

# Ohio regulators continue piecemeal approach to HB 6 cases despite calls for big picture review

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## NewsRoom

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Ohio regulators continue piecemeal approach to HB 6 cases despite calls for big picture review

Kathiann M. Kowalski, Energy News Network

Jul 02, 2024

An electricity meter. Getty Images.

This monthly newsletter provides updates on Ohio's ongoing utility corruption scandal. Was this forwarded to you? [Click here to subscribe.](#)

Ohio utility regulators will continue to consider four FirstEnergy cases related to HB 6 separately, despite requests by the utility, customer advocates, and others to combine the cases. Meanwhile, intervenors say the timeline set in two of the cases puts them at a disadvantage as they struggle to keep up with several hundred thousand pages of discovery documents.

Other recent developments in Ohio's ongoing utility corruption scandal include:

Text messages show Gov. Mike DeWine played a more active role in soliciting money from FirstEnergy than was previously known. A former FirstEnergy executive plans to call both DeWine and Lt. Gov. Jon Husted as witnesses at his criminal trial. Former Ohio House Speaker Larry Householder is advancing a new argument on appeal from his criminal conviction in federal court last year.

## **Piecemeal approach continues at PUCO**

The Public Utilities Commission of Ohio is sticking with a piecemeal approach to four HB 6-related cases despite requests earlier this month from the company and challengers asking for different degrees of consolidation.

FirstEnergy wanted issues in three HB 6 cases to be considered together next year, and would have split a fourth case over whether the company improperly used ratepayer money to subsidize affiliated businesses, including FirstEnergy Solutions' unregulated coal and nuclear plant operations.

The Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association Energy Group and several other parties urged the PUCO to consolidate all four HB 6 cases. In addition to the corporate separation case, one case requires FirstEnergy's utilities to show ratepayer money was not used for charitable or political purposes, and the other two deal with the company's use of funds from two riders.

Regulators stayed all four cases in mid-2022 after a request from the federal prosecutor's office. Administrative Law Judge Jacky St. John ruled last week that the commission would not order further consolidation beyond its combination of the two rider cases when the stay was lifted in late February.

"The Commission is vested with broad discretion to manage its dockets," she wrote, adding that more delay was not warranted.

Critics see the decision not to combine the cases as a missed opportunity for a big-picture review of FirstEnergy's operations and governance in the wake of HB 6.

"I don't understand the logic," said Ashley Brown, a former PUCO commissioner. "It's hard to find any public policy or private interest not to consolidate."

Multiple cases also require duplicative efforts and increase legal costs. "The commission is making us try HB 6 cases multiple times," said Kim Bojko, an attorney for the Ohio Manufacturers' Association Energy Group.

The PUCO "seems like it's still piecemealing it and kicking some of the can down the road, while trying to fast-track the rest," said Dave Anderson, policy and communications manager for the Energy and Policy Institute. He noted the commission's limited approach to addressing the HB 6 case began under former PUCO chair Sam Randazzo, who died from an apparent suicide this spring after criminal indictments in federal and state courts, plus charges of legal ethics violations.

Read more:

Eye on Utilities: All hush-hush (Energy News Network) Freeze of regulator's HB 6 cases could further harm Ohio consumers (Energy News Network/Eye on Ohio)

### **A 'punitive' schedule**

The PUCO set schedules in its June 21 orders which call for testimony in the rider cases to be filed in early August, with an evidentiary hearing set to start later that month.

Testimony in the corporate separation case must be filed in September, with a hearing to start in October. The PUCO also said it would move ahead in that case without an additional audit on the HB 6-related issues. A 2021 report by Daymark Energy Advisors found no major violations of corporate separation, but noted the company hadn't gotten numerous documents for the time period relevant to HB 6.

An independent audit still has not been completed in the political and charitable spending case. That case doesn't have a hearing date yet.

Several intervenors have raised concerns about the pace, noting that it's still unclear when pre-hearing fact-finding will wrap up. The commission put that process on hold for a year and a half after federal prosecutors asked for a pause in state regulators' investigations as they pursued criminal cases related to HB 6.

FirstEnergy still has not produced all the documents parties in the four cases asked for nearly three years ago, because the PUCO didn't require the company to comply with earlier document requests when it stayed the cases.

From February through mid-June of this year, FirstEnergy produced roughly 725,000 pages of documents. "We just got another 500 pages last week," with more still to come, Bojko said. Yet now she and other parties will have to file witnesses' testimony in roughly six weeks without knowing whether they'll have all the documents.

"It's punitive," Bojko said, adding that lawyers for intervening parties are still scrambling to try to review the materials they've recently gotten. In her view, factors that frustrate intervenors' ability to prepare their cases will work to FirstEnergy's advantage.

Maureen Willis, agency director for the Office of the Ohio Consumers' Counsel, said the office is evaluating the PUCO's approach to the cases.

"OCC will continue to advocate for a fair process that allows all the facts to come out," Willis said.

FirstEnergy spokesperson Jennifer Young declined to comment due to the ongoing nature of the proceedings.

Read more:

Regulators' foot-dragging on public records hides the full story behind Ohio's utility corruption scandal (Energy News Network/Eye on Ohio)

### **Spotlight on DeWine and Husted**

Newly revealed documents show Gov. DeWine played a larger role in soliciting money from FirstEnergy executives than was previously known.

FirstEnergy and its affiliates gave roughly \$4 million to dark money groups supporting DeWine and Husted's 2018 campaigns. Less than a month before the election, DeWine texted Chuck Jones, then CEO of FirstEnergy, to set up a call. Three days later, Mike Dowling, then a FirstEnergy vice president, texted Jones to let DeWine know \$500,000 was going to a dark money group called State Solutions.

Other texts recently obtained by journalists show Husted trading statements about Ohio energy policy with Dowling in the summer of 2018. Documents produced earlier show Husted also performed "battlefield triage" to assure the appointment of Randazzo to chair the PUCO.

DeWine claimed he didn't remember the call. Spokesperson Dan Tierney told the Energy News Network the texts "all document legal campaign fundraising and independent expenditures," which have been previously reported. "The Governor follows all applicable campaign finance laws," he added. Husted spokesperson Hayley Carducci did not respond to Energy News Network's request for comment.

The newly produced documents don't show a bribe or quid pro quo, and neither DeWine nor Husted has been named as a defendant in any criminal or civil cases relating to HB 6.

However, the timing so close to the election raises questions, Anderson said, because DeWine's campaign staff likely knew FirstEnergy executives and the company's political action committee would already have reached their limits for direct campaign contributions. Under federal campaign finance law, candidates are not supposed to coordinate fundraising or other activities with groups that make so-called independent expenditures in political races.

Read more:

'Call Mike DeWine on the \$500k:' Governor's text sparked dark money payment, texts show (Cleveland.com) Phenomenally corrupt or insanely incompetent? What is Ohio Gov. Mike DeWine's deal? (Ohio Capital Journal) Text messages link DeWine to FirstEnergy dark money payment (Dayton Daily News) Gov. DeWine says he doesn't remember text soliciting FirstEnergy for campaign cash (Toledo Blade) New texts allegedly show Ohio Lt. Gov. Jon Husted leading FirstEnergy's push for House Bill 6 (News 5 Cleveland)

### On the witness list

Dowling, the former FirstEnergy vice president, listed both DeWine and Husted as potential witnesses in a June 18 filing in the state of Ohio's criminal case against him, Jones and two companies that were controlled by Randazzo. The two also have received subpoenas in civil cases filed by FirstEnergy shareholders.

Others on Dowling's witness list include former American Electric Power executives Nicholas Akins and Tom Froehle. AEP holds the largest interest among Ohio electric utilities in the two 1950s coal plants that ratepayers continue to subsidize as a result of HB 6. An estimate by RunnerStone for the Ohio Manufacturers' Association found Ohioans will pay nearly \$1 billion for those subsidies through 2030.

Jones was also named as a defendant in the case against Dowling, along with Randazzo and two companies he controlled before his death. The state is still pursuing charges against those companies, said Steve Irwin, press secretary for Ohio Attorney General Dave Yost.

Read more:

Ex-FirstEnergy executive lists DeWine, Husted as possible witnesses in bribery trial (Columbus Dispatch) FirstEnergy VP Dowling plans to call DeWine and Husted to the stand in corruption trial (News 5 Cleveland)

### Householder and Borges appeals

Former Ohio House Speaker Larry Householder wants to add an argument to his appeal of a criminal conviction in federal court last year. A June 11 filing argues Judge Timothy Black erred in instructing Householder not to talk about his ongoing testimony while he was still under oath during an overnight break on March 1 last year. Householder's lawyers did not object to the instruction, and the judge told Householder he could otherwise talk with his attorneys.

The government has objected to allowing the extra argument, first raised months after Householder's initial brief of more than 16,000 words was filed in late February. Even if the court doesn't allow the extra argument, a June 21 filing said the government still needs another four weeks to file its response.

Briefing in lobbyist Matt Borges' appeal from his criminal conviction in last year's federal trial should wrap up by the end of this month, unless his lawyers ask for more time to reply to the federal government's brief.

Householder is currently serving a 20-year sentence, and Borges is serving a five-year sentence. Their appeals are pending before the Sixth Circuit Court of Appeals.

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**NewsRoom**

# 'Call Mike DeWine on the \$500k:' Governor's text sparked dark money payment, texts show

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June 16, 2024

## 1. Ohio Politics

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Ohio Gov. Mike DeWine greets state representatives before speaking at the State of the State address in Columbus. (Joshua Gunter/Cleveland.com)Joshua Gunter, cleveland.com

By

Jake Zuckerman, [jzuckerman@cleveland.com](mailto:jzuckerman@cleveland.com)

COLUMBUS, Ohio – About a month before the 2018 election that would launch then-Attorney General Mike DeWine into the governor's office, he sent a text to FirstEnergy's CEO – indicted earlier this year on bribery charges – looking for a cash injection to help put him over the top.

"Chuck. Can u call me?" DeWine wrote to company CEO Chuck Jones on Oct. 13, 2018, adding that a teachers' union gave a million dollars the day before to a group backing his Democratic rival.

## Skip Ad

Records show FirstEnergy had already spent millions backing DeWine, including its subsidiary giving \$500,000 to the pro-DeWine Republican Governor's Association (RGA) just two days prior. Jones forwarded DeWine's outreach to Mike Dowling, a senior vice president – who also was indicted this year on bribery charges alongside Jones. By Oct. 16, 2018, the FirstEnergy men agreed to a “dark money” contribution, which are unlimited in size and not publicly disclosed.

“Chuck – go ahead and call Mike DeWine on the \$500k. It's going to RGA's C(4) called State Solutions. All set,” Dowling said in a text to Jones.

Chuck Jones - iPhone - FK2ZCRRYN70H

Messages in chronological order (times are shown in GMT -04:00)

|    | NODISPLAY                                                                                                                                                                               |                     |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| MD | Mike DeWine<br>Chuck. Can u call me ? Mike Dewine [REDACTED]                                                                                                                            | 10/13/2018, 9:58 AM |
| CJ | Charles Jones<br>In the air returning to Ohio. I can call around 1pm. Does that work?                                                                                                   | 9:59 AM             |
| MD | Mike DeWine<br>No. We have event in Fairfield at that time but 230 works. Also after 7:30 pm. ( driving to Cleve then so in car. For 3 hrs. ). OEA put in million yesterday for Cordray | 10:05 AM            |
| CJ | Charles Jones<br>OK. I'll call at 2:30.                                                                                                                                                 | 10:07 AM            |

Text messages between then-Attorney General Mike DeWine and FirstEnergy CEO Chuck Jones. Jake Zuckerman

DeWine has said he didn't know the extent of FirstEnergy's dark money support for his gubernatorial races. But newly revealed text messages and other documents suggest he personally solicited some of the money from FirstEnergy's top executive.

The two FirstEnergy men have been accused by state law enforcement of paying a \$4.3 million bribe to Sam Randazzo, whom DeWine appointed as Ohio's chief utility regulator. FirstEnergy as a corporate entity, in a guilty plea-like arrangement with federal prosecutors, admitted to bribing both Randazzo and ex-Ohio House Speaker Larry Householder, who's

now serving a 20-year prison sentence. Among other favors, both Randazzo and Householder worked from inside state government to ensure legislative passage of a \$1.3 billion ratepayer-funded bailout of FirstEnergy's nuclear plants.

Beyond the fundraising, the texts depict DeWine and Lt. Gov. Jon Husted as powerful insiders lobbying for House Bill 6, legislation that bailed out the nuclear plants while also providing FirstEnergy a roughly \$50 million per year "decoupling" revenue stream.

DeWine won the 2018 election thanks in part to FirstEnergy's support. The company that year gave \$2.5 million to State Solutions, a dark money arm of the Republican Governors Association, internal records show. It also gave the \$500,000 to the RGA directly. It provided \$75,000 through another 501(c)(4) to support the governor's daughter in a local prosecutorial race. And in 2019 it gave \$300,000 to the pro-DeWine Securing Ohio's Future 501(c)(4).

When DeWine came looking for a boost with his October 2018 text message to Jones, FirstEnergy's top executives wondered if they had already done enough. The company had done "more than anyone," Dowling told Jones in a text message. Dowling, FirstEnergy's top lobbying agent, texted Jones that DeWine "already knows about" the \$500,000 contribution that FirstEnergy's subsidiary provided to the RGA that week. The two mulled how to respond but made up their mind to provide another donation by Oct. 16. Jones told Dowling he'd call DeWine that evening to tell him.

|    |                                                                                                                                          |         |
|----|------------------------------------------------------------------------------------------------------------------------------------------|---------|
| MD | <b>Michael Dowling</b><br>Chuck - go ahead and call Mike DeWine on the \$500k. It's going to RGA's C(4) called State Solutions. All set. | 2:54 PM |
| CJ | <b>Charles Jones</b><br>OK. I'll call him around 5.                                                                                      | 2:54 PM |
| CJ | <b>Charles Jones</b><br>Thanks.                                                                                                          | 2:54 PM |

Texts between FirstEnergy CEO Chuck Jones and senior vice president Mike Dowling.jake zuckerman

DeWine has not been accused of any criminal wrongdoing. Dan Tierney, a DeWine spokesman, said the governor doesn't recall if he spoke on the phone with Jones on Oct. 13 or Oct. 16, as the texts depict. However, if the calls did occur, they would have been consistent with "hundreds of calls" seeking financial support he was making at the time, Tierney said.

However, Tierney denied that DeWine solicited a contribution to a supportive dark-money group, which Tierney said would be illegal. He said DeWine has followed all campaign finance laws and didn't coordinate with any independent expenditure group. Tierney called it

“sick and disgusting” and “highly offensive and irresponsible” to suggest otherwise, despite Dowling’s text to Jones instructing the CEO to inform DeWine.

The texts referenced in this story were released by FirstEnergy to investors suing the company in the wake of the still-unfurling bribery scandal as part of the legal process. The Ohio Consumers’ Counsel, a state agency, obtained the evidence exchanged by the parties as part of the state’s regulatory investigation into the matter, and has been releasing them on a rolling basis in response to a public records request.

## Powerful friends

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The documents shed new light on ties between FirstEnergy and Husted.

Back in 2017, FirstEnergy backed Husted, who at the time was battling DeWine for the Republican nomination for governor. He eventually bowed out to join the ticket. Husted kept an open line of communication with Dowling, text messages show.

The company that year secretly gave \$1 million to another dark money group for what’s described in company records as “Husted campaign.”

Around that time, Dowling texted Husted about a supportive mailer and TV ad he saw.

“Thank you for helping make it possible,” Husted replied.

When Husted agreed to drop his candidacy and instead join DeWine’s ticket, Dowling told Husted he’s “proud” of him. Husted responded: “I hope I didn’t disappoint you.”

Husted, through spokeswoman Hayley Carducci, said he doesn’t remember what he was referring to as far as Dowling “helping make it possible.” She said most of the texts are other parties discussing Husted, as opposed to Husted speaking himself. And she added that Husted has long said publicly that he supports the plants because they provide the vast-majority of Ohio’s carbon free energy.

The documents also show:

- DeWine and Husted together toured the Davis Besse nuclear plant in Ottawa County in the summer of 2018, one of two that qualified for the bailout FirstEnergy sought. That day, Husted personally traded drafts of a statement with Dowling calling for nuclear power to be “included in the state’s energy strategy.”
- Dowling later helped DeWine and Husted land guests for a fundraiser in Texas. And Jones hosted a fundraiser for DeWine in his own backyard, where his prepared remarks call Husted a “friend of FirstEnergy.” After the event, Jones sent DeWine a message.

"We are glad to be able to help out. Ohio needs you," Jones wrote.

DeWine wrote back: "Many many thanks."

With FirstEnergy's help, DeWine would go on to defeat Democratic candidate Richard Cordray and begin to build his administration. He hired a former FirstEnergy lobbyist, Dan McCarthy, as his legislative director. And he brought on his old chief of staff from his days in Congress, Laurel Dawson, who's married to a FirstEnergy consultant. DeWine's longtime campaign adviser Josh Rubin would become a FirstEnergy lobbyist.

DeWine would later nominate Randazzo – whom FirstEnergy later admitted to bribing with \$4.3 million – as chairman of the PUCO. From that post, he led the five-member commission on several rulings in the company's favor. DeWine has said he didn't know about the \$4.3 million until federal agents raided Randazzo's home in October 2020. However, state prosecutors say Dawson knew about the payment in January 2019. Neither DeWine nor Dawson have explained the apparent knowledge gap.

DeWine appointed Randazzo despite a warning from an environmental group about his hostile stance on renewable energy and another from a former aide about Randazzo's "opaque and undisclosed" ties to FirstEnergy.

FirstEnergy wanted Randazzo. The records show Dowling and Jones planned to "push DeWine hard" to appoint him and that they credited DeWine and Husted for performing "battlefield triage" during the nomination process when word got out about a financial link between FirstEnergy and Randazzo's companies.

Randazzo pleaded not guilty to the state and federal charges and denied any wrongdoing. He died by suicide in April before his trial.

## **'Who we want engaged'**

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Alongside his traditional regulatory duties, Randazzo, then a respected figure in statehouse GOP circles, helped draft and see to passage of HB6.

The bill sailed through the House with much more ease than the Senate, likely because Householder put his political muscle behind it. Records show that Householder believed DeWine wasn't doing enough to help. He texted Jones that it would be a good time for DeWine to start showing some support for HB6 and "use the situation to LEAD."

FirstEnergy and its allies came to see DeWine and his people not just as a supporter of HB6 but an active participant in lobbying state lawmakers to pass the bill.

Dowling relayed to Jones reports of him talking by phone with Husted, who lobbied senators to add additional years to the terms of the nuclear bailout proposed in HB6. A top executive at the FirstEnergy subsidiary that owned the nuclear power plants, said at Householder's trial to be positioned for a \$100 million windfall through the eventual sale of the subsidized plants, told Jones he "loved" Husted after meeting with him. Dowling too sung his praises.

"The admin is engaged – especially John [sic] Husted, which is who we want engaged," Dowling said.

Ohio's Constitution gives the governor 10 days to sign a bill after it passes. DeWine signed HB6 within hours of it passing the legislature.

Later that day, Jones texted Husted, thanking him for his "leadership on a very challenging issue."



## Stories by Jake Zuckerman

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- Lawmakers gutted Ohio's energy efficiency rebates in HB6. The Ohio House wants to revive them, over GOP opposition
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*Jeremy Pelzer contributed research for this report.*

*Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.*

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# Purdue Ruling Tees Up 'Consent' Question for Bankruptcy Courts

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- Supreme Court didn't define consensual liability releases
- Court rulings on opt-out provisions poised to loom large

The US Supreme Court, in rejecting Purdue Pharma LP's bankruptcy plan, definitively shut down third-party litigation shields that don't have consent from creditors. Now it's up to bankruptcy courts to determine what, exactly, counts as "consent."

The answer is likely going to boil down to judges' views on the specific language and presentation of documents sent to creditors who are entitled to vote on a company's bankruptcy exit plan.

"Third-party releases are a very important part of the process, but they're going to have to be consensual, and we're going to have to spend some time figuring out what that means," Jonathan Carson, co-CEO of bankruptcy claims agent Stretto, said.

The proposed liability releases for members of the billionaire Sackler family who own Purdue under a \$6 billion litigation settlement would have protected the family against lawsuits accusing it of improperly pushing opioid sales. The Sacklers have long denied wrongdoing.

The high court ruled that the releases, which would've been granted to the Sacklers via a bankruptcy plan even though they are not themselves bankrupt, are impermissible because they were obtained without the consent of some people who sued.

But Justice Neil Gorsuch's June 27 opinion for a 5-4 majority in *William K. Harrington v. Purdue Pharma LP* made clear that nonbankrupt parties can still obtain liability releases as long as they are obtained consensually.

The task now before bankruptcy judges arises from the Supreme Court's decision not to define "consensual" releases.

Gorsuch said the court didn't "have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor."

## Opt-ins and Opt-outs

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With nonconsensual third-party releases off the table, “tremendous” questions for courts remain, including whether silence equals consent in a bankruptcy plan, said former bankruptcy judge Bruce Markell, a professor of bankruptcy law at Northwestern Pritzker School of Law.

Some courts have said that while silence isn’t consent, it could count as a waiver of a creditor’s rights, he said.

The answer could depend on how judges think about so-called “opt-out” provisions in bankruptcy plans. In cases with opt-out procedures, creditors can decline to grant releases to nonbankrupt people and entities by checking a box on a ballot. If creditors don’t check that box and return the ballot, they’re deemed to consent to that release.

The question, then, is whether those who don’t actively opt out of a bankruptcy plan release by taking those steps can be deemed consenting creditors. Some judges, including in the US Bankruptcy Court for the District of Delaware and the US Bankruptcy Court for the Southern District of New York, have held that opt-out provisions can be considered consensual.

In those cases, whether claimants were given proper notice of their opportunity to opt out becomes a key issue, said Scott Underwood of Underwood Murray PA, who represents distressed businesses. Judges want to make sure that claimants had a chance to opt out, which means proving they had a chance to view the ballot, Underwood said.

Even opt-outs can be an ineffective tool for achieving a settlement, said Wake Forest University law professor Samir Parikh, who focuses on mass tort restructurings. Opt-out releases are insufficient in complicated, non-asbestos mass tort cases because creditors holding the high value claims will opt out and pursue their suits in other courts, believing they can receive more from a judgment than they will from the settlement, Parikh said. Asbestos cases have their own rules under bankruptcy law.

With the high-value claims removed, there’s far less incentive for a company to put forth a robust settlement offer, attorneys said.

Still, courts that deem opt-outs to be consensual will become preferred venues for debtors in light of the Purdue decision, said Leyza B. Florin of Sequor Law, who focuses on debt restructuring and representation of creditors. It will take time to fully flesh out how courts view opt-ins versus opt-outs, Florin said.

“I think you’re going to see a lot more body of law on the distinction between those two,” she said.

Ultimately, the additional litigation over the issue of consensual releases will lead to less recovery for claimants, she said.

"It's an unfortunate result for those of us who practice in this area because it takes away the ability for us to divert money in a more efficient manner," Florin said.

The case is William K. Harrington v. Purdue Pharma LP , U.S., No. 23-124, 6/27/24 .

—James Nani contributed reporting.

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# Judge's Conflict Revives Big Bank Suit Over Small Bond Trading

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Bank of America Corp., JPMorgan Chase & Co., Goldman Sachs Group Inc., and several other big banks will have to face a revived lawsuit over claims they conspired to suppress small corporate bond trades.

The New York federal judge who initially dismissed the suit in October 2021 should've recused himself because his wife owned stock in Bank of America while he was hearing the case, the US Court of Appeals for the Second Circuit ruled Tuesday.

While Judge Lewis J. Liman's wife sold off her Bank of America investment in July 2021, more than two months before oral arguments in the case, Liman should've recused himself once he was aware of his wife's stock holding, a three-judge Second Circuit panel determined.

"Because we find that this conflict presents an appearance of impropriety, we therefore conclude that vacating the judgment both complies with our statutory mandate and is the best means of dispelling any potential loss of faith in the judiciary," the panel said.

The case is now set to return to the US District Court for the Southern District of New York for further proceedings. Judge Valerie E. Caproni will preside over the litigation.

Units of Barclays Plc, Citigroup Inc., Credit Suisse Group AG, Deutsche Bank AG, Morgan Stanley, NatWest Group Plc, and Wells Fargo & Co. are the other defendant banks in the case. Credit Suisse is now a part of UBS Group AG.

The banks conspired to suppress corporate bond trades smaller than \$1 million at par value, harming small investors since at least August 2006, the plaintiffs alleged in their April 2020 suit.

Barclays and Deutsche declined to comment. The rest of the banks didn't immediately respond to a request for comment. Counsel for the plaintiffs didn't immediately respond to a request for comment.

The opinion was issued by Judges Eunice C. Lee and Alison Nathan of the Second Circuit, along with Judge Jed S. Rakoff of the US District Court for the Southern District of New York sitting by designation.

The plaintiffs are represented by Kellogg, Hansen, Todd, Figel, & Frederick PLLC; Scott & Scott Attorneys at Law LLP; Korein Tillery LLC; and Bartlit Beck LLP.

Sullivan & Cromwell LLP represents Goldman Sachs. Shearman & Sterling LLP represents Bank of America. Cahill Gordon & Reindel LLP represents Credit Suisse. Covington & Burling LLP represents JPMorgan Chase. Davis Polk & Wardwell LLP represents NatWest. Skadden, Arps, Slate, Meagher & Flom LLP represents Citigroup. Simpson Thacher & Bartlett LLP represents Deutsche Bank. Paul, Weiss, Rifkind, Wharton & Garrison LLP represents Morgan Stanley. Jones Day represents Wells Fargo. Paul Hastings LLP represents Barclays.

The case is *Litovich v. Bank of America Corp.*, 2d Cir., No. 21-2905, Opinion 7/2/24 .

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# SPAC Claims Advance Against Cantor Unit, Window Maker View Inc.

By Martina Barash

- 'Smart window' warranty accounting allegedly incorrect
- Intent allegations sufficient for proxy claims, not fraud

Bloomberg Law News 2024-07-02T09:55:3173031793-04:00

SPAC Claims Advance Against Cantor Unit, Window Maker View Inc.

By Martina Barash 2024-07-01T16:13:50000-04:00

- 'Smart window' warranty accounting allegedly incorrect
- Intent allegations sufficient for proxy claims, not fraud

View Inc. investors adequately alleged securities law violations by the "smart glass" window maker, its leadership, and adviser Cantor Fitzgerald & Co. for failing to disclose liabilities in a merger proxy bringing the company public, a federal court ruled.

But the investors can't proceed with securities fraud claims over the window warranty liabilities under Securities Exchange Act Section 10(b)(5), at least for now, Judge Beth Labson Freeman said June 28 for the US District Court for the Northern District of California. Freeman recently revived the suit, determining that the lead plaintiff had standing to sue.

Silicon Valley-based View, which makes smart glass panels that adjust in response to the sun, filed for bankruptcy April 2 shortly after its auditor stepped away. It nevertheless remains a defendant in the investor suit under a Chapter 11 plan confirmed by the US Bankruptcy Court for the District of Delaware, according to Freeman.

The proposed class action over View's March 2021 combination with a special purpose acquisition company affiliated with Cantor Fitzgerald LP is among many legal entanglements faced by companies formed through such mergers. Numerous companies that formed through de-SPAC, or blank-check, mergers have faltered following the deals' peak in 2020 and 2021, sending investors to the courts, Bloomberg reported.

View's investors alleged the company understated its warranty accruals in the run-up to the merger, including in proxy statements seeking approval for the deal.

Then the merged company announced in August 2021 that its audit committee was investigating the adequacy of those numbers. In November of that year, View said its committee found misstatements, according to the complaint. The company's stock dropped after each announcement.

The investors sued a range of defendants. They named View, its CEO and its chief financial officer as defendants. They also targeted several Cantor Fitzgerald LP entities, including the blank check company itself and six of its directors, its sponsor, adviser Cantor Fitzgerald & Co., Cantor itself, and CF Group Management Inc.

Freeman allowed an additional investor to become a representative of the proposed class and green-lighted the proxy statement claims, or control-person liability claims based on proxy statements, against most of the defendants in the new ruling. The newly added plaintiff, investor David Sherman, adequately pleaded losses caused by the alleged misstatements, she said.

Allegations of the defendants' level of intent fell short of the level needed for a securities fraud claim, however, but the investors will have a chance to re-plead that claim, she said.

The investors sufficiently alleged negligence by CFO Vidul Prakash, she said. View, its CEO Rao Mulpuri, Cantor Fitzgerald & Co., and the blank-check company directors remain in the suit as well.

Kaplan Fox & Kilsheimer LLP represents the lead plaintiffs. Munger Tolles & Olson LLP represents View and Mulpuri. Morrison & Foerster LLP represents Prakash. Winston & Strawn LLP represents the Cantor entities and the SPAC directors.

Mehedi v. View, Inc. , N.D. Cal., No. 5:21-cv-06374, 6/28/24

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# 'Roaring Kitty' lawsuit over GameStop is withdrawn for now

 [reuters.com/legal/roaring-kitty-is-sued-alleged-gamestop-manipulation-2024-07-01](https://www.reuters.com/legal/roaring-kitty-is-sued-alleged-gamestop-manipulation-2024-07-01)

Jonathan Stempel

A screen displays GameStop stock trading information on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., June 3, 2024. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, July 1 (Reuters) - Investors in GameStop (GME.N) , opens new tab have for now withdrawn their lawsuit accusing Keith Gill, who is known as "Roaring Kitty" and helped spur the meme stock mania of 2021, of defrauding them through a "pump-and-dump" scheme for the videogame retailer.

A proposed class action accusing Gill of securities fraud was filed on Friday in the Brooklyn, New York, federal court, but voluntarily withdrawn on Monday without explanation. The lawsuit can be refiled , opens new tab, according to the filing.

Lawyers at the Pomerantz law firm, which represents the investors, did not immediately respond to requests for comment.

Investors led by Martin Radev, who lives in the Las Vegas area, said Gill manipulated GameStop securities between May 13 and June 13 by quietly accumulating large quantities of stock and call options, then dumping some holdings after emerging from a three-year social media hiatus.

They said Gill's activities caused GameStop's share price to gyrate wildly, generating "millions of dollars" in profit for him at their expense.

"Defendant still enjoys celebrity status and commands a following of millions through his social media accounts," the complaint said. "Accordingly, Defendant was well aware of his ability to manipulate the market for GameStop securities, as well as the benefits he could reap."

Gill did not immediately respond to requests for comment on Monday.

On May 12, he posted a cryptic meme on the social media platform X that was widely seen as a bullish signal for GameStop, whose stock he cheerlead in 2021.

GameStop's share price more than tripled over the next two days, then gave back nearly all the gains by May 24.

On June 2, Gill revealed that he owned 5 million GameStop shares and 120,000 call options, and on June 13 revealed he had shed the call options but owned 9 million GameStop shares.

Investors said the truth about Gill's investing became known on June 3 when the Wall Street Journal wrote about the timing of his options trades and said the online brokerage E\*Trade (MS.N) [opens new tab](#) considered kicking him off its platform.

The meme stock mania was fueled in part by investors stuck at home during the pandemic, and led to a "short squeeze" that caused losses for hedge funds betting stock prices would fall.

On Monday, trading in Chewy (CHWY.N) [opens new tab](#) shares became volatile after Gill revealed a 6.6% stake in the pet products retailer.

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

Reporting by Jonathan Stempel in New York; Editing by David Holmes and David Gregorio

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

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Securities Law News

July 1, 2024, 2:57 PM PDT

# GameStop Shareholder Quickly Drops 'Roaring Kitty' Fraud Suit

By Avalon Pernell

- Keith Gill rose to fame during the 2021 meme stock craze
- He's being sued over recent posts promoting GameStop again

Bloomberg Law News 2024-07-02T09:49:52888769567-04:00

GameStop Shareholder Quickly Drops 'Roaring Kitty' Fraud Suit

By Avalon Pernell2024-07-01T17:57:18129-04:00

- Keith Gill rose to fame during the 2021 meme stock craze
- He's being sued over recent posts promoting GameStop again

A lawsuit accusing popular stocks influencer **Keith Gill**, better known as "Roaring Kitty," of engaging in a "pump and dump" scheme involving GameStop Corp. shares was dropped within days of its filing.

In a proposed class action filed Friday in Brooklyn, New York, federal court, GameStop shareholder Martin Radev sued Gill for securities fraud, claiming he was seeking to manipulate the stock for his own gain. In a court filing late Monday afternoon, Radev said he was voluntarily dismissing the lawsuit.



Keith Gill during a YouTube livestream arranged on a laptop at the New York Stock Exchange on June 7.  
Photographer: Michael Nagle/Bloomberg

It's unclear why Radev dropped the suit, and his lawyers didn't immediately respond to requests for comment. The dismissal was without prejudice, meaning he is free to file the suit again.

Gill also didn't respond to an email seeking comment.

One of the public faces of the 2021 meme-stock craze, Gill amassed more than a million followers across his "Roaring Kitty" YouTube channel and "DeepF\*\*\*ingValue" Reddit page. He reemerged in May and again began posting about Gamestop on X, the social media platform formerly known as Twitter.

The suit alleged that Gill acquired 120,000 call options in GameStop before he began posting about the company in May. The stock, which had been trading around \$17 just before Gill began to post, soared to \$48.75 on May 14.

On June 2, he revealed that he owned 5 million shares of GameStop and 120,000 call options that were set to expire on June 21. By June 13, Gill's holdings had risen to more than 9 million shares of GameStop with no outstanding call options.

Gill "quietly sold and/or exercised (i.e., dumped) all 120,000 of his GameStop call options for a large profit, seemingly to increase his own stake in GameStop stock by over 4 million shares," Radev said in the suit.



# Musk Asks Judge to Reinstate \$56 Billion Pay Deal After Vote (1)

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## Litigation

In the wake of a 72% vote in favor by investors, Elon Musk and Tesla Inc. asked a Delaware judge to reinstate the \$56 billion pay package she struck down.

Photographer: David Paul Morris/Bloomberg

- Judge urged to follow 'well-informed' 72% vote for Musk pay
- She previously ruled he had excessive influence on process

Elon Musk and Tesla Inc. asked a Delaware judge Monday to reinstate the \$56 billion pay package she struck down, citing last month's investor vote overwhelmingly approving the compensation deal.

The company and its billionaire chief executive said the 72% vote in favor of reinstating the pay package operated to retroactively ratify it. Chancellor Kathaleen St. J. McCormick ruled in January that Musk's "superstar CEO" status gave him excessive influence over the process the automaker's board followed to set the largest compensation deal in US history.

Now that Tesla's investors approved Musk's pay through "one of the most well-informed stockholder votes in Delaware history"—while being explicitly aware of McCormick's criticisms—the judge should revise her earlier ruling and uphold the compensation deal, Musk and other Tesla directors said in a court filing. The company submitted a separate legal brief joining the request.

"Such a decision would respect the stockholders' express wishes to honor Musk's previously agreed-upon compensation, earned by creating astronomical value for them, while preserving the court's thorough guidance for the future," Musk's filing said. "That is a win-win outcome."

The request came a week before McCormick, chief judge of Delaware's Chancery Court, is set to hold a hearing on a request for more than \$5 billion in legal fees from the shareholder attorneys who brought the successful lawsuit. The judge said June 27 that she planned to schedule a separate hearing on the effect of the June 13 shareholder vote.

Musk and the board are represented by Ross Aronstam & Moritz LLP, Quinn Emanuel Urquhart & Sullivan LLP, and Cravath, Swaine & Moore LLP. Tesla is represented by Morris, Nichols, Arsht & Tunnell LLP, Richards, Layton & Finger PA, and Sullivan & Cromwell LLP.

The investor who led the case is represented by Bernstein Litowitz Berger & Grossmann LLP, Andrews & Springer LLC, and Friedman Oster & Tejtell PLLC.

The case is Tornetta v. Musk , Del. Ch., No. 2018-0408, motion filed 7/1/24 .

(Updates with additional reporting and case information in paragraphs five through seven.)

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July 1, 2024, 10:10 AM PDT

# Travelzoo Founder Should Dodge Investor Lawsuit, Judge Says

By Matthew Bultman

- Investors want to claw back \$2 million from Ralph Bartel firm
- Transaction fits securities exemption, magistrate judge finds

**Bloomberg Law News 2024-07-02T09:54:18726887893-04:00****Travelzoo Founder Should Dodge Investor Lawsuit, Judge Says****By Matthew Bultman 2024-07-01T13:10:57000-04:00**

- Investors want to claw back \$2 million from Ralph Bartel firm
- Transaction fits securities exemption, magistrate judge finds

Travelzoo founder Ralph Bartel should escape a shareholder lawsuit seeking to recover \$2 million in profits his investment firm made on alleged “short-swing” trades, a magistrate judge said.

Securities law prohibits corporate insiders from making so-called short-swing trades, in which stock is purchased and then sold within six months. But Bartel’s transactions fall under an exemption for trades involving a director that were approved by a special committee of the board or by a majority of shareholders, Magistrate Judge Sarah Cave said in a Friday report.

Cave, in the US District Court for the Southern District of New York, recommended a district court judge dismiss the lawsuit.

Azzurro Capital Inc., owned by Bartel through The Ralph Bartel 2005 Trust, in late 2022 bought almost \$20 million worth of Travelzoo stock, in a deal approved by shareholders and a special committee of the board. Bartel gave up his director position the day the deal closed.

Shortly thereafter, from April to June 2023, Azzurro sold a chunk of the shares, netting about \$2 million in profits.

Investors argued there was a question whether Bartel remained a director through the closing. But what’s important, Cave said, is that Bartel was a director when shareholders and the special committee signed off on the deal.

"Because the Special Committee and shareholders approved the Purchase—the relevant 'trading decision'—while Mr. Bartel was a director and with knowledge of his interest in the transaction, the rationale underlying the Rule 16b-3(d) exemption is satisfied, and his subsequent resignation is irrelevant," Cave said.

Miriam Tauber Law and the Law Office of David Lopez represent the investors. Morrison Cohen LLP represents Azzurro. Ballard Spahr LLP represents Travelzoo.

The case is Rubenstein v. Travelzoo , S.D.N.Y., No. 23-cv-4396, 6/28/24 .

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# Utility Owner Allete Sued in Bid to Stop \$6.2 Billion Sale (1)

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Allete Inc. isn't giving investors enough information to make an informed decision about a proposed \$6.2 billion sale of the publicly traded utility owner to an investment partnership, a shareholder says in a suit to halt the deal.

The proposed transaction is also unfair because company insiders will benefit disproportionately, creating conflicts of interest, the shareholder says. She filed her complaint Monday in the US District Court for the Southern District of New York.

A February 2024 press release on the company's financial results for the previous year "indicated sustained and solid financial performance," including "earnings of \$4.30 per share on net income of \$247.1 million and operating revenue of \$1.9 billion," plaintiff Mary Shabestari says. Operating revenue for 2022 was \$1.6 billion, she said. The company outlined a five-year, \$4.3 billion capital expenditure plan, she said.

But the proxy statement for a vote on the take-private sale doesn't provide insight on differing sets of financial projections, the board's decision to hire financial advisers for sale-related analyses, the nature of a confidentiality agreement between the company and the partnership that seeks to acquire it, or "the totality of communications regarding post-transaction employment," Shabestari says.

The Duluth, Minn.-based company owns the Upper Midwest utilities Minnesota Power and Superior Water, Light & Power, as well as renewable energy units and a coal mine, according to its website. The Canada Pension Plan Investment Board and Global Infrastructure Partners head the partnership that intends to buy it for \$67.00 per share, Shabestari says. The \$6.2 billion figure includes the assumption of debt.

The \$67.00 offer represents a 19% premium on the closing share price just before the proposed sale was reported on in December, according to Bloomberg.

The shareholder brings claims for proxy misstatements and, against individual directors, control person liability. She seeks to enjoin the transaction and compel the directors to issue a more complete proxy statement. If the transaction goes through first, she seeks to rescind it or to obtain damages.

Allete declined to comment in an email Tuesday.

Brodsky & Smith represents Shabestari.

The case is Shabestari v. Allete, Inc. , S.D.N.Y., No. 1:24-cv-04996, complaint 7/1/24 .

(Updated with company response in eighth paragraph.)

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July 1, 2024, 3:03 PM PDT

# Sumo Logic Gets Shareholders' Underpriced-Sale Lawsuit Dismissed

By Martina Barash

Bloomberg Law News 2024-07-02T09:54:58781798332-04:00

Sumo Logic Gets Shareholders' Underpriced-Sale Lawsuit Dismissed

By Martina Barash 2024-07-01T18:03:57000-04:00

Sumo Logic Inc. investors have so far fallen short in showing that the software company's proxy documents were negligently prepared, a federal court said in dismissing claims that the stock was undervalued in a merger.

But Judge Beth Labson Freeman's decision June 28 for the US District Court for the Northern District of California gave the shareholders a toehold. The plaintiffs adequately alleged that the software company's proxy documents omitted positive data, and they will have another chance to plead negligence and other aspects of their proposed class action, she said.

- Amid volatility in Sumo Logic's stock price, Francisco Partners Management LP allegedly made several offers, including a February 2023 offer of \$12.05 per share
- Sumo Logic's proxy allegedly assumed revenue growth would decline from the previous quarter's revenue growth of 19%, and the merger was approved even though the stock closed at \$12.18 the day before the merger announcement and another sponsor was allegedly interested in paying \$13.00 per share
- The investors will have 60 days to file an amended complaint, Freeman said

Monteverde & Assocs. PC and Kahn Swick & Foti LLC are lead counsel for the class. Kirkland & Ellis LLP represents Sumo Logic.

The case is Wasicek v. Sumo Logic, Inc. , 2024 BL 222074, N.D. Cal., No. 23-cv-03665, 6/28/24 .

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# Aerotech Defends Stock Plan Cash Holdings as Wise in New Lawsuit

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- Suits say large cash holdings unfit for retirement savers
- Strategy allowed plan to flourish for decades, company says

Motion systems equipment manufacturer Aerotech Inc. defended its practice of keeping cash-like investments in its workers' employee stock ownership plan.

Aerotech derided a legal challenge to this practice as an attempt to “manufacture a new type of claim.” It has successfully maintained its ESOP for nearly 50 years in part because it keeps sufficient funds available to repurchase workers' shares when necessary, the company said.

A new lawsuit saying the plan holds too much cash challenges “the very system that has sustained the ESOP for decades,” the company said Monday in a motion to dismiss.

The proposed class action also rests on an inappropriate comparison between ESOPs and traditional retirement plans, Aerotech said.

“Congress and courts are clear that ESOPs' special purpose—transferring stock ownership to employees—exempts them from fiduciary considerations that may apply to other retirement plans,” the company said.

The lawsuit, filed in April in the US District Court for the Western District of Pennsylvania, challenges how Aerotech invests the portion of its ESOP that's not dedicated to holding stock in the company. Workers said the company put more than \$10 million of the plan's assets in “cash equivalents” that returned less than 1.5% between 2018 and 2023. This “unusual and imprudent” strategy wasn't a suitable way to manage long-term retirement investments, the workers said.

A handful of employers have been sued over this strategy in the past few months, including Aluminum Precision Products, Pride Mobility Products Corp., and Wilson Electric Services Corp. Attorneys say these cases could force courts to grapple with the differences between traditional retirement plans and ESOPs, which are aimed at giving workers an ownership stake in their companies.

ESOP sponsors are required to fund a retired employee's payout pursuant to a share price set by the trustee, Aerotech said in its motion. For established ESOPs, this obligation can “swing drastically from year to year” based on factors outside a company's control, and

Aerotech navigated this uncertainty by adopting the common practice of “reshuffling” active participant cash and departing participant stock, according to the motion.

“By following a capital preservation strategy for investing Aerotech’s contributions, the ESOP’s fiduciaries prudently protected its participants’ payouts from the risk of market losses and ensured that the ESOP maintained funds sufficient to pay distributions and perpetuate itself via recycling—the very purpose of an ESOP,” the company said.

The case is assigned to Judge W. Scott Hardy.

Groom Law Group represents Aerotech. Engstrom Lee LLC represents the workers.

The case is Schultz v. Aerotech, Inc. , W.D. Pa., No. 2:24-cv-00618, motion to dismiss 7/1/24

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[NCAA Hit With Antitrust Suit From 2008 Kansas Basketball Team](#)

# GE Is Latest Firm Sued Over Athene-Linked Pension Transfers

By Jacklyn Wille

- **COURT:** N.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-00822](#)

Bloomberg Law News 2024-07-02T09:51:21449098951-04:00

GE Is Latest Firm Sued Over Athene-Linked Pension Transfers

By Jacklyn Wille 2024-07-01T11:01:37000-04:00

- **COURT:** N.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-00822](#)

General Electric Co. is the latest employer to be hit with a proposed class action challenging its decision to transfer workers out of its pension plan in favor of annuities from a controversial insurance company.

The lawsuit takes aim at a 2020 move in which GE—now operating as GE Aerospace—agreed to transfer more than \$1.7 billion in pension obligations to subsidiaries of Athene Holding Ltd., which retirees criticize as being overly risky and improperly connected to private equity. This transaction caused about 70,000 workers to lose the federal protections of the Employee Retirement Income Security Act and jeopardized their retirement savings, according to the lawsuit.

The retirees' complaint, docketed Monday in the US District Court for the Northern District of New York, says this move "immediately diminished" the value of these pensions and greatly increased the risk that they won't receive the benefits they've earned.

The lawsuit is part of a recent series of cases targeting large employers that attempt to de-risk their pension plans by purchasing annuities from units of Athene, an Apollo Global Management subsidiary that's not named as a defendant in any of the cases. The lawsuits, including ones targeting AT&T Inc., Lockheed Martin Corp. and Alcoa USA Corp., say Athene uses a risky offshore structure that jeopardizes workers' ability to receive benefits without compensating them for taking on additional risk.

GE didn't immediately respond to a request for comment

Schlichter Bogard LLP represents the GE retirees.

The case is *Bueno v. Gen. Elec. Co.* , N.D.N.Y., No. 1:24-cv-00822, complaint docketed 7/1/24 .

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July 1, 2024, 7:02 AM PDT

# Evonik Beats 401(k) Class Suit With Prudent Fiduciary Process

By Jacklyn Wille

- Investment committee properly reviewed fund performance
- Plan recordkeeping fees fell during relevant time period

**Bloomberg Law News 2024-07-02T09:53:07985318226-04:00****Evonik Beats 401(k) Class Suit With Prudent Fiduciary Process****By Jacklyn Wille 2024-07-01T10:02:35000-04:00**

- Investment committee properly reviewed fund performance
- Plan recordkeeping fees fell during relevant time period

Evonik Corp. appropriately managed its employees' \$1.3 billion retirement plan, a New Jersey federal judge said in an opinion rejecting class action claims of poor investment performance and high fees.

The undisputed evidence shows Evonik's retirement committee used a diligent process for reviewing plan investments, Judge Madeline Cox Arleo said in a June 28 opinion awarding the company summary judgment. The committee reviewed funds at quarterly meetings that included analysis from an outside adviser and even held an off-cycle meeting to discuss the adviser's recommendation to remove a specific investment, the judge said.

Arleo, who sits in the US District Court for the District of New Jersey, also approved of the plan's annual recordkeeping fee levels, which fell from \$116 to \$49.50 per person during the period in question. The plaintiffs said Evonik could have further lowered these fees by moving to a new recordkeeper, but Arleo credited the company's explanation that doing so could have introduced disruption and risk by forcing the plan to switch default investments.

Arleo also rejected claims that the plan's investment policy statement was inappropriately vague, saying it provided guidelines for monitoring plan funds and criteria for handling "investments of concern."

The lawsuit accuses Evonik—the US arm of German specialty chemical company Evonik Industries AG—of allowing its retirement plan recordkeeping fees to spiral out of control and of keeping expensive funds in the plan despite the existence of identical, lower-cost options. Arleo allowed the bulk of the lawsuit to advance in 2020 and certified a class of about 4,800 people in 2022.

Hundreds of lawsuits challenging retirement plan fees have been filed over the past few years, and federal appeals court rulings have been mixed.

The Third, Fifth, and Ninth circuits revived lawsuits against Wesco Distribution Inc., United Surgical Partners, Trader Joe's Co. and Salesforce.com Inc., while the Sixth, Eighth, Tenth, and D.C. circuits issued employer-friendly decisions largely favoring CommonSpirit, TriHealth Inc., MidAmerican Energy Co., Barrick Gold, and Georgetown University. The Seventh Circuit rejected a plan fee challenge against Oshkosh Corp. in 2022, but last year it allowed key claims to proceed against Northwestern University.

Jackson Lewis PC represents Evonik. Capozzi Adler PC represents the plan participants.

The case is *Silva v. Evonik Corp.*, D.N.J., No. 2:20-cv-02202, 6/28/24.

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# Securities Law Prof Blog

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Monday, July 1, 2024

## New Securities Law Articles in Print

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The following law review article relating to securities regulation is now available in paper format:

Adam B. Badawi, Matthew D. Cain & Steven Davidoff Solomon, *Does Voluntary Financial Disclosure Matter? The Case of Fairness Opinions in Mergers and Acquisitions*, 66 J.L. & Econ. 535 (2023).

Eric C. Chaffee, *Regulation by Survey*, 65 B.C. L. Rev. 601 (2024).

Sheila Krische, Note, *Auditing the Auditors: Overregulation under the Sarbanes–Oxley Act*, 52 Hofstra L. Rev. 211 (2023).

Lisa Lopez, Comment, *The Road to the Rules: The SEC Mandates Cybersecurity Disclosures*, 96 Temp. L. Rev. 65 (2023).

Corey B. Shapiro, Note, *Green Funds in a Gray Area: The ESG Fund Labeling Problem and How the SEC Can Fix It*, 48 Colum. J. Env't L. 415 (2023).



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kw=Arguing%20Class%20Actions:%20In%20Defense%20of%20Defendant%20Class%20Actions&utm\_position=6&utm\_source=email&utm\_medium=enl&utm\_campaign=afternoonupdate&utm\_conten



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COMMENTARY

## Arguing Class Actions: In Defense of Defendant Class Actions

Arguing Class Actions is a monthly column by Adam J. Levitt for the National Law Journal.

July 01, 2024 at 04:00 PM

Class Actions

By Adam J. Levitt | July 01, 2024 at 04:00 PM



In the typical class action brought pursuant to Rule 23 of the Federal Rules of Civil Procedure, a single plaintiff brings claims on behalf of a group of absent plaintiffs. This structure provides the necessary mechanism to litigate claims where a defendant is alleged to have harmed a large group of individuals in a small enough amount that no single plaintiff has sufficient incentive on its own to pursue the wrongdoing individually.

But Rule 23 of the Federal Rules of Civil Procedure not only permits a representative plaintiff to sue on behalf of a class of persons or entities harmed by defendants, but also provides that a defendant may be sued as a member of a class: “one or more members of a class may ... be sued as representative parties.” Fed. R. Civ. P. 23(a).

Defendant class actions are viewed as “one of the rarest types of complex litigation,” in fact “so rare they have been compared to ‘unicorns.’” See *Bell v. Brockett*, 922 F.3d 502, 504 (4th Cir. 2019). And while seldom used, defendant class actions provide practitioners with a tool which, if employed in the appropriate case, can be both valuable and effective. Indeed, a defendant class action may provide numerous benefits and efficiencies to all parties. For plaintiffs, a defendant class action may offer the following potential advantages:

- The ability to seek recovery from multiple defendants at once, rather than pursuing the same or similar relief from each defendant one at a time;
- The ability to seek global injunctive relief and enjoin multiple defendants, rather than just one;
- The efficiencies associated with litigating once on all claims, rather than multiple times against multiple defendants in multiple forums;
- The ability to aggregate and prosecute claims that might not otherwise be economically feasible absent a defendant class;
- The ability to toll limitations periods against defendants who cannot otherwise be served in multiple individual suits before the expiration of the limitations period; and
- The possibility of easing obstacles relating to personal jurisdiction and venue against nonresident defendants, which would preclude individual litigation against them in the forum state absent a defendant class action.

There are benefits to defendant class actions for defendants as well. Those benefits may include: lowering defense costs by leveraging the economies of scale of acting in concert with other class members; reducing the costs of resolving what may otherwise be perceived as nuisance claims; and avoiding inconsistent rulings in multiple cases proceeding at varying paces. Similarly, judicial considerations may also factor into the effective use of defendant class actions. Indeed, defendant class actions might afford courts the ability to achieve efficiencies by adjudicating one rather than many cases and simultaneously avoiding inconsistent outcomes.

### Types of Cases

Defendant class actions may be appropriate for any number of cases, including the following:

- *Constitutional law.* Defendant class actions can be used to enjoin the enforcement of unconstitutional laws by private attorneys general and government officials. See *Nelson v. Warner*, 336 F.R.D. 118 (2020) (certifying defendant class of all West Virginia county ballot commissions in action seeking declaratory and injunctive relief with respect to allegedly unconstitutional ballot rule); see also Private Attorneys General and the Defendant Class Action, 135 Harv. L. Rev. 1419 (2022).
- *Drugs and pharmaceutical litigation.* In antitrust price-fixing cases, where each participant in an alleged conspiracy is jointly and severally liable to victims of the scheme, a plaintiff might have one or more claims against each member of the defendant class even though that plaintiff dealt only with a subset of the class of defendants alleged to be part of the conspiracy. See *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980). Similarly, in *Sebo v. Rubenstein*, 188 F.R.D. 10 (N.D. Ill. 1999), the court, relying on *Uranium*, accepted our argument and certified a defendant class of urologist shareholders in a private lithotripsy venture, concluding that the defendant class satisfied all of the Rule 23 requirements such that “it is possible that plaintiff would forego claims against the defendant class members should a class not be certified. If she indeed undertook separate lawsuits, however, this district would have approximately 100 similar actions to contend with. The court does not view either alternative as superior to a class action.” And the recent opioid litigation involved several different alleged wrongdoers, including manufacturers, distributors, and doctors. In opioids, defendant class actions might allow individuals harmed by opioid use to pursue recoveries against all companies and individuals responsible for the deadly epidemic, so long as each defendant class or subclass satisfied Rule 23’s certification requirements.
- *Bankruptcy.* Defendant class actions might successfully be used in bankruptcy proceedings where a class of defendants received the improper transfer of estate property. See *In re Integra Realty Resources*, 354 F.3d 1246 (10th Cir. 2004).
- *Firearms and gun violence.* Defendant class actions might be used to hold firearm manufacturers liable for damage caused by gun violence. See *NAACP v. Acusport*, No. 99 CV07037 (E.D.N.Y. filed Oct. 29, 1999) (although the case was dismissed for lack of standing, the court noted that “[t]he evidence presented at trial demonstrated that defendants are responsible for the creation of a public nuisance,” adding that distributors could sharply limit gun violence “voluntarily and through easily implemented changes in marketing and more discriminating control of sales practices”).

And criticisms over the use of defendant class actions are more properly focused on the specifics of each case or ensuring due process protections for defendants (such as an ability to opt-out and sufficiency of notice) rather than the tool itself. For example, in 2019, Maryland adopted a ban on defendant class actions after a Maryland state court certified a defendant class in *Yang v. G & C Gulf*. *Yang* involved a class of plaintiffs suing for damages arising out of allegedly illegal “trespass tows.” See *Yang v. G & C Gulf*, No. 403885-V (Md. Cir. Ct. Jan. 16, 2018). In addition to suing the tow operator, plaintiffs sued—and the court certified—a defendant class of businesses that used the tow company’s services. The Maryland rules committee cited *Yang*, along with due process concerns in recommending a ban on defendant class actions. See [Standing Committee on Rules of Practice and Procedure Notice of Proposed Rule Changes](#), March 5, 2019, at 1-3. In *Yang*, however, defendants had no opportunity to opt out, and the first notice of class membership was a mailed postcard that gave little information about the case (notice was not required by law, but ordered by the judge overseeing the case). Notably, *Yang* was the first defendant class action ever certified in Maryland, providing further evidence that the state’s decision was based on a bad application of defendant class actions, not the mechanism itself. And Maryland’s decision to eliminate defendant class actions appears to be a knee-jerk reaction to the application of a set of rules that lacked protections otherwise offered by federal law and procedure, and the laws of other states.

Ultimately, the defendant class action mechanism serves a niche, but important role in American jurisprudence. Litigators dealing with sprawling misconduct involving multiple bad actors should consider using it.

- Postscript: As I was finalizing this month’s column, the U.S. Supreme Court issued its opinion in *Trump v. United States*, No. 23-939. Because the purpose and goal of this column is to highlight and discuss key aspects of the greatest civil justice system the world has ever known, this highly politicized opinion from the most polarized Supreme Court in our lifetime will, unfortunately, further erode public confidence in our courts. The 6-3 Supreme Court majority continues to turn out the lights in President Ronald Reagan’s “shining city on a hill” one room at a time—this time in the service of a convicted felon. It’s safe to say that Mrs. Alito will be turning her flag right-side up today in support of this national embarrassment.

—*DiCello Levitt partner, Brian O’Mara, and associate, Hani Farah, contributed to this column.*

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## Consumer Class Actions May Be the Next Wave of PFAS Litigation

A new wave of litigation about PFAS (per- and polyfluoroalkyl substances) has begun. If it gains momentum, it could be the biggest yet.

July 02, 2024 at 10:50 AM

By Matthew J. Malinowski, Gary Feldon and Sebastian Ovalle | July 02, 2024 at 10:50 AM



A new wave of litigation about PFAS (per- and polyfluoroalkyl substances) has begun. If it gains momentum, it could be the biggest yet.

Litigation concerning PFAS—so-called “forever chemicals”—has been growing in intensity for more than 20 years now. So far, the litigation has mostly been based on either personal injury claims or claims concerning damage to natural resources, especially water. However, the past few years have seen a significant number of cases brought as consumer class actions based on a failure to disclose that a product contains PFAS as an ingredient or contaminant.

We cannot yet know how large this new wave of litigation may be, but there is at least the potential for a tsunami. Recent EPA regulations governing PFAS are contributing to the already significant public attention. In April 2024, the EPA finalized a regulation capping the levels of six types of PFAS compounds in drinking water. Under another recent EPA regulation, virtually everyone who manufactured or imported PFAS since 2011 must provide the EPA with a detailed PFAS report by April 2025. Some of these reports will likely provide fodder for additional lawsuits by the mass tort plaintiffs bar. PFAS claims brought as consumer class actions may be especially well-suited to take advantage of the rising tide of negative publicity, if they can gain traction in the courts.

The early targets of consumer class action PFAS claims have included companies that market their products as healthy or all-natural, although no industry appears exempt. Already, these complaints have been filed against companies making everything from cosmetics to pet food to orange juice to clothing. The crux of these claims is that consumers would not have purchased the product, or would have paid less for it, if the manufacturer disclosed that it contained or was contaminated by PFAS.

Focusing on consumer fears sidesteps the burden of producing reliable scientific evidence showing any actual risk from a product containing PFAS. That burden is a significant one, given the lack of reliable science on the possible health impacts of most PFAS or the levels of exposure required to have an impact. Indeed, there is not even agreement on which synthetic chemicals are within the PFAS group—the National Institute of Environmental Health Sciences claims nearly 15,000, while the National Institute for Occupational Safety and Health states there are around 9,000.

PFAS consumer claims are also very attractive to the mass torts plaintiffs bar because they are more likely than personal injury claims to be certified as class actions. Under Federal Rule of Civil Procedure 23, proposed representatives in a class action must show their claims are typical of the proposed class (as well as meeting the rule’s other requirements of numerosity, commonality, and adequacy). It is easier to meet the typicality requirement when the

proposed class representative's claim is based on a uniform economic injury, rather than plaintiff-specific health issues. If they can meet the other requirements for a class action claim, plaintiffs lawyers may need only a few potential representatives who bought a product to have the chance to bring claims on behalf of a class of millions.

Given all these advantages, it is reasonable to ask why this emerging wave of PFAS litigation has yet to flood the courts. Many members of the mass tort plaintiffs bar are likely waiting to see how early cases fare before putting resources into bringing their own claims. Many of those early cases have faltered as a result of courts' diligent scrutiny of the complaints at the motion to dismiss stage. Three recent dismissals illustrate some common deficiencies in the PFAS consumer claims filed so far:

- In *Krakauer v. REI*, the U.S. District Court for the Western District of Washington dismissed a complaint alleging PFAS on a jacket both for lack of Article III standing and for failure to state a claim. Among its standing rulings, the court held that the plaintiff failed to plead an injury because allegations that tests showed heightened levels of organic fluorine on the jacket were insufficient to plausibly allege the presence of PFAS and the plaintiff did not plausibly allege that the jacket contained more PFAS than comparable products. The court went on to say that the complaint also failed to state a claim, including because it failed to identify the specific PFAS compound allegedly contained in the jacket and did not establish reasonable reliance by the plaintiff on the allegedly deceptive representations.
- The Northern District of California in *Lowe v. Edwell Personal Care* similarly rejected plaintiff's allegation that the presence of organic fluorine in tampons was an adequate proxy for the presence of PFAS. The ruling differed from *Krakauer's* in that the dismissal was for failure to state a claim, instead of failure to allege standing. The court in *Lowe* additionally held that the complaint failed to state a claim because it did not plausibly allege that testing of the tampons showed more than a negligible amount of organic fluorine.
- In *Garland v. The Children's Place*, a case about alleged PFAS on school uniforms, the Northern District of Illinois found that plaintiffs had standing based on their alleged economic injury. The court nonetheless dismissed the complaint for failure to state a claim after holding that the defendant did not have an affirmative duty to disclose lawful use of PFAS and did not make any representations that would lead a consumer to believe they were 100% free of PFAS.

Early losses like these have so far stemmed the tide of PFAS consumer claims, but numerous cases are working their way through the courts. Federal courts in Massachusetts and California have already denied motions to dismiss PFAS class action consumer complaints, allowing those cases to proceed to discovery. And, in virtually every dismissed case we reviewed, plaintiffs have filed amended pleadings to try to evade the original grounds for dismissal.

The manufacturing and retail industries should position themselves now for what may come next in the evolving field of PFAS litigation. Looking forward, companies may want to proactively address potential grounds for PFAS consumer claims. At minimum, they should review their public-facing policies, labeling, and advertising to ensure compliance with their legal obligations and avoid any new basis for claims. To address potential PFAS contamination in a product's supply chain, companies should also consider including PFAS disclosure and indemnification provisions in contracts with vendors. For companies who are already likely targets for PFAS consumer class actions, they may want to retain counsel to develop a litigation risk mitigation strategy before lawsuits are filed. We will continue monitoring this emerging litigation trend closely, at least until we can tell what its impact will be.

**Matthew Malinowski** is a partner and trial lawyer at Hollingsworth LLP, representing clients in highly complex, "bet the company" trials and litigation, including environmental contamination claims, medical device and pharmaceutical products liability defense, construction and commercial contract disputes, high-dollar lost business value and business interruption claims, and putative class action matters.

**Gary Feldon** is a partner in the firm's complex litigation, pharmaceutical & medical device, and toxic torts & products liability groups. At the firm, he has defended multiple mass tort claims alleging inadequate warnings on FDA-approved pharmaceuticals. Feldon was also part of the trial team that won a full defense verdict against a lawsuit concerning a

*medical device sterilization company’s use of ethylene oxide.*

**Sebastian Ovalle** *is an associate at the firm, practicing in the complex litigation and toxic torts and products liability groups. In 2022, he was a member of the trial team defending an ethylene oxide sterilizer in Cook County, Illinois, where after a 28-day trial, the firm secured a complete defense verdict.*

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# Samsung defeats consumers' mass arbitration demand in US appeals court

 [reuters.com/legal/transactional/samsung-defeats-consumers-mass-arbitration-demand-us-appeals-court-2024-07-02](https://www.reuters.com/legal/transactional/samsung-defeats-consumers-mass-arbitration-demand-us-appeals-court-2024-07-02)

Mike Scarcella

REUTERS/Kim Hong-Ji Purchase Licensing Rights , opens new tab

July 2 (Reuters) - A U.S. appeals court has reversed a decision that would have required Samsung Electronics to pay millions of dollars in arbitration fees to respond to thousands of consumer privacy claims.

In a case that could help define the scope of consumer mass arbitration, the Chicago-based 7th U.S. Circuit Court of Appeals on Monday overturned , opens new tab a lower court decision that said Samsung must arbitrate the consumers' claims and pay administrative fees in the process.

The unanimous three-judge panel said the plaintiffs had not shown they had valid arbitration agreements. The panel also said the order requiring Samsung to pay administrative fees was beyond the power of the trial judge.

Samsung and lawyers for the consumers did not immediately respond to requests for comment.

The appeals court's order was a setback for tens of thousands of Illinois consumers who sought to pursue their privacy claims through arbitration rather than in court.

The plaintiffs sued Samsung in U.S. federal court in 2022, seeking an order compelling the device maker to arbitrate claims that it was violating a state law that curbs the collection and use of personal biometric information such as facial scans and fingerprints.

Samsung has denied the allegations, calling them "frivolous."

Samsung in its appeal challenged the consumers' contention that they had valid arbitration agreements. The company also disputed that it had refused to arbitrate.

The appeals court said the consumers had not presented enough information to confirm they were Samsung purchasers. The court said a spreadsheet of names and addresses was not enough to prove the consumers were Samsung customers.

Consumer information such as receipts and order numbers would have proved an arbitration agreement, the appeals panel said.

The consumers had argued that the court had no power to hear the appeal since the trial judge ordered the dispute into arbitration. They also argued that they should be given a chance in the lower court to prove that the 35,651 Illinois consumers who filed arbitration demands had valid agreements.

“The consumers had the opportunity to present their evidence, and they failed to do so,” wrote Circuit Judge Thomas Kirsch II, joined by Chief Judge Diane Sykes and Circuit Judge Frank Easterbrook.

The appeals court said that the status of the case “does not allow second chances.”

The case is Paula Wallrich et al v. Samsung Electronics America et al, 7th U.S. Circuit Court of Appeals, No. 23-2842.

For Wallrich: Deepak Gupta of Gupta Wessler

For Samsung: Shay Dvoretzky of Skadden, Arps, Slate, Meagher & Flom

Read more:

In Live Nation case, appeals court mulls mass arbitration breakthrough

Samsung asks US court to block mass arbitration in privacy case

Fox's Tubi sues law firm over 'manufactured' mass arbitration claims

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

# Drugmakers' appeal to end Zantac cancer lawsuits rebuffed by judge

 [reuters.com/legal/drugmakers-appeal-end-zantac-cancer-lawsuits-rebuffed-by-judge-2024-07-01](https://www.reuters.com/legal/drugmakers-appeal-end-zantac-cancer-lawsuits-rebuffed-by-judge-2024-07-01)

Brendan Pierson

A bottle of Zantac heartburn drug is seen in this picture illustration taken October 1, 2019. [REUTERS/Brendan McDermid/Illustration/File Photo Purchase Licensing Rights](#) , opens new tab

July 1 (Reuters) - A Delaware judge rebuffed a request by GSK (GSK.L) , opens new tab and other drugmakers to appeal a ruling allowing more than 70,000 lawsuits claiming that the heartburn drug Zantac caused cancer to go forward.

The ruling by Judge Vivian Medinilla of the Delaware Superior Court means that the drugmakers, which also include Pfizer (PFE.N) , opens new tab, Sanofi (SASY.PA) , opens new tab and Boehringer Ingelheim, will have to ask the Delaware Supreme Court directly for permission to appeal. GSK said it already submitted its appeal to that court.

If the state high court declines to take the appeal, it will clear the way for the Zantac lawsuits to go to trial.

"Judge Medinilla resoundingly rejected GSK, Boehringer Ingelheim, Pfizer, and Sanofi's attempt to end run around the jury system in Delaware," said Jennifer Moore, a lawyer for the plaintiffs.

GSK in a statement said "the scientific consensus remains that there is no consistent or reliable evidence that ranitidine increases the risk of any cancer." Ranitidine is the active ingredient in the now discontinued drug.

Lawsuits began piling up after the U.S. Food and Drug Administration in 2020 asked manufacturers to pull the drug off the market over concerns that ranitidine could degrade into a cancer-causing chemical called NDMA over time or when exposed to heat.

The drugmakers say Medinilla should have kept the plaintiffs from introducing expert testimony that Zantac can cause cancer, as a federal judge did in 2022 in about 50,000 claims centralized in Florida.

The plaintiffs' cases depend on that testimony, and cannot go to trial without it.

Industry groups including the U.S. Chamber of Commerce backed the drugmakers' appeal in a filing last month, saying letting Medinilla's ruling stand had relaxed the standards for evidence in the traditionally business-friendly state and threatened to turn it into "a hotbed of products-liability and mass-tort litigation."

Medinilla wrote on Monday that she had not adopted a different standard from the Florida federal judge, but simply reached a different conclusion about the evidence in the case.

First approved in 1983, Zantac became the world's best-selling medicine in 1988 and one of the first to top \$1 billion in annual sales. It was originally marketed by a forerunner of GSK and later sold successively to other companies.

The vast majority of pending cases are in Delaware. Only one case, against GSK and Boehringer Ingelheim in Illinois, has gone to trial, ending in a victory for the companies last month.

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Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi and Bill Berkrot

# John Hancock Sued Over Data Breach of Vendor DG3 North America

By Christopher Brown

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 2:24-cv-07385](#)

Bloomberg Law News 2024-07-02T09:53:41415911811-04:00

John Hancock Sued Over Data Breach of Vendor DG3 North America

By Christopher Brown 2024-07-01T12:13:33000-04:00

- **COURT:** D.N.J.
- **TRACK DOCKET:** [No. 2:24-cv-07385](#)

John Hancock Investment Management LLC and its marketing vendor DG3 North America Inc. failed to protect the personal information of thousands of investors that was exposed in a February data breach, a proposed federal class action said.

Daniel Cunningham alleged that John Hancock and DG3, which does business as Diversified Global Graphics Group, breached their duties under common law and contract to protect investors' sensitive information, failed to implement reasonable data-security measures or abide by their obligations under the Federal Trade Commission Act and the Gramm-Leach-Bliley Act, and failed to provide timely and adequate notice of the breach.

Information exposed in the incident included names, addresses, email addresses, investment-fund information and account numbers, and Social Security numbers, according to a complaint filed June 28 in the US District Court for the District of New Jersey.

John Hancock advises individual and institutional investors and provides portfolio-management services. Neither defendant responded immediately to requests for comment.

DG3 said in a May breach notification provided to the office of the attorney general of Maine that the incident affected 13,746 people.

Victims have suffered injury in the form of increased risk of fraud and identity theft, invasion of privacy, out-of-pocket costs incurred from mitigation measures, lost time responding to the breach, reduced value of their personal information, the complaint said.

Cunningham seeks to represent a nationwide class of people whose information was compromised in the incident.

The lawsuit brings claims of negligence, negligence per se, breach of implied contract, breach of third-party beneficiary contract, breach of fiduciary duty, breach of confidence, and unjust enrichment.

Cunningham is seeking compensatory, statutory, and punitive damages; restitution; injunctive relief; attorneys' fees and costs; and pre- and post-judgment interest.

Kopelowitz Ostrow Ferguson Weiselberg Gilbert represents Cunningham and the proposed class.

The case is Cunningham v. DG3 N. Am. Inc. , D.N.J., No. 2:24-cv-07385, complaint filed 6/28/24 .

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# Sullivan & Cromwell Partner's 4,000 Hours In FTX Case Drawing Attention

**A** [abovethelaw.com/2024/07/sullivan-cromwell-partners-4000-hours-in-ftx-case-drawing-attention](https://abovethelaw.com/2024/07/sullivan-cromwell-partners-4000-hours-in-ftx-case-drawing-attention/)

Kathryn Rubino

July 2, 2024

Biglaw

## That's a lot of billable hours -- even for a Biglaw partner.

By Kathryn Rubino

on July 2, 2024 at 12:03 PM

Biglaw attorneys bill a lot. That is an uncontroversial truism. But there's usually an ebb and flow to the work — sure, you might be working like a dog during trial but then you have a blessedly light August, and you can recharge your batteries and the cycle starts anew. But that's not what's happened for Sullivan & Cromwell partner Brian Glueckstein.

As reported by Reuters, since August of 2022 (through April of this year), Glueckstein has averaged ~11 hours a day, 5 days a week on the FTX bankruptcy. Over the course of those 18 months, he's billed 4,000 hours — at a rate of \$2,375 per — to the matter.



(Image via Getty)

Now, that's a lot of hours, but the FTX bankruptcy is a complex matter so it isn't all that strange for a Biglaw partner:

The intensity required from bankruptcy practitioners depends on the case, and FTX is a “bet-the-company engagement,” said Nancy Rapoport, a fee examiner and law professor at the University of Nevada, Las Vegas.

Other experts noted that lawyers at large U.S. law firms often work eye-popping hours, with extreme workloads sometimes considered a badge of success.

“It brings to mind the adage that making partner is a pie-eating contest and the prize for winning is more pie,” Georgetown Law professor Adam Levitin said in an email.

But it is incredibly profitable.

Across all its timekeepers, Sullivan & Cromwell has billed 168,000 hours to the FTX bankruptcy. So far, \$171.8 million in fees has been approved by the judge in the matter, plus the firm has an outstanding \$26.8 million request.

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

## Topics

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Bankruptcy, Biglaw, Billable Hours, FTX, Partner Issues, Sullivan & Cromwell

# Market for Carbon Credits Faces Fresh Blow as Offsets Slammed

By Alastair Marsh

Bloomberg Law News 2024-07-02T09:52:267213956-04:00

Market for Carbon Credits Faces Fresh Blow as Offsets Slammed

By Alastair Marsh2024-07-02T00:00:30925-04:00

The market for carbon credits is facing a renewed wave of opposition as climate activists deliver a fresh warning to companies and governments not to use such financial instruments to offset their emissions.

More than 80 nonprofits have teamed up to declare that carbon offsets are undermining genuine net zero action, and are now calling for the total blacklisting of such instruments in climate regulations and guidelines.

ClientEarth, ShareAction, Oxfam, Amnesty International and Greenpeace are among those calling on companies to focus on the outright reduction of greenhouse-gas emissions without the use of offsetting.

"Allowing companies and countries to meet climate commitments with carbon credits is likely to slow down global emission reductions while failing to provide anything like the scale of funds needed in the Global South," the group said in a statement. It also would reduce "pressure to develop large-scale mechanisms such as 'polluter pays' fees on emission-intensive sectors."

For that reason, "voluntary and regulatory frameworks on climate transition planning must exclude offsetting," the group said.

The nonprofits say they're responding to what they characterize as a "growing push" to normalize offsetting as a mainstream path toward reporting lower emissions. As a key example of this, the group points to a controversial statement made in April by the board of the Science Based Targets initiative, which said credits could be used to offset emissions from supply chains, a category that often represents the lion's share of a company's carbon footprint.

Read More: [How One of the Most Revered Climate Groups Descended Into Chaos](#)

The extent to which carbon credits should be used is becoming an increasingly divisive issue in climate finance. Efforts are currently underway to revive the offset market, after studies showing it was rife with inflated green claims left a sizeable dent. Critics say it's still close to impossible to verify the true climate impact of such credits.

The US government has sought to inject greater credibility into the offsets market, including giving its official blessing in May that credits should be an accepted part of climate finance. There are also nonprofits, including Conservation International, the Environmental Defense Fund and the Nature Conservancy, that have endorsed SBTi's proposal to allow greater reliance on credits.

Read More: Wall Street Backers See Breakthrough Moment for Carbon Credits

The nonprofits behind Tuesday's joint statement said that allowing companies and countries to meet climate commitments with carbon credits threatens to hamper efforts to fight climate change.

"Offsetting, at best, does not reduce the concentration of greenhouse gases in the atmosphere, it simply moves emission reductions from one place to another," they wrote. "The logic of offsetting is built on the idea that one entity gets to keep emitting. For this reason, offsetting often ends up providing the social license for high-emitting activities to continue while reinforcing past injustices."

What's more, scientific literature "has shown significant quality issues" with carbon crediting programs, often resulting in worthless credits.

"Carbon credits send a misleading signal about the efforts required to pursue climate action, and they undermine carbon prices by providing a false sense of the existence of ultra-cheap abatement options around the world," the nonprofits said. Such financial instruments also risk "disincentivizing the significant investments needed to ensure profound changes to corporate value chains and economic systems."

*Listen on Zero: How Did a Good Idea Go So Wrong?*

**Hindenburg Research**

## Indian regulators allege Hindenburg's Adani report 'indulged in unfair trade practices'

'Show cause' notice reveals short seller worked with US hedge fund Kingdon Capital Management



Billionaire Gautam Adani's conglomerate was rocked by allegations of fraud by short seller Hindenburg Research © Bloomberg

**Antoine Gara** in New York, **Ortenca Aliaj** in London and **Chris Kay** in Mumbai  
YESTERDAY



India's markets regulator has alleged Hindenburg Research's report on Indian billionaire Gautam Adani "indulged in unfair trade practices" and said the short seller worked with a New York hedge fund to make its bet.

The Securities and Exchange Board of India said in a "show cause" notice dated June 26 that Hindenburg Research "deliberately sensationalised and distorted certain facts". A show-cause order is often a precursor to formal legal action.

[Hindenburg](#), which published the notice on its website, called the allegations "an attempt to silence and intimidate those who expose corruption and fraud perpetrated by the most powerful individuals in India".

Following a show-cause notice, India's regulator can impose financial penalties and bar participation in its capital markets. Sebi gave Hindenburg 21 days to respond to its allegations.

The Hindenburg report released in January 2023 on [Adani](#)'s extensive ports, power and infrastructure empire derailed the group's \$2.5bn share sale plans and wiped \$140bn off the group's market value. Adani has vehemently denied the allegations.

In its notice, Sebi named US hedge fund Kingdon Capital Management as a silent partner to Hindenburg's short bet against Adani Enterprises. Kingdon is an established New York-based hedge fund founded in 1983 and owned by financier Mark Kingdon. The group entered 2024 with about \$640mn in assets under management, according to a March securities filing.

Hindenburg Research, founded by Nathan Anderson, has grown into a feared force in financial markets. Anderson said he had worked with partners including other hedge funds to finance his trades due to his firm's small size. Activist short sellers tend to sell research to third parties who in exchange provide cash to execute their trades.

In its 46-page notice, Sebi outlined an alleged relationship between Hindenburg and Kingdon that began in the autumn of 2022, months before Hindenburg published a report alleging extensive impropriety at Adani Enterprises, which the conglomerate denied.

The short seller also revealed that it made about \$4.1mn in gross revenue through the Adani shorts scrutinised by Sebi, as well as \$31,000 through its own "tiny" short of the group's US bonds.

After expenses related to its two-year investigation into Adani "we may come out ahead of break-even on our Adani short", said Hindenburg.

The publication of the report in 2023 sent shockwaves through the global financial community and put financial pressure on the empire of Adani, one of India's richest men.

The report accused the conglomerate of moving billions of dollars in and out of Adani-controlled entities, often without disclosure. It also detailed a network of offshore funds it said "helped Adani evade minimum shareholder listing rules".

Hindenburg has said it bet against Adani using various financial instruments to short one of the biggest companies in India, a notoriously difficult jurisdiction for offshore investors to access.

After being hit by the report, Adani's stocks have since recovered most of their losses.

Kingdon and Hindenburg did not immediately respond to messages seeking comment.

Hindenburg on Monday criticised Sebi for not focusing its investigation on the Adani conglomerate. Hindenburg also said Sebi was seeking to claim jurisdiction over a US-based investor.

Kotak Mahindra Bank, one of India's largest banks and brokerage groups, "created and oversaw the offshore fund structure used by our investor partner to bet against Adani", Hindenburg said in a blog post.

Kotak Mahindra International Limited and K-India Opportunities Fund "unequivocally state that Hindenburg has never been a client of the firm nor has it ever been an investor in the fund. The fund was never aware that Hindenburg was a partner of any of its investors," said Kotak.

Sebi and Adani did not immediately respond to a request for comment.

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# Silvergate Pays \$63 Million to Settle US Regulators' Probes (2)

By Lydia Beyoud

Bloomberg Law News 2024-07-02T09:50:43454819652-04:00

Silvergate Pays \$63 Million to Settle US Regulators' Probes (2)

By Lydia Beyoud2024-07-01T17:40:19433-04:00

Silvergate, the California lender done in by the collapse of crypto exchange FTX, agreed to pay \$63 million to settle state and federal probes on Monday.

The Federal Reserve announced the penalties against the bank, owned by Silvergate Capital Corp. The Fed portion of the fine is \$43 million, and the California Department of Financial Protection and Innovation makes up the remainder. The Securities and Exchange Commission also said it settled with the lender.

Silvergate didn't admit to or deny claims made by the regulators.

"The settlements announced today, which will facilitate the surrender of Silvergate's bank charter, are part of the bank's continued orderly wind-down and successfully conclude investigations by the Federal Reserve, DFPI and SEC," the company said in a statement. The bank added that it "made a responsible decision to liquidate voluntarily and without government assistance" in 2023, and that all deposits had been repaid to banking customers.

## SEC Claim

On Monday, the SEC said the lender would pay \$50 million to settle claims of negligence-based fraud for misleading investors about its compliance. That amount could be offset by other penalties, according to the SEC.

"Because of those deficiencies, Silvergate allegedly failed to detect nearly \$9 billion in suspicious transfers among FTX and its related entities," **Gurbir Grewal**, the head of the SEC's enforcement unit, said in a press release.

The markets regulator also settled with former Silvergate Chief Executive Officer Alan J. Lane and former Chief Operating Officer Kathleen Fraher for \$1 million and \$250,000, respectively. Attorneys for the two executives didn't immediately respond to requests for comment.

The SEC's complaint also alleged that Antonio Martino, the lender's former chief financial officer, and the bank understated losses and misrepresented that it remained well-capitalized at the end of 2022.

Martino denied the agency's claims in an emailed statement. The SEC's allegations concern a technical accounting treatment for one quarter in 2022 that is also highly subjective to business judgment, according to the statement.

"Mr. Martino acted reasonably and in good faith throughout his time at Silvergate. He denies any wrongdoing and intends to challenge the SEC's claims in court," his attorney, Adam Lurie, a partner at Linklaters, said in the emailed statement.

### **Crypto Clients**

Bloomberg reported in February 2023 that the lender faced a criminal investigation from the Justice Department into its dealings with FTX and Sam Bankman-Fried, the exchange's former chief executive officer.

The status of that probe isn't known. Law enforcement officials at the agency previously said the bank was also a victim of large-scale fraud perpetrated by FTX and Bankman-Fried.

As one of the few traditional banks to embrace doing business with the then-nascent digital-asset industry, Silvergate became embroiled in the crypto industry's meltdown in late 2022 and 2023.

Silvergate had made a name for itself by operating one of the few payments systems that allowed investors and digital asset companies to convert US dollar deposits into digital assets, serving as a key infrastructure to digital-asset exchanges.

The collapse of the FTX exchange, once purported to be the world's largest crypto trading platform, precipitated a liquidity crunch as Silvergate investors and clients rushed to sever ties with the La Jolla-based lender.

(Updates with additional information on SEC settlements starting in the seventh paragraph. An earlier version corrected the spelling of the bank's name in the headline.)

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## GoDaddy Shareholders Balk At Further Chancery Delay

By **Leslie A. Pappas**

Law360 (July 1, 2024, 9:05 PM EDT) -- A special litigation committee that GoDaddy Inc. created in September 2023 in response to shareholder litigation over an \$850 million tax asset buyout has 30 days to convince a Delaware Chancery Court judge that it is conducting a good-faith investigation and cooperating with the suing shareholders.

In response to the committee's request to continue a stay of litigation for an additional 150 days, Vice Chancellor J. Travis Laster told the committee on Monday that it should try to respond to the shareholders' document requests more fully and get back to him in a month on where things stand.

"Bottom line for today: We're good for another 30 days," the vice chancellor said in a bench ruling by telephone after oral arguments, adding that he would make a more definitive ruling in a month if the parties could not resolve matters by then.

"I don't want to do continual piecemeal renewing of this thing," he said. If after 30 days, the parties are still at odds, "my inclination will be to have discovery."

The pension fund shareholder, IBEW Local Union 481 Defined Contribution Plan and Trust, **sued** the Tempe, Arizona-based company and 10 of its directors in June 2022, alleging that they breached their fiduciary duties by paying \$850 million to terminate tax receivable agreements that the company's founders and certain private equity sponsors negotiated shortly before it went public in April 2015.

Ten GoDaddy directors are named as defendants, including GoDaddy CFO Raymond E. Winborne and members of a special committee that negotiated the terms of the buy-out of the tax receivable agreement rights.

The shareholders argue that GoDaddy grossly overpaid for the assets, which they assert were worth no more than \$175.3 million.

**The company has argued** that the \$850 million was a sound business decision since the TRA obligations could have added up to as much as \$1.8 billion over 10 years.

Vice Chancellor Laster **denied the defendants' motions to dismiss** the complaint in August 2023, saying the shareholders had raised "reasonably conceivable" claims that the buyout was tainted by conflicts of interest and was unfair to common stockholders.

The special committee was established on Sept. 21, 2023, to evaluate the allegations in the complaint, and Vice Chancellor Laster stayed the litigation on Dec. 6, 2023, for 180 days.

In arguments Monday, an attorney for the shareholders complained that the special litigation committee had not complied with the December court order staying the litigation because it had not turned over certain documents.

The key issue in the case is the valuation of the tax assets, but the special committee has not turned over any of the projections, inputs, or valuations that the company used to arrive at the \$850 million buyout figure, the shareholders' attorney, Jeffrey M. Gorris of Friedlander & Gorris PA, told the court.

"We're not getting any cooperation at all, let alone the very specific documents we're entitled to," Gorris said. "Do they not understand these issues? Are they playing games? Or both?"

Koji Fukumura of Cooley LLP, an attorney for the special litigation committee, said it had reviewed 80,000 of 1.7 million documents that it obtained from the company, defendants and third parties.

"We are moving at a very fast pace through a monumental body of information," he said. "We're trying to cooperate, but we want to make sure we send over the right documents."

Some of the shareholders' information requests have been inappropriate, Fukumura added. For example, they have asked to sit in on the special litigation committee's interviews with company executives, such as Winborne, the CFO.

In his bench ruling, the vice chancellor called for more transparency on the part of the committee, and more flexibility from the shareholders.

"I'm not opening this up to parallel discovery at this point," the vice chancellor said. "I'm not going to authorize or order the plaintiffs be allowed to participate in interviews ... or be another horse in the buggy pulling the SLC."

Parties in the case either declined to comment or did not immediately respond Monday to Law360's request for comment.

The shareholders are represented by Randall J. Baron, Benny C. Goodman III, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP, Gladriel Shobe and Jarrod Shobe of Shobe & Shobe LLP, and Joel Friedlander, Jeffrey M. Gorris and Christopher M. Foulds of Friedlander & Gorris PA.

GoDaddy Inc. is represented by Paul J. Lockwood and Gregory P. Ranzini of Skadden Arps Slate Meagher & Flom LLP.

Defendant Raymond E. Winborne is represented by Elena C. Norman, Lakshmi A. Muthu, Kevin Rickert, and Zeliang Liu of Young, Conaway, Stargatt & Taylor LLP

The non-executive director defendants are represented by Jordan Eth, Philip T. Besirof, David J. Wiener and Lara McDonough of Morrison & Foerster LLP, and S. Mark Hurd and Alexandra M. Cumings at Morris Nichols Arsht & Tunnell LLP.

The special litigation committee is represented by Koji Fukumura, Elizabeth Skey, Alexandra Eber and Urvashi Malhotra of Cooley LLP and Corinne Elise Amato and Eric J. Juray of Prickett Jones & Elliott PA.

The case is IBEW Local Union 481 Defined Contribution Plan and Trust v. Winborne et al., case number 2022-0497, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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## Justices Told Clarity Needed On Ch. 11 Exculpations

By **Rick Archer**

Law360 (July 1, 2024, 6:56 PM EDT) -- Highland Capital and parties opposed to the venture capital firm's Chapter 11 plan asked the U.S. Supreme Court to clear up how the high court's recent rejection of third-party claims releases in the Purdue Pharma reorganization applies to Chapter 11 exculpations.

Both Highland Capital Management LP and NexPoint Advisors, a company owned by Highland co-founder James Dondero, asked the justices Friday to grant certiorari to their appeals of Fifth Circuit rulings regarding plan clauses shielding parties from lawsuits related to Highland's Chapter 11 case. The Supreme Court did not resolve the issue with its Purdue hearing last month, they argued.

"Lower courts are unlikely to read Purdue as conclusively resolving this issue for exculpation clauses. Absent further review, the circuit conflict is likely to persist," NexPoint said in its **brief** supporting Highland's bid for certiorari.

The filings are a continuation of a legal battle that started in 2020, when Dondero and associated companies, including NexPoint, **challenged Highland's Chapter 11 plans**.

The Fifth Circuit ruled in August 2022 that a Texas bankruptcy court had **overstepped its authority** by approving plan clauses shielding nearly all the bankruptcy participants from litigation related to the reorganization, but upheld a portion of the plan protecting case participants from suits filed by Dondero and NexPoint.

Highland and NexPoint petitioned the Supreme Court in January 2023 to review the circuit court decision. Highland contended that an appellate panel wrongly limited its bankruptcy plan carveout, pointing out that seven other circuit courts have found such provisions reasonable. Meanwhile, NexPoint asked the justices to toss the carveout completely, arguing the Bankruptcy Code prohibits such third-party exculpations.

Each side filed a supplemental brief Friday saying the high court needs to provide additional clarity for lower courts after **last week's Purdue ruling**. In that decision, a majority of the Supreme Court found that bankruptcy courts did not have the authority to force creditors to drop claims against third parties but which both parties said did not expressly address exculpation clauses.

NexPoint said the justices should grant certiorari and reverse the Fifth Circuit decision it appealed, asserting that Highland's positions had invoked the same two Bankruptcy Code provisions Purdue had used to try and justify the third-party releases in its plan.

"Neither provision allows bankruptcy courts to extinguish claims against third parties who have not themselves declared bankruptcy — whether through releases or exculpations," it said.

NexPoint argued that the Supreme Court should grant certiorari to Highland's appeal as well and uphold that portion of the circuit court finding, saying the two cases are "tightly interwoven."

"A ruling prohibiting third-party exculpations may do little to settle the disarray if courts continue to grant broad protections to third parties based on expansive views of immunity," it said.

Highland also said its appeal needs a ruling, but that its case is distinguishable from Purdue. The Purdue plan released claims against the company's former owners for prepetition acts, while the Highland plan exculpated estate fiduciaries and professionals for actions during the bankruptcy, it

said.

"Such clauses are much more closely related to the debtor and to its bankruptcy case and so have much more to be said for their "appropriate[ness]" than third-party releases," it wrote.

The debtor argued the high court should deny certiorari to NexPoint's appeal, saying its prior argument for denial of cert — that the plan does not permanently shield parties from claims over post-bankruptcy business activity, as NexPoint insisted — is unaffected by Purdue.

In an email sent Monday, an attorney representing Highland, Roy Englert Jr. of Kramer Levin Naftalis & Frankel LLP, said he was "glad" NexPoint agreed that the venture capital firm's petition should be granted certiorari.

"NexPoint's own petition tries to piggyback on ours but makes arguments that were never made in the Fifth Circuit. It should be denied," he told Law360.

Counsel for NexPoint did not immediately respond late Monday to requests for comments about Highland's arguments.

NexPoint is represented by Jeffrey A. Lamken, Robert K. Kry, Eugene A. Sokoloff and Benoit Quarmby of MoloLamken LLP.

Highland Capital is represented by Roy T. Englert Jr., Matthew M. Madden, Paul Brzyski and Shikha Garg of Kramer Levin Naftalis & Frankel LLP, and Jeffrey N. Pomerantz, John A. Morris and Gregory V. Demo of Pachulski Stang Ziehl & Jones LLP.

The cases are Highland Capital Management LP v. NexPoint Advisors LP et al., case number 22-631, and NexPoint Advisors LP et al. v. Highland Capital Management LP, case number 22-669, in the U.S. Supreme Court.

--Additional reporting by Katie Buehler, Daniel Ducassi and Emily Lever. Editing by Covey Son.

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# Parsing Justices' Toss Of Purdue's Controversial Ch. 11 Plan

By **Justin Ellis, Mark Kelley and Lois Ahn** (July 1, 2024, 4:21 PM EDT)

Last week, the U.S. Supreme Court issued **a landmark decision** for the restructuring world in *Harrington v. Purdue Pharma LP*, one of the highest profile bankruptcy decisions in the history of the court.[1]

Holding that the U.S. Bankruptcy Code does not allow for nonconsensual releases of claims against nondebtors, the court prevented the Sackler family from using the Purdue bankruptcy to settle thousands of civil opioid lawsuits without the consent of all of the plaintiffs.

The decision has profound implications for bankruptcy cases, especially in the mass tort arena. Although bankruptcy may well remain an important tool for managing mass tort liabilities, Purdue shifts the playing field by providing significant leverage to claimants.

The decision also has potentially major implications in many other areas of bankruptcy practice outside of mass torts.

## The Decision

The case arose out of the bankruptcy of Purdue, the manufacturer of the highly addictive opioid OxyContin. After entering the market in the mid-1990s, OxyContin rapidly saturated the market and Purdue made billions.[2] The Sackler family, which owned and controlled Purdue, became one of the wealthiest families in America.[3]

As OxyContin's addictive qualities came to light, victims filed thousands of lawsuits alleging more than \$40 trillion in damages.[4] To protect themselves personally, the Sacklers withdrew approximately \$11 billion from Purdue — approximately 75% of the company's assets.[5] Purdue then sought Chapter 11 protection in 2019.[6]

As part of the proposed bankruptcy plan, the Sacklers offered to contribute \$4.325 billion to the bankruptcy estate in exchange for a release from all current and future opioid-related claims against them, including claims for fraud, willful misconduct and fraudulent transfer.[7] The vast majority of claimants consented to the plan, but some did not.[8]

The U.S. Bankruptcy Court for the Southern District of New York confirmed Purdue's Chapter 11 plan that included the release and an injunction to enforce it.[9]

The district court vacated the decision, holding that the bankruptcy court lacked authority to release claims against nondebtor third parties without the claimants' consent.[10] A divided panel of the U.S. Court of Appeals for the Second Circuit then reversed the district court and affirmed the reorganization plan.[11]

The Supreme Court reversed in an opinion by Justice Neil Gorsuch, joined by Justices Clarence Thomas, Samuel Alito, Amy Coney Barrett and Ketanji Brown Jackson. The majority's largely



Justin Ellis



Mark Kelley



Lois Ahn

textualist decision held that nonconsensual releases are not authorized by Section 1123(b)(6) of the Bankruptcy Code,[12] a catchall provision following a list of terms that may be included in a Chapter 11 plan.[13]

Because subsection (b)(6) can only authorize terms that are similar to the enumerated terms, the court held, and because the enumerated terms of Section 1123(b) all concern the debtor's relations with its creditors, Section 1123(b)(6) does not grant the power to impose nonconsensual releases of claims against nondebtors.[14]

The majority also reasoned that the relief the Sacklers sought was inconsistent with the "simple bargain" underlying the Bankruptcy Code.[15] That bargain allows a debtor to discharge its debts if it acts honestly and places "virtually" all its assets on the table for creditors.[16]

At the same time, the code prevents the discharge of claims for fraud, willful and malicious injury, and wrongful death.[17] In the court's view, the Sacklers had flouted both parts of that bargain.

First, they neither filed for bankruptcy nor made all their assets available for creditors, and second, they sought a release they could not have obtained even if they had done so. In other words, the court said, they sought "to pay less than the code ordinarily requires and receive more than it normally permits." [18]

Finally, the court rejected arguments based on the policy consequences of its decision. The court acknowledged a debate about whether nonconsensual third-party releases were necessary to deal with holdouts in bankruptcy and that such releases had been in use for some time.[19]

But the court stated that the decision of what releases to authorize must be left to Congress, not the judiciary.[20] The court thus held that bankruptcy courts may not authorize releases and injunctions under a plan that "effectively discharge" a nondebtor without the consent of affected claimants.[21]

## The Dissent

Justice Brett Kavanaugh penned an emphatic dissent, joined by Chief Justice John Roberts and Justices Sonia Sotomayor and Elena Kagan.

In that opinion, the dissenters criticized the majority decision as a ruinous result that is sure to create chaos and cause opioid victims to suffer greatly.[22]

The dissent explained that bankruptcy was a solution to the collective action problem that arises when a debtor's assets cannot satisfy all of its obligations.[23] To avoid a race to the courthouse, bankruptcy pauses claims and encourages a fair distribution of the debtor's property.[24]

The dissent asserted that nondebtor releases had become a well-established tool to resolve these problems, particularly in mass tort bankruptcies.[25]

Those releases are also a key feature of bankruptcy plans when officers and directors are indemnified by the debtor.[26] Since claims against indemnified parties are "essentially the same as creditor claims against the debtor," according to the dissent, nondebtor releases also avoid drain on the estate through a creditors' race to enforce those claims.[27]

The dissent also disagreed with the majority's textualist reasoning. It argued that the use of the term "appropriate" in Section 1123(b)(6) gives bankruptcy courts discretion to deal with complex scenarios like those that plague mass tort bankruptcies.[28]

And because the Sacklers' releases concerned claims arising from the debtor's acts, it followed the "common thread" of the enumerated terms in Section 1123(b).[29] In any event, the dissent argued, other subsections of Section 1123(b) concern nondebtors, too, so nondebtor releases are not a radical departure.[30]

For the Purdue bankruptcy, the dissent called the decision "devastating" and warned of the loss of the claimants' best chance for meaningful recovery.[31]

Without the releases, the dissent reasoned, the Sackler family is unlikely to contribute a significant settlement payment to the bankruptcy estate.[32]

And because claims against the Sacklers face liability and collectability issues — in addition to indemnification issues — the dissent was not optimistic that claimants would recover without such settlement.[33]

### **The Decision's Implications**

Although the decision is guaranteed to make waves, the full extent of its impact remains to be seen. One thing is certain: Claimants in mass tort bankruptcies now have far more leverage in the plan formation process.

Although the majority acknowledged the problem of holdouts, it did not directly address the collective-action issues emphasized in the dissent.

Courts and practitioners will be looking for creative new ways to deal with that problem. One possible tool is to channel estate claims toward post-confirmation litigation trusts. Another tool may be aggressive interpretations of what claims belong to the estate and thus, under Purdue, may be released.

The decision will also pose challenges to a specific form of mass tort bankruptcy that has gained prominence: the so-called Texas two-step. In these bankruptcies, a solvent parent spins off tort liability into a new company through a Texas divisive merger, and the new company declares bankruptcy.

The parent company then often receives a third-party release from liabilities assigned to the spinoff, preventing claimants from suing the parent.

The U.S. Court of Appeals for the Third Circuit rejected a Texas two-step reorganization even before Purdue on different grounds,[34] but Purdue is likely to pose additional obstacles.

Another emerging trend in bankruptcy — gatekeeper provisions — could be affected as well. These are provisions in bankruptcy plans that require a bankruptcy court to ensure that lawsuits are colorable before they are filed against participants in the bankruptcy.

This allows the court to prescreen bad faith litigation aimed at disrupting the bankruptcy plan's effectiveness.[35] Given that Purdue casts doubt on injunctions preventing litigation against nondebtors, such gatekeeper injunctions could be subject to challenge as well.

Other forms of releases in bankruptcy, such as exculpation provisions for fiduciaries and professionals, or releases against post-petition lenders, may also face challenges.

Parties to restructuring and funding assert that those protections are necessary to encourage their participation in the bankruptcy process. If those releases are no longer available, estates may need to fashion new incentives to bring parties — and the capital they contribute — to the negotiating table.

Temporary restraints on litigation against nondebtors may also be vulnerable following Purdue. While Section 362 of the code provides for an automatic stay of litigation against the debtors, no clear statutory authority allows extending that stay to nondebtors.

But many courts have allowed extending the stay where litigation against nondebtors would adversely affect the estate.[36] Some courts have allowed stays as to nondebtors simply to avoid distracting the debtor from its reorganization.[37]

Staying claimants' litigation against nondebtors can be an important tool to bring those claimants to the negotiating table. But if courts apply Purdue's restriction on anti-suit injunctions to extensions of the automatic stay, that tool may be in jeopardy.

More broadly, the decision's plain-text approach to the code could be interpreted as a check on more

expansive approaches to bankruptcy court practice. Citing the need for flexibility and business judgment, bankruptcy courts often read their statutory powers broadly. Lower Article III courts may see Purdue as a signal that this flexibility needs to be reined in.

Moreover, even if appellate courts move toward stricter readings of the code, legal and practical limits on appellate review of bankruptcy court decisions, such as equitable mootness, may slow or restrain change. Practitioners will watch, and look for ways to take advantage of, this potential tension between bankruptcy and appellate courts.

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*Justin Ellis is a partner, and Mark Kelley and Lois Ahn are associates, at MoloLamken LLP.*

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[1] No. 23-124, 2024 WL 3187799 (U.S. June 24, 2024).

[2] *Id.* at \*3.

[3] *Id.*

[4] *Id.* at \*3-4; *id.* \*20 (Kavanaugh, J., dissenting).

[5] *Id.* at \*3.

[6] *Id.* at \*3-4.

[7] *Id.* at \*4.

[8] *Id.*

[9] *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y.).

[10] *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

[11] *In Re Purdue Pharma L.P.*, 69 F.4th 45 (2d Cir. 2023).

[12] 11 U.S.C. §1123(b)(6).

[13] 2024 WL 3187799, at \*7.

[14] *Id.*

[15] *Id.* at \*3.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at \*11.

[20] *Id.*; *id.* at \*10 n.6.

[21] *Id.*

[22] *Harrington v. Purdue Pharma L. P.*, No. 23-124, 2024 WL 3187799, at \*37 (U.S. June 27, 2024) (Kavanaugh, J., dissenting).

[23] Id. at \*15.

[24] Id.

[25] Id. at \*16.

[26] Id. at \*13, \*16.

[27] Id. at \*18.

[28] Id. at \*14-15.

[29] Id. at \*34-35.

[30] Id. at \*28.

[31] Id. at \*12-13.

[32] Id. at \*25.

[33] Id. at \*23-24.

[34] *In re LTL Mgmt., LLC* , 64 F.4th 84 (3d Cir. 2023). MoloLamken represented the Official Committee of Talc Claimants before the Third Circuit.

[35] See, e.g., *NexPoint v. Highland Cap. Mgmt.* , No. 21-10449 (5th Cir. 2022). MoloLamken represents the NexPoint parties in this case before the Supreme Court.

[36] See, e.g., *Queenie, Ltd. v. Nygard Int'l* , 321 F.3d 282, 287 (2d Cir. 2003).

[37] See, e.g., *In re SVB Fin. Grp.* , No. 23-10367 (MG), 2023 WL 2962212, at \*6 (Bankr. S.D.N.Y. Apr. 14, 2023); *In re W.R. Grace & Co.* , 386 B.R. 17, 35 (Bankr. D. Del. 2008); *In re Calpine Corp.* , 365 B.R. 401, 410 (S.D.N.Y. 2007); *In re Zenith Lab'ys, Inc.* , 104 B.R. 659, 665 (D.N.J. 1989).



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# Pegasystems Investors Sue After \$2B Trade Secrets Verdict

By **Julie Manganis**

Law360 (July 1, 2024, 4:45 PM EDT) -- A pair of Pegasystems Inc. stockholders are seeking to hold its CEO and other officers liable for lost value following a \$2 billion judgment against the company in a trade secrets case, according to a shareholder derivative complaint filed in Massachusetts state court.

John Dwyer and Ray Gerber say Cambridge, Massachusetts-based Pegasystems officials sought to hide the case from investors and have since failed to take "suitable action" in response to what a jury found to be a decade-long campaign of corporate espionage overseen by founder and CEO Alan Trefler, according to the complaint, filed in Suffolk County Superior Court on Friday.

The complaint seeks damages for breach of fiduciary duty from Trefler, the firm's controlling stockholder, and from half a dozen board members and four officers.

It is the latest fallout from an alleged scheme by Pegasystems to target rival Appian Corp. in order to steal its trade secrets. The two companies compete in the software development field.

A Virginia jury in 2022 found that Pegasystems used various means, including corporate spies and shell companies, to gain a competitive advantage over Appian and attempt to force it out of business.

Dwyer and Gerber say the Pegasystems board of directors "was either asleep at the switch or complicit in the spying campaign" against Appian.

"At first blush, the allegations in this complaint seem better suited for a Tom Clancy novel, yet a jury has already found them to be true," the plaintiffs say.

Appian learned of the scheme in 2020 from two former Pegasystems employees and filed suit in the Fairfax County Circuit Court in Virginia. A jury in 2022 found Pegasystems **liable for \$2 billion in damages** following a seven-week trial.

In addition to the \$2 billion judgment, Pegasystems was ordered to pay \$24 million in legal fees for Appian and \$122 million a year in post-judgment interest.

Pegasystems, which is appealing the jury verdict, has consistently denied any wrongdoing.

But Dwyer and Gerber say Pegasystems failed to disclose the allegations until February 2022 in U.S. Securities and Exchange Commission filings, then continued to mislead investors until announcing the jury verdict three months later, maintaining throughout that the claims were "without merit" and that the company had strong defenses.

"Ultimately, investors learned the truth," the plaintiffs say.

Aside from that judgment, Pegasystems also faced a 2022 shareholder suit **that settled** in March for \$35 million — another financial blow to shareholders, the plaintiffs say.

A Pegasystems spokesperson on Monday told Law360 Monday evening, "The complaint and the allegations concern the same events that are the subject of previously disclosed derivative litigation."

A messages seeking comment from counsel for the plaintiffs did not immediately receive a response on Monday afternoon.

John Dwyer and Ray Gerber are represented by Joel Fleming and Amanda Crawford of Equity Litigation Group LLP and by Jeroen van Kwawegen, Edward G. Timlin, Christopher Orrico, Shiva Mohan and Daniel E. Meyer of Bernstein Litowitz Berger & Grossman LLP.

Counsel information for the defendants was not available Monday.

The case is Dwyer et al., v. Trefler, et al., case number 2384CV01734, in the Suffolk County Superior Court of the Commonwealth of Massachusetts.

--Additional reporting by Brian Dowling and Britain Eakin. Editing by Alex Hubbard.

*Update: This story has been updated to include a response from Pegasystems.*

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## Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (July 1, 2024, 4:01 PM EDT) -- Two multimillion-dollar settlement approvals, a \$25 million fee-shifting demand, and a biotech merger spoiled by murder: This was just the beginning of the drama last week in the nation's preeminent court of equity. Shareholders in satellite companies filed new cases, a cannabis company headed toward trial, and there were new developments in old disputes involving Tesla and Truth Social.

In case you missed it, here's the recap of what happened last week out of Delaware's Chancery Court.

### In the Courtroom

At a hearing in Wilmington, Vice Chancellor Nathan A. Cook pushed the co-founders of TV data company Alphonso Inc. to explain how their self-serving litigation with parent company LG Electronics and its subsidiary Zenith Electronics LLC **justified a \$25 million fee-shifting request**.

A joint owner of a gun manufacturing business who accused his partner of duping him out of his 50% stake **told a three-justice panel** at Delaware's Supreme Court that the partner had repeatedly lied during Chancery Court litigation, so the trial court's decision in his partner's favor should be overturned.

### Decisions

In a written order, Chancellor Kathaleen St. J. McCormick found that directors of New York-based online food-ordering venture Olo had **mooted a proposed class challenge** to a company stock buyback program.

And in a **bench ruling on cross-motions for summary judgment**, she concluded that the Chancery Court, not an independent accountant, would need to resolve a post-merger dispute between cannabis dispensary giant Curaleaf Holdings Inc. and the former owner of Tryke Cos., a multistate cannabis operation that Curaleaf acquired in 2022.

Vice Chancellor J. Travis Laster **approved a \$71 million settlement** to end derivative litigation with healthcare-purchasing giant Premier Inc., along with a \$14 million fee award for a four-firm team of shareholder attorneys for what he called a "complex case."

Vice Chancellor Lori W. Will **approved a \$15.5 million class settlement** to resolve a suit from stockholders of DiamondPeak Holdings Corp., the blank-check company that took Lordstown Motors Inc. public in October 2020, along with an award for stockholder attorneys of \$3.4 million in fees and \$430,000 in litigation expenses.

### New Cases

Los Angeles biotech firm Renovaro Inc. sued a former scientific adviser and merger partner over an assortment of alleged fraudulent schemes — including a **kidnapping and contract killing** linked to an alleged international oil trading scam.

Investors in a blank check company that took vertical electric air taxi company Archer Aviation Inc. public in 2021 **accused the venture**, controlled by interests of billionaire Ken Moelis, of deceptively hyping its progress and prospects.

An AT&T Inc. stockholder **sued the company's directors and top officers** over their alleged failure to disclose ongoing liabilities and toxic risks from lead-tainted cables around the country.

Two shareholders of California-based satellite launch company Astra Space Inc. **sued for records about a take-private deal** that valued company stock at a discount, voicing suspicions that the merger was approved to squeeze out minority shareholders.

A shareholder of patent developer Network-1 Technologies Inc. **sought the company's books and records** to investigate, among other things, whether it is violating the Investment Company Act of 1940 by operating as an unregistered investment company.

Charles Kim, a shareholder and director of California materials testing company Femtometrix Inc., **sued the company for books and records**, saying he hasn't been given enough information to function as a director.

### Still Under Seal

An Owens Corning Inc. stockholder filed a proposed class action against the company and its directors, alleging breaches of fiduciary duty. The case is *George Assad v. Brian D. Chambers, et al.*, case number 2024-0688.

A shareholder of cloud-based management software company Okta Inc. filed a verified stockholder derivative complaint against Okta CEO and co-founder Todd McKinnon, co-founder and vice chairman J. Frederic Kerrest, chief financial officer Brett Tighe and other company leaders, asserting claims of fiduciary duty and other violations of law. The case is *Salvatore Grimaldi v. Todd McKinnon, et al.*, case number 2024-0685.

Two former executives of Momentus Inc. — former chief revenue officer Dawn Harms and former president Fred Kennedy — sued the company for advancement of legal fees for several other Chancery Court lawsuits. The case is *Dawn Harms et al. v. Momentus Inc.*, case number 2024-0691.

### Ongoing disputes

Tesla Inc. **doubled down on arguments** that a stockholder ratification of CEO Elon Musk's mammoth compensation plan should sideline upcoming Delaware proceedings on a proposed multibillion-dollar class attorney fee, saying the electric vehicle company never conceded that a Chancery Court ruling on Jan. 30 voiding the pay package was final, nor that the June 13 stockholder vote wouldn't affect the July 8 fee hearing.

Chancellor McCormick **responded by ordering a separate hearing** in late July or early August to discuss the effect of the stockholder vote, and said the court still would go forward with the fee hearing July 8.

Vice Chancellor Will **scheduled a one-day trial** July 29 in the dispute between Digital World Acquisition Corp., the blank check company that took Donald Trump's Truth Social public in March, and its sponsor ARC Global Investments II LLC.

A stockholder of Hennessy Capital Acquisition Corp. IV, the blank-check company that took electric vehicle company Canoo Holdings Ltd. public in March 2021, **appealed the dismissal** of his proposed class challenge to the \$2.4 billion deal to the Delaware Supreme Court.

### Settlements

The remaining parties in a class action over the \$11.6 billion sale of Bioverativ Inc. to Sanofi Inc. in 2018 told the court that they had agreed to **settle their litigation for \$40 million** in cash.

The co-chairman of B. Riley Financial Inc. and others **agreed to pay \$8.5 million** to settle a class action accusing them of making misleading and inadequate disclosures leading up to a \$320 million special-purpose acquisition company deal for battery storage venture Eos Energy Storage LLC.

**Quotable**

"It seems that the trial court weighed the equities of this case, and she didn't believe anybody." — Delaware Supreme Court Chief Justice Collins J. Seitz Jr., during **appeal arguments** of Vice Chancellor Will's September 2023 opinion in REM OA Holdings LLC et al. v. Northern Gold Holdings LLC et al.

--Additional reporting by Jeff Montgomery, Alyssa Aquino and Sydney Price. Editing by Kelly Duncan.

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## Caribou Bio Inks \$3.9M Deal In Investors' Cancer Therapy Suit

By **Rae Ann Varona**

Law360 (July 1, 2024, 6:20 PM EDT) -- Caribou Biosciences Inc. has agreed to pay \$3.9 million to settle a proposed class action alleging it misled investors about the durability of its most advanced cancer-fighting therapy before and after the gene-editing biotechnology company went public, investors told a California federal judge on Friday.

The investors said in a motion for preliminary approval that the settlement resulted from "rigorous settlement negotiations" and a mediation session that, despite not initially ending in an agreement, led to continued negotiations and a mediator's proposal to resolve the case.

Proposing resolution was retired U.S. District Judge S. James Otero — whom the investors described as "well-respected" and as having "several years of experience mediating complex actions and over thirty years of experience as a federal and state court judge presiding over securities class actions such as this one."

The investors said in Friday's motion that continuing with litigation would be "complex, uncertain, costly, and lengthy, requiring document and deposition discovery, multiple expert reports and testimony, briefing and arguing motions for summary judgment, and an expensive and risky trial."

The investors were led by Ron Bergman, who initiated the proposed **class action** in April 2023. The suit accused Caribou — which develops gene-edited cell therapies to treat solid tumors and blood cancers — of misleading investors about the durability of its top cancer-fighting therapy product, called CB-010, leading up to and after the company went public in July 2021.

The investors explained in a September 2023 amended complaint, which added underwriters as defendants, that Caribou designed CB-010 to boost antitumor activity as an allogeneic or "off-the-shelf" cell therapy that might lower costs and result in quicker turnaround times.

They said in their amended complaint that the defendants overstated CB-010's clinical and commercial prospects in offering documents through several omissions, including that CB-010's design was not an improvement on competitors' designs and that escalating the dosage of CB-010 would not improve its durability in a clinical trial.

They said that following Caribou's initial public offering and as competitors began posting clinical trial results, Caribou continued to tout its product, including in May 2022 initial results of a phase 1 trial showing an 80% "complete response" rate. Complete response refers to the absence of all detectable cancer after treatment.

Yet before markets opened on June 10, 2022, Caribou reported updated results revealing that only 40% of patients who took a single dose of CB-010 remained in complete response status six months later, the investors alleged. That news caused Caribou's stock price to fall 41.5% on June 13 of that year, down to \$5.10 per share, the investors said in the amended complaint.

They said Caribou's stock had also seen a 22.6% fall in July 2023 following news showing that patients continued relapsing despite receiving higher doses.

Caribou and the underwriter defendants had filed separate motions to dismiss the suit in November. Caribou **argued** in its motion that the investors couldn't show that statements were known to be

false when they were made.

It said that its offering documents had over 68 pages of "detailed risk disclosures" warning investors about the many ways an investment in the company was inherently risky, including that it "may not achieve the desired safety and efficacy of our product candidates."

The investors said in the Friday motion that the parties participated in mediation with Otero in mid-April. While they were unable to resolve claims at mediation, Otero proposed a mediator's proposal, which the investors and Caribou accepted, the investors said.

A notice of settlement was filed in early May, after which the court stayed a hearing on the motions to dismiss.

According to the Friday motion, the settlement class covers all who bought Caribou common stock from July 2023, 2021 to July 13, 2023, and suffered damages.

The investors said that while they believe the case has "substantial merit," they recognize the "significant risk and expense necessary" to make their case through the dismissal motions, a contested motion for class certification, discovery, summary judgment, trial, subsequent appeals, "as well as the inherent difficulties and delays that complex litigation like this entails."

They said that an appeal of any judgment in their favor would prolong the case for years with an uncertain outcome. Meanwhile, the \$3.9 million settlement would give them substantial and immediate recovery, they said.

Class counsel also intends to ask for \$1,092,000 — or 28% of the settlement amount — for attorney fees and no more than \$60,000 for litigation costs, according to the motion.

Neither counsel for the investors nor counsel for Caribou immediately responded to requests for comment Monday.

The investors are represented by Laurence M. Rosen, Phillip Kim and Sara Fuks of the Rosen Law Firm PA, and Brian Schall, Ivy T. Ngo and Rina Restaino of the Schall Law Firm.

Caribou is represented by Jonathan A. Shapiro, Jennifer B. Luz, Adam Slutsky, Katherine G. McKenney and Kourtney Kinsel of Goodwin Procter LLP.

The case is Bergman v. Caribou Biosciences Inc. et al., case number 3:23-cv-01742, in the U.S. District Court for the California Northern District.

--Additional reporting by Tom Zanki and Sydney Price. Editing by Amy French.



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## EV Charging Co. Strikes \$3.75M Deal With Investors

By **Madeline Lyskawa**

Law360 (July 1, 2024, 2:09 PM EDT) -- Electric-vehicle charging station operator Blink Charging Co. has agreed to cough up nearly \$4 million to resolve investors' claims it misled them about the functionality of its charging network.

The terms of the deal were unveiled in a motion for preliminary approval of the class action settlement filed by the investor plaintiffs in Florida federal court on Friday, just more than two months after Miami Beach-base Blink and the investors initially indicated they had reached a deal in principle in a notice of settlement filed before the court in mid-April.

Under the deal, the investors said class members will receive \$3.75 million in cash from Blink, which equates to approximately 6.6% of the total maximum damages potentially available in this action, if the investors overcame all obstacles to establishing liability, and completely prevailed on all loss causation and damages theories, according to their damage expert's estimation.

"However, defendants raised credible loss causation arguments which could have significantly reduced or eliminated the total amount of potential damages. A recovery of at least 6.6% of maximum damages is an excellent result for the settlement class," the investors said.

"In fact, it exceeds the average recovery in similar situations ... For this reason, and others, the settlement is substantively fair," the investors continued.

The litigation between Blink and the investors dates back to August 2020, when individual shareholder Richard M. Bush **kicked off a suit** alleging Blink misrepresented or failed to disclose that many of its charging stations were damaged or inaccessible, and overstated its partnerships and expansions with other companies.

An amended complaint was filed by co-lead plaintiffs Tianyou Wu, Alexander Yu and H. Marc Joseph in February 2021, after Bush's suit was consolidated with that filed by another Blink investor. Blink, in response, moved to dismiss the amended complaint in late April 2021, arguing that the investors failed to adequately allege the company's representations about its charging network were false or misleading, among other things.

Persuaded, in part, U.S. District Judge Kathleen M. Williams in November 2023 **dismissed the investors' claims** that Blink materially misrepresented the size of its charging network, but held the investors adequately alleged Blink made materially false and misleading statements regarding the functionality of its charging network.

Mediation between the parties commenced in early April, which quickly led to the proposed settlement after one full-day session, the investors said in their Friday motion. The proposed class includes all persons and entities that purchased or otherwise acquired Blink securities between March 6, 2020, and Aug. 19, 2020.

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

The investors are represented by Lucas E. Gilmore and Reed R. Kathrein of Hagens Berman Sobol Shapiro LLP, Brenda Szydlo, Jeremy A. Lieberman, Villi Shteyn and Dean Ferrogari of Pomerantz LLP, David M. Buckner of Buckner & Miles, Carol C. Villegas and David J. Schwartz of Labaton Sucharow LLP and Jayne A. Goldstein of Shepherd Finkelman Miller Shah LLP.

Blink and the other defendants are represented by Tracy A. Nichols, Stephen P. Warren and Allison Kernisky of Holland & Knight LLP.

The case is Bush v. Blink Charging Company et al., case number 1:20-cv-23527, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Linda Chiem and Katryna Perera. Editing by Patrick Reagan.

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# Carvana Seeks Toss Of Chancery Suit Alleging Faulty Sales

By **Jeff Montgomery**

Law360 (July 1, 2024, 8:09 PM EDT) -- An attorney for online used-car sales giant Carvana Inc. on Monday urged Delaware's chancellor to toss or stay what he described as a derivative damages case "repackaged" from past or pending federal securities actions that "have not fared well."

Andrew Clubok of Latham & Watkins LLP, counsel for Carvana's officers and directors, told Chancellor Kathaleen St. J. McCormick that the five-count suit "cut and pasted" allegations from federal suits and attempted to shoehorn them into Delaware corporate law claims.

Allegations in the Chancery case include claims citing purported failures to monitor company legal compliance, insider-trading "Brophy" claims, and "Massey" claims alleging prioritization of profits over legal compliance as well as unjust enrichment.

"All of these allegations end up bumping against each other" but are not pled with specifics or details, Clubok told the chancellor, arguing that attorneys for the proposed class "pled themselves out of these claims."

The proposed class action, filed in June 2023 and led by stockholder Rhonda Schertz, accused the Arizona-headquartered Carvana of operating with such an "insatiable hunger for growth" that it bought questionable used cars without assuring they had necessary paperwork — then selling the vehicles to customers without properly transferring the titles, making them illegal to drive.

Daniel Tepper of Levi & Korsinsky LLP, counsel for the proposed class, told Chancellor McCormick that Carvana's board "did not have a regular system of overseeing 'mission-critical'" operations.

"You cannot separate the transactions from the legal documents," Tepper said. "Compliance with state-licensing and registrations laws is critical to Carvana." He alleged there was a "pervasive lack of board concern" for critical issues and scant board level oversight.

"Ad hoc updates, episodic updates, irregular updates do not satisfy the duty of oversight" under the *In re: Caremark International Derivative Litigation* ruling by the court in 1996, Tepper said. That case and those that followed focused on the "utter failure" of fiduciaries to address compliance and board disregard that leads to a "corporate trauma."

In Carvana's case, the suit targeted allegations that Carvana failed to meet its fiduciary and compliance obligations as rapid growth during the COVID-19 pandemic, along with lagging new car production and a sagging economy, spurred used-car sales.

The complaint alleged Carvana continued to sell and deliver cars without properly transferring titles, which left customers unable to legally drive the cars they had just bought for as long as two years, leading to suits and regulatory actions.

Clubok pointed to conflicts within the complaint, telling the chancellor "it's difficult to ignore problems and yet know enough to carry out insider trading. It's difficult to say you've ignored it and yet you also intentionally tried to violate it" for profit, conduct that became the focus of *In re: Massey Energy Co.*

A particular focus of the complaint, Tepper said, is company founder Ernst Garcia II and his relatives,

with the company said to have been run "like a family business" for their benefit.

The senior Garcia, according to the complaint, "traded on confidential information to the tune of \$3.6 billion and faces a substantial likelihood of liability for otherwise breaching his fiduciary duties to the company."

Four directors sold stock during the period covered by the suit, with three selling more than \$500,000 in shares.

Clubok asked the chancellor to dismiss the case for failure to make a pre-suit demand on the board to investigate and pursue the derivative claims, which are the property of the company, or based on failure to show a substantial likelihood of liability and failure to back up any claim with particularized facts.

In the alternative, Carvana argued, the Delaware case should be stayed pending action on the first-filed federal suits.

Chancellor McCormick said she would take the arguments under advisement.

Rhonda Schertz and the proposed class are represented by Stephen E. Jenkins and F. Troupe Mickler IV of Ashby & Geddes PA, Daniel Tepper, Gregory M. Nespole, Correy A. Suk and Cinar Oney of Levi & Korsinsky LLP, and Brian J. Robbins, Kevin A. Seeley and Matthew G. Leagre of Robbins LLP.

Carvana's officers and directors and the company are represented by David Ross and R. Garrett Rice of Ross Aronstam & Moritz LLP and Andrew Clubok, Susan E. Engel, Matthew J. Peters, Stephen T. Nasko and Jeff G. Hammel of Latham & Watkins LLP.

The case is Rhonda Schertz v. Ernest Garcia II et al., case number 2023-0600, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas. Editing by Philip Shea.