

A stockholder of a special acquisition company that merged with health and wellness company The Beachbody Company Group **sued** the blank check company's directors, officers and controlling stockholders, alleging breaches of fiduciary duty in connection with the deal.

Several funds affiliated with hedge fund Starboard Value sued Autodesk Inc. and its board of directors on June 17, alleging they misled stockholders about problematic customer billing and cash collection practices until after the window for director nominations had closed, thus avoiding a proxy contest and entrenching the current board leadership. The case was assigned to Vice Chancellor Paul A. Fioravanti Jr., who denied a motion to expedite the suit on June 20. The case is Starboard Value LP et al. v. Autodesk Inc., case number 2024-0659.

Still Under Seal

A stockholder of Archer Aviation Inc. filed a proposed stockholder class action on June 19 against Atlas Crest Investment LLC, Moelis & Co., and multiple Atlas Crest officers and board members for breaches of fiduciary duties arising from Atlas Crest's September 2021 merger with Archer Aviation Inc. The case was assigned to Vice Chancellor Lori W. Will. The case is Wortman v. Atlas Crest Investment LLC et al., case number 2024-0665.

Ongoing disputes

Tesla **asked** Chancellor McCormick to consider rescheduling a July 8 hearing on a proposed multibillion-dollar fee for class attorneys who won a Chancery Court challenge to Elon Musk's \$46 billion equity pay package after shareholders voted to revive the stock-based pay proposal and move the company's corporate home to Texas.

Attorneys for the Tesla stockholders who challenged the deal **argued** that the vote hadn't affected the claims and issues in the case, so the hearing should proceed as scheduled.

Quotable

"To some extent, there's a war between the bench and the corporate bar, and it's got to stop because the Delaware franchise really is at stake." — Lawrence A. Hamermesh, professor emeritus and the former Ruby R. Vale professor of corporate and business law at Widener University Delaware Law School, in **response to proposed amendments** to Delaware's corporate law in S.B. 313.

--Additional reporting by Jeff Montgomery. Editing by Adam LoBelia.



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

Toyota Accused Of Misleading Investors Over Emission Tests

By **Lauren Berg**

Law360 (June 24, 2024, 8:14 PM EDT) -- Toyota and its top brass misled investors by understating in U.S. Securities and Exchange Commission filings its role in falsifying emissions and fuel-economy data, which led to a drop in stock price when the truth came out, according to a proposed class action filed Monday in California federal court.

Toyota's 2022 annual report noted that its truck and bus subsidiary, Hino Motors Ltd., had found past misconduct related to emissions and fuel economy performance and certification in North American and Japanese markets, but that statement was misleading because it gave the impression the "malfeasance ... was isolated to past misconduct at Hino," according to the **complaint** filed by Islam Abeed.

Then in its 2023 annual report, Toyota again noted Hino's misconduct, as well as subsidiary Daihatsu Motor Co. Ltd.'s misconduct related to safety tests, but that statement was also misleading because it omitted that Toyota itself had "improperly submitted data as part of the Japanese government's certification process" in addition to the two subsidiaries, the suit states.

These and other statements "were materially false and/or misleading because they misrepresented and failed to disclose the following adverse facts pertaining to the company's business, operations and prospects, which were known to defendants or recklessly disregarded by them," Abeed said, adding that "Toyota understated its malfeasance relating to certification of its cars and issues relating to overall legal compliance."

Earlier this month, Toyota filed a Form 6-K with the SEC, which attached an announcement the company had filed on June 3 with the Tokyo Stock Exchange, revealing that seven vehicle models were safety tested using methods that differed from the Japanese government standards, the suit states.

Although it said there are no performance issues that run afoul of laws and regulations, Toyota decided to temporarily halt sales of three models produced in Japan: Corolla Fielder, Corolla Axio and Yaris Cross, according to the complaint.

That same day, national media outlets published articles reporting that Toyota had mishandled vehicle testing over the past 10 years, including using outdated data in collision tests and incorrectly testing airbag inflation in crashes, the complaint states.

When the news broke, the price of Toyota American Depositary Shares fell by \$5.34 per ADS, or 2.45%, to close at \$212.17 per ADS on June 3, according to the suit.

"As a result of defendants' wrongful acts and omissions, and the precipitous decline in the market value of the company's common shares, plaintiff and other class members have suffered significant losses and damages," Abeed said.

Abeed wants to represent a class of potentially thousands of fellow investors who acquired Toyota's stock between June 23, 2022, and June 2, 2024, and who were damaged, according to the complaint.

The suit — which also targets Toyota's CEO Koji Sato, Chief Financial Officer Yoichi Miyazaki, board

chair Akio Toyoda and former board member Kenta Kon — claims violations of the Securities Exchange Act. It seeks damages, litigation costs and attorney fees, among other relief.

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

Back in August 2022, a proposed class of truck buyers sued Hino Motors, alleging it manipulated emissions and fuel-economy test results for vehicles sold in the U.S. after the company in March 2022 admitted to falsifying emissions and fuel-economy data for thousands of trucks equipped with its medium- and heavy-duty engines.

Hino Motors moved to dismiss the case, arguing that none of the plaintiffs alleged it purchased a truck equipped with one of the Japanese-market engines at issue, nor did they show their theories of misconduct affected vehicles sold in the U.S.

But the buyers **hit back**, arguing that the Florida federal court has jurisdiction over Tokyo-based Hino Motors because the company conducted business in the state and defrauded customers in Florida through American subsidiaries, such as Hino Motors Sales USA Inc., that it controls.

In October, the parties filed a motion for preliminary approval of a \$237.5 million settlement, which was approved a few days later, according to court records. In April, the court entered an order of dismissal and judgment granting final approval of the deal.

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

Counsel information for the defendants was not immediately available.

The case is Islam Abeed v. Toyota Motor Corp. et al., case number 2:24-cv-05284, in the U.S. District Court for the Central District of California.

--Additional reporting by Linda Chiem. Editing by Vaqas Asghar.



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

Anaplan Beats Chancery Suit Over \$10.4B Thoma Bravo Deal

By **Katryna Perera**

Law360 (June 24, 2024, 6:56 PM EDT) -- A Delaware vice chancellor has tossed a consolidated suit alleging that former officers of Anaplan Inc. "squandered" roughly \$400 million in shareholder value when agreeing to the company's \$10.4 billion sale to private equity firm Thoma Bravo, saying the suit fails because the stockholders approved the transaction through an informed and uncoerced vote.

Delaware Vice Chancellor Nathan A. Cook issued an **opinion** Friday saying that even though the suit presents several novel issues and arguments, it cannot move forward because all the Anaplan stockholders' theories and claims are immediately undermined by the fact that they, "via an informed and uncoerced vote, overwhelmingly approved the renegotiated transaction."

Lead plaintiff Pentwater Capital Management LP **sued** the former top brass of the software-as-a-service venture in 2022, asserting breach of fiduciary claims in connection with the merger. The suit alleged that they "either were recklessly indifferent to or deliberately ignored" restrictions under an initial merger agreement "and issued significant equity awards well above the cap to both current employees and new hires."

"Defendants' actions forced the company to renegotiate the transaction price downwards, lowering the ultimate payment to stockholders to the tune of about \$400 million," the suit said.

The initial merger agreement would have sold Anaplan to Thoma Bravo for \$66 per share, a transaction valued at \$10.7 billion. However, following the officers' alleged misconduct, the share price was **negotiated down** to \$63.75 per share.

According to Friday's opinion, the shareholders argued that although they approved the merger, they lacked material information when they voted. Vice Chancellor Cook disagreed with this claim, pointing to the disclosures in the merger's supplemental proxy statement.

"Immediately up front in the supplemental proxy, the board set forth its position, which was readily understandable to any stockholder reading it — that the board believed the company and its directors and officers had acted in good faith and in compliance with the original merger agreement, but that a bona fide dispute had arisen with Thoma Bravo on that issue," the opinion states.

"Stockholders would further understand that, rather than continue to dispute the issue and risk losing the deal, the board made the business judgment that it was in the best interests of Anaplan and its stockholders to agree to a price reduction in return for securing the still premium transaction and enhanced closing certainty," the opinion further states.

The Anaplan shareholders had all the material information they needed to make an informed vote, the vice chancellor said Friday, including the most critical piece about the sale price.

According to the opinion, the shareholders also claimed the vote was coerced because they had a "metaphorical gun to their head" when asked to approve the revised merger agreement.

But Vice Chancellor Cook said the shareholders do not offer any support to their claim that they were stuck between a rock and a hard place, nor do they allege any self-dealing or other "extraneous factors" that might suggest coercion.

"Anaplan stockholders had a choice to accept the revised merger or to vote it down and thereby retain their shares in the standalone company. Plaintiff does not allege the company, or its shares, would be worthless or even materially impaired in terms of their intrinsic value," the opinion states. "Anaplan stockholders had the opportunity to retain an interest in a multibillion-dollar company with significant revenue. The difference between good, better, and best here is not grounds for situational coercion."

Finally, the vice chancellor rejected the shareholder's claim that they were forced to "give up value in exchange for nothing" due to the defendants' alleged misconduct.

Vice Chancellor Cook said the shareholders did not get "nothing." In fact, they received \$10.4 billion in cash from the merger and several concessions from Thoma Bravo, including nearly doubling Thoma Bravo's reverse termination fee.

"This is not 'so one sided' that a reasonable person could not conclude that Anaplan received adequate consideration," the vice chancellor said. "Plaintiff fails to state a waste claim because closing certainty, significant premium price, and swiftness coupled with an increased termination fee is not 'literally nothing.'"

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

The shareholders are represented by Gregory V. Varallo, Andrew E. Blumberg and Daniel E. Meyer of Bernstein Litowitz Berger & Grossman LLP, Ned Weinberger, Mark Richardson and John Vielandi of Labaton Keller Sucharow and Aaron T. Morris, Leonid Kandinov and Andrew W. Robertson of Morris Kandinov LLP.

The defendants are represented by Edward B. Micheletti, Sarah R. Martin and Lauren M. Griffith of Skadden Arps Slate Meagher & Flom LLP.

The case is In re: Anaplan Inc. Stockholders Litigation, case number 2022-1073, in the Court of Chancery of the State of Delaware.

--Additional reporting by Rose Krebs. Editing by Jay Jackson Jr.



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

Judge Mulls BioXcel's Duty To Tell Investors Of FDA Troubles

By **Brian Steele**

Law360 (June 24, 2024, 9:39 PM EDT) -- A Connecticut federal judge wondered Monday if executives at the artificial intelligence-driven drugmaker BioXcel Therapeutics Inc. had an opportunity to correct problems that government regulators identified with a key clinical trial and, if so, whether their statements on the subject to investors could be considered false or misleading.

At oral arguments in Hartford, the company and several of its leaders asked U.S. District Judge Sarala V. Nagala to throw out a proposed shareholder class action that accuses them of withholding information about a regulatory action taken by the U.S. Food and Drug Administration in December 2022, which targeted the third-party company tasked with carrying out a clinical trial of its drug known as BXCL501. The FDA issued a notice called a Form 483, identifying areas of concern about how the trial was being conducted, and Judge Nagala tried to nail down whether the issues could be considered "correctable" before investors needed to be told.

"For all I can infer, the defendants during that period of time fixed things," the judge said, pointing to a lack of specificity in the complaint.

The fact that the FDA's investigation was still happening six months later, when BioXcel revealed the Form 483's existence to the market, shows that the deficiencies were not corrected, said Alexandra E. Forgione of Grant & Eisenhofer PA, counsel for the plaintiffs. Even if the FDA were satisfied with BioXcel's response, the defendants still deliberately concealed information from investors to shield the stock price, give themselves time to sell off large numbers of shares, and try to unlock new financing, she argued.

The FDA made "serious, egregious" claims that undermined the trial's integrity, Forgione said.

Before the market opened on June 29, 2023, New Haven-based BioXcel publicly acknowledged that the FDA was investigating the clinical trial for BXCL501, a formulation of a drug called dexmedetomidine that is used to sedate people experiencing psychiatric and neurological disorders, and the agency issued the Form 483 in December 2022 after conducting a 16-day site inspection of clinical researcher Segal Trials, according to the complaint.

The Form 483 identified several problems with the trial. Out of 37 patients, 25 "did not have sufficient documentation showing they met all inclusion criteria," and three of them possibly met the criteria for being excluded, the complaint said. On top of that, at least one serious adverse event was not reported in a timely manner, some participants did not sign a proper consent form, and the trial "was not being conducted in accordance with the approved protocol in certain instances," it said.

The trial was meant to explore the possibility of using the drug to treat agitation in Alzheimer's and other dementia patients. BioXcel "examines drugs that are, or have previously been in, Phase II or Phase III clinical trials and uses AI to find new uses for them," the complaint said.

Colleen C. Smith of Latham & Watkins LLP, counsel for the defendants, told Judge Nagala that the Form 483 made it clear that the issues relating to the inclusion and exclusion of participants were "a documentation issue," and there was "no indication" that the problems identified by the FDA could not be fixed.

"It is a correctable problem, and I don't think there are any allegations that it was not a correctable

problem," she said. "It could be that they can't correct it, but we don't have those facts" in the case record.

Smith also noted that the complaint does not claim that BioXcel never handed over the proper documents to the FDA. She pointed to a third-party investigation by outside counsel and an audit of the trial, which found no problems with the integrity of the data, as evidence that the company took proper actions at the right time, and said the company disclosed those expenses.

The suit's individual defendants are BioXcel cofounder and CEO Vimal Mehta, Chief Financial Officer Richard Steinhart, and Chief Medical Officer Robert Risinger.

The lead plaintiffs in the amended complaint — Florida-based investor Tonya Hills and the Oklahoma Law Enforcement Retirement System, known as OLERS — claimed that trading prices for the company's shares fell by nearly 64% after the revelation, but company "insiders engaged in significant highly unusual and suspiciously timed insider trading during the class period, reaping millions of dollars in personal gains." They also said that "critical" private investor funds were tied to BioXcel's success in the trial.

"BioXcel's continued existence was heavily dependent on its ability to gain FDA approval to prescribe BXCL501 to Alzheimer's and dementia patients," the complaint said.

The investors say the company lacked control over its adherence to its protocols and the situation threatened BioXcel's ability to gain regulatory approval for the drug. Investor Katelyn Martin filed the original complaint.

The class period began on Dec. 7, 2022, when Mehta told investors that the trial was "progressing well," and ended Aug. 11, 2023, when share prices closed at \$7.40, the operative complaint said. Right before the public disclosure, the price was \$17.67, according to the plaintiffs.

On Aug. 14, 2023, the company announced that management had "substantial doubt about the company's ability to continue as a going concern for a period of at least 12 months," further driving down share prices, the suit said.

Hills claimed she lost \$541,000, and OLERS said it lost \$158,000.

Smith said that even though the plaintiffs view the trades as suspicious based on their proximity to the FDA inspection and the eventual disclosure, they were made according to self-executing plans that were crafted months before the events at issue.

In their Feb. 6 memo arguing for dismissal, the defendants said that they did not have an affirmative duty to disclose the Form 483 earlier than they did.

"BioXcel did not say it hadn't received such a notice, nor did it promise full compliance with all clinical practice requirements at any point in time," it said.

The defendants said that the complaint fails to "plead facts establishing a cognizable motive to commit fraud" and that the plaintiffs did not identify any false statements.

On Monday, the parties disagreed about whether statements about the drug trial, such as the notion that it was "progressing well" and "on track" and had "full enrollment," were actionable or examples of truthful forward-looking statements, puffery, or sincere opinions and beliefs, and whether they included proper cautionary language. Forgione said that if the defendants were going to discuss the trial at all, they were obligated to avoid half-truths and disclose everything that would be material to investors, but Smith argued that the law does not set such a "sweeping" standard.

"While defendants claim they believed the problems identified by the FDA could be remedied, that is no excuse for their failure to disclose them," the plaintiffs said in their March 5 memo opposing dismissal.

The investors are represented by Shannon Hopkins, Devyn R. Glass and Adam M. Apton of Levi & Korsinsky LLP, and Daniel L. Berger, Alexandra E. Forgione and Caitlin M. Moyna of Grant & Eisenhofer

PA.

The BioXcel defendants are represented by Colleen C. Smith, Jessica Bengels, Michele D. Johnson, Sarah Tomkowiak and Meryn C.N. Grant of Latham & Watkins LLP.

The case is Martin v. BioXcel Therapeutics Inc. et al., case number 3:23-cv-00915, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Sydney Price. Editing by Adam LoBelia.

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



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

Tesla Class Attys In Del. Blast Musk's Texas Pay-Salvage Plan

By **Jeff Montgomery**

Law360 (June 24, 2024, 9:43 PM EDT) -- Tesla stockholder attorneys who won a Delaware Court of Chancery order voiding Elon Musk's then-\$56 billion compensation package in January have asked the court to reject company claims that recent stockholder approval of the same Musk pay plan after Tesla's reincorporation in Texas "has controlling and preclusive effect."

In a motion filed with the court on Friday, class attorneys urged the court to keep a scheduled July 8 hearing on a proposed stock-based fee award worth some \$5 billion, scheduled after Chancellor Kathaleen St. J. McCormick ruled against Musk's pay on Jan. 30.

Under the class proposal, both sides also could brief the court on their positions regarding the effect of the ratification vote in Texas ahead of the July 8 fee hearing.

"For several independent reasons, Tesla's 'ratification' gambit has no effect on this action, including the court's already-entered judgment rescinding the grant and plaintiff's pending fee petition," attorneys for the stockholders said in their brief.

In a separate brief last week, Tesla's attorneys argued that the Texas ratification vote on June 13 has "controlling and preclusive effect, and must be given effect by this court."

Attorneys for the company told the chancellor that "judgment should not be entered in favor of plaintiff to undo, on behalf of Tesla, that which its stockholders have now reapproved. And plaintiff's counsel's request for an award of attorneys' fees is directly impacted by the now-ratified 2018 compensation plan."

Earlier last week, class attorneys argued that "there is no such thing as statutory ratification of a fiduciary breach" and that "ratification under common law cannot be raised after judgment."

In the Texas vote, Tesla stockholders ratified Musk's stock-based pay proposal, estimated at around \$46 billion based on the company's current stock price with 72% of the vote. The "redomestication" of the company's charter in Texas received 84% of the vote, the letter said.

Musk's compensation went to a weeklong trial in Delaware in November 2022 after it was challenged by stockholders opposing the 10-year compensation scheme. It included multiple performance milestones, all of which Tesla argued that Musk has met.

Chancellor McCormick found that the approval was marred by disclosure failures, a conflicted board, vague terms and unfair interference by Musk himself. Soon after the chancellor's decision, Musk responded with a post on his social platform X that said, "Never incorporate your company in the state of Delaware."

On Friday, attorneys for the class in Delaware said Musk "and the beholden Tesla board have denigrated, attacked, and actively sought to circumvent this court and its opinion" from the outset. Class attorneys branded Musk's moves "unceremonious machinations" advanced by Tesla's leader and the company's seven law firms.

Attorneys for Tesla argued against holding a hearing on the fee proposal without the court first considering the Texas ratification in a brief filed on Thursday.

"The voting stockholders that supported ratification included some of the most sophisticated institutional investors in the world, including BlackRock and Vanguard," the company's brief said.

Tesla pointed out that Vanguard — which owns 7% of Tesla shares and voted against the plan in 2018 — told investors in a memorandum recently memorandum that the company had eliminated Vanguard's concerns about the pay deal.

Total shareholder return was in the 98th percentile of all Russell 3000 companies from 2018 through 2023, Vanguard observed, "and there are few companies that have created as much absolute market value appreciation as Tesla."

Among other points raised by class attorneys was the benefit stockholders would realize from the court's voiding of the stock award, restoring 303,960,630 shares worth some \$56 billion at midday on Monday.

A dip in share prices in mid-April slashed the snapshot value of the same share package to about \$43 billion at one point, although the company's shares have rebounded since.

Tesla and counsel for the stockholders did not immediately respond to a request for comment.

Tesla Inc. is represented by Rudolf Koch, John D. Hendershot, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA, William M. Lafferty, Susan W. Waesco, Ryan D. Stottmann, Miranda N. Gilbert and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP, John L. Reed, Ronald N. Brown, Caleb G. Johnson and Daniel P. Klusman of DLA Piper, Catherine A. Gaul and Randall J. Teti of Ashby & Geddes PA and Brian T. Frawley, Matthew A. Schwartz and Matthew L. Strand of Sullivan & Cromwell LLP.

Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss and Ira Ehrenpreis are represented by David E. Ross, Garrett B. Moritz and Thomas Mandracchia of Ross Aronstam & Moritz LLP and Evan R. Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP.

Tornetta is represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtzel of Friedman Oster & Tejtzel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

The case is Richard J. Tornetta et al. v. Elon Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

The case is Richard J. Tornetta et al. v. Elon Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Additional reporting by Lauren Berg and Hailey Konnath. Editing by Peter Rozovsky.



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

McDermott Investors See Partial Cert. In \$6B CB&I Deal Suit

By **Emilie Ruscoe**

Law360 (June 24, 2024, 5:56 PM EDT) -- Investors in energy industry engineering company McDermott International Inc. saw part of their proposed investor class certified as a lead plaintiff is sought for a second subclass in litigation over the company's \$6 billion acquisition of Chicago Bridge & Iron Company NV.

In a Friday order in Texas federal court, U.S. District Judge George C. Hanks Jr. said that institutional investor the Nova Scotia Health Employees' Pension Plan would serve as lead plaintiff for a certified class of investors who converted shares of CB&I into McDermott stock as part of the merger.

Judge Hanks also said that five investors who had sought lead plaintiff appointment earlier in the suit, as well as some of the movants from a separate suit making similar claims, could seek to represent a subclass of investors who purchased McDermott share during the relevant time period.

Judge Hanks' Friday order adopts recommendations made in April by U.S. Magistrate Judge Andrew M. Edison. The April recommendations represent a reversal for the magistrate judge, who earlier said that the Nova Scotia pension fund should have to revise its class certification bid to include the two subclasses.

The suit concerns McDermott's all-stock deal to acquire CB&I, which the companies announced in 2017 and closed in May 2018.

When the deal was announced, the companies said that post-closing McDermott's shareholders would own a little over half of the combined company, and CB&I shareholders could have a little under 2.5 shares of McDermott stock in exchange for each of their CB&I shares.

The investors claim that as the companies sought to seal the deal, McDermott failed to let shareholders know that it would likely see costs for four "large, challenging CB&I projects" swell to "well over \$1 billion."

The costs associated with those projects posed a credible threat to the "strength and viability of McDermott's postmerger capital structure, balance sheet, liquidity, and financial health," the investors claim.

On Monday, counsel for the investors declined to comment and representatives for McDermott did not immediately respond to requests for comment.

The Nova Scotia Health Employees' Pension Plan is represented by Matthew L. Tuccillo, Jeremy A. Lieberman, Jennifer Banner Sobers and Zachary Denver of Pomerantz LLP, and Willie Charles Briscoe of the Briscoe Law Firm PLLC.

McDermott is represented by David D. Sterling, Amy Pharr Hefley, J. Mark Little, Anthony J. Lucisano and Elizabeth Furlow Malpass of Baker Botts LLP.

The case is *Edwards v. McDermott International Inc. et al.*, case number 4:18-cv-04330, in the U.S. District Court for the Southern District of Texas.

—Additional reporting by Bonnie Eslinger and Craig Clough. Editing by Amy French.



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

Apple, Amazon Assail Hagens Berman's Class Rep 'Charade'

By **Bryan Koenig**

Law360 (June 24, 2024, 7:25 PM EDT) -- Apple and Amazon.com blasted Hagens Berman Sobol Shapiro LLP for trying to "have it both ways" in an antitrust suit over a pact between the companies restricting Amazon iPhone and iPad sales to approved vendors, arguing the firm cannot withdraw its original named plaintiff without forcing him to testify.

The Washington **federal court filing Friday** is the latest fight over what role, if any, there is still to play for original named plaintiff Steven Floyd after he went dark on his Hagens Berman counsel earlier this year.

While the judge permitted Hagens Berman **in early May** to introduce new named consumer plaintiffs, Apple Inc. and Amazon.com Inc. still want to depose Floyd. The companies argued Friday that the plaintiff firm's conduct "raises significant questions" because Hagens Berman told the court that Floyd had no plans to withdraw, only to tell Law360 on the day they filed the second amended complaint "that Floyd 'no longer wished to serve' as class representative, despite having had no contact with Floyd since January 16, 2024."

"Plaintiffs' counsel gloss over their failure to obtain informed consent, stating that they 'advised' Floyd that he will be withdrawn and that he has not 'stated' any opposition ... But this [is] not meaningful advice or consent; rather, Floyd has simply not 'responded to counsel's messages,' and there is no evidence he ever saw them," the tech giants said.

"Furthermore, while plaintiffs' counsel have made representations about their efforts to contact Floyd, there remain inconsistencies within the representations plaintiffs' counsel have made to defendants and the court. For example, in their motion to amend, counsel speculated — without any support — that Floyd was incapacitated or unwell," they continued. "As defendants responded without contravention, Floyd's public Facebook postings confirmed he was in fact fine."

Amazon declined comment. Representatives for the consumers and Apple did not immediately respond Monday to press inquiries.

In permitting amendment, and the addition of named buyers Jolene Furdek and Jonathan Ryan to the antitrust suit, U.S. District Judge Kymberly K. Evanson rejected Amazon and Apple's objections as efforts to "prematurely" challenge the adequacy of class representation before class certification is on the table.

Amazon and Apple had argued that amendment shouldn't be permitted because a check of Floyd's email address showed he purchased contested products outside Amazon.com, ostensibly making the consumer unqualified to represent the class. Hagens Berman responded by saying such a rejection **would be "unprecedented."**

Under the pact targeted by the suit, Amazon allegedly permits only Apple-approved third-party vendors to sell iPhones and iPads in the online marketplace, which allows Amazon to receive a steady supply of discounted Apple products to sell. Floyd filed the proposed class action in November 2022, claiming he purchased an iPad on Amazon in 2021 at an inflated price because the companies' 2018 deal eliminated many Apple product resellers from the e-commerce platform.

The two companies have claimed in court filings that their "Global Tenets Agreement" is meant to

protect consumers from falling prey to counterfeit electronics sellers and not an attempt to stifle competition.

After Floyd stopped responding to his attorneys at Hagens Berman, the firm asked the court in a Feb. 29 motion for approval to add two class representatives who wished to bring the same Sherman Act claims based on the same set of facts.

Amazon and Apple pushed back against the request in a March 21 brief, underscoring concerns that the companies had already raised about the suit's narrow definition of the affected market: smartphone and tablet sales in online marketplaces.

Based on Floyd's email address alone, the tech giants said, Apple's records allegedly show he has bought over a dozen smartphones from AT&T, Verizon and other carriers — all reasonable "economic substitutes" to the market defined in the suit — including a new iPhone 14 Pro Max registered through T-Mobile in May 2023, thus undermining the antitrust allegations as a whole.

Judge Evanson in May rejected those arguments as premature. But that hasn't stopped the fight over Floyd's continued role in the litigation, with Hagens Berman seeking to withdraw him entirely and the defendants contending, including on Friday, that Floyd cannot now be cut loose without first being deposed and forced to hand over other discovery material.

"Plaintiffs do not dispute that a current party (like Floyd) must participate in discovery. Rather, plaintiffs seek to avoid Floyd's participation in discovery by claiming that he should be withdrawn. This conflicts with their prior position, which sought to keep Floyd in the case as a vehicle for amendment. They cannot have it both ways," the companies said, in a filing serving both as a reply brief continuing to push to compel Floyd's deposition, as well as an opposition brief fighting the manner by which Hagens Berman wants to withdraw the named plaintiff.

The companies continued to argue that Floyd's purchase history is crucial because it's endemic to the nature of a market where they say consumers aren't "locked in" to buying from Amazon, as the complaint contends, but can in fact buy from cell carriers and other sources, diluting any market power that may be exercised through the pact. They also argued that Floyd is important to their statute of limitations defenses because he can attest to when he learned about the October 2018 deal at the heart of the November 2022 complaint, just outside the four-year window under U.S. antitrust law.

In their brief, Amazon and Apple said they don't oppose Floyd's withdrawal. But that withdrawal, they said, should be conditioned on Floyd responding to their discovery demands, arguing that Hagens Berman's moves without Floyd's consent represent a "charade [that] raises serious questions about Floyd's participation throughout this litigation."

"At a minimum, Apple is entitled to ask Floyd directly, and under oath, whether he has authorized any of the filings in this litigation made in his name," the companies said.

Nor can Hagens Berman avoid the deposition by simply contending Floyd would ignore any court order, according to the filing.

"The court should give no weight to plaintiffs' counsel's circular speculation that Floyd would not fulfill his discovery obligations in the face of a court order compelling him to do so. Critically, plaintiffs' counsel can only speculate as to the effect of a judicial order on Floyd's responsiveness because they have no reason for Floyd's lack of contact," the companies said. "Despite what the plaintiffs' counsel have argued, there is good reason to expect that a judicial order compelling discovery from Floyd will carry more weight than outreach from his own counsel."

The consumers are represented by Steve W. Berman, Barbara A. Mahoney, Ben M. Harrington and Benjamin J. Siegel of Hagens Berman Sobol Shapiro LLP.

Amazon is represented by John Goldmark and MaryAnn Almeida of Davis Wright Tremaine LLP and Jonathan E. Nuechterlein and Benjamin M. Mundel of Sidley Austin LLP.

Apple is represented by Mark S. Parris of Orrick Herrington & Sutcliffe LLP and Brian G. Liegel, Eric S.

Hochstadt and Mark A. Perry of Weil Gotshal & Manges LLP.

The case is Floyd et al. v. Amazon.com Inc. et al., number 2:22-cv-01599, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Nadia Dreid. Editing by Michael Watanabe.

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



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

Truth Social Dispute Heads Toward Chancery Trial In July

By **Leslie A. Pappas**

Law360 (June 24, 2024, 6:02 PM EDT) -- The sponsor of Digital World Acquisition Corp., the blank check company that took Donald Trump's Truth Social public in March, is heading to a one-day trial on July 29 in its investment dispute with the company and its directors, according to a scheduling order filed Monday.

ARC Global Investments II LLC, sponsor of Digital World Acquisition Corp., which merged with Truth Social owner Trump Media & Technology Group Corp. on March 25, **alleged ahead of the merger** that the special purpose acquisition company was planning to dilute ARC's equity in the post-closing company by using an improper conversion ratio when converting ARC's B shares.

The 20-page complaint filed in Delaware Chancery Court on Feb. 29 targeted Digital World and its directors, Eric S. Swider, Frank J. Andrews, Edward J. Preble, and Jeffrey A. Smith, alleging breaches of the company's charter and fiduciary duty.

In an amended complaint filed in June after the merger closed, ARC asserted that Digital World, which it refers to as DWAC, used a conversion ratio of 1.348 to 1, when it should have been approximately 1.81 to 1.

"DWAC's decision to issue ARC too few shares is in direct contravention of the charter, unjustly dilutes ARC's equity stake in the post-closing public company, and constitutes a breach of the charter," the amended complaint says.

Prior to the business combination, ARC held 5,490,000 shares of Class B Common Stock, according to the amended complaint.

The case is ARC Global Investments II v. Digital World Acquisition Corp., et al., case number 2024-0186, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.

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



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

UFC Fighters Swing Again To Get OK On \$335M Wage Deal

By **Bonnie Eslinger**

Law360 (June 24, 2024, 9:55 PM EDT) -- UFC fighters seeking preliminary approval for their \$335 million deal to end class claims that the mixed martial arts organization suppressed their wages submitted a revised distribution plan Monday, after a Nevada federal judge said he wanted to see "life changing" money for fighters who waited through the decadelong litigation.

Last month, the fighters filed a written request to U.S. District Judge Richard F. Boulware II asking for initial approval of the settlement they reached **in March** with UFC parent TKO Group Holdings Inc.

The settlement encompasses claims within two class actions, one filed in 2014 by former UFC fighter Cung Le, which had been scheduled to go to trial in mid-April, and a second filed by former UFC fighter Kajan Johnson in 2021, which claims the conduct challenged in the Le action continued after discovery closed in that case in mid-2017.

The judge, however, told the parties at a June 14 status conference he had serious concerns about the deal.

In the earlier version of the settlement, the Le class was set to received 75% of the funds — after attorney fees and costs — due to their earlier filing date and potentially greater damages. The revised allocation submitted to the court Monday hands the nearly 1,120 Le class members a bigger chunk of the deal, 90%, with the remaining 10% going to the approximately 1,300 Johnson class members, according to the **supplemental filing**, which notes that about 500 individuals are in both classes.

Confidential information that will be provided to the court outlines how much each fighter will receive, the plaintiffs said. The spreadsheet shows that the agreement addresses the judge's wish that "life changing" money be provided to fighters who have endured the 10 years of litigation, the plaintiffs said.

More than \$1 million each will go to 36 fighters in the Le class, which will see an average award for its members of about \$200,000, with the median exceeding \$73,000, according to the filing.

"By any measure, this is a significant amount of money that will be meaningful to well more than one thousand fighters and their families," the filing says. "This money would be sorely missed if the settlement were not approved and plaintiffs either lost at trial, or simply incurred many more years of delay through trial, post-trial motions, and appeals after which the result would be uncertain."

The minimum recovery for Le claimants is now \$13,000, instead of \$8,000, according to the new filing.

The distribution of the settlement fund also takes into account the number of bouts fought by each fighter, and the revised allocation provides more weight for each bout, the plaintiffs told the court.

Conversely, the Johnson claimants will see a drop in their payout under the revised plan. The class members without arbitration clauses in their contracts will receive a minimum recovery of \$6,000, instead of the \$7,000 previously promised. And the flat recovery for Johnson claimants with arbitration clauses will be \$3,000, instead of \$5,000, according to the new filing.

No change is indicated in the supplemental filing to the request in the preliminary approval motion for an attorney fees award of up to one-third of the \$335 million settlement fund and reimbursement of litigation expenses up to \$11 million.

"Assuming the court grants the fee and expense award ... the settlement under the revised plan would result in a total net recovery for the Le class of approximately \$193.5 million," and about \$21.5 million for the Johnson settlement class, Monday's filing says.

The litigation had been heading for an April 15 trial on the Le claims, a date that was vacated after TKO Group Holdings and the fighters entered **private mediation** in late February.

The Le action is much older and covers an earlier class period and its members, who have been "subject to more delay in compensation for the alleged misconduct are entitled to a significantly higher recovery" relative to members of the Johnson settlement class, the plaintiffs told the court.

In addition, the Le action was certified and "fully litigated up to the eve of trial," while the Johnson action was still in the early stage of discovery at the time the settlement was reached.

"Thus, plaintiffs and the certified class in the Le action had more leverage in settlement negotiations than the plaintiffs in the Johnson action," the plaintiffs said.

The UFC also appears to have made potentially positive changes to its fighter contracts after the Le action, which benefited the Johnson settlement class members, as well as some members of the Le class who have not retired.

The Monday filing also underscored that half the Johnson settlement class members had arbitration clauses and provisions in their contracts that waive participation in class actions.

"If these clauses were upheld, they would significantly reduce the overall value of the claims brought by the Johnson settlement class, according to the filing.

Nonetheless, the proposed allocation of 10% of the settlement amount recognizes that the Le class did benefit from the filing of the Johnson litigation, the plaintiffs said.

The plaintiffs' expert economist had computed damages ranging from \$210 million to \$1.2 billion, and the court found the models reliable and admissible, the fighters said.

"In other words, this case settled at trial for between 4% and 25% of available single damages," the filing says.

The deal is better than what's provided in a typical antitrust class action settlement and outweighs the risks of continued litigation, the fighters added.

"It is unsurprising, if unfortunate, that the annals of antitrust litigation history are littered with examples of plaintiffs receiving little or no damages despite having engaged in extensive litigation — even when such plaintiffs succeeded in establishing the defendants' liability," the fighters said.

"In sum, the settlement is an excellent result for the settlement classes by all traditional measures. The case is nearly 10 years old," the fighters said, later adding. "This settlement, if approved, would be a significant step towards ameliorating past wrongs, and forcing more competitive conduct by the UFC and other powerful entities."

The mixed martial arts fighters and UFC had been at odds for years, with the fighters alleging UFC used its market power to keep a lid on compensation. The court **certified a class** of more than 1,200 professional fighters last year.

The lawsuits were originally filed against Zuffa LLC, the entity that formerly housed UFC, and were consolidated into a single action in 2015. Zuffa was replaced as the parent company of UFC after the **April 2023 megamerger** of Endeavor Group Holdings Inc. and World Wrestling Entertainment Inc. TKO was created as a result of that deal.

A lawyer for the fighters, Eric L. Cramer of Berger Montague PC, said they look forward to presenting the terms to the judge in court.

"We believe that our exhaustively negotiated settlement for \$335 million plus prospective relief is in the best interests of all of the fighters in the settlement classes," Cramer wrote in an email.

Representatives for the Ultimate Fighting Championship did not immediately respond Monday to requests for comment.

The fighters are represented by Eric L. Cramer, Michael Dell'Angelo, Ellen Noteware, Patrick F. Madden, Najah Jacobs and Joshua P. Davis of Berger Montague PC, Richard A. Koffman, Benjamin Brown, Daniel Silverman and Daniel Gifford of Cohen Milstein Sellers & Toll PLLC, Joseph R. Saveri, Kevin E. Rayhill, Christopher K.L. Young and Itak Moradi of Joseph Saveri Law Firm LLP, Don Springmeyer of Kemp Jones LLP, Robert C. Maysey and Jerome K. Elwell of Warner Angle Hallam Jackson & Formanek PLC and Crane Pomerantz of Clark Hill PLC.

The UFC is represented by Christopher S. Yates, Aaron T. Chiu, Sean M. Berkowitz, Laura Washington and David L. Johnson of Latham & Watkins LLP, William A. Isaacson, Jessica Phillips, Brette M. Tannenbaum and Yotam Barkai of Paul Weiss Rifkind Wharton & Garrison LLP and Donald J. Campbell and J. Colby Williams of Campbell & Williams.

The case is *Cung Le et al. v. Zuffa LLC*, case number 2:15-cv-01045, in the U.S. District Court for the District of Nevada.

--Additional reporting by Bryan Koenig, Al Barbarino and Alex Lawson. Editing by Linda Voorhis.



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

\$12.8M Deal Ending Some Chiquita MDL Claims Gets Approval

By **Carolina Bolado**

Law360 (June 24, 2024, 3:38 PM EDT) -- A Florida federal judge said Monday he would sign off on a proposed \$12.8 million settlement between Chiquita Brands International Inc. and some of the victims suing the banana company over its funding of Colombian paramilitary groups.

In a remote hearing held on Zoom, U.S. District Judge Kenneth Marra said he was inclined to approve the settlement between Chiquita and the clients of attorney Paul Wolf, who are family members of the 2,572 victims for whom Wolf has filed five lawsuits now consolidated as part of sprawling multidistrict litigation.

The proposed deal was announced Friday, just a few days after the attorneys for the majority of the plaintiffs **asked the court** to sever the claims of those plaintiffs represented by Wolf in the coming second bellwether trial, which was slated to begin July 15. The attorneys had long been at odds with Wolf and said forcing them to try a case together "is a mistrial waiting to happen."

But Judge Marra opted Monday to cancel the second bellwether trial, saying he did not see any purpose in holding another trial operating under the same parameters he set out for the first trial before the Eleventh Circuit has had a chance to review his actions.

"I don't see that it makes a great deal of sense to go through the second trial just for the purpose of trying to strengthen an issue preclusion argument down the road," Judge Marra said. "It's a narrow and limited purpose, and it doesn't justify another second trial when we can benefit from the Court of Appeals straightening out any errors that I may have made or affirming what I've done."

Under the terms of the settlement with the Wolf plaintiffs, Chiquita will pay \$12.8 million, with 33% going to Wolf for attorney fees. Wolf will receive half of his fees almost immediately, 25% upon the payment of the 750th claim, and 25% after 18 months, according to the agreement.

Plaintiffs will have 18 months to make a claim and will receive either \$1,327 for those with limited documentation or \$3,404 for those who have proof their relatives were killed by the paramilitary group Autodefensas Unidas de Colombia, according to the settlement. Wolf, who says he has not been able to maintain contact with all of his clients in the last 15 years, said he would "make very significant efforts to find these people" and that he would begin getting the word out via Colombian media.

Judge Marra said he would approve the settlement but retain jurisdiction over any dispute over a claim for about \$250,000 of the attorney fee award by Conrad & Scherer LLP, which claims to have done some work for a small group of Wolf's clients. The judge said the 18 months should be enough time to resolve the dispute over the fee award.

The plaintiffs in the MDL have been operating separately as "non-Wolf plaintiffs" and "Wolf plaintiffs" for about a decade, since Wolf in 2013 allegedly copied Chiquita's lead counsel on a message discussing case strategy. The non-Wolf attorney group also says he voluntarily produced confidential work product communications in response to discovery requests from Chiquita.

But what prompted the motion to sever was a post that Wolf, who did not have clients in the first bellwether trial, made in Spanish on a website that he linked to his Facebook page. The post included the verdict form from the first trial — which ended June 10 with a **\$38 million win** for the plaintiffs

— with the names of the plaintiffs and the amounts of money each was awarded. The non-Wolf plaintiffs' attorneys objected to the post, saying it put their clients at risk for violence and extortion in Colombia and that it violated a previous order from the judge that barred attorneys from disseminating the plaintiffs' names outside of official court filings.

In the settlement agreement, Wolf said that he believes the verdict is likely to be reversed and vacated by the appeals court because of various errors by the trial court. Any money left in the settlement fund after 18 months "shall be spent on good works within the plaintiffs' community, Apartadó, Colombia," such as a school or a hospital, according to the settlement.

After the first bellwether trial, jurors in West Palm Beach awarded 16 of the plaintiffs — all survivors of eight of the nine victims of the AUC whose deaths were at issue in the case — \$38.3 million. The jurors did not find Chiquita liable for one of the nine deaths, determining that there was insufficient evidence it was caused by AUC paramilitaries.

The case was the first to go to trial in the MDL that began in 2008, when families of AUC victims sued Chiquita, claiming the banana company is liable for the deaths. They say Chiquita paid the AUC nearly \$2 million to protect its interests in the banana-producing regions of Santa Marta and Urabá in northern Colombia, which was also ground zero for the country's civil war.

Chiquita executives testified at trial that the extortions began in 1988, when left-wing guerrilla group Fuerzas Armadas Revolucionarias de Colombia, or FARC, began demanding money from the manager of one of the farms the company had recently purchased. The AUC began making similar demands when it moved into the area in 1998, according to the company.

Chiquita pled guilty in 2007 to federal charges stemming from the payments and agreed to pay a \$25 million fine.

But attorneys for the plaintiffs brushed off Chiquita's protestations that the AUC was extorting it, saying the U.S. government rejected the extortion defense when it prosecuted the banana company. They argued that Chiquita was not only paying off the AUC, but was also providing guns and ammunition to frighten employees who might try to unionize.

The non-Wolf plaintiffs are represented by John Scarola, Victoria Mesa-Estrada and Mariano Garcia of Searcy Denney Scarola Barnhart & Shipley PA, James K. Green of James K. Green PA, Rick Herz, Maryum Jordan, Marissa Vahlsing and Marco Simons of EarthRights International, William J. Wichmann of the Law Offices of William J. Wichmann PA, William R. Scherer of Conrad & Scherer LLP, Agnieszka Fryszman and Leslie M. Kroeger of Cohen Milstein Sellers & Toll PLLC, Jonathan C. Reiter of the Jonathan C. Reiter Law Firm PLLC, Terry Collingsworth of International Rights Advocates and Gabriela Paola Valentin Diaz.

The settling plaintiffs are represented by Paul Wolf.

Chiquita is represented by Michael L. Cioffi, Frank A. Dante, Melissa F. Murphy, Michael A. Stoolman and Serena S. Gopal of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc., Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Editing by Kelly Duncan.