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Gores, SPAC Backers Have Deal to End UWM Blank-Check Merger Case

By Mike Leonard 2024-07-03T12:31:40000-04:00

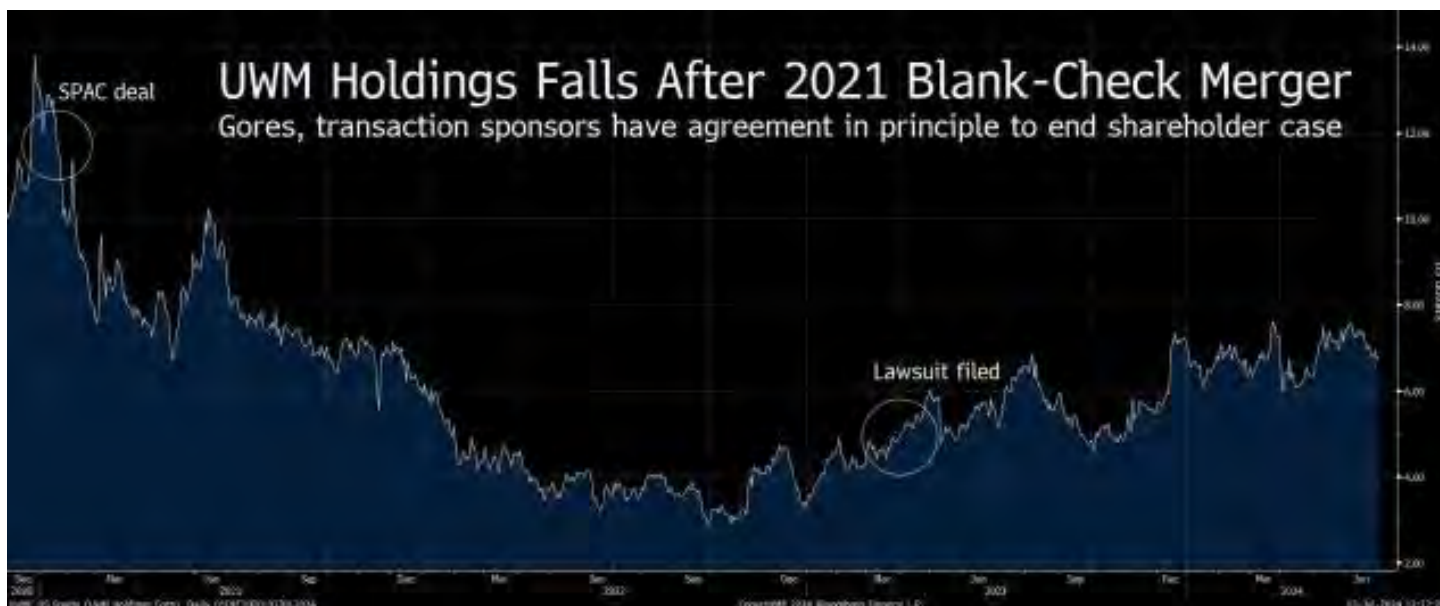
- Lawsuit said disastrous transaction gave insiders a windfall
- Billionaire, affiliates disclose settlement in principle

Private equity billionaire [Alec Gores](#) and other architects of [United Wholesale Mortgage LLC's](#) \$16 billion blank-check merger have agreed to settle litigation challenging the transaction.

The agreement in principle would resolve claims that Gores and other sponsors of the merger, which created the publicly traded [UWM Holdings Corp.](#) in 2021, were driven by lopsided incentives to engineer a disastrous deal that gave insiders a windfall. The proposed class action didn't target UWM—the country's largest wholesale mortgage lender—or its billionaire CEO, [Mat Ishbia](#), who owns the NBA's Phoenix Suns and the WNBA's Phoenix Mercury.

The tentative accord comes about seven months before a trial scheduled to take place in late January 2025. Those proceedings are no longer necessary, and “the parties will work expeditiously to submit a stipulation of settlement” laying out the pact's details, according to a joint filing Tuesday in Delaware's Chancery Court.

The [shareholder suit](#) was part of a wave of litigation challenging mergers with special purpose acquisition companies—a type of shell entity—designed to let privately traded businesses bypass initial public offerings. The UWM transaction was among the largest of a two-year SPAC deal boom that has receded since 2021 as the sector underperformed in the open market.



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

The lawsuit challenging the merger between UWM and an entity backed by affiliates of Gores Group LLC—a serial SPAC sponsor—was filed in March 2023. The proposed settlement requires the approval of the presiding judge, Vice Chancellor Lori W. Will, who has issued several major SPAC-related rulings.

The investors leading the case, Richard Delman and Michael Farzad, are represented by Grant & Eisenhofer PA, Robbins LLP, and Robbins Geller Rudman & Dowd LLP. The deal sponsors are represented by Ross Aronstam & Moritz LLP and Weil, Gotshal & Manges LLP.

The case is [In re Gores Holdings IV Inc. S’holder Litig.](#) , Del. Ch., No. 2023-0284, letter filed 7/2/24 .

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July 2, 2024, 5:24 PM PDT

AstraZeneca Wins Dismissal Of Shareholder Suit Over Viela Sale

By Maia Spoto

Bloomberg Law News 2024-07-03T13:06:46142218506-04:00

AstraZeneca Wins Dismissal Of Shareholder Suit Over Viela Sale

By Maia Spoto 2024-07-02T20:24:21000-04:00

AstraZeneca Plc escaped a lawsuit from shareholders over its \$3 billion sale of biotech firm Viela Bio Inc., after a judge ruled on Tuesday that the complaint failed to show the pharmaceutical company was Viela's controlling shareholder at the time.

AstraZeneca didn't owe a fiduciary duty to Viela stockholders because it lacked control, and it didn't materially mislead or omit facts in communications with shareholders, Delaware Chancery Court Vice Chancellor Paul A. Fioravanti, Jr. wrote in a 102-page opinion. Fioravanti dismissed the case with prejudice.

Shareholders challenged AstraZeneca's 2021 sale of Viela to Horizon for \$53 per share, when AstraZeneca owned 26.7% of Viela's outstanding stock, saying the sale undervalued Viela. AstraZeneca's attorneys argued in December that an impending antitrust review of the company's \$39 billion purchase of Alexion Pharmaceuticals Inc. removed the company's leverage over the sale.

Viela was contractually dependent on AstraZeneca for many of its business operations, and AstraZeneca had veto power over some bylaw amendments, "but that power, along with AstraZeneca's lone board designee at the time of the Merger, did not give it control over Board decisions or the company generally," Fioravanti wrote

The shareholder plaintiff's "strongest argument" was a letter from AstraZeneca that proposed cutting contracts with Viela to allegedly pressure it into a "rushed, single-bidder sale," the judge wrote — but the letter doesn't show control because it didn't include a real threat and negotiations over the deal with Horizon were already underway.

McCarter & English LLP and Freshfields Bruckhaus Deringer US LLP represent AstraZeneca. Richards, Layton & Finger PA and Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC represent the ex-Viela board directors. Block & Leviton LLP, Robbins Geller Rudman & Dowd LLP, and Johnson Fistel LLP represent the shareholder.

The case is Sciannella v. Astrazeneca UK Ltd. , Del. Ch., No. 2023-0125-PAF, 7/2/24 .

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Column: US Supreme Court's Purdue decision narrows options for mass torts defendants | Business Information & News | FE

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Column: US Supreme Court's Purdue decision narrows options for mass torts defendants

6/27/24 Alison Frankel's On The Case 20:56:50

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Alison Frankel

Alison Frankel's On The Case

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June 27, 2024

(Reuters) - When a fractured U.S. Supreme Court ruled on Thursday that federal bankruptcy law does not permit members of the billionaire Sackler family to use the Chapter 11 bankruptcy of their company, Purdue Pharma, to avert all lawsuits by opioids plaintiffs, it said nothing about a controversial corporate maneuver known as the Texas Two-Step.

But the court's Purdue opinion, according to experts I consulted, will force companies facing mass torts liability to think hard about whether it still makes sense to use the tactic, in which thriving parent companies attempt to resolve mass torts claims through the bankruptcy process without actually declaring themselves bankrupt. (The trick: Parent companies cabin their mass torts liability in a subsidiary that enters Chapter 11 bankruptcy, then use the subsidiary's bankruptcy to propose a global mass torts settlement.)

"This decision will make it more difficult for companies to extinguish claims using the Texas two-step," said Deepak Gupta of Gupta Wessler, who filed a friend-of-the-court brief in the Purdue case on behalf of plaintiffs whose mass torts claims were shifted out of litigation and into the bankruptcy process when companies took advantage of the maneuver.

The Texas two-step is intended to allow parent companies to avoid the strictures of bankruptcy while still reaping some of the benefits of Chapter 11, such as a stay on pending litigation and an orderly process for evaluating and settling claims. Proponents contend that

bankruptcy court is the most efficient and effective forum for plaintiffs and defendants to negotiate global deals to settle claims not just against the bankrupt corporate subsidiary but also the non-bankrupt parent company.

That proposition depends, however, on defendants' ability to bind plaintiffs to the deal struck in bankruptcy court. And in the Supreme Court's Purdue decision, the majority held that the bankruptcy code does not allow courts to force unwilling plaintiffs to release their claims against non-bankrupt parties.

In the Purdue case, those parties were Sackler family members who tried to obtain litigation releases through their company's Chapter 11. In the Texas two-step paradigm, the non-bankrupt party is the healthy parent company.

"A bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors," wrote Justice Neil Gorsuch for the Supreme Court majority, which also included Justices Clarence Thomas, Samuel Alito, Amy Coney Barrett and Ketanji Brown Jackson.

I should pause here for an important caveat. As Gorsuch noted in the majority opinion, Congress enacted special rules for asbestos-related bankruptcies. Those rules do, in fact, allow bankruptcy courts under specified circumstances to force plaintiffs to release claims against non-bankrupt entities.

Most (but not all) of the companies that have proposed Texas two-steps have used the tactic to address asbestos liability. So, in way, I'm writing about how the court's Purdue decision will impact a phenomenon – Texas two-steps by non-asbestos companies -- that exists more in theory than reality.

To be sure, as my Reuters colleague Dietrich Knauth pointed out in a terrific story on Thursday, the Purdue decision will also make it harder to resolve mass torts through more conventional bankruptcies. Knauth, like Justice Brett Kavanaugh in his dissenting opinion, wrote that outside parties like insurance companies and corporate officers may be reluctant to contribute money to global bankruptcy settlements if they can't obtain broad releases.

But it's worth considering the decision's impact on Texas two-steps for non-asbestos companies because of the attention garnered by the tactic in the last couple of years, with lower courts openly speculating about the prospect of healthy companies using bankruptcy to sidestep mass torts litigation.

Law professor Anthony Casey of the University of Chicago, who co-authored a 2024 law review article, *In Defense of Chapter 11 for Mass Torts*, that is cited throughout Kavanaugh's dissent, told me that the Purdue decision makes the two-step a less attractive option for non-

asbestos companies.

"The value of bankruptcy has gone down if you can't use it to [protect] the parent company," Casey said.

One of the big advantages of the two-step tactic, Casey said, is that companies can use the bankruptcy process to structure a settlement to handle future claims – a particular issue in mass torts involving products alleged to cause diseases that can take years to develop. The Purdue decision, Casey said, casts doubt on bankruptcy deals to resolve future claims, since those yet-unknown claimants can't consent.

"It really narrows the universe" of cases in which the Texas two-step makes sense, Casey said.

But the tactic might still benefit some non-asbestos companies. The Purdue opinion left open the possibility, for instance, that mass torts defendants can use the two-step to stall litigation against parent companies. Lower courts are divided on whether parent companies that have agreed to indemnify their subsidiaries for liability to mass torts plaintiffs must still face their own cases or whether those cases must be stayed or enjoined when the subsidiary enters Chapter 11. (The issue is shockingly complex!) Companies might try Texas two-steps to obtain at least a temporary respite from litigation.

Defendants might also calculate that bankruptcy court is still the best forum for a global settlement even if they have to obtain consent from plaintiffs. They'd have to obtain the same consent, after all, in a global mass torts settlement in multidistrict litigation. Bankruptcy court could offer a more orderly process than piecemeal agreements with individual plaintiffs and their lawyers.

It may cost defendants more money, after the Purdue decision, to settle mass torts cases through bankruptcy if they have to contribute enough money to win consent from 80 or 90% of claimants. But some companies may decide it's nevertheless their best option.

"I think this decision has dollars and cents impact," said law professor Lindsey Simon of Emory University. "I don't think it will eliminate bankruptcy court as a forum to resolve mass torts liability."

(Reporting By Alison Frankel)

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Cerevel Sued Over Stock Sale to Bain Ahead of AbbVie Deal News

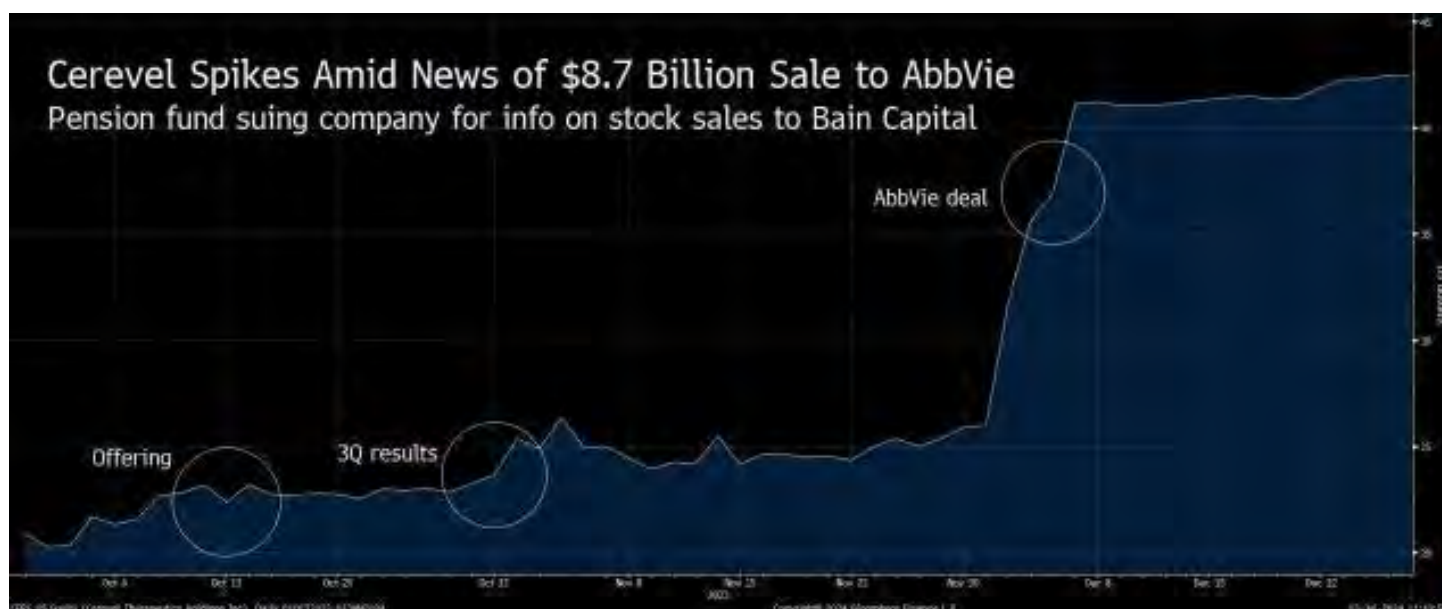
By Mike Leonard 2024-07-03T11:15:04000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0718](#)

[Bain Capital LP](#) affiliates may have arranged to buy stock on the cheap when they knew [Cerevel Therapeutics Holdings Inc.](#) was set to be acquired by AbbVie Inc. for \$8.7 billion, a newly filed lawsuit says.

A pension fund sued Cerevel on Wednesday, seeking to investigate claims that Bain—allegedly the drug company’s controlling stockholder—exploited inside information about AbbVie’s bid to engineer a heavily discounted stock offering that locked in a 97% profit. [Perceptive Advisors LLC](#), which had a 6% stake in Cerevel, also participated in the offering, the suit says.

Cerevel, with eight directors tied to Bain on its 12-seat board, “timed the October offering to allow the insiders to purchase shares at a discount” when they knew the AbbVie transaction was on the horizon, “then took steps to monetize their windfall,” according to the shareholder complaint filed by the SEIU Benefit Funds.



Bain, which isn't named as a defendant, declined to comment Wednesday. Cerevel and Perceptive, which also isn't directly targeted by the lawsuit, didn't immediately respond to requests for comment. The Cerevel board members linked to Bain allegedly included former Massachusetts Gov. Deval Patrick (D), who left for the [Vistria Group LP](#) in January.

According to the court complaint, Bain controls Cerevel through its influence over the board and its 36% voting control of the biotech business, which spun off from Pfizer Inc. in 2018 and went public through a 2020 blank-check merger with a special purpose acquisition company. Cerevel, based in Cambridge, Mass., focuses on treatments for mental and neurological disorders.

'Unbelievable Good Fortune'

The lawsuit in Delaware's Chancery Court says the structure and timing of the \$22.81-per-share Oct. 11 offering suggest Bain "leveraged material, nonpublic information" gleaned from its board representatives to arrange the transaction just days before AbbVie made a \$35-per-share acquisition offer that wasn't immediately disclosed.

Bain allegedly acquired stock worth \$125 million, while Perceptive bought shares worth \$20 million, in an offering that raised about \$499 million total. The sale to AbbVie—announced Dec. 6—is expected to close "in the middle of this year," the suit says.

About two weeks after AbbVie's initial approach, Cerevel announced positive third quarter results, leading analysts to provide price targets of \$40 to \$41 per share, according to the complaint. The company then allegedly "used the positive news to parlay a higher transaction price with AbbVie," which ultimately bumped its bid to \$45.

Based on the close proximity of the various moving parts, "it appears that the company (and the insiders) knew that takeover offers were imminent," the lawsuit says, referring to Bain's "unbelievable good fortune."

The suit seeks internal files from Cerevel under a law giving investors broad access to corporate records if they have credible but preliminary suspicions of wrongdoing by management or the board. Records cases often reflect an effort to drum up fiduciary breach claims for future litigation.

The pension fund is represented by Grant & Eisenhofer PA and Bernstein Litowitz Berger & Grossmann LLP.

The case is [SEIU Benefit Funds v. Cerevel Therapeutics Holdings Inc.](#) , Del. Ch., No. 2024-0718, complaint filed 7/3/24 .

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Altimmune Hit With Derivative Suit Over Obesity Drug Statements

By Matthew Bultman

- **COURT:** D. Del.
- **TRACK DOCKET:** [No. 1:24-cv-00772](#)

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Altimmune Hit With Derivative Suit Over Obesity Drug Statements

By Matthew Bultman 2024-07-02T15:07:38000-04:00

- **COURT:** D. Del.
- **TRACK DOCKET:** [No. 1:24-cv-00772](#)

Altimmune Inc.'s directors were sued by a shareholder who alleges misleading statements about its experimental weight loss drug will cost the company millions.

The derivative lawsuit comes several months after a short report by Kerrisdale Capital questioned the ability of Altimmune's treatment to compete with drugs like Ozempic. Altimmune has also been sued by shareholders in a proposed class action.

"The Company will have to expend many millions of dollars" because of the directors' alleged misconduct, the derivative lawsuit said. The complaint highlighted the cost of defending the shareholder suit and a need "to undertake internal investigations," among other things.

The suit, filed Monday in the US District Court for the District of Delaware, seeks damages for Altimmune and corporate governance changes, including a proposal to strengthen the board's supervision of operations.

Altimmune is among the companies seeking to replicate the success of drugs like Novo Nordisk AS' Ozempic and Eli Lilly & Co.'s Mounjaro.

Altimmune late last month presented data from a phase 2 clinical trial of its drug, pemvidutide.

The results “not only demonstrated significant weight loss but an impressive ability to preserve lean mass,” Louis Aronne, a doctor at Weill Cornell Medicine, said in a statement announcing the data.

Altimune didn’t immediately respond to a request for comment.

Brown Law Firm PC and Farnan LLP represent the investor.

The case is Alaraidah v. Garg , D. Del., No. 24-cv-00772, 7/1/24 .

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Charles River Labs Defeats Investor Suit Over Primate Imports

By Martina Barash

- Suit didn't adequately allege false statements, intent
- Inotiv investors recently overcame company's dismissal bid

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Charles River Labs Defeats Investor Suit Over Primate Imports

By Martina Barash 2024-07-02T14:44:27000-04:00

- Suit didn't adequately allege false statements, intent
- Inotiv investors recently overcame company's dismissal bid

Charles River Laboratories International Inc.'s statements about its sourcing of non-human primates for pharmaceutical research weren't misleading, a federal court said in throwing out a proposed investor class action.

Shareholders suing the drugmaker also failed to show the necessary level of intent for securities fraud, Judge Denise J. Casper said Monday for the US District Court for the District of Massachusetts.

Charles River board members are defending a derivative suit with substantially the same allegations of failing to disclose that the company engaged in allegedly illegal import activity. That case has been stayed in anticipation of a ruling in the class action.

In April, medical research company Inotiv Inc.'s investors survived an effort to dismiss their suit over a supplier's alleged primate import and animal mistreatment issues. Inotiv allegedly told investors that its acquisitions of Envigo RMS Holding Corp. and Orient BioResource Center—which specialized in breeding and importing animals like beagles and non-human primates for medical testing—would be positive developments for the company, according to that suit.

Envigo and Orient BioResource are key players in the proposed class suit against Charles River as well. The investors allege Charles River turned to those macaque sources and others as the Covid-19 pandemic cut off China's exports of the animals and Cambodian suppliers increased their exports. The lead plaintiff, a teachers' retirement fund, faulted six categories of statements by the company and its executives about its macaque supply chain and legal compliance.

But the statements weren't false or misleading when made, Casper said. And some targeted statements were non-actionable expressions of optimism, or "puffery," she said.

The investors' allegations of fraudulent intent based on the premise that two executives, CEO James Foster and chief financial officer David Smith, "sold over \$67 million in artificially inflated shares of Charles River common stock" fails because the pair frequently sold or gave away stock, and also increased their holdings during the period covered by the complaint, Casper said. The allegations "provide more support for nonculpable explanations for Foster and Smith's trading activity than culpable ones," she said.

Kaplan Fox & Kilsheimer LLP is lead counsel for the investors. Davis Polk & Wardwell LLP and McDermott Will & Emery LLP represent Charles River and the executives.

The case is *State Tchrs. Ret. Sys. of Ohio v. Charles River Labs. Int'l, Inc.*, 2024 BL 224125, D. Mass., No. 23-cv-11132, 7/1/24.

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SentinelOne Wins Dismissal of Investor Suit Over Accounting Gaffe

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Class Action

Photo Illustration: Jonathan Hurtarte/Bloomberg Law; Photos: Getty Images

July 3, 2024, 11:02 AM PDT

Matthew Bultman

Reporter

- Suit came after SentinelOne acknowledged accounting errors
- Judge said investors haven't shown company intended to defraud

A federal judge dismissed a shareholder lawsuit accusing cybersecurity firm SentinelOne Inc. of overstating a key revenue metric.

The investors haven't adequately allege that SentinelOne, which acknowledged revenue accounting errors in 2023, intended to defraud investors, Judge Haywood S. Gilliam Jr. in the US District Court for the Northern District of California said Tuesday.

"The more convincing theory is that Defendants failed to catch certain accounting errors and at most might unintentionally have misled investors" by defining the revenue metric "with less than ideal clarity," Gilliam said.

The investor plaintiffs have a chance to amend the complaint.

SentinelOne offers its cyber defense products through subscription contracts, which generally run one to three years, according to the lawsuit.

Investors alleged that SentinelOne baked into its metric an assumption that customers would incur charges for data overages and other services not required by the contract. Investors also said SentinelOne's figures double-counted contracts that were renewed.

The company in June 2023 lowered its 2024 revenue guidance, while acknowledging a "change in methodology" and "correction of historical inaccuracies" related to its annualized recurring revenue metric.

The suit included statements from a former SentinelOne worker who left the company in early 2022 and said the finance department had spotted errors in the calculations.

Nonetheless, “the inferences the Court could draw from the limited allegations relating to scienter are not as compelling as competing innocent inferences,” Haywood said.

Scott + Scott Attorneys at Law LLP and The Schall Law Firm are lead counsel for the investors. Fenwick & West LLP represents SentinelOne.

The case is In re SentinelOne, Inc. Sec. Litig. , N.D. Cal., No. 23-cv-02786, 7/2/24 .

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Frequency Therapeutics Defeats Investor Claims Over Hearing Drug

By Mike Vilensky

- Suit alleged executives misled investors about drug potential
- Complaint doesn't show company knowingly lied, 1st Cir. says

Bloomberg Law News 2024-07-03T13:07:19746461262-04:00

Frequency Therapeutics Defeats Investor Claims Over Hearing Drug

By Mike Vilensky 2024-07-02T19:37:20000-04:00

- Suit alleged executives misled investors about drug potential
- Complaint doesn't show company knowingly lied, 1st Cir. says

A Frequency Therapeutics Inc. investor failed to persuade the First Circuit Tuesday to revive a class action lawsuit alleging the regenerative medicine company willfully misrepresented the progress of a hearing-loss drug.

Julian Quinones's securities fraud suit doesn't offer sufficient evidence Frequency executives knew the drug wasn't performing better than a placebo when they made positive statements about its potential, said Judge William J. Kayatta, Jr. of the US Court of Appeals for the First Circuit.

The ruling affirms a district court decision dismissing the complaint, clearing away a cloud Frequency faced from the consolidated suit.

Quinones alleged Frequency executives violated the Securities and Exchange Act by making misleading comments about the drug's performance in the company's clinical trial The complaint cited a share price drop of 78% when the company announced the trial showed the drug "did not demonstrate improvements in hearing measures versus placebo."

The drug, FX-322, was intended to treat severe sensorineural hearing loss.

To survive Frequency's motion to dismiss, the investors "must 'state with particularity facts giving rise to a strong inference that [Frequency] consciously intended to defraud, or that they acted with a high degree of recklessness,'" Kayatta said, citing a 2020 First Circuit decision.

The complaint doesn't allege that problems with the trial—including the inclusion of participants who didn't meet the trial criteria—were relayed to Frequency chief development officer Carl LeBel before he spoke positively about the trial at a 2011 investor meeting.

"Like Conan Doyle's dog that did not bark, this silence says much," Kayatta wrote.

The court rejected Quinones' argument that Lebel knew from an online message board about the flawed trial since he went on a podcast, Tinnitus Talk, hosted by the same website as the forum. "Merely alleging that a person went on a podcast associated with a website does not by itself generate a strong inference that the person reviewed prior posts on that website," Kayatta said.

Kayatta also rejected the investors' argument that Frequency chief executive David Lucchino's sale of Frequency stock before results of the trial were made public supports an inference he knowingly misled investors. Although Lucchino sold stock, he also received additional shares in the company as part of his compensation around the same time, the court said. So "on the whole, he did not reduce his investment in the company by enough to allow for" for the "strong inference" he knowingly or recklessly misled investors, Kayatta said.

Judges Bruce M. Selya and Jeffrey R. Howard joined the opinion.

Scott & Scott LLP represents Quinones and the proposed class. Latham & Watkins LLP represents Frequency and its executives.

The case is Quinones v. Frequency Theras., Inc. , 1st Cir. App., No. 23-01393, 7/2/24 .

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Vaxart Investors Lose First Bid for Class Status Against Insider

By Martina Barash 2024-07-03T12:20:48000-04:00

- Vaccine developer allegedly hyped role in Covid-19 program
- Hedge fund Armistice defending claims after Vaxart settled

Vaxart Inc. investors suing a controlling shareholder over an allegedly misleading press release presented a flawed theory of how the whole proposed class overpaid for the vaccine developer's stock, a federal court ruled.

"In short, both sides have completely missed the point," Judge Vince Chhabria said Tuesday for the US District Court for the Northern District of California. "They have not come close to giving the Court the evidence or analysis needed to decide whether class certification is appropriate."

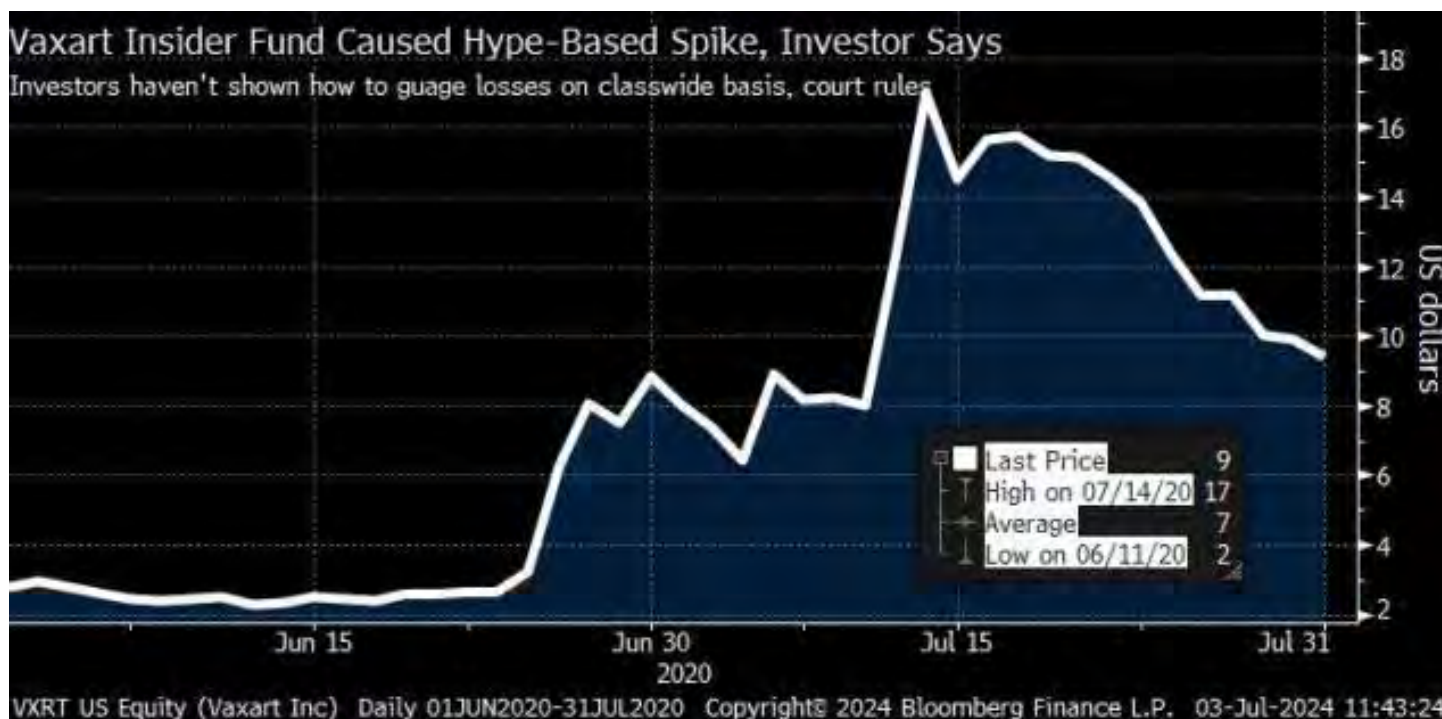
The investors will have another chance to argue for class treatment on their claims against Armistice Capital LLC, Chhabria said. The hedge fund was Vaxart's controlling shareholder when the company issued the press release about its participation in a government-funded Covid-19 vaccine development program. The investors settled their claims against Vaxart for a little more than \$12 million, receiving [final approval](#) in January 2023.

The investors alleged Vaxart—pressured by Armistice—plotted to inflate its stock price with false hype about the prospects of its experimental Covid-19 vaccine. It announced in a June 26, 2020, press release that Vaxart's vaccine candidate had been "selected for the U.S. Government's Operation Warp Speed."

But below the headline, the announcement specified that Vaxart had been "selected to participate in a non-human primate (NHP) challenge study, organized and funded by Operation Warp Speed," according to Chhabria. The government later confirmed that Vaxart wasn't chosen to be a leading vaccine developer, he said.

Armistice allegedly unloaded almost all its Vaxart stock when the stock shot up 28% on the heels of the announcement. One month later, on July 25, 2020, The New York Times published a story in

which the government clarified that it hadn't given funding to Vaxart or negotiated a funding arrangement. The stock dropped 11% that day, after a larger drop earlier that month, according to data compiled by Bloomberg.



The parties presented their arguments for and against class certification in a “cookie-cutter” manner, as though the case involved a “bombshell” revelation that caused a stock drop, Chhabria said. But either there was some “leakage” of information or the market fully absorbed the information before the article came out, he said, pointing to the qualifying information in the press release and Vaxart’s disclosure of Armistice’s stock sale several within days of its occurrence.

The investors’ request for class certification didn’t account for those scenarios, he said.

The claims against Armistice [survived](#) dismissal in May 2023.

Hagens Berman Sobol Shapiro LLP is lead counsel for the investors. Akin Gump Strauss Hauer & Feld LLP and Conrad Metlitzky Kane LLP represents Armistice.

The case is [In re Vaxart, Inc. Sec. Litig.](#) , 2024 BL 225924, N.D. Cal., No. 20-cv-05949, 7/2/24 .

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<https://www.law.com/newyorklawjournal/2024/07/03/proposed-settlement-of-securities-class-action-concerning-alleged-bribery-scheme-approved-as-fair-and-reasonable/>



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ANALYSIS

Proposed Settlement of Securities Class Action Concerning Alleged Bribery Scheme Approved as 'Fair and Reasonable'

In 'In re Tenaris S.A. Securities Litigation', Judge Kiyo Matsumoto found that the proposed settlement satisfied both procedural and substantive fairness. As to procedural fairness, the court found that the settlement resulted from arm's-length negotiations enhanced by substantial discovery and that lead plaintiffs and lead counsel had adequately represented the settlement class because they had engaged in "vigorous advocacy" on its behalf.

July 03, 2024 at 10:09 AM

By Thomas E. L. Dewey | July 03, 2024 at 10:09 AM



After information implicating Tenaris S.A. (Tenaris) executives in an alleged scheme to bribe Argentinian government officials was disclosed in 2018, Tenaris's stock price dropped. Later that year, plaintiff Charles Atanasio filed a securities class action in the U.S. District Court for the Eastern District of New York against Tenaris and other defendants. That action was later consolidated with another class action concerning nearly identical claims.

After several years of litigation—including extensive discovery and motion practice—the parties notified the court in November 2022 that they had reached a \$9.5 million settlement in principle. Subsequently, the lead plaintiffs filed an unopposed motion for settlement approval, which the court preliminarily approved. Thereafter, lead plaintiffs filed a motion seeking final approval of the proposed settlement, and lead counsel filed a motion for attorneys' fees.

In *In re Tenaris S.A. Securities Litigation*, Judge Kiyo Matsumoto found that the proposed settlement satisfied both procedural and substantive fairness. As to procedural fairness, the court found that the settlement resulted from arm's-length negotiations enhanced by substantial discovery and that lead plaintiffs and lead counsel had adequately represented the settlement class because they had engaged in "vigorous advocacy" on its behalf.

As to substantive fairness, the court found that the settlement was "fair, reasonable, and adequate" because there were significant risks associated with establishing liability and damages and collecting on a judgment in foreign jurisdictions; lead counsel had conducted a thorough investigation and extensive discovery; and not a single settlement class member objected to the settlement.

In addition, the court granted lead counsel's request for a one-third recovery of the settlement amount plus interest as attorneys' fees. In reaching that decision, the court stated that district courts in the Second Circuit "routinely approve" fee awards in that percentage as reasonable.

Background

On Dec. 12, 2018, Atanasio filed his original complaint. Later that day, Judge Raymond Dearie was assigned to the case.

On April 29, 2019, Dearie granted Jeffrey Sanders and Starr Sanders' motion for appointment as lead plaintiffs, granted Glancy Pongay & Muray's motion for appointment as lead counsel, and consolidated Atanasio's class action with a related class action.

On July 19, 2019, lead plaintiffs filed an amended complaint. On Oct. 9, 2020, Dearie issued a decision denying defendants' motions to dismiss the amended complaint for lack of personal jurisdiction and failure to state a claim as to Tenaris and one individual defendant and granting defendants' motion to dismiss as to the other defendants.

The parties conducted extensive discovery over the next 15 months, including document productions, initial disclosures and interrogatories, witness interviews with a bilingual investigator, third-party subpoenas and Freedom of Information Act (FOIA) requests to the U.S. Securities and Exchange Commission (SEC) and U.S. Department of Justice (DOJ). The parties also litigated three discovery motions.

In August 2022, lead plaintiffs made an initial settlement demand, but the parties were unable to reach an agreement. In November 2022, the parties renewed their settlement discussions, which resulted in a settlement in principle. On Nov. 11, 2022, lead plaintiffs notified Matsumoto—to whom the case had been reassigned a few days earlier—that the parties had reached a settlement.

Thereafter, lead plaintiffs filed an unopposed motion seeking preliminary approval of the settlement, conditional certification of the proposed class, and approval of lead plaintiffs' notice of proposed settlement. On April 10, 2023, Matsumoto preliminarily granted lead plaintiffs' unopposed motion.

On Sept. 14, 2023, lead plaintiffs filed a motion seeking final approval of the proposed settlement. At an Oct. 19, 2023, settlement conference and fairness hearing, the court indicated that the proposed settlement appeared to be fair, reasonable, and adequate but directed lead plaintiffs to file a status updated regarding the proposed method of distribution. On March 29, 2024, lead plaintiffs filed a submission stating that they had completed claims processing. No members of the proposed settlement class asked to be excluded from the settlement class or filed objections to the proposed settlement.

The Court's Ruling on the Proposed Settlement

The court began its examination of the proposed settlement by explaining that Federal Rule of Civil Procedure 23(e) states that approval of a proposed settlement may only be granted if the proposed settlement is "fair, reasonable, and adequate." The court emphasized that this analysis requires examining the "negotiating process leading up to the settlement"—*i.e.*, "procedural fairness"—and "the settlement's substantive terms"—*i.e.*, "substantive fairness".

As to procedural fairness, the court analyzes whether the settlement arose from arm's length negotiations and whether class counsel adequately represented the class. The court analyzes substantive fairness by considering the factors in *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974), including (1) the complexity, expense and likely duration of the litigation; (2) the settlement class's reaction; (3) the stage of the proceedings and amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of attendant litigation risks.

Here, as to procedural fairness, the court found that the settlement resulted from arm's-length negotiations augmented by "meaningful discovery". In addition, lead counsel adequately represented the class because lead counsel had substantial experience litigating securities class actions, including a history of multi-million dollar recoveries, and no class member objected to the proposed settlement.

As to lead plaintiffs, their interests were “coextensive with other class members’ interests” because lead plaintiffs’ claims were based on the same allegedly wrongful conduct. Further, lead plaintiffs’ and lead counsel’s “thorough initial investigation”, taking of “voluminous fact discovery”, and participation in “extensive motion practice” showed that they had engaged in “vigorous advocacy”.

With respect to substantive fairness, the court found that the above factors weighed in favor of approval.

First, the court noted that securities actions are “among the most complex and costly species of disputes heard in federal district courts.” It also stated that lead plaintiffs had been planning to take several depositions, including depositions of third-party witnesses in foreign jurisdictions, and noted that further motion practice was expected, including, e.g., summary judgment motions, as well as trial itself—all of which would likely require “significant costs” and “years” of further litigation. The court also noted that, even if lead plaintiffs prevailed, collecting on a judgment in a foreign jurisdiction would be “complicated” and “expensive”.

Second, the court noted that not a single settlement class member had asked to be excluded from the settlement class or objected to the settlement.

Third, as to the stage of the proceedings and amount of discovery completed, the court stated that the question was whether the parties had adequate information. Based on the extensive investigation and discovery conducted by lead plaintiffs—including analyzing public filings, research reports, investor call transcripts and Argentine criminal court filings and consulting with damages experts—lead plaintiffs likely had adequate information.

Fourth, the court found that the risks of establishing liability favored approval because the court had already narrowed lead plaintiffs’ claims by dismissing several defendants, the underlying alleged misrepresentation was litigated in Argentine court without a finding of criminal liability and defendants were expected to contest scienter, a difficult element to prove in a securities fraud action.

Fifth, the court found that the risks of establishing damages favored approval because causation and damages would have required an expensive “battle of the experts.” The court noted that lead plaintiffs also faced “significant collection and enforcement obstacles”, because Tenaris had few domestic assets and post-judgment litigation in a foreign jurisdiction would be required if lead plaintiffs were to prevail at trial.

Sixth, as to the risks of maintaining the class action, the court stated that the class was only certified conditionally for settlement purposes and that defendants could be expected to vigorously contest certification.

Seventh, the court noted that the mere ability of a defendant to pay a greater amount does not make a settlement unfair. In addition, Tenaris had few U.S. assets and collection in foreign court(s) would be complex.

Eighth, the court found that the proposed settlement amount—\$9.5 million—which is 4.02-5.01% of the total estimated “base-case” recovery of \$189.6-236.4 million—is “significantly higher” than the 2.4-2.9% average settlement recovery rate for similar class actions from December 2011 to December 2022. In addition, the court found that the proposed settlement would give the settlement class “certainty and immediacy”.

Ninth, the court declined to rule on the proposed settlement at the October 2023 fairness hearing so lead plaintiffs could provide more information about the distribution method. Thereafter, lead plaintiffs confirmed that they had complied with the approved notice program and that all claims received during the notice period were processed. Based on that information, the court found that the proposed method of distribution was “effective and reasonable.”

The Court's Ruling on Attorneys' Fees, Costs and PSLRA Recovery

In lead counsel's motion for attorneys' fees and costs, lead counsel requested one-third of the settlement fund plus interest and reimbursement of nearly \$100,000 in costs. Analyzing the fee request as a percentage of the recovery, the court noted that district courts in the Second Circuit "routinely approve attorneys' fees awards" of one-third.

In addition, the court considered the lodestar method—which multiplies the number of hours spent by the hourly billing rate for each member of class counsel's team—as a "cross-check" and found lead counsel's billing rates were "comparable to peer firms", that lead counsel's team's hours were documented, and that the resulting 1.36 multiplier would appropriately compensate lead counsel.

The court then considered the factors in *Goldberger v. Integrated Resources*, 209 F.3d 43 (2d Cir. 2000) to analyze whether the requested fees were reasonable, including (1) counsel's time and labor; (2) the magnitude and complexities of the litigation; (3) the risk of continued litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Applying those factors, the court found that they too supported the requested fee award, including because lead counsel devoted substantial time and resources to investigating and litigating this complex case on behalf of the settlement class—which resulted in a proposed settlement amount higher than the settlement rate in similar actions during 2011 to 2022—and because public policy favors the award of reasonable attorneys' fees in securities actions to attract qualified counsel to bring such actions.

The court also found that lead counsel's request for reimbursement of expenses—which lead counsel adequately documented—were "essential" to prosecuting and resolving this action. In addition, the court found that lead plaintiffs were entitled to a total recovery of \$7,500 under the PSLRA because they reviewed pleadings, briefs and court orders and had regular discussions with lead counsel about strategy and settlement negotiations.

Conclusions

The court's decision makes clear that a proposed settlement in a securities class action must be "fair, reasonable, and adequate" to be approved. In this case, the court found that the proposed settlement—which highly experienced lead counsel negotiated at arm's length based on information obtained through extensive investigation and discovery—satisfied procedural fairness. In addition, the court found that the proposed settlement satisfied substantive fairness because there were significant risks associated with establishing liability and damages—including the complexity and expense that would be required to collect on a judgment in foreign courts if lead plaintiffs were to prevail at trial—while the proposed settlement would provide certainty and immediacy in an amount significantly above the average settlement rate in similar actions during a recent 10-year period.

The court's decision is also notable because it granted lead counsel's motion for attorneys' fees and costs in full. Lead counsel was able to obtain that result by requesting a percentage of the settlement fund that district courts in the Second Circuit routinely approve—one-third—and by submitting adequate documentation of lead counsel's team's billing rates and their hours and expenses.

Going forward, counsel and clients in securities class actions should keep in mind that courts will evaluate proposed settlements using the "fair, reasonable, and adequate" standard and that this standard requires analyzing several factors related to the complexity of the action, its associated risks, and the amount of the proposed settlement.

In addition, where lead counsel seeks to recover attorneys' fees and costs, they should be aware that a fee request is more likely to be approved if the percentage of the recovery requested is consistent with percentages that districts courts in the Second Circuit routinely approve, and that submitting adequate documentation of billing rates, hours and expenses can be essential to recovering the requested amounts.

Thomas E. L. Dewey *is a partner at Dewey Pegno & Kramarsky. Christopher P. DeNicola, a counsel at the firm, assisted in the preparation of the article.*

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Lampert Wins \$10 Million Damage Reduction in Sears Hometown Case

By Jennifer Kay

- Delaware judge initially awarded \$18.3 million in damages
- Lampert sought re-assessment of additional liquidation costs

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Lampert Wins \$10 Million Damage Reduction in Sears Hometown Case

By Jennifer Kay 2024-07-02T17:32:18000-04:00

- Delaware judge initially awarded \$18.3 million in damages
- Lampert sought re-assessment of additional liquidation costs

Billionaire Eddie Lampert only owes former Sears Hometown and Outlet Stores Inc. shareholders \$8.7 million, a Delaware judge said Tuesday in an order cutting the amount of damages he had awarded in a first-of-its-kind decision earlier this year.

The Delaware Chancery Court in January ordered Lampert to pay \$18.3 million to ex-shareholders of the bankrupt onetime affiliate of the iconic department store chain that Lampert took private in 2019. Vice Chancellor J. Travis Laster corrected the amount to \$8.7 million, before interest, in response to Lampert's request for an adjustment.

Sears Hometown spun off from Sears Holding Corp.—Sears, Roebuck & Co.'s former parent—in 2012. Following a three-day trial in 2023, the court found that, as a controlling stockholder, Lampert interfered in the board's liquidation plan in such a way that he could short-change shareholders.

Lampert has argued the court failed to consider additional liquidation costs that should have been included in its assessment of what was a fair price.

In Tuesday's order, Laster explained how he initially reached the \$18.3 million damages award. The trial hadn't focused on the additional liquidation costs, and since the court didn't have "a high-level of confidence" in various estimates provided by the parties, Laster said he ultimately excluded them because "Lampert had not proved by a preponderance of the evidence what amount the court the should include."

Laster said he has now come back around to his initial intention to include deductions for additional liquidation costs of \$35.6 million, while now excluding deductions for \$14.3 million for increased third-party liabilities.

While he re-checked his math, Laster rejected Lampert's request that he reconsider whether the transaction fell within the range of fairness.

"But this is not a setting where Lampert successfully replicated the equivalent of arm's length bargaining," the judge said. "The modifications to the opinion therefore do not alter the outcome of the court's findings regarding Lampert's breach of duty or the need for a remedy."

Laster's Jan. 24 opinion stunned some corporate litigators for its novel assessment of fiduciary duties owed when a controlling stockholder uses their voting power to change a company's status quo. The opinion set a new standard for controlling stockholders, requiring them to show good faith and prohibiting them from intentionally harming the company or minority shareholders when they push through changes the way corporate boards typically make. Blocking a board decision also now draws an enhanced level of court review.

The former shareholders are represented by Labaton Keller Sucharow; Andrews & Springer; Prickett, Jones & Elliott; Wolf Popper; and Levi & Korsinsky. Lampert is represented by Potter Anderson & Corroon.

The case is *In re Sears Hometown & Outlet Stores Inc. S'holder Litig.*, Del. Ch., No. 2019-0798, order 7/2/24.

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Tishman Speyer Agrees to Settle Latch Inc. Blank-Check Deal Case

By Mike Leonard 2024-07-03T14:20:06000-04:00

- Case challenged SPAC merger, said it only benefited insiders
- Developer, other deal architects have settlement in principle

[Tishman Speyer Properties LP](#) affiliates, including co-founder Jerry Speyer, have agreed to resolve litigation challenging their blank-check merger to take Latch Inc. public.

The billionaire developer and other architects of the transaction disclosed a settlement in principle to end the shareholder case, which targeted sponsors of the special purpose acquisition company that combined with Latch, a manufacturer of smart locks and building management software. Latch itself wasn't named as a defendant.

The proposed class action was part of a wave of litigation challenging mergers with SPACs—a type of publicly traded shell entity—designed to let startups bypass initial public offerings. The deals, known as de-SPACs, have receded from a boom in 2020 and 2021, with scores landing in court after the sector underperformed in the open market.

Like most of the cases, the lawsuit against Tishman Speyer—[filed in Delaware's Chancery Court in May 2023](#)—said financial backers of the Latch merger were driven by lopsided incentives to engineer a disastrous deal that gave insiders a windfall.



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

The settlement disclosed in a court filing Wednesday will head off a trial scheduled for mid-March 2025.

“The parties will work expeditiously to submit a stipulation of settlement” laying out the accord’s details, they said in a letter to the presiding judge, Vice Chancellor [Lori W. Will](#), who has issued several major SPAC-related rulings.

The agreement requires Will’s ultimate approval.

The group of investors leading the case is represented by Grant & Eisenhofer PA, Fishman Haygood LLP, and Bragar Eigel & Squire PC. The Tishman Speyer affiliates are represented by Abrams & Bayliss LLP and Sullivan & Cromwell LLP. The other deal sponsors are represented by DLA Piper LLP (US).

The case is [In re TS Innov. Acquisitions Sponsor LLC S’holder Litig.](#) , Del. Ch., No. 2023-0509, letter filed 7/3/24 .

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[Securities Law News](#)

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Judge Conflict Revives Big Bank Suit Over Small Bond Trading (1)

By Evan Weinberger

Documents

[Opinion](#)[Litovich v. Bank of America Corp.](#)[Docket](#)

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- Case alleges big banks harmed small corporate bond traders
 - Lower judge didn't recuse despite wife's bank investment

Bloomberg Law News 2024-07-03T13:03:02897406155-04:00**Judge Conflict Revives Big Bank Suit Over Small Bond Trading (1)****By Evan Weinberger 2024-07-02T12:51:37000-04:00**

- Case alleges big banks harmed small corporate bond traders
- Lower judge didn't recuse despite wife's bank investment

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.

Bank of America, Barclays, Citigroup, 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.

(Updates with Bank of America and Citigroup declining to comment in eighth paragraph.)

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Matt Levine's Money Stuff: It's Hard to Make Rules Now

By Matt Levine 2024-07-03T13:55:10660-04:00

Programming note: *Money Stuff* will be off tomorrow and Friday, back on Monday, and there will be no *Money Stuff* podcast this week. Happy Independence Day!

Regulation by enforcement

It might be *impossible* for the US Securities and Exchange Commission to write new rules for crypto? We have talked, over the years, about how the crypto industry frequently says that it wants the SEC (or the Commodity Futures Trading Commission, or Congress) to write rules regulating cryptocurrency markets, so that the industry can have regulatory clarity and get on with building the future of finance or whatever. Instead, crypto people complain, there is “regulation by enforcement”: Rather than writing clear rules saying what is allowed, the SEC just decides on a case-by-case basis what *isn't* allowed, and then sues people who already did it to make them pay big fines.

Now, I sometimes think that these complaints are overstated — I think that a lot of crypto projects *obviously* violate longstanding securities laws, and it's just wishful thinking to complain about a lack of clarity — but I am broadly sympathetic to them. It would probably be better to have clear rules than to have to interpolate the rules from backward-looking enforcement actions.

But the way that the SEC actually makes rules is:

- 1. It writes some rules.
- 2. It proposes them publicly.
- 3. There's a period for industry participants and interested bystanders to submit comments about the rules.
- 4. The SEC considers the comments and puts out final rules.
- 5. Anyone who doesn't like the rules can sue. The SEC's authority to regulate crypto (or anything) is contested, and even if it has the authority to regulate, it has to follow proper procedures and not act arbitrarily. Whatever the rules are, you can find arguments against them.
- 6. In 2024, the person who sues *will obviously win*. The US Supreme Court is suspicious of

rulemaking by regulatory agencies, but some of the lower courts are *way more suspicious*, and everybody knows this and can bring their lawsuit in a court that will definitely strike down the rules.

- 7. And then there is some long appeal process, at the end of which there's a decent chance that the rules will be struck down, and the SEC has to go back to the beginning and propose new rules.
- 8. Even this is oversimplified: Actually different people can sue at different times in different courts over different aspects of the rules, leading to even more confusion about what the rules are.

The incentives, for the SEC, are bad. If it makes new rules, that is a lot of work, and those rules will be attacked from every angle. Probably they will be struck down, in ways that limit the SEC's power and create *greater* confusion about what is allowed.

Meanwhile if the SEC just sees some crypto project that it doesn't like, it can sue that project — probably in a court of *its* choosing — say “this violates longstanding securities law,” and have a decent chance (not a certainty!) of winning. Its chances are better not only because it can pick a more sympathetic court, but also because it can pick a *less* sympathetic antagonist: It can argue “we need the power to regulate crypto” in a case where investors lost everything and the value of regulation is clear, rather than writing general rules and getting sued by a nice upstanding firm that doesn't like them.

And by bringing those cases, it can provide reasonable clarity about (what it thinks are) the boundaries of the law. In the case of crypto, the SEC pretty clearly thinks the answer is “you can't do crypto,” but that is not necessary to this analysis. Even if the SEC were more sympathetic to crypto, it would probably set out the rules by (1) suing people who do stuff it doesn't like and (2) informally advising other people “if you do *this* stuff, we won't sue you.” The rules are set by what the SEC sues over and what it doesn't sue over, not by actually writing rules.

I don't think that this is as bad as crypto people say it is — this is kind of the normal common-law way that a lot of rules get made, and there is some value in having courts, rather than the SEC, decide what is allowed — but, sure, it's not *great*. But my point here is that, even if you do think it's bad, it's not entirely the SEC's fault.

This comes up most often around here about crypto, but it's not just about crypto. The current SEC has an ambitious rulemaking agenda and also an ambitious enforcement agenda, but the former is at more risk of being reversed. And it's not just the SEC. Here's a Bloomberg Law article by Evan Weinberger titled “Bank Regulators to Lean on Enforcement as High Court Hits Rules”:

A pair of US Supreme Court decisions curtailing the rule-writing authority of federal regulators will

likely force banking agencies to rely on their supervisory and enforcement powers to police Wall Street.

The high court on Monday ruled that any new entrant to a market has six years from the time they're able to sue to challenge a regulation they oppose, exposing a broad universe of existing rules to new legal fights. That came just days after the justices overturned a long-standing doctrine deferring to regulators on interpreting ambiguous laws.

The decisions are set to crimp high-profile financial rules, including stricter capital requirements proposed by the Federal Reserve, the Federal Deposit Insurance Corp., and the Office of the Comptroller of the Currency.

But unlike other federal regulators, the prudential banking agencies have clear powers to directly supervise banks for unsafe and unsound banking practices. And those supervisors can force banks to hold more capital or change business practices behind closed doors.

With their authority curbed on the rulemaking front, banking regulators may end up leaning on their supervisory and enforcement tools, said Graham Steele, the former assistant Treasury secretary for financial institutions in the Biden administration.

"That is one irony of this whole effort," he said. "This could actually lead to regulation by the agencies being more opaque, less transparent, and by an examiner-by-examiner basis."

By the way, the proper answer to all of this is that *Congress* has to make detailed explicit rules for crypto, and for anything else that you want regulated. The point of the current Supreme Court's restrictions on rulemaking is that it wants elected lawmakers in Congress, not bureaucrats at the regulatory agencies, to make the rules.

Skydance

Well, we've heard this before:

Paramount Global shares jumped the most in two months on Wednesday after a merger deal with independent film and TV producer Skydance Media was revived.

Skydance, led by Oracle Corp. co-founder Larry Ellison's son David Ellison, has reached a preliminary agreement to buy Shari Redstone's National Amusements Inc. and merge with Paramount, the parent of CBS and MTV, according to a person with knowledge of the matter.

National Amusements, the family company that controls Paramount, will refer the deal to a special committee of Paramount directors for review, said the person, who asked not to be identified discussing an agreement that hasn't been announced.

The problem with Paramount, I have argued in the past, is that National Amusements owns about 5% of Paramount's stock, but controls about 77% of its *votes*, because most Paramount shares have no voting rights. Therefore, if you want to buy Paramount, (1) you have to give Shari Redstone a good deal, to get her votes, but (2) if you give her a better deal than the other shareholders, the other shareholders will complain.

What does it mean that the other shareholders will complain? Well, as a threshold matter, any deal to actually acquire Paramount — to merge with it and recapitalize it and so forth — requires the approval of Paramount's board of directors (and a special committee of independent directors), who have fiduciary duties to the public shareholders. So the extreme deal of "we pay Shari Redstone all the money and everyone else gets nothing" would not get through.

But you can probably get *something* through the special committee: They seem open to negotiating, and they understand that, given Redstone's voting control, she is going to get a sweeter deal than the nonvoting shareholders. It is not unreasonable for the special committee to conclude that the public shareholders are better off with a deal than with no deal, and that giving Redstone a better deal is a prerequisite for getting any deal for the other shareholders.

Still, though, those shareholders can complain. By which I mean sue. Ultimately, if Paramount does any sort of merger, some public shareholders will definitely sue, arguing that the deal is conflicted and gives too much to Redstone (and too little to the public shareholders). And Paramount and Redstone will say "no, we had an independent special committee which concluded that this deal was fair," which will help, but which does not *always* work. (Ask Elon Musk.) And it is always possible that a court will find that the deal was unfair and, for instance, take some money from Redstone to give to the public shareholders instead.

One way to mitigate that would be to *let* the public shareholders vote: Hold a vote of the otherwise-nonvoting shares, and if a majority of them approve the deal then that gives you a better argument, in

the inevitable lawsuit, that the deal was fair to everyone. Again, though, this doesn't always work; again, ask Elon Musk.

Redstone wants to *get* a lot of value for National Amusements, but she also wants to *keep* that value. If she gets paid five times as much as public shareholders in the deal, and they sue and win and the court makes her give back all of that value, it's not a very good deal for her. So her goal is not just to get paid, but to get paid in a legally bulletproof way.

Previous efforts to get the Skydance/Redstone deal done seem to have fallen apart over this risk. But the new deal takes another crack at them. In the previous deal, Redstone had wanted to hold a vote of the nonvoting shares, to insulate her a bit from liability; Skydance had apparently said no, because it doesn't want the deal to be contingent on that vote. In the new deal, [the Wall Street Journal reports](#):

Under the new preliminary agreement, National Amusements isn't mandating that the Paramount merger be approved by a majority of non-Redstone shareholders, a sticking point in the last round of deal talks.

But Redstone will get something for that give. Bloomberg's Michelle Davis reports:

The new terms include a higher valuation for National Amusements and stronger language indemnifying the Redstones' company against litigation that may result from the deal, the person said. The sellers have 45 days to seek better offers, another person familiar with the matter said.

Ultimately it makes sense that, if Skydance is willing to pay Redstone more for her voting control of Paramount than it will pay the nonvoting shareholders, it should also take the risk that a court will find that unfair. To get a deal done, you have to give Redstone a sweetener, and you have to let her keep it.

Conflicts

This is [a little weird](#):

A federal appeals court Tuesday reinstated a \$10 billion antitrust lawsuit against 10 banks after finding that a judge who had earlier dismissed the case should have recused himself because of an

apparent conflict of interest first exposed by The Wall Street Journal.

The Manhattan lawsuit against Bank of America and nine other banks should never have been heard by U.S. District Judge Lewis Liman because his wife owned as much as \$15,000 in Bank of America stock when he was assigned the case, the Second U.S. Circuit Court of Appeals ruled.

The lawsuit now goes back to the district court to be heard by another judge. The appeals court said it didn't look at the merits of the case.

Here is the [appellate decision](#). The lawsuit is an antitrust case, alleging that the 10 banks — basically all the big names — conspired to restrict electronic trading of corporate bonds so they could make more money on odd-lot trades. Judge Liman [dismissed it in 2021](#). Now it is back because, apparently unknown to him, his wife owned “as much as \$15,000 in Bank of America stock,” though she sold it months before his decision on the case.

I don't know Lewis Liman's net worth, but he was [a partner at big New York law firms](#) for 20 years, so I suspect that “as much as \$15,000” represents rather less than 1% of his family's assets. If the Limans had put all of their money in S&P 500 stock index funds — sort of the default “not making any investment decisions” approach — then Bank of America Corp. stock would represent about 0.54% of their portfolio. JPMorgan Chase & Co., another defendant in this lawsuit, would be 1.15%. Citigroup Inc., Wells Fargo & Co., Goldman Sachs Group Inc. and Morgan Stanley — the other US defendants — would add another 1.25% or so.

Presumably not all of their money is in stocks, but still. The point is that it would be somewhat unusual for a wealthy US citizen *not* to have economic exposure equivalent to owning \$15,000 worth of stock in one or more of the big banks. If no judge with that much exposure can hear an antitrust case against all of the big banks, then it's possible that no judge *at all* can hear the case.

Obviously that's not right. In fact [the rule](#) requires a judge to recuse himself if he or his spouse has an “equitable interest, however small,” in a company involved in the case, but “ownership in a mutual or common investment fund that holds securities is not a ‘financial interest’ in such securities unless the judge participates in the management of the fund.” So owning an index fund that *obviously* owns stock in all the big banks does not count as a financial interest, but direct ownership of stock by your spouse, “however small,” even if you don't know about it, does.

Canna Global

We talked on Monday about Canna Global Acquisition Corp., a special purpose acquisition company that issued some fake shares of stock. In brief:

- Canna Global is a SPAC with about 1 million public shares outstanding, sold in an initial public offering in 2021 for \$10 each.
- Those shares entitle the holders to get their \$10 back with interest when Canna Global liquidates or does a merger. There is a trust account, with about \$12.6 million in it, backing those shares.
- Under SPAC rules, Canna Global can't spend the trust account, or issue more shares with a claim on it.
- For somewhat perplexing reasons, Canna Global did a deal with a company called Liqueous LP in which Liqueous paid roughly \$1.25 million to extinguish some of Canna's debt, [and Canna](#) "agreed to issue 1,544,531 new shares of Class A common stock to Liqueous at a future date."
- And then, Canna Global says, Liqueous turned around, tricked its transfer agent into thinking that the stock-to-be-issued-later was *actual stock*, got registered as a shareholder, and *sold* a bunch of stock to unsuspecting public investors, without disclosure. Liqueous probably cleared about \$8 million dollars doing this.
- The result is that there are many more shares outstanding than anyone thought, each representing a claim on a limited pot of cash. There's something like \$4.72 per share in the trust account, not the \$10 plus interest that there's supposed to be.

This was an extremely weird problem that caused Nasdaq, the stock exchange where Canna is listed, to halt trading in the stock. By Monday, though, the problem was sort of solved: Canna's transfer agent, Continental Stock Transfer & Trust Company, apparently felt bad about the whole mess, [and agreed](#) "to guarantee the payment of full trust value for the 724,000 Class A common shares of Canna Global in the event of a redemption or liquidation event."

I want to mention a few updates. First of all, after halting Canna last week, Nasdaq got fed up with the whole situation and kicked it off the exchange entirely. [Canna announced on Monday](#):

Under Nasdaq Listing Rule IM-5101-2(e), a company whose business plan is to complete one or more business combinations is required to, among other things, provide all shareholders with the opportunity to redeem their shares for cash equal to their pro rata share of the aggregate amount the

gross proceeds from the initial public offering then in the deposit account. Consistent with that requirement, at the time of the Agreement the Company's Certificate of Incorporation prohibited the issuance of "any additional shares of capital stock of the Corporation that would entitle the holders thereof to receive funds from the Trust Account or vote on any initial Business Combination...." Following review of this matter, Nasdaq has determined to delist the Company. Specifically, as a result of the share issuance described above, the Company failed to comply with IM-5101-2(e).

Additionally, Nasdaq has determined that it is appropriate to apply Nasdaq Listing Rules 5101 and IM-5101-1. In order which allow Nasdaq to "suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq." Nasdaq has concluded that the exercise of this authority is appropriate based on the potential harm to the Company's shareholders from the share issuance and the uncertainty surrounding the Company's actions.

The rules that govern SPACs are, in large part, the rules of the stock exchanges. (Which, in turn, are made in consultation with, and with the approval of, the US Securities and Exchange Commission.) When I say that, "under SPAC rules, Canna Global can't spend the trust account, or issue more shares with a claim on it," the "SPAC rules" there are the ones set by Nasdaq. [Those rules](#) require SPACs to put the proceeds of their IPO in a trust account, to find an acquisition within a set period of time, and to allow shareholders to redeem their shares for cash. Canna, by selling these phantom shares to Liqueous, seems to have breached these rules. But all Nasdaq can do about it now is delist Canna, which doesn't really help the shareholders much.

Second, Liqueous [issued a press release](#) saying that actually it was the victim here:

Liqueous LP announced today that it is working with Canna-Global Acquisition Corp. (NASDAQ: CNGL) to address Canna-Global's invalid issuance of Class A common stock to Liqueous LP. When Liqueous acquired the shares, Canna-Global represented in writing that the shares were duly and validly issued, and Liqueous relied on those representations, which Liqueous now understands may be inaccurate.

Liqueous intended to acquire the Canna-Global shares in exchange for the extinguishment of certain debts of Canna-Global, which Liqueous acquired from third parties with the consent of Canna-Global. The extinguishment of such debt provided substantial financial benefits to Canna-Global and its stockholders.

Liqueous intends to continue to work diligently with all relevant parties to resolve the matter.

And here's a second, weirder document titled "[Unveiling the Truth: Liqueous LP's Bold Stand Against Misrepresentation in Canna-Global Transactions](#)":

Liqueous LP, a prominent investment firm known for its involvement in the cannabis industry, made a groundbreaking announcement today in partnership with Canna-Global Acquisition Corp. (NASDAQ: CNGL). This collaborative effort aims to rectify a serious issue regarding Canna-Global's invalid issuance of Class A common stock to Liqueous LP. When Liqueous LP acquired these shares, Canna-Global reassured them in writing that the shares were duly and validly issued. Liqueous LP, relying on these representations, has now come to realize that they may have been misled.

The cannabis industry has been a hot topic in recent years, with increasing legalization efforts and a surge in investments. As the market expands, so does the need for transparency and accountability. The partnership between Liqueous LP and Canna-Global highlights the importance of proper due diligence and accurate representation in investment transactions, especially in such a dynamic and evolving industry. ...

As the industry continues to mature, regulatory bodies are stepping up their efforts to monitor and regulate cannabis-related investments. The partnership between Liqueous LP and Canna-Global can be seen as a proactive step to maintain the sanctity of investment processes within the cannabis sector. By taking swift and decisive action, Liqueous LP is positioning itself as a responsible and trustworthy player in the ever-expanding world of cannabis investments.

But it doesn't say what the swift and decisive action ... is? For instance, Liqueous does not seem to be buying back the invalid shares that it sold for \$8 million. Anyway here are [two lawsuits](#) against Liqueous over other deals it has done.

Finally, a bunch of people emailed and [tweeted](#) to say "ahh, they should have used a blockchain." I guess? Ultimately the problem here is that Canna Global (or Liqueous, or the transfer agent, or someone) *created* a bunch of new stock, and then *didn't tell anyone* about that until it had already been sold into the market. Having an immutable public list of how many shares there are would, I suppose, have helped.

Elsewhere in authorized shares

When we last discussed Canna Global, I pointed out that it is not that uncommon for a company to (1) need money, (2) find potential investors who are willing to give the company money in exchange for stock, but (3) not have enough stock to give them. That was roughly Canna Global's situation, but it comes up more often when a company's charter says "this company can issue up to 100 million shares," or whatever, and the company has issued 99 million and wants to issue more.

The simplest solution, in that case, is to ask shareholders to vote to amend the charter to authorize more shares. But that takes time, and sometimes you need the money now. In that case, the less simple solution is to issue some sort of IOU for stock: "You give us the money now, and in exchange we'll promise to give you the stock when we can get shareholders to authorize it."

Usually this IOU takes the form of "blank check preferred stock": The investors get a new special preferred stock (not covered by the charter's limitation on shares), and the preferred converts into common stock whenever the company gets around to amending its charter to authorize more stock.

All of this can be a bit more urgent for *banks*. A bank is a highly leveraged pile of assets, which means:

- 1. Its stock can go down a lot. You might think "we have 56 million shares outstanding and 100 million authorized shares, so we can sell 44 million more, which is plenty; the stock trades at like \$25 per share, so that's like a billion dollars of financing room." And then the stock goes to \$5 and it's not enough.
- 2. If it needs money, it needs money *right now*. If a bank announces "we're going to raise money as soon as we get this shareholder vote," it is not going to last until the shareholder vote.

On [that note](#):

A Texas-based regional bank with heavy commercial real-estate exposure is raising \$228 million from a group of investors led by Fortress Investment Group, the latest sign of the mounting pressure on banks that lend to that sector.

Fortress, Canyon Partners, Strategic Value Bank Partners, North Reef Capital and other investors agreed to buy common and preferred shares from First Foundation, a Dallas bank with some \$14 billion in assets, according to the firms.

They will own 49% of the bank after the deal closes, while existing shareholders will retain 51% ownership. As part of the deal, the investors will buy common and preferred shares at a price of \$4.10 a share. The stock closed at \$6.57 a share on Tuesday.

The infusion is aimed at giving the bank time to sell off certain loans, according to people close to the matter.

Here is [the press release](#), which has a long litany of weird stock:

In connection with the equity capital raise transaction, First Foundation will sell and issue, in the aggregate, to the investors (i) 11,308,676 shares of common stock, par value \$0.001 per share, of the Company at a price per share of \$4.10, (ii) 29,811 shares of a new series of preferred stock, par value \$0.001 per share, of the Company designated as Series A Noncumulative Convertible Preferred Stock (the "Series A preferred stock"), and (iii) 14,490 shares of a new series of preferred stock, par value \$0.001 per share, of the Company designated as Series B Noncumulative Convertible Preferred Stock (the "Series B preferred stock"). ...

The preferred stock is being issued in connection with the equity capital raise in part due to the fact that the Company does not have a sufficient amount of authorized but unissued shares of common stock under its certificate of incorporation (the "Certificate of Incorporation") to permit the Company to issue only common shares to the investors. Accordingly, the Company will need the approval of its stockholders, as described in further detail below, in order to amend the Certificate of Incorporation to increase our total authorized shares of common shares and to permit the issuance of an amount of common stock that is 20% or more of the Company's total common stock in compliance with the rules of the New York Stock Exchange ("NYSE"). Additionally, the Company's issuance of non-voting preferred stock facilitates the investors' ability to make immediate larger equity investments in the Company in a manner that complies with applicable banking laws and regulations, including the rules and limitations of Regulation Y of the Bank Holding Company Act of 1956, as amended.

For reasons — its charter, but also [the rules](#) governing who can buy a bank and how — First Foundation can't just go *sell* \$228 million worth of common stock. But it really needs the money, and it found investors who were willing to buy the stock. So it's giving them IOU stock instead.

Mouse jigglers

I have written, and [speculated on the Money Stuff podcast](#), about the cat-and-mouse game between people who monitor remote employees to make sure that they are working and the remote employees who want to pretend that they are working. Like:

- 1. The remote employees work remotely and take long lunch breaks.
- 2. Their employers worry that they are not working, so they monitor their computer activity — mouse movement, keystrokes, etc. — to make sure that they are working.
- 3. The employees buy or build devices — “mouse jigglers,” the [Homer Simpson pecking bird](#) — to move their mice and hit their keyboards to fool the monitors.
- 4. The monitors build or buy better software to catch the mouse jigglers.
- 5. The jiggle-builders build better jigglers to fool the jiggle-catching software.
- 6. Etc.

Here is a thorough [Wall Street Journal investigation](#) of the battle:

The share of companies using some kind of electronic worker-surveillance system surged during the pandemic, reaching nearly 50% in 2023, according to a survey of nearly 300 medium to large employers by research and advisory firm Gartner. These systems, which track how active workers are at their computers, have long been able to detect some installed software or extra hardware.

More of these software systems, such as Teramind and Hubstaff, now also use machine-learning tools that can identify repetitive cursor movements or irregular patterns in someone's computer activity. In addition, some worker-monitoring software can randomly scrape screen images to check whether screen activity is changing as the computer mouse moves.

Most mouse jigglers on the market are detectable, says Ilya Kleyman, Teramind's chief growth officer. ... “It won't look like normal human mouse cursor activity that regularly clicks, drags, etc.,” he says. Plus, the software can flag artificial activity in general, such as when a cursor is active over the same static Wikipedia page for hours on end.

I wonder if Teramind eats its own cooking. When its developers build the machine-learning tools to identify repetitive cursor movements, are their keystrokes monitored? Anyway it makes sense that big companies would have better AI to catch shirking employees than employees would have to shirk, but there is a market opportunity here! Someone needs to build a robot with good enough artificial

intelligence that it can pretend to work at least as convincingly as a human can.

If I were writing apocalyptic science fiction, my robot takeover would start with someone building an AI that is good enough at pretending to work to fool Teramind's AI. The pretending-to-work Turing test. There is something fittingly human about it: Humans are the species that uses computers to pretend to work. And then the robots would quietly pretend to pretend to work while really they are plotting the enslavement of humanity.

Things happen

Corporate Lenders Are Locking Down Protection Against Tough Times From High Rates. FTC Blocks [Tempur Sealy, Mattress Firm's Deal](#) on Competition Concerns. The Underground Network Sneaking [Nvidia Chips](#) Into China. China's Investment Bankers Join the Communist Party as Morale (and Paychecks) Shrink. Southwest Air Adopts Poison Pill to Counter Activist Elliott. Bezos to Sell \$5 Billion of Amazon as Shares Hit Record High. JPMorgan's Kolanovic to Exit Amid String of Poor Stock Calls. Everything Is a [Canned Cocktail](#) Now.

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- 1. Based on Bloomberg's reported S&P 500 weights (SPX Index MEMB) as of this morning.
- 2. Sorry!

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Meta faces potential class action over off-platform tracking

DJ [dailyjournal.com/articles/379576-meta-faces-potential-class-action-over-off-platform-tracking](https://www.dailyjournal.com/articles/379576-meta-faces-potential-class-action-over-off-platform-tracking)

Data Privacy

Share

Jul. 3, 2024

The lawsuit targets an advertising model built on the platform's ability to track users' movements after they left the social media site, stating users did not consent to its use.

A proposed class action accuses Meta Platforms Inc., the parent company of Facebook, of "intentionally intercepting sensitive and confidential communications" between the plaintiffs and numerous streaming services, including Paramount+, ESPN+, Hulu, and Starz.

The complaint alleges that Facebook's advertising practices, dating back to its 2007 "Beacon Program," violate California's consumer privacy law. The Beacon Program tracked users' movements after leaving the social media site to gather valuable data for targeted ads. Although the Beacon Program was shut down in 2009 amid lawsuits and public protests, the new class action claims that Facebook continues to track users' movements after they leave the site. *Starzinski et al. v. Meta Platforms, Inc.*, 24CV441982, Santa Clara Super. Ct., filed June 27, 2024.

A Meta spokesperson responded, "We've been clear in our policies that advertisers should not send sensitive information about people through our Business Tools. Doing so is against our policies, and we educate advertisers on properly setting up Business Tools to prevent this from occurring. Our system is designed to filter out potentially sensitive data it can detect."

In a December 2007 blog post, CEO Mark Zuckerberg acknowledged criticism of the Beacon Program, admitting it had "missed the right balance."

Attorneys for the plaintiffs, L. Timothy Fisher and Philip L. Fraietta of Bursor & Fisher P.A., argued that Facebook's off-platform tracking violates user privacy. "Plaintiffs and class and subclass members did not consent to Facebook's interception or continued gathering of the user's communications after accessing a video tape service provider's platform," they wrote.

They further noted that Facebook assured users it would not collect sensitive information without authorization, and that the intercepted communications were confidential, protected by various state and federal statutes.

Facebook's advertising practices have faced litigation and regulatory intervention for over a decade. In 2008, the Beacon Program was the focus of a lawsuit alleging illegal tracking of user activity on websites like Blockbuster, Fandango, and Gamefly. That lawsuit was settled for \$9.2 million. In 2012, Facebook and the Federal Trade Commission reached a \$5 billion consent decree over accusations that the company violated federal law by "intentionally wiretapping electronic communications from users and non-users alike."

#379576

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NOT FOR REPRINT
NEWS

Judge Denies Wholesalers' Class Certification in RICO Suit Against EpiPen Manufacturer Mylan

U.S. District Judge Eric C. Tostrud for the District of Minnesota determined that the plaintiffs failed to affirmatively demonstrate the class was so numerous and joinder of all members is impracticable under Rule 23(a)(1), that the representative parties will adequately protect the interests of the class under Rule 23(a)(4), or that questions of law or fact common to class members predominate over any questions affecting only individual members under Rule 23(b)(3).

July 03, 2024 at 10:58 AM

Class Actions



Riley Brennan



A federal judge in Minnesota denied a motion for class certification by drug wholesalers in a lawsuit accusing EpiPen manufacturer Mylan of overcharging for the medication in an alleged racketeering scheme, concluding that the plaintiffs failed to satisfy certification requirements, including numerosity and commonality.

U.S. District Judge Eric C. Tostrud for the District of Minnesota determined that the plaintiffs, Rochester Drug Co-Operative and Dakota Drug, failed to affirmatively demonstrate that the class was so numerous and joinder of all members is impracticable under Federal Rule of Civil Procedure Rule 23(a)(1), among other procedural reasons, according to the [July 1 opinion](#).

The wholesalers alleged that Mylan paid bribes and kickbacks to a group of pharmacy benefit managers to ensure that it could raise the price of EpiPen with impunity while preserving the monopoly market share. The plaintiffs alleged that Mylan violated the Racketeer Influenced and Corrupt Organizations Act and the Sherman Act, asserting claims for themselves and for the proposed class who similarly purchased EpiPen directly from Mylan.

The defendants argued that some class members benefited from the EpiPen price increase, claiming that for some members, as the product’s list price increased, so did some members’ profits. Mylan argued that there was “a fundamental conflict” between Rochester and Dakota, who claimed to have been injured by the increased EpiPen prices, and class members who benefited from them.

The court held that the proposed class didn’t meet Rule 23(a)(1)’s numerosity requirement, noting that the Sherman Act’s four-year statute of limitations removed at least 20 of the 66 proposed class members, as the limitations began running when the alleged wrongful act occurred. While the plaintiffs filed the case in March 2020, some members of the proposed class purchased EpiPens dating as far back as 2013, the opinion said.

In regard to the RICO claim, the court concluded that the plaintiffs knew or should have known of their injuries before March 2016. The plaintiffs claimed in their first amended class action complaint that the limitations period was tolled because they couldn't have discovered the bribery scheme until 2016.

However, the court noted that Mylan Chief Executive Officer Heather Bresch's public statements about the EpiPen prices would have given them enough information to discover their injuries, concluding that the plaintiffs were barred from asserting claims outside the four years preceding the filing of the case.

According to Tostrud, the plaintiffs' inability to assert claims that predated March 29, 2016, meant that the proposed class definition must begin from that date, not Jan. 1, 2013, thus eliminating 20 would-be class members from 66 possible members.

Additionally, the court disagreed with the plaintiffs' argument that "the impracticability of joinder is 'presumed' when the proposed class has forty or more members."

"A presumption usually implies burden-shifting. So, in other words, if the impracticability of joinder were 'presumed' when a proposed class has forty or more members, one would expect the burden to shift to a defendant—perhaps to rebut the presumption or to bear the burden of showing joinder's practicability," Tostrud said. "The bottom line here is that forty-six is a significant number of class members, but that number holds no special legal significance that might warrant presuming joinder's impracticability or trump other relevant considerations."

Regarding the joinder question, Tostrud concluded that the claims of three would-be class members amount to more than 90% of total damages claimed in the case, with AmerisourceBergen Corp., Cardinal Health and McKesson Corp., having claims totaling \$1.19 billion, the court said.

The court pointed to the U.S. Court of Appeals for the Third Circuit's 2016 ruling in *In re Modafinil Antitrust Litigation*, where the court vacated certification of a class of 22 drug wholesalers due to numerosity, and three of the members claims making up 97% of the total value, at \$1 billion.

"Here, Plaintiffs seek certification of a comparatively small class comprised of members with mostly large individual claims. It's not that a class with those characteristics could never satisfy Rule 23(a)(1)'s numerosity requirement. But on this case's specific facts, the better answer is that Plaintiffs have not shown that their proposed class does," Tostrud said.

Regarding typicality, the court further concluded that the representative parties failed to adequately protect the interests of the class in the Rule 23(a)(4) sense.

Lastly, in addressing the predominance inquiry, the court concluded that the plaintiffs failed to answer Rule 23(b)(3)'s causation-related questions of "whether Plaintiffs have identified a causal link between the alleged bribery-and-kickback scheme and proposed class members' injuries," and "whether the identified causal link can be established by the same proof for each would-be class member."

According to the court, the plaintiffs didn't deliver an accurate characterization of the bribery theory which underlies their claims. Therefore, the court concluded that they needed to answer the Rule 23(b)(3) causation question of whether causation can be established by common proof by reference to their theory that the bribes Mylan paid the PBMs caused the plaintiffs' harm.

The plaintiffs were represented by Peter Kohn, a partner with Faruqi & Faruqi in Philadelphia. Mylan was represented by Adam K. Levin, a partner at Hogan Lovells in Washington, D.C.

Counsel did not immediately respond to a request for comment.

Adobe Hit With Consumer Suit Over Deceptive Renewal Practices

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- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. 4:24-cv-03980

Adobe Inc. obfuscates the terms of its automatic subscription renewal for its software products, a proposed consumer class action complaint alleged.

The company “surreptitiously enrolls consumers into a program that automatically renews the Adobe Subscriptions from month-to-month or year-to-year” without providing legally mandated disclosures, the complaint filed Monday in the US District Court for the Northern District of California said.

Lead plaintiff Vikram Singh said Adobe fails to comply with California’s Automatic Renewal Law, which requires retailers to clearly state renewal terms, get customers’ affirmative consent before making any payment charges, and provide an easy way to cancel the subscription.

Singh’s suit comes shortly after the US Federal Trade Commission sued Adobe in June, alleging the company violated consumer protection laws by making subscription cancellations too difficult. The FTC said the company designed the cancellation process to be difficult and filled with procedural hurdles.

The agency has also sued Amazon over similar practices related to its Prime program.

Adobe’s yearly subscription to its Creative Cloud suite of apps and tools can cost multiple hundreds of dollars.

Singh said Adobe is facing a “sharp decline in subscriber satisfaction” as the company’s platform becomes “riddled” with dark patterns, or website design practices that can manipulate customers into buying products or services.

“It is unclear when, exactly, consumers must cancel by and how that cancellation affects the continuation of their Adobe Subscriptions,” the complaint said.

Adobe charges customers 50% of the remaining yearly subscription when they try to cancel after 14 days, the complaint noted.

Singh seeks to represent a California consumer class. He brings claims under the state’s consumer protection statutes as well as claims for conversion, unjust enrichment, negligent misrepresentation, and fraud. He is seeking damages.

Singh is represented by Bursor & Fisher PA and Gucovschi Rozenshteyn PLLC.

The case is Singh v. Adobe Inc. , N.D. Cal., No. 4:24-cv-03980, complaint filed 7/1/24 .

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Lipitor Ruling Raises Class Status Bar in Pay-for-Delay Cases

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- Judge denied class status to indirect, direct purchasers
- Pharma companies sued over delayed version of Lipitor

Sun Pharmaceutical Industries Ltd.'s win against claims that the company conspired to hinder the release of a generic cholesterol-reducing drug raises the standard for plaintiffs to win class status in pay-for-delay cases.

The denial of class certification to two groups of purchasers of the blockbuster Lipitor drug from Judge Peter G. Sheridan of the US District Court for the District of New Jersey in June reinforces the high bar plaintiffs counsel must clear in cases challenging patent litigation settlements that include payments from brand drug companies to keep generic brands off the market.

Defense attorneys are likely to cite this opinion in other pay-for-delay cases, especially given the high-profile nature of the Lipitor drug, said Ken Racowski, a partner with Holland & Knight who has defended companies in antitrust suits and class actions. The Lipitor ruling might apply, for example, to the ongoing antitrust litigation over the Thalomid drug, he said.

"This is a big case, a big opinion for a drug that everybody knows," Racowski said of Lipitor. "Just in and of itself, that's a great soundbite, that's a great precedent for the defense."

The standard was heightened in part through Sheridan's finding that indirect buyers didn't have a feasible method to determine who was qualified to be a class member and that direct purchasers, such as large wholesalers, failed to prove they couldn't have brought their own lawsuit outside of a class action mechanism.

Sheridan's conclusion that the plaintiffs couldn't show an alleged anticompetitive settlement was the cause of any generic delay also added to the high bar for class certification.

The ruling also builds upon Third Circuit decisions that have incrementally raised the bar to achieve class status in pay-for-delay cases, including a 2020 decision to reverse certification for a group of direct purchasers of an epilepsy drug and a 2016 ruling in which the appellate court vacated a lower court's class certification order in a narcolepsy medication case.

"Courts, especially in the Third Circuit, are being very rigorous," said Devora W. Allon, a litigation partner for Kirkland & Ellis in New York and lead counsel for Sun. "They are not rubber-stamping classes."

The Lipitor litigation centers on claims that Ranbaxy, a Sun subsidiary, and Pfizer's 2008 patent litigation settlement prevented Ranbaxy's generic version of Lipitor from launching until November 2011.

'One-Two Punch'

The ruling delivers a "one-two punch" to the Sun plaintiffs who couldn't satisfy two key major prerequisites for achieving class status—numerosity and ascertainability—said Christine Bartholomew, a law professor at the University at Buffalo focused on antitrust.

But plaintiffs in the Sun case failed to meet the numerosity standard, which requires them to prove that it would be unreasonable to expect the class members to sue on their own behalf. The judge said the proposed class of 63 direct purchaser plaintiffs had the means to bring their own suits outside of a class action vehicle.

Courts consider several factors to determine numerosity, including the financial resources of class members, geographical dispersion, and their ability to sue on their own.

"DPPs have failed to provide sufficient reasons by the preponderance of the evidence that judicial economy would be greatly served by the certification of this class," Sheridan said.

The judge's opinion gives that threshold requirement "very sharp teeth," and makes it harder for other plaintiffs to aggregate similar claims, Bartholomew said.

"It creates uncertainty—what is going to be enough to satisfy numerosity?" Bartholomew said. "What you have is an opinion that ratchets up what it means to be numerous."

Sheridan also determined the indirect buyer plaintiffs didn't meet the ascertainability prerequisite that requires a mechanism for determining whether thousands of potential class members fell within the class definition.

That requirement is especially crucial because it isn't always clear who should be compensated as part of a class given the multitude of parties involved in the prescription payment chain, including manufacturers, wholesalers, pharmacy benefit managers, and consumers.

Sheridan concluded the plaintiffs' contention that data was available to determine who complies with the class definition wasn't sufficient.

"The court said, 'You have to show me today you have the methodology,'" said Allon of Kirkland & Ellis. "'Showing me later is not good enough.'"

Proving Harm

The ruling also means proving causation—the tie between the alleged injured and alleged wrongdoing—remains a difficult hurdle for plaintiffs to overcome even if they succeed in creating a dispute of fact about the underlying conduct, said Ben Greenblum, a partner with Williams & Connolly LLP who specializes in pay-for-delay cases.

Sheridan ruled that the plaintiffs failed to show an alleged agreement between Pfizer and Sun caused any delay. Sun argued Ranbaxy's manufacturing facilities in India faced significant regulatory challenges that prevented the Food and Drug Administration from reviewing and approving its generic Lipitor any sooner.

"It's not enough to just say a pharmaceutical company engaged in anticompetitive conduct; plaintiffs have to show they were harmed as a result of that conduct," Greenblum said. "You don't have the right to get damages just because they did a settlement that you are challenging all these years later."

The opinion can be used to shut down the argument that approval of generic drugs could have happened any faster, added Chris Holding, a partner in Goodwin's antitrust and competition practice.

"This analysis is going to apply to a lot of cases," Holding said. "The proof of harm is really central to these cases, and the plaintiffs have to come up with a viable theory."

Sun Pharmaceuticals is represented by firms including Kirkland & Ellis. The plaintiffs are represented by firms including Carella Byrne Cecchi Brody & Agnello and Hagens Berman.

The case is *In re Lipitor Antitrust Litig.*, D.N.J., No. 3:12-cv-2389.

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Gasoline companies settle price-fixing lawsuit for \$13.9 million

DJ [dailyjournal.com/articles/379570-gasoline-companies-settle-price-fixing-lawsuit-for-13-9-million](https://www.dailyjournal.com/articles/379570-gasoline-companies-settle-price-fixing-lawsuit-for-13-9-million)

U.S. District Judge Jacqueline Corley in San Francisco

Gasoline companies accused of fixing prices by manipulating the spot market following a 2015 explosion at a Torrance refinery agreed to pay \$13.9 million to settle the consolidated litigation, weeks after the California Attorney General filed deceptive marketing claims Exxon Mobil and other major fossil fuel companies.

U.S. District Judge Jacqueline Scott Corley in San Francisco continued the stay of proceedings on Tuesday following the notice of a preliminary settlement, which attorneys said was the result of "months of mediation and arm's-length negotiations between the parties." *In re: California Gasoline Spot Market Antitrust Litigation*, 3:20-cv-03131-JSC (N.D. Cal., filed May 6, 2020)

The plaintiffs are represented by several firms, led by Girard Sharp LLP and Hausfeld LLP. The defendants, which include Vitol Inc. and SK Energy Americas Inc. are represented by Susman Godfrey LLP, Quinn Emanuel Urquhart & Sullivan LLP, K & L Gates LLP, and Covington & Burling LLP. A hearing on the preliminary settlement is scheduled for Aug. 8.

In February 2015, the cracking unit of a refinery in Torrance owned by Exxon Mobil exploded, reducing its ability to refine alkylates, chemicals used as a high-octane blending component for gasoline, for several months. According to the complaint, the defendants realized that the supply disruption allowed them to artificially inflate gasoline prices traded on wholesale spot markets in California without scrutiny by other market participants and regulators.

Upon learning about the explosion, the companies "negotiated large contracts to supply gasoline and gasoline blending components for delivery in California. The largest of these contracts was for more than ten million gallons," wrote Hausfeld partner Michael P. Lehmann and Girard Sharp partner Dena C. Sharp.

There was a logical and benign explanation for the rising gasoline prices, read the defendants' motion to dismiss the claims. "The Torrance refinery supplied approximately 20% of the gasoline sold in Southern California (and 10% of the statewide supply), and the explosion took the refinery offline for more than a year," read the motion.

"Trades between Vitol and SK Energy Americas accounted for less than 1% of the total gasoline in California. Yet the complaint implausibly contends that these traders conspired to manipulate spot-market prices, causing multi-year increases in downstream retail gasoline

prices that continued more than a year after SK Energy Americas permanently stopped trading in the California gasoline market," the motion continued.

California also sued Vitol and SK Energy Americas following the explosion, claiming the companies violated the state's antitrust laws and engaged in unfair and fraudulent practices that raised gasoline prices. Xavier Becerra, the state's attorney general at the time, accused the defendants of selectively reporting trades to the Oil Price Information Service to drive up benchmark prices in the spot market report. The case is pending in San Francisco County Superior Court. *The People of the State of California v. Vitol Inc. et al.*, CGC20584456 (S.F. Super. Ct., filed May 11, 2020).

On June 10, Attorney General Rob Bonta filed an amended false advertising lawsuit against Exxon Mobil, Shell, Chevron, ConocoPhillips, BP, and the American Petroleum Institute, adding disgorgement claims under AB 1366. Taking effect this year, the law establishes a restitution fund financed by the disgorged profits from businesses found to have breached consumer protection laws.

According to the state's complaint, these gasoline corporations deceived the public about the connection between fossil fuel combustion and climate change, resulting in environmental harm throughout California. "This much is clear: Big Oil continues to mislead us with its lies and mistruths, and we won't stand for that. Their ongoing egregious misconduct is damning," Bonta said.

#379570

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California Metal Maker Pollution Case Settled for \$2.5 Million

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Litigation

The San Francisco-Oakland Bay Bridge connects the two cities in northern California.

Photographer: David Paul Morris/Bloomberg

- Oakland plant allegedly spewed carcinogens without warning
- Metal foundry moved to Texas in 2022 after attorney general suit

California Attorney General Rob Bonta (D) on Tuesday announced a \$2.5 million multi-party settlement with an Oakland metal manufacturer that allegedly emitted the potent carcinogen hexavalent chromium without warning residents.

AB&I Foundry, which had operated a metal casting plant in East Oakland since 1906, and its parent company McWane Inc. will pay \$1.3 million to the state Department of Justice and another \$1.2 million to settle claims with the California Air Review Board.

About half of each settlement allocation will go toward supplemental environmental projects, including Oakland mobile health clinics serving patients with respiratory issues, and a foundation to promote environmental justice, the attorney general said.

The AB&I Foundry manufactured cast-iron and metal pipe fittings, but closed down the Oakland plant in 2022 and moved its operations to Texas — shortly after Bonta sued the company in California Superior Court of Alameda County.

Bonta alleged the manufacturer violated California's Proposition 65, a 1986 voter-passed law requiring warnings when consumers come in contact with cancer-causing chemicals, by spewing hexavalent chromium into the air. The attorney general's case was combined with a 2021 suit from the nonprofit Communities for a Better Environment.

The California Air Review Board brought a parallel complaint alleging nuisance odor violations.

McWane didn't immediately return a request for comment about the settlement.

The case is *Communities for a Better Environment v. McWane Inc.*, Cal. Super. Ct., No. 21CV004188, 7/2/24 .

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GM to pay \$145.8 million penalty after US finds excess emissions

 [reuters.com/business/autos-transportation/gm-pay-1458-million-penalty-after-us-finds-excess-emissions-59-million-vehicles-2024-07-03](https://www.reuters.com/business/autos-transportation/gm-pay-1458-million-penalty-after-us-finds-excess-emissions-59-million-vehicles-2024-07-03)

David Shepardson

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

July 3 (Reuters) - General Motors (GM.N) , opens new tab will pay a \$145.8 million penalty after a U.S. government investigation found excess emissions from approximately 5.9 million GM vehicles, government agencies said on Wednesday.

The Environmental Protection Agency said GM has agreed to give up approximately 50 million metric tons in carbon allowances after the multi-year investigation found vehicles from the 2012-2018 model years were emitting more than 10% higher carbon dioxide on average than GM's initial compliance reports claimed.

The National Highway Traffic Safety Administration separately said GM will pay a \$145.8 million penalty for fuel economy compliance issues and cancel more than 30.6 million fuel economy credits for the 2008-2010 model years to resolve the issues identified by EPA's light-duty vehicle in-use testing program.

Reuters was first in reporting the settlement, citing sources.

In a statement, GM said it "has at all times complied with and adhered to all applicable laws and regulations in the certification and in-use testing of the vehicles in-question" but added it believes "this is the best course of action to swiftly resolve outstanding issues with the federal government regarding this matter."

Unlike the 2015 Volkswagen (VOWG_p.DE) , opens new tab diesel emissions case, the EPA is not alleging GM used a defeat device to intentionally reduce emissions in testing. The EPA is not seeking a recall of the GM vehicles that generated excess emissions.

"EPA's vehicle standards depend on strong oversight in order to deliver public health benefits in the real world," EPA Administrator Michael Regan said in a statement. "Our investigation has achieved accountability and upholds an important program that's reducing air pollution and protecting communities across the country."

The vehicles include 4.6 million 2012-2018 full size pickups and SUVs and approximately 1.3 million 2012-2018 midsize SUVs.

In June 2023, NHTSA said GM paid \$128.2 million in fuel economy penalties for not meeting requirements for 2016 and 2017. GM, which sells Chevrolet, Buick, GMC and Cadillac vehicles in the United States, had not previously paid a fine in the 40-year-old history of the fuel economy program. It had initially planned to use credits to meet its compliance shortfall but opted to pay penalties, NHTSA said.

Last year, NHTSA had proposed hiking fuel economy standards from 2027 through 2032 that it estimated would cost GM \$6.5 billion over the period. Under the final rule issued last month NHTSA said GM could face \$906 million in penalties through 2031.

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

Reporting by David Shepardson; Editing by Chizu Nomiyama and Trevor Hunnicutt

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Matt Levine's Money Stuff: People Dislike Activist Short Selling (Correct)

By Matt Levine

Opinion

Bloomberg Law News 2024-07-03T13:08:0819071256-04:00

Matt Levine's Money Stuff: People Dislike Activist Short Selling (Correct)

By Matt Levine 2024-07-02T14:51:20031-04:00

Hindenburg

The basic business model of an activist short seller is:

1. Investigate a company, ideally using only public sources.
- 2. Find out that the company is bad.
- 3. Short its stock.
- 4. Put out a public report describing your findings — “this company is bad” — in a zippy, emphatic, hopefully accurate way.
- 5. Watch the stock go down, because people read your report, realize that the company is bad and dump the stock.
- 6. Profit, by covering your short at the new, lower market price reflecting the new, accurate, bad information that you have published about the company.

Obviously some short sellers, sometimes, will deviate from this ideal model. They will investigate a company using nonpublic information, for instance, or their report will be inaccurate. But assuming that they follow the ideal model: Is this okay? Are you allowed to do this?

In the US, I think the answer is clearly yes, but people do get mad about it. There is some apparent intuition that it is market manipulation: You are betting that a stock will fall, and then you are *making* it fall (by publishing your report), and that seems somehow like cheating. In practice, most people who don't like it will complain that the report is inaccurate — it is more clearly market manipulation if the report is wrong — but I think that some of this really is driven by suspicion of the whole business model. Even if the report is entirely accurate and based on public information, something about the model strikes people as icky.

Here is a slight complication of that business model:

1. Investigate a company, ideally using only public sources.
- 2. Find out that the company is bad.
- 3. Write a report describing your findings — “this company is bad” — in a zippy, emphatic, hopefully accurate way.
- 4. *Sell* that report to some other, larger, better capitalized hedge fund.
- 5. *That* fund shorts the stock.
- 6. You publish the report.
- 7. Watch the stock go down, because people read your report, realize that the company is bad and dump the stock.
- 8. The other hedge fund profits, by covering its short at the new, lower market price reflecting the new, accurate, bad information that you have published about the company.
- 9. It gives you a cut of the profits.

This is a more complicated model, but it makes more sense given the economic and social reality of activist short selling:

If you are an activist short seller, you are normally pretty specialized: Finding and investigating bad companies is your calling, and you're not also out there making tons of deep-value long bets or whatever.

- Stocks mostly go up, so it is hard to run a hedge fund that only makes short bets: Who would want to invest?
- Also it is *just possible* that the personal characteristics that make you a good activist short seller (cynicism, combativeness) will also make you bad at raising money from clients.
- So if you're good at identifying bad companies and writing punchy reports about how they're bad, you might not be in a position to make a big bet on your report, because you just don't have a lot of capital.
- Meanwhile plenty of other, bigger hedge funds would love to have some good short ideas, but don't want to pay a full-time analyst to go around digging for frauds. They'll happily give you a share of the winnings if you bring them your ideas.

What about this model? I think people find it even ickier. In particular, there is something about the *collusion* between the short researcher and the hedge fund that rubs people the wrong way. Surely it is unfair for the hedge fund to trade on the researcher's report before it is published. The report is nonpublic information (it hasn't been published yet), and it is material (if it causes the stock to go down), so isn't it insider trading for the hedge fund to trade on it?

Again, I think that the answer in US law is no, this is fine. Insider trading, I like to say, is not about fairness; it's about theft. It's illegal to trade on material nonpublic information that you get in violation of some duty to someone; trading on *your own* information — like “I am about to publish this report” — is fine. Here, the short researcher owns the information (the report), and *wants* the hedge fund to trade, so it's fine. But I should stress:

1. Nothing here is legal advice.

- 2. It icks people out, even if it is legal, and there are constant rumors of US investigations into collusion among short sellers.
- 3. The US has somewhat unusual insider trading rules, and in other countries there is more of a risk that *any* trading on material nonpublic information might be illegal.

Last year, US activist short research firm Hindenburg Research published a report on India's Adani Group, titled “Adani Group: How The World's 3rd Richest Man Is Pulling The Largest Con In Corporate History.” “Over two weeks, the report wiped out more than \$110 billion from the conglomerate's pre-Hindenburg value, pushed some of its bonds to distressed levels and caused Adani to shelve stock and bond offerings.”

Yesterday, Hindenburg published an “Adani Update – Our Response To India's Securities Regulator SEBI.” At Bloomberg News, Sanjai P R reports:

The firm also posted on its website the full “show cause” notice it said it received from the Securities and Exchange Board of India, or Sebi, in June, which states that Hindenburg's report on the Adani Group had certain misrepresentations and inaccurate statements that were meant to mislead readers.

In the 46-page document, Sebi said Hindenburg “has resorted to extrapolation and conjecture to emphasize some facts and understate others in favor of negative inference against Adani Group Companies.” It also said the short seller cited a broker banned from the securities market, shaking investors' trust in the regulatory framework.

Hindenburg in turn said India's markets regulator failed to address the fraud allegations in its report last year.

Sebi “seems more interested in pursuing those who expose such practices” while its investigation into billionaire Adani's empire has hit a wall, Hindenburg said.

Here is the Sebi notice that Hindenburg posted. There is, of course, some argument over whether Hindenburg's Adani report was accurate. Sebi says:

During investigation, it was also observed that the Hindenburg Report contained certain misrepresentations/ inaccurate statements. These misrepresentations built a convenient narrative through selective disclosures, reckless statements and catchy headlines, in order to mislead readers of the report and cause panic in Adani Group stocks, thereby deflating prices to the maximum extent possible and profit from the same. ...

It was observed that the Hindenburg Report deliberately sensationalized and distorted certain facts through the use of catchy *headlines* such as "Scandal."

Hindenburg argues, though, that Sebi doesn't really identify any material inaccuracies; it just doesn't like that the Hindenburg report is written in the zippy, argumentative style of a short report.

But Hindenburg also points out that the discussion of alleged inaccuracies is brief and starts on page 24 of the 46-page Sebi order. Sebi's main point is something else: Hindenburg monetized the trade by selling it to a bigger hedge fund, and Sebi doesn't like that. Bloomberg reports:

Sebi's notice also named US hedge fund Kingdon Capital Management as an involved party, stating that Kingdon knew about Hindenburg's research on the Adani Group before it was published and had a profit-sharing pact with the short-seller on its trades.

Hindenburg shared a draft of the Adani report with Kingdon in November 2022, nearly two months before it published the report, according to the Sebi show cause notice. In return Kingdon agreed to share 30% of its net profits from trading securities related to Adani with Hindenburg. That profit-sharing then got reduced to 25%, due to the cost of setting up these trades. ...

As of June 1, the Kingdon fund returned \$4.1 million of the gains from the Adani short sale to Hindenburg while another \$1.4 million has yet to be shared, according to Sebi.

Again, this is the fairly standard business model — "much of the notice seemed designed to imply that our legal and disclosed investment stance was something secret or insidious," says Hindenburg — but you don't have to like it. Sebi says:

Noticee No. 1 (Hindenburg) colluded with Noticee No. 3 (Mr. Mark E. Kingdon) along with Noticees Nos. 4, 5 and 6 i.e. *Kingdon entities*, in a scheme devised to use advance knowledge of non-public information ("*NPI*") regarding the existence, timing, and overall nature of the Report, to enable Noticee No. 6 to build short positions in the futures of AEL [Adani Enterprises Ltd.] and share profits accrued from squaring-off the positions at prices deflated due to publication of the Hindenburg Report in a manner designed to lower scrip prices to the maximum extent possible. ...

Therefore, it is alleged that Hindenburg and Kingdon entities dealt only in securities of AEL while in possession of NPI regarding existence, timing, and overall nature of the Hindenburg Report on Adani Group securities including the securities of AEL and profited unlawfully from the price deflated due to publication of the Report, without ensuring compliance with the [Research Analyst] regulations. This also constituted an unfair trade practice which prejudiced good faith dealings in the shares of AEL, by ordinary investors.

That at least suggests that, even if every word in the Hindenburg report was *true*, it would still be *illegal*, because Hindenburg showed it to Kingdon, and Kingdon traded on it, before it was published. People really do not like activist short sellers and think they should be illegal, and some of those people are securities regulators.

Bridgewater

Way back in 2016, I published a theory of Bridgewater Associates that people seemed to find compelling, or at least funny. I wrote:

I joked on Twitter that I never understood how Bridgewater gets any investing done, but of course there's a computer that does the investing. ("After honing ideas through debate and discussion, Bridgewater employees write trading algorithms that buy and sell investments automatically, with some oversight.") One stylized model for thinking about Bridgewater is that it is run by the computer with absolute logic and efficiency; in this model, the computer's main problem is keeping the 1,500 human employees busy so that they don't interfere with its perfect rationality. This model might predict that the computer would create a series of distractions for the humans; the distractions would keep the humans busy, but if you examined them closely, there would be telltale signs that the intelligence that designed them was not completely human.

This was about Bridgewater's famously weird culture in which everyone goes around ranking and critiquing each other instead of discussing investment ideas. The joke was that the computer was distracting the humans with all the meetings and critiques and self-reflection, so that it could get on with the investing.

I should say, though, that I no longer believe that theory. I mean, the theory was a joke to begin with, but it's not a joke I would make today. Bridgewater, it now seems to me, was fairly *early* to the game of rule-based, algorithmic investing, but now, as algorithmic investors go, it does not seem to be *particularly* algorithmic. It has some investing rules, many of them developed out of founder Ray Dalio's market intuitions, but it's not like a computer goes around making the decisions with minimal human involvement. There are hedge funds like that! Renaissance Technologies famously (1) doesn't understand what its computer is doing and (2) doesn't meddle with it. Bridgewater, by most accounts, is not like that. Bridgewater's rules seem to be simpler, more intuitive, more human-legible, and more subject to human meddling.

So here is a Senate report from last month on "Hedge Funds' Use of Artificial Intelligence in Trading," based in part on interviews with a handful of hedge funds. Bridgewater seems to be the *least* computer-driven of the sample:

For example, RenTech told Majority Committee staff that it intentionally brought in leadership and employees with ML [machine learning] background and that it uses ML "to extract information from large data sets and then use that information to trade in markets." Additionally, WorldQuant stated that it has been using AI, defined broadly, for several years. WorldQuant allows employees to use certain AI tools for research, code editing, and in some instances, allows its portfolio managers to use ML systems to identify the best combination of trading signals to support their portfolio strategy. ...

Other hedge funds were less clear about their interests and intended uses for AI/ML. Citadel stated in responses to Majority Committee staff, that the company does not use ML for fully automated trading, but does leverage ML to create some signals that are incorporated into quantitative or discretionary strategies. Bridgewater told Majority Committee staff it has been exploring ML techniques for more than five years. According to the company, it is "not currently utilizing ML systems in its investment process, with the exception of a narrow use case...."

On the other hand, Bridgewater is the biggest hedge fund in the world, and machine learning is pretty hot right now, so Bloomberg's Sonali Basak reports:

Bridgewater Associates launched a fund that uses machine learning as the primary basis of its decision-making.

The vehicle debuted with almost \$2 billion of capital from more than a half-dozen clients and began trading Monday, according to people familiar with the matter, who asked not to be identified discussing the strategy.

The hedge fund giant, led by Chief Executive Officer Nir Bar Dea, told investors that it's leaning on its own proprietary technology that it's been building for more than a decade. It's an outcome of a broader venture spearheaded by co-chief investment officer Greg Jensen, and the new fund will also broaden to include models developed by OpenAI, Anthropic and Perplexity, among others, the people said.

The new fund will be run by Jensen. Westport, Connecticut-based Bridgewater has been testing the strategy since late last year with a small sleeve of its main Pure Alpha fund — about \$100 million — to ensure the technology works, the people said. ...

The push into machine learning is a "good manifestation of us taking the flag and putting it at the top of the mountain," Bar Dea said in an interview, while declining to provide specifics about the new fund. "This is maybe the most significant and pure manifestation of the moment we're in."

It also has the potential to change the hiring strategy and composition of staff at Bridgewater to include more data scientists, said Jensen, 49, who has been thinking about how machine learning could impact the hedge fund's investing since 2012. That year, Bridgewater hired David Ferrucci, who led the team of engineers responsible for Watson at International Business Machines Corp. He left the hedge fund firm in 2021, but remains an adviser. ...

"The big jump here is using machine intelligence to generate the alpha — that is a leap," Jensen said. "If this is a side hobby of people who normally have the responsibility of Pure Alpha, they wouldn't be able to have the focus necessary to make this giant leap that we're making." ...

"You're going to have intelligence that can read every newspaper in the world," Jensen said. "Machines are better at finding patterns across times and across countries."

Now the computer will get to do the investing.

Law firms pay well

I suppose a model of a large private equity firm would be:

1. It is a conglomerate with an equity value of hundreds of billions of dollars, perhaps a trillion dollars.
- 2. It is extremely acquisitive, buying lots of new companies each year.
- 3. It uses a lot of leverage: It borrows money to pay for those acquisitions.
- 4. It constantly needs to *raise equity*. Most hundred-billion-dollar companies just have stock outstanding, and buy some back sometimes, but rarely sell more. But private equity firm runs funds with limited lifespans, so it has to keep raising more money.
- 5. All of these activities — the acquisitions, the borrowing, the equity raising — are reasonably complex and bespoke; borrowing to fund a leveraged buyout is more complicated and expensive than issuing an investment-grade bond.
- 6. Its staffing is quite lean, with just a few thousand employees managing all those acquisitions and fundraisings.

This makes big private equity firms the best possible clients for a lot of professional service providers: They are enormous, they are constantly doing stuff, the stuff is complex and labor-intensive, and they don't have enough employees to do it in-house. So they have to employ lots of outside service providers, accountants and consultants and bankers and lawyers.

Also private equity firms are sometimes less focused on cost discipline than the average, you know, industrial company: Private equity firms are pretty good at passing on professional expenses to their investors, and the private equity employees are all pretty well paid so they're not going to begrudge their professionals making a bit of money for themselves.

And so the most lucrative skill for a lawyer in the US in 2024 is probably less "knowing law" and more "knowing private equity firms." At the New York Times, Maureen Farrell and Anupreeta Das report:

Hotshot Wall Street lawyers are now so in demand that bidding wars between firms for their services can resemble the frenzy among teams to sign star athletes.

Eight-figure pay packages — rare a decade ago — are increasingly common for corporate lawyers at the top of their game, and many of these new heavy hitters have one thing in common: private equity.

In recent years, highly profitable private equity giants like Apollo, Blackstone and KKR have moved beyond company buyouts into real estate, private lending, insurance and other businesses, amassing trillions of dollars in assets. As their demand for legal services has skyrocketed, they have become big revenue drivers for law firms. ...

Lawyers with close ties to private equity increasingly enjoy pay and prestige similar to those of star lawyers who represent America's blue-chip companies and advise them on high-profile mergers, takeover battles and litigation.

Last year, six partners at Kirkland [& Ellis LLP], including some who were recruited during the year, each made at least \$25 million, according to people with knowledge of the arrangements who weren't authorized to discuss pay publicly. Several others in its London office made around \$20 million.

One partner at a law firm said pay for top lawyers had roughly tripled in the past five years.

As a former corporate law associate, I cannot deny that I am envious, though my feelings are complicated. If you are a law firm partner getting paid \$25 million for working on private equity, it's not because you are billing \$25,000 per hour for *your* time. It's because you are *generating* work for an absolute army of associates, who are working all night on your deals.

Coupons

My favorite theme in modern finance is:

1. Interest rates were very low for a very long time.

- 2. Now they are higher.
- 3. People just forgot that that was a possibility, and were surprised.

There are various important manifestations of this — a frozen US housing market, the 2023 regional banking crisis — but it is pervasive in strange small ways too. For instance, for a long time, the way that debt investing worked was that you bought some bonds, and their prices went up or down, and you had inflows or outflows, so you had various reasons to sell the bonds you had or buy new bonds. If you asked “what drives demand for bonds,” you'd get answers about client inflows or relative value or whatever. But in 2024 you get stories like this:

The Federal Reserve's rate hike campaign is boosting corporate bonds in an unexpected way, as investors plow coupon payments back into the market.

Investors' rising income from their corporate bond holdings is giving them more money to buy corporate bonds now. The total income generated by the high-grade corporate credit market should be around \$369 billion this year, or 15% more than last year, according to an analysis by Bank of America Corp. strategists.

The coupon payments that investors are getting are relatively high compared with the bonds for sale. For the second half of 2024, total corporate coupon payments should equal about \$220 billion, while net issuance is likely to be around \$89 billion, according to Bank of America.

The imbalance between coupon payments to be reinvested and bonds expected to be sold could help keep valuations for corporate bonds relatively strong, said Travis King, head of US investment-grade corporates at Voya Investment Management.

"The cash inflow story is one of the most important technical factors in corporate bond demand now," King said. "The concern is that investors will have more money coming into their pockets with less opportunity to reinvest it."

Or this:

Demand for the safest [collateralized loan obligation] tranches soared this year after an influx of money into exchange-traded funds. Banks have also been piling into the AAA bonds, and some Japanese institutions may scoop up more of the debt. On top of that, Bank of America estimates that about \$64 billion of the debt has been paid back so far this year, including amortizations and called CLOs, meaning asset owners have more capital to put to work.

"If you're an existing investor, you're getting so much money in the door that's creating demand in and of itself," said Amir Vardi, a managing director at UBS Asset Management, at the Global ABS conference in Barcelona earlier this month, referring to amortizations and called CLOs.

"Forget about increasing the budget to get more," he said on a panel. "You're just trying to keep what you have invested."

It turns out that, if you are a bond investor, you buy bonds, and then those bonds *pay you interest*, and then if you want to keep being a bond investor you might use that interest to buy more bonds. Just not a problem people had in 2020!

Cow manure

We talked last week about a securitization backed by cattle, which was the occasion for some cow puns, and which also led to this reader email:

I once worked on a trade which was somewhat literally cow manure backed securities.

My client provided financing to farmers to grow crops to be eaten by cows. The farmers would then take the manure produced, sell it, and pay off the financing.

We then looked to do a securitization of these loans.

The business model works well, but the deal fell apart for technical reasons. The short version was it was unclear if the security interest in the crops attached to the manure. It was a question whether the manure was proceeds of the crops under UCC [Uniform Commercial Code].

We didn't think the deal would work if it was indeed the case the loans were unsecured while the would-be-collateral was being digested.

It reminds me a little bit of the story we discussed last year, in which lenders financed a ship scrapping business by taking a security interest in the ships. But then the business scrapped the ships, so there was no collateral for the lenders to seize. Similarly, here, you take a security interest in the crops, but, in the natural course of the business, eventually there are no crops. There is only manure. And then I guess you need a particularly specialized lawyer to tell you if you have a security interest in the manure. Even if you do, though, foreclosing on *that* collateral seems particularly unpleasant.

Also the original cattle securitization story featured a portfolio manager saying "If it had a PIK coupon in steak I would buy that PA [personal account]," and another reader emailed to say "surely PIK = 'payment in kine'?" Sure, yes, one last cow pun for the road.

Things happen

BlackRock Aims to 'Index the Private Markets' After Preqin Deal. Hedge fund giants Citadel and Millennium post strong first-half gains. Ozy Media Founder Takes the Stand to Deny Fraud Allegations. Global investment banks cut jobs in China retreat. HSBC Curbs Hiring, Reins In Banker Travel in Cost-Cutting Push. CFA Level II Pass Rate Spikes to 59%, the Highest Since 1998. Longer Video of Ex-Moelis Banker Shows Lead-Up to Punch. "The NDA became enmeshed in every part of our lives — the defining legal document of our time." Googly-eyed trains.

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(Corrects spelling in first section of Bloomberg News reporter Sanjai P R.)

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- 1. So you don't get in trouble for insider trading. Not legal advice, and the exact lines here are complicated.
- 2. This one too is fraught. If your report says "this company is bad and will go to zero in the next three months," and people read the report and the stock drops 20% in a day, should you cover your short immediately (securing a quick, large profit), or do you have to wait to see if the stock actually drops to zero? As a matter of sensible trading, you will probably at least consider covering some of your short immediately. But if

you do that, people will get mad: “You didn’t really believe the stock was going to zero,” they will say; “you just wanted to create a quick panic so you could profit.”

- 3. Obviously there are exceptions. David Einhorn is a pretty famous short seller who is *mostly* a long investor. Bill Ackman is mostly a value investor who has had some famous activist shorts. But the more modern trend does seem to be toward specialization, at least in activist (as opposed to quiet) short selling.
- 4. There are ways to finesse this — the standard argument is that clients should allocate some money to your short fund to allow them to increase their allocation to long investments — but it’s a more complicated pitch than “my fund usually goes up.”
- 5. Also, if you do one big short report a month, you might not want to risk a huge portion of your capital on that report being right: A portfolio consisting solely of your activist short ideas will not be very diversified. Selling the idea to someone with more capital and more, different ideas makes the bet more sensible.
- 6. For instance: “SEBI did not allege any aspect of our description [of a particular incident] was false. Rather, it argued that CESTAT looked at the earlier case and alleged that we ‘sensationalized or distorted certain facts’ by using the word ‘scandal’ to describe the prior alleged INR 6.8 billion scheme by Adani that resulted in a 239-page order from the Commissioner of Customs detailing evidence of fraud, an INR 250 million (U.S. \$4.6 million) fine, and extensive subsequent legal proceedings.”
- 7. It also hints that it might be illegal even for Hindenburg to trade on the report itself, though that is less clear.

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Hedge Fund's Secret Adani Short Revealed in Blow-by-Blow Account

By Bhuma Shrivastava and Bei Hu

- Regulatory response shows NY fund profited most from short
- Hindenburg calls notice “nonsense,” aimed at silencing critics

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Hedge Fund's Secret Adani Short Revealed in Blow-by-Blow Account

By Bhuma Shrivastava and Bei Hu2024-07-03T01:36:42177-04:00

- Regulatory response shows NY fund profited most from short
- Hindenburg calls notice “nonsense,” aimed at silencing critics

An activist short-seller, a New York hedge fund, a Mauritius-based investment vehicle and a broker tied to a big Indian bank: All played a role in one of the world's most damaging short-seller attacks.

A fresh war of words between the short seller — Hindenburg Research — and India's markets regulator has thrown up an intriguing cast of characters behind the scathing report and related bets against the Adani Group that wiped out as much as \$153 billion in market value last year.

The Hindenburg missive sent the Securities and Exchange Board of India, or Sebi, knocking on the door of the US research firm, seeking answers about its “misleading” report. While posting an aggressive rebuttal on its website on Monday, Hindenburg added a link to Sebi's “show cause notice” — a 46-page letter detailing the innards of a well-planned transaction that shook India's capital markets for months.

Among the new revelations, Sebi's letter showed for the first time that Hindenburg shared its Adani research exclusively with Kingdon Capital Management LLC before it was published, and that the two firms had a profit-sharing deal. In the end, the New York hedge fund made three times more money on the short bets than Hindenburg itself. What's more, Kingdon enlisted help from one of India's biggest banks to carry out the trades.



The Sebi headquarters in Mumbai.

Photographer: Dhiraj Singh/Bloomberg

The extensive notice — sent to Hindenburg, its founder **Nathan Anderson**, Kingdon's founder-owner **Mark Kingdon** and Mauritius-based investor K India Opportunities Fund — is part of Sebi's investigation into the trading activities surrounding Adani Enterprises Ltd., the flagship company for the billionaire Adani family.

Though Adani repeatedly denied Hindenburg's allegations, the ensuing stock rout at one point wiped out billions in market value from its listed companies. Adani Group, whose sprawling empire ranges from energy and mining to ports, has since recovered the bulk of the stock losses.

The Indian markets regulator didn't respond to a request for comment, nor did the Adani Group or Hindenburg. Kingdon declined to comment.

'Pre-Release Sharing'

The regulatory investigation examined communication from Hindenburg starting from November 2022 — nearly a month before the report was shared with Kingdon and three months before it was published.

"Pre-release sharing of research with select investors is not uncommon industry practice, particularly among short-sellers," said **Kher Sheng Lee**, Asia-Pacific co-head of the Alternative Investment Management Association. "The legality of such sharing is fact-sensitive, with a focus on whether there was intent to manipulate markets or engage in insider trading."

Read more: Hindenburg Made Just \$4 Million From \$153 Billion Adani Rout

Kingdon, which had a controlling stake in the K India fund, had a profit-sharing pact with Hindenburg, with the latter receiving 30% of any gains from trading securities based on its research, according to the Sebi letter. For the Adani short bet, the cut was pared to 25% due to the extra time and effort needed to route trades via the K India fund.

By the end of December, Kingdon begun subscribing into the shares of the fund, and in January transferred \$43 million in two tranches to build short positions in Adani Enterprises. Kingdon Capital also signed an agreement with India lender Kotak Mahindra (International) Ltd., or KMIL, to help execute the trades.



Mark Kingdon, right, and wife, Anla Cheng, pose for a photo at the 30th Anniversary Gala for the Museum of Chinese in in New York.

Photographer: JB Reed/Bloomberg

The K India fund built short positions for 850,000 shares between Jan. 10 and 20 — just days ahead of the report's release — through futures contracts and squared-off these positions between Feb. 1 and Feb. 22. The bets yielded gains of \$22.3 million, Sebi said in the notice. As part of its deal with the short-seller, Kingdon owed Hindenburg \$5.5 million. About \$4.1 million of that had been paid as of June 1, according to the Sebi note.

Regulatory Crosshairs

While Hindenburg has called out Sebi for going after those who are exposing fraud in India, the face-off underscores an escalating tussle globally as short-sellers themselves increasingly find themselves in the regulatory crosshairs.

Read more: [Matt Levine's Money Stuff: People Dislike Activist Short Selling](#)

A sweeping US effort to examine relationships between hedge funds and skeptical researchers began rattling the industry three years ago as investigators set out to gather intelligence on money managers and activists.

The US Justice Department was collecting a trove of information on dozens of investment firms and researchers engaged in short selling to hunt for potential trading abuses. The probe recently yielded its first notable punishment, offering a rare glimpse into controversial collaborations between bearish researchers and hedge funds that place big bets against companies.

Read More: [Activist Hedge Fund Fined for Secret Payments to Researcher](#)

"Short-selling, when grounded in diligent research, plays a crucial role in price discovery, market efficiency and identifying potential corporate governance issues," AIMA's Lee said.

Kingdon Capital said it had legal advice that it could receive draft reports and make investments before these were publicly disseminated, without violating US laws, according to the Sebi notice.

Kingdon is one of the oldest hedge funds in the industry. Started by Mark Kingdon in 1983 with \$2 million, its assets grew to \$7 billion in 2007. Kingdon's Brooklyn-born founder started penning investment newsletters as early as his high school years. He took sole control of running the main fund in 2018 after investment losses and investor withdrawals prompted the liquidation of its credit pool.

Masking Kotak



Uday Kotak

Photographer: Prakash Singh/Bloomberg

In its July 1 statement, Hindenburg also shot back at Sebi for papering over the links between the transaction and prominent Indian lender, Kotak Mahindra Bank Ltd.

"Its notice conspicuously failed to name the party that has an actual tie to India: Kotak Bank," one of India's largest banks and brokerage firms founded by **Uday Kotak**, which oversaw the offshore fund structure used by Kingdon, the short-seller said.

Instead, it named the K-India Opportunities fund and "masked the Kotak name with the acronym "KMIL,"" Hindenburg said.

Hindenburg has never been a client of Kotak Mahindra International nor has it ever been an investor in the K India Opportunities Fund, the Indian lender said in a statement Tuesday. The fund was never aware that Hindenburg was a partner of any of its investors, it added.

Much of the Sebi notice is also devoted to what the regulator considers misleading aspects of Hindenburg's initial report alleging fraud at the ports-to-power Adani Group.

Violated Laws

"These misrepresentations built a convenient narrative through selective disclosures, reckless statements and catchy headlines in order to mislead readers of the report and cause panic in Adani group stocks, thereby deflating prices to the maximum extent possible," Sebi noted.

Hindenburg also violated local security laws by publishing the report, since it wasn't registered as a research firm in India, it added.

On its part, Hindenburg thinks Sebi is muzzling those cautioning the investors.

"We are sharing the entirety of this notice, frankly because we think it is nonsense, concocted to serve a pre-ordained purpose: an attempt to silence and intimidate those who expose corruption and fraud perpetrated by the most powerful individuals in India," the short-seller said in the July 1 statement.

--With assistance from **Advait Palepu** and **Saikat Das**.

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Eurofins Considers Cash Audit in Response to Muddy Waters Report

By Julien Ponthus

- Laboratory testing company published statement on Wednesday
- Stock has plunged since Muddy Waters disclosed short position

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Eurofins Considers Cash Audit in Response to Muddy Waters Report

By Julien Ponthus2024-07-03T02:55:00909-04:00

- Laboratory testing company published statement on Wednesday
- Stock has plunged since Muddy Waters disclosed short position

Eurofins Scientific SE further rejected what it called “misleading” allegations about its financial reporting made by Carson Block’s Muddy Waters Research and said it was considering an independent audit of its cash positions.

In a detailed statement published on Wednesday, Eurofins said it would systematically address any areas of concern raised by investors and make results of its investigations public. It said it was considering mandating an international accounting firm to audit its cash position at the end of 2023.

Muddy Waters’ disclosure of a short position against the laboratory-testing company on June 24 triggered its stock to plunge the most in two decades.

Although Eurofins shares have recouped some of their losses, they currently stand 15% lower than prior to the publication of the short-seller’s report. On Tuesday, Eurofins ended the session 2.7% lower after Citi cut its price target for the stock to the lowest among 16 brokers.

It’s not the first time that Luxembourg-based Eurofins has been targeted by a short seller.

In 2019, ShadowFall criticized the company’s governance, accounting at subsidiaries and debt levels. Eurofins defended its governance practices and rejected ShadowFall’s criticism as inaccurate and unfounded, though it did take steps to improve its governance.

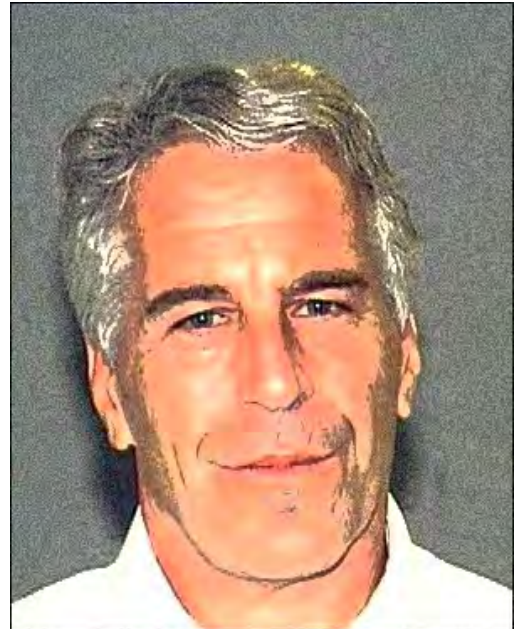
Grand Jury Transcript in Jeffrey Epstein Case Is Released, Raising Questions about Epstein's Darkest Secrets Being Protected in JPMorgan Cases

 wallstreetonparade.com/2024/07/grand-jury-transcript-in-jeffrey-epstein-case-is-released-raising-questions-about-epsteins-darkest-secrets-being-protected-in-jpmorgan-cases

By Pam Martens and Russ Martens: July 3, 2024 ~

On Monday, the transcript of the July 19, 2006 grand jury proceedings involving sexual assaults and rape by Jeffrey Epstein against underage girls in Palm Beach County, Florida was released by a Circuit Court. The Palm Beach Post newspaper had sued in that court for release of the transcript in 2019 in order to shine more light on how Florida State Attorney, Barry Krischer, had ignored a powder keg of evidence against Epstein that had been developed by the Palm Beach Police and cut a sweetheart deal under pressure from Epstein's attorneys.

Florida legislation, signed into law by Governor Ron DeSantis, called for the transcript to be released on or after July 1, in response to the extensive public interest in the case.



Jeffrey Epstein

Despite police evidence that Epstein had sexually assaulted dozens of underage school girls, Krischer and the U.S. Department of Justice cut a deal that allowed Epstein to serve just 13 months in jail from June 2008 to July 2009 – the majority of the time in a work release program where Epstein was driven to an office each day by his limo driver.

After the work release program, Epstein was supposed to spend one year under house arrest at his Palm Beach residence. But in the Netflix documentary series on Epstein, *Filthy Rich*, based on the book by the same name, a Palm Beach police official explained what actually happened, stating as follows:

“He would violate his probation almost on a daily basis. There’s 11 pages here of just different violations. I think, I, myself, documented 66 different days that he violated his probation...He would go to New York, to his island, he would go to the airport, jump in his helicopter. Who knows where he went – without telling anybody. Every time I brought the

probation office a case, they kept telling me the same thing. What would you like us to do? He's a celebrity. I mean, just think about this: You have a pedophile out on probation – to violate probation in the state of Florida is illegal, except for Jeffrey Epstein.”

Despite having videotaped testimony from Epstein's victims and statements confirming the abuse from a multitude of other witnesses, the U.S. Department of Justice allowed this pedophile to remain on the loose – traveling throughout the United States and around the world on his private jets – sexually abusing girls and young women at his multiple mansions for another decade, until his arrest on July 6, 2019 on federal sex trafficking charges. Epstein died in a Manhattan jail on August 10, 2019 – just a little more than a month after his arrest. The New York City Medical Examiner ruled his death a suicide.

The Department of Justice was likely shamed into finally taking action against Epstein in 2019 by reporter Julie Brown's explosive series on Epstein's sex crimes that appeared in the Miami Herald in November 2018.

The thrust of mainstream media's reporting on the grand jury transcript since its release on Monday is the travesty in how the Florida state attorney's office undermined its own case before the grand jury by outrageously portraying underage sexual assault victims as prostitutes.

But there may be an additional bombshell going unnoticed in that grand jury transcript. According to the Palm Beach County Police detective in charge of the Epstein case, Joe Recarey, the pedophile owned not five opulent homes – that have so frequently been reported – but six homes. Recarey testified in the grand jury proceeding that in addition to Epstein's mansion in Palm Beach, he owned homes in New York, New Mexico, St. Thomas, Paris and “England.” While the first five homes have been widely reported, *Wall Street On Parade* is not aware of any mainstream media reporting of Epstein owning a home in the U.K. or England. If true, that could open up a broad new area of investigation since Epstein has already been charged by a victim of loaning her out for sex with Prince Andrew. That case was settled for a reported \$16 million in 2022.

Wall Street On Parade's focus on the Epstein case has centered on the fact that the largest federally-insured bank in the United States, JPMorgan Chase, was supplying Epstein with the tens of thousands of dollars in hard cash each month to pay off his victims as well as the young women he hired to recruit more school girls that he could abuse. (JPMorgan Chase has an extensive operation in London.)

But despite the fact that JPMorgan Chase has a rap sheet that rivals that of an organized crime family, including five criminal felony counts, the U.S. Department of Justice has yet to bring a criminal case against the bank for aiding and abetting Epstein in his crimes – despite a mountain of detailed evidence developed by the Attorney General of the U.S. Virgin

Islands, where Epstein owned his own so-called “Pedophile Island” and treated himself and his ultra rich pals to sexually abusing young girls within the isolated confines of his tropical paradise.

The opening witness in the grand jury proceeding of 2006 was Detective Recarey, who died in 2018. During his testimony, Recarey explained that he was a detective in the Palm Beach County Police’s special investigations unit where he pursued “long term investigations, financial crimes, white-collar crimes....” That is extremely relevant because there is strong evidence that serious financial crimes were occurring in tandem with Epstein’s sex crimes.

Previously released documents indicate that Recarey aggressively pursued the Epstein case and was not intimidated by Epstein’s power, money or teams of attorneys and private investigators who sought to dig up dirt on the victims to undermine their credibility. This raises the question – at what point, if any, did the Palm Beach County Police, which eventually turned their case over to the FBI, inquire into where Epstein was getting the tens of thousands of dollars in hard cash he needed monthly to pay off his victims and recruiters.

The federal lawsuit filed by the Attorney General of the U.S. Virgin Islands alleged that JPMorgan Chase had “actively participated” in Epstein’s sex trafficking. A Memorandum of Law arguing for partial summary judgment in the case, that was filed by the Attorney General for the U.S. Virgin Islands, makes the following points:

“Even if participation requires active engagement...there is no genuine dispute that JPMorgan actively participated in Epstein’s sex-trafficking venture from 2006 until 2019. The Court found allegations that the Bank allowed Epstein to use its accounts to send dozens of payments to then-known co-conspirators [redacted] provided excessive and unusual amounts of cash to Epstein; and structured cash withdrawals so that those withdrawals would not appear suspicious ‘went well beyond merely providing their usual [banking] services to Jeffrey Epstein and his affiliated entities’ and were sufficient to allege active engagement.”

The U.S. Virgin Islands had previously alerted the court to the unfathomable sums of hard cash that Epstein was able to take from the accounts he maintained at JPMorgan Chase without the bank filing the legally mandated Suspicious Activity Reports (SARs) to law enforcement. In the Memorandum linked above, it tallied up the giant pile of cash, writing as follows:

“Between September 2003 and November 2013, or approximately ten years, JPMorgan handled more than \$5 million in outgoing cash transactions for Epstein — ignoring its own policy discouraging large cash withdrawals....”

The U.S. Virgin Islands' attorneys cite to internal emails at JPMorgan Chase showing that employees at the bank were aware of Epstein's "[c]ash withdrawals ... made in amounts for \$40,000 to \$80,000 several times a month" while also being aware that Epstein paid his underage sexual assault victims in cash.

After a scorched earth campaign by JPMorgan Chase's attorneys to humiliate the U.S. Virgin Islands in the media over its own unseemly political ties to Epstein, the case was settled, with the bank paying the U.S. Virgin Islands \$75 million.

JPMorgan Chase's involvement in the Epstein sex trafficking ring was also alleged in a class action lawsuit against JPMorgan Chase brought by lawyers David Boies and Bradley Edwards on behalf of Epstein's victims. At a March 13, 2023 court hearing in the case, Boies argued in open court that JPMorgan Chase had used a private jet owned by the bank's hedge fund, Highbridge Capital, to transport girls for Epstein's sex trafficking operation. A January 13, 2023 amended complaint filed by Boies' law firm provided the following details on that allegation:

"As another example of JP Morgan and [Jes] Staley's benefit from assisting Epstein, a highly profitable deal for JP Morgan was the Highbridge acquisition.

"In 2004, when Epstein's sex trafficking and abuse operation was running at full speed, Epstein served up another big financial payday for JP Morgan.

"Epstein was close friends with Glenn Dubin, the billionaire who ran Highbridge Capital Management.

"Through Epstein's connection, it has been reported that Staley arranged for JP Morgan to buy a majority stake in Dubin's fund, which resulted in a sizeable profit for JP Morgan. This arrangement was profitable for both Staley and JPMorgan, further incentivizing JP Morgan to ignore the suspicious activity in Epstein's accounts and to assist in his sex-trafficking venture.

"For example, despite that Epstein was not FINRA-certified, Epstein was paid more than \$15 million for his role in the Highbridge/JP Morgan deal.

"Moreover, Highbridge, a wholly-owned subsidiary of JP Morgan, trafficked young women and girls on its own private jet from Florida to Epstein in New York as late as 2012."

With the criminal division of the U.S. Department of Justice still failing to take action against JPMorgan Chase for its alleged money laundering for Epstein, and the Boies/Edwards lawsuit on behalf of victims now settled for \$290 million by JPMorgan Chase – with victims'

lawyers getting \$87 million in legal fees and \$2.5 million in expenses while victims are guaranteed nothing other than a requirement to release their claims – there is no assurance that the American people will ever get genuine transparency.

According to court filings in the Epstein/JPMorgan Chase cases, Epstein was running a “sex-themed cult.” According to a deposition of a JPMorgan banker, the only money-generating business that Epstein had was tending to his “network.” According to witness testimony, fulfilling the sexual fantasies of powerful men in Epstein’s “network,” was how he obtained six opulent homes and hundreds of millions of dollars in wealth.

There is also the unseemly reality that Federal District Court Judge Jed Rakoff, who presided over the Epstein/JPMorgan Chase cases filed in Manhattan, has allowed the bulk of the deposition testimony and thousands of other documents to remain under seal.

Nvidia customer's valuation voodoo tests AI mania

BV [breakingviews.com/considered-view/nvidia-customers-valuation-voodoo-tests-ai-mania](https://www.breakingviews.com/considered-view/nvidia-customers-valuation-voodoo-tests-ai-mania/)

2 Jul 2024 | By Yawen Chen Follow [@ywchen1](#)

Chips down.

Customers of Nvidia are trying to steal some of the Californian chip giant's valuation magic. That's one way to understand the news that Germany's \$1.4 billion Northern Data may re-list part of its business in the United States with a possible \$10 billion to \$16 billion target valuation, based on banker pitches as reported by Bloomberg. If investors go along with that price tag, it's a sign that artificial intelligence mania has reached new heights.

The Frankfurt-listed company has a knack for getting hold of Nvidia's highly sought-after chips, partly because of its history as a cryptocurrency miner. These days, the best way to monetise super powerful chips is not to perform calculations in return for bitcoin or ether, but to rent out the computing power to AI-hungry companies. Northern Data's new strategy, therefore, is to get its Taiga Cloud unit up to 75% of total revenue next year from 20% last year, while pushing crypto down to 20% of sales compared with 80% in 2023.

If that works, the company might hope for an AI-worthy multiple as a reward. Northern Data's privately held U.S. peer CoreWeave, for example, recently secured a \$19 billion valuation. It has about twice as many high-end Nvidia graphics processing units (GPUs) as the German group. The implied read-across may be that Northern Data's relevant cloud unit alone should be worth just under \$10 billion. The theory may be that a Nasdaq initial public offering for the AI bits of the group may help to juice that valuation even further.

There are several problems with that line of thinking. The first is that investors already implicitly attach a value for the divisions in question, and it's nowhere near the mooted U.S. IPO price tag. Even after a roughly 20% surge on Tuesday following the Bloomberg report, Northern Data's market value was about \$1.7 billion. Berenberg analysts, which initiated their coverage of the stock in April with a "buy" rating, estimated that Taiga Cloud is worth about \$2 billion, based on a discounted cash flow analysis. It's unclear why that number should be so much higher purely by virtue of having a Nasdaq listing.

Another question is the sustainability of Northern Data's unique edge, which consists of its access to Nvidia chips. Its AI pivot is enabled by the fact that it got access to thousands of Nvidia H100 Tensor Core GPUs last year, partly through the acquisition of a business called Damoon from stablecoin specialist Tether. That was a good deal, but investors might suspect it was a one-off. The two units that Northern Data may IPO will generate about \$470 million of EBITDA in 2027, Berenberg analysts reckon. So a \$16 billion enterprise value would imply a heady 34 times multiple. That sounds more like valuation voodoo than financial reality.

Context News

Northern Data is mulling an initial public offering of its combined artificial intelligence and data centre businesses on the Nasdaq as early as in the first half of next year, Bloomberg reported on July 1 citing people familiar with the matter. The company has asked several financial advisers to pitch for a role on the float and could mandate lead banks within the coming months, the report said. Banks have suggested valuations for the business that range from about \$10 billion to \$16 billion, the report also said. Separately, Northern Data said it has purchased Nvidia's latest H200 graphics processing units (GPUs) through a newly established partnership with IT group Supermicro, according to a statement on July 1. The company said that its cloud computing unit, Taiga Cloud, will be the first in Europe to offer access to the H200 GPU hardware, with delivery and deployment scheduled for the fourth quarter of 2024. Northern Data shares were up 20% to 30 euros as of 0918 GMT on July 2.

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Chancery Tosses Challenge To \$3B AstraZeneca Viela Bio Sale

By **Jeff Montgomery**

Law360 (July 3, 2024, 12:11 PM EDT) -- AstraZeneca PLC and a U.K. affiliate beat late Tuesday a Delaware Court of Chancery stockholder suit accusing the company of orchestrating an underpriced, \$3 billion sale of clinical stage biopharmaceutical venture Viela Bio Inc. in order to clear the way for AstraZeneca's purchase of a larger competitor.

Vice Chancellor Paul A. Fioravanti, in a 104-page decision, ruled that AstraZeneca's actions were entitled to business judgment protection because, as a 26.7% owner of Viela Bio's stock, it did not control Viela Bio at the time of the sale in 2021, scuttling breach of fiduciary duty claims.

Also rejected by the decision were allegations in the complaint, filed in February 2023, that AstraZeneca issued materially misleading or incomplete facts about the deal, as well as four counts alleging breaches of the duty of loyalty against eight Viela Bio directors, including two current or former AstraZeneca directors and an AstraZeneca executive.

The vice chancellor found that, despite a Viela Bio supermajority voting requirement that gave AstraZeneca and its 26.72% share voting block veto power over limited Viela Bio corporate actions, the percentage "did not give AstraZeneca power to wield control" over Viela's board or to "operate the decision-making machinery" of Viela Bio.

AstraZeneca CEO Pascal Soiro, who was also a director of Viela, likewise never exercised the blocking rights AstraZeneca had, the vice chancellor observed.

According to the complaint, Viela was created as a spinoff AstraZeneca subsidiary in 2018 but remained heavily dependent on its parent for manufacturing resources, intellectual property and finances. It nevertheless developed a promising and potentially lucrative drug, Uplizna, used in the treatment of autoimmune disease.

Viela Bio's future prospects, however, allegedly collided with AstraZeneca's interest in acquiring a far larger biomedical company, Alexion Pharmaceuticals, that had market and business overlaps with Viela's business sufficient to trigger antitrust hurdles and potential divestiture demands on the buyer.

Ultimately clearing the way for the Alexion deal was a Viela Bio agreement to sell itself to Horizon Therapeutics PLC for \$53 per share in 2021, after start-and-stop talks. Although the stockholder suit alleged that Viela Bio cut its financial projections to justify the merger price, the vice chancellor found that the suit failed to support allegations that the sale to Horizon failed to reflect Viela's "best estimates of future cash flows."

Attorneys for individual directors named in the suit successfully argued that the complaint should be dismissed, in part, because a majority of Viela's disinterested stockholders voted their shares in favor of the deal in an uncoerced and fully-informed way, the vice chancellor found. The ruling observed that the vote subjected Viela Bio's actions to business judgment deference under the 2015 Chancery precedent set in *Corwin v. KKR Financial Holdings LLC*.

"The supermajority voting requirements under the Viela certificate [of incorporation] gave AstraZeneca — by virtue of its 26.72% voting block — veto power over limited corporate actions, but as a whole, did not give AstraZeneca power to wield control over the board" or operate Viela's decision making machinery, the vice chancellor found.

In addition, the vice chancellor wrote, "AstraZeneca's prior designation of two directors on an eight-member board — only one of whom remained at the time the board approved the merger — is not a persuasive allegation of actual control over the company and the board."

According to the complaint, AstraZeneca was willing to sacrifice "material value in its Viela investment, to the detriment of Viela's non-controlling stockholders," in order to get clear of potential antitrust barriers anticipated in its effort to close on an acquisition of Alexion.

AstraZeneca argued that the suit made "must have," conjecture-based arguments that Zhengbin Yao, a former AstraZeneca executive and Viela CEO and chairman during the run-up to the deal, "could and in actuality, not theoretically, did coerce and dominate the free exercise of the Viela directors'" decision making during what was described as a superficial, single bidder process.

The Alexion deal, completed on July 21, 2021, included \$13.3 billion in cash, plus more than 236.3 million new AstraZeneca shares, with the total valued at \$39 billion.

AstraZeneca and counsel for the stockholders who sued did not immediately respond to a request for comment.

The stockholders are represented by Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP, Randall J. Baron, David A. Knotts, Teo Doremus, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP and Brett M. Middleton of Johnson Fistel LLP.

The AstraZeneca parties are represented by Daniel M. Silver, Benjamin A. Smyth and Sarah E. Delia of McCarter & English LLP and Meredith Kotler, Mary Eaton and Nicholas Caselli of Freshfields Bruckhaus Deringer LLP.

The Viela directors are represented by Kevin M. Gallagher and Nicole M. Henry of Richards Layton & Finger PA, and John F. Sylvia and Kerime S. Akoglu of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

The case is Stephen M. Sciannella et al. v. AstraZeneca UK Ltd. et al., case number 2023-0125, in the Court of Chancery of the State of Delaware.

--Editing by Alyssa Miller.

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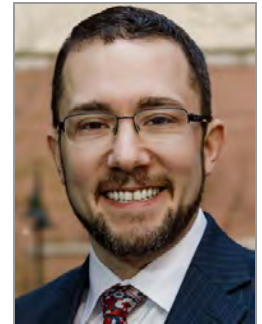
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Purdue Ch. 11 Ruling Reinforces Importance Of D&O Coverage

By **Evan Bolla** (July 2, 2024, 6:43 PM EDT)

On June 27, the U.S. Supreme Court **delivered** a landmark ruling in William K. Harrington v. Purdue Pharma LP, fundamentally altering the landscape for third-party releases in bankruptcy proceedings.

The court held that a Chapter 11 reorganization could not discharge claims against a nondebtor without the consent of affected claimants. The ruling meaningfully increases the importance of maintaining robust directors and officers insurance as a critical safeguard for directors and officers when companies face insolvency.



Evan Bolla

The Supreme Court's Decision

The Purdue Pharma bankruptcy case revolved around the company's role in the opioid crisis and the proposed settlement plan, which included third-party releases for the Sackler family, Purdue's owners.

These releases would have protected the Sacklers from civil liability related to opioid claims without them declaring bankruptcy personally. However, the Supreme Court found that such nonconsensual third-party releases are not authorized under the Bankruptcy Code outside of specific, narrowly defined circumstances, such as those involving asbestos-related claims.

Justice Ketanji Brown Jackson, writing for the majority, emphasized that the Bankruptcy Code does not permit the extension of discharge protections to nondebtors like the Sacklers unless explicitly provided for by Congress. This decision reinforces the boundaries of the debtor's estate and the creditor-debtor relationships and preserves the rights of creditors to pursue claims independently of the bankruptcy process against those who did not include their assets in the estate.

Impact on Directors, Officers, Creditors' Committees and Bankruptcy Trustees

Traditionally, bankruptcy proceedings have provided a setting for claims related to a company's insolvency, including malfeasance or misfeasance by its directors and officers, to be efficiently addressed.

An assigned bankruptcy trustee or appointed committee of creditors or disinterested directors would investigate what occurred and assess potential claims against the company's management and others that may viably increase the assets in the estate for the benefit of the bankrupt debtor's creditors.

Those tasked with investigating the estate could use the promise of recommendations for general releases of all related claims to obtain cooperation or to leverage settlements.

In other words, the estate investigators could offer complete peace by agreeing to recommend a bankruptcy plan that includes releases effective against other parties. These proposed releases would be reviewed and regularly approved by bankruptcy courts as part of the overall bankruptcy plan. This allowed those tasked with maximizing the estate to offer broad civil immunity deals, similar to prosecutors' offers of immunity in criminal cases.

Thus, cooperating or settlement parties were incentivized to strike deals because they would no

longer face potential claims from other parties who may have been harmed as a result of the company's insolvency.

This key bargaining chip relied on to both obtain cooperation and incentivize settlements to maximize a bankruptcy estate is limited post-Purdue.

The Supreme Court's holding that such releases of third-party claims are invalid under the Bankruptcy Code will complicate the efforts of creditors' committees and bankruptcy trustees to settle claims against directors and officers.

With these releases no longer permissible, settlements in bankruptcy will not offer the same level of finality, potentially prolonging litigation and increasing costs for all parties involved.

While the Supreme Court confirmed that the plan may still include releases of derivative claims against directors and officers because they belong to the company, independent claims held by third parties are no longer subject to release.

Creditors' committees and trustees will have a more limited arsenal to encourage cooperation or leverage settlements without the ability to offer broad releases for third-party claims, making it harder to reach agreements that satisfy all stakeholders.

The Importance of D&O Insurance, and a New Need to Maintain Reserves

In light of the Supreme Court's ruling, it is now more crucial than ever for companies to maintain comprehensive D&O insurance policies.

An increase in D&O claims is common after a company's insolvency as the creditors look for a means to be made whole. D&O insurance provides coverage for the personal liability of company directors and officers arising from their conduct by reasons of their positions. This coverage becomes essential in bankruptcy situations where third-party releases are no longer an option to cap potential claims against these individuals.

While directors and officers may have previously encouraged an insurer to pay a substantial portion or all of a policy to settle litigation against them, this would be on the condition of receiving a complete release for both derivative and third-party claims. This will no longer be the case.

In addition, those who suffered independent losses as a result of the company's insolvency will now have greater freedom to advance claims against the company's prior directors and officers irrespective of any agreement between the company's estate and that director or officer. Therefore, directors and officers can expect a material uptick in claims brought by company creditors who are not sufficiently satisfied through distribution of the bankruptcy assets.

Accordingly, directors and officers will need to maintain higher insurance reserves to address the increase in potential third-party claims that could arise outside the bankruptcy proceeding, ensuring that they are financially protected even if the company itself can no longer indemnify them.

This may additionally complicate decisions by insurers on maintaining future reserves and consenting to settlements. Insurers have a general duty to apportion the policy in a fair manner to not unduly prejudice other insureds.

Previously, an insurer could agree to settling a claim with representatives of the estate and feel confident that there would not be additional claims against the policy if the bankruptcy plan included releases for the debtor's prior directors and officers.

Since the potential liability and claims for a company's directors and officers will continue through the bankruptcy and thereafter, insurers will have additional challenges in ensuring that potential insureds are protected, and the policy is appropriately deployed.

Directors, officers and insurers will be less likely to agree to policy limit demands brought by those acting for the creditors, as there will be an increased need to maintain reserves of potential coverage for a defense of potential future third-party claims.

Ensuring Robust D&O Insurance Provisions

Given these developments, it may be advisable for directors and officers to consider negotiating within their employment or indemnification agreements robust D&O insurance provisions. These may include higher policy limits, layers of excess coverage, or additional Side A coverage. Side A provides coverage for directors and officers when the company does not advance legal fees, as in the case of bankruptcy.

A director or officer should confirm the number of officers and directors the policy would cover as often each covered party — or in some cases groups of parties — may retain their own counsel if named as a defendant. Thus, the greater the number of individuals covered the greater need for larger limits to cover defense costs.

As companies cannot typically acquire new coverage after bankruptcy and can only extend existing coverage, a director or officer may look to negotiate provisions that require earmarked funds be maintained to properly extend insurance coverage should the company face insolvency.

Once a company enters bankruptcy, it typically loses the ability to advance legal fees or indemnify its directors and officers due to the automatic stay and the depletion of its financial resources. Thus, advancement and indemnification rights are unlikely to provide the director or officer any true protection.

At that juncture, the only recourse for directors and officers is the D&O insurance policy. Therefore, ensuring that the company maintains adequate coverage before any financial distress becomes critical to protecting the personal assets of these individuals.

Conclusion

The Supreme Court's decision in the Purdue Pharma case marks a significant shift in bankruptcy law. This ruling will increase the amount of litigation arising from corporate insolvency leaving open previously closed pathways for injured parties to look to be made whole.

A company's management often becomes a target as creditors and security holders raise questions concerning the company's failures. Going forward, directors and officers will no longer be able to limit that litigation through the bankruptcy proceeding and plan.

For creditors' committees and bankruptcy trustees, this decision complicates the settlement process, requiring more careful negotiation and higher insurance reserves to cover potential third-party claims.

Ultimately, the Supreme Court's ruling reinforces the need for clear, robust insurance provisions and prudent financial planning to navigate the risks to directors and officers that often arise as the result of corporate bankruptcy.

Evan W. Bolla is a partner, general counsel and the chair of the insurance recovery practice group at Harris St. Laurent & Wechsler LLP.

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Chancery Cuts Sears Shareholders' \$18.3M Award To \$8.7M

By **Leslie A. Pappas**

Law360 (July 2, 2024, 4:37 PM EDT) -- Minority stockholders of Sears Hometown and Outlet Stores saw their class award in Delaware Chancery Court litigation trimmed from \$18.3 million to \$8.7 million Tuesday after former Sears CEO Edward S. Lampert and his co-defendants protested that the court had erred in its calculations.

In a Jan. 31 motion for reargument, the defendants asserted that Vice Chancellor J. Travis Laster had "inadvertently" missed certain payables, liabilities and adjustments when he calculated the valuation of the company's underperforming Hometown segment.

The **15-page order** from Vice Chancellor Laster granted the defendants' motion by recalculating the damages award from his **January post-trial opinion**, while leaving most of his other post-trial findings intact.

"This order grants the motion by making the adjustment the defendants' request," the vice chancellor's order says. That adjustment, in turn, caused the court to revisit a related determination, which subsequently modified the amount of damages, before interest, to \$8.7 million, the vice chancellor wrote.

The modifications "do not alter the outcome of the court's findings regarding Lampert's breach of duty or the need for a remedy," Vice Chancellor Laster said.

The adjustment comes after a post-trial ruling in which Vice Chancellor Laster **awarded more than \$18.3 million** to stockholders after a three-day trial. The first-of-its-kind ruling found that controllers of a company can owe duties of good faith and care to a company and minority stockholders.

The class action, **filed in 2019** and later consolidated, asserted breach of fiduciary duty and unjust enrichment claims against Lampert, his hedge fund ESL Investments Inc., and several related companies he set up to buy most of Sears Holdings Corp.'s assets out of bankruptcy.

Shareholders asserted that the billionaire CEO, who was also Sears' controlling shareholder, spent nearly a decade stripping value from Sears and its affiliated companies for his personal benefit at the expense of minority shareholders.

In February 2023, shareholders reached a **\$3.1 million partial settlement** with three former board directors who were also initially named as defendants. The court **approved the deal** with directors Josephine Linden, Alberto Franco and John E. Tober in November, which ended their involvement in the case.

Vice Chancellor Laster's January post-trial decision resolved Lampert's role in the allegedly conflicted liquidation of the poorly performing segment.

None of the parties immediately responded Tuesday to Law360's request for comment.

The co-lead plaintiffs are represented by Ned Weinberger, Mark Richardson, Michael C. Wagner, Jiahui (Rose) Wang, David Schwartz and John Vielandi of Labaton Keller Sucharow LLP; Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC; Samuel L. Closic and Robert B.

Lackey of Prickett Jones & Elliott PA; and Donald J. Enright and Elizabeth K. Tripodi of Levi & Korsinsky LLP. The co-lead plaintiffs' executive committee is represented by Carl L. Stine and Adam J. Blander of Wolf Popper LLP.

Edward S. Lampert, ESL Investments Inc., ESL Partners LP, RBS Partners LP, Transform Holdco LLC and Hometown Midco LLC are represented by Michael A. Pittenger, Matthew E. Fischer, Jacqueline A. Rogers, Nicholas D. Mozal, Charles P. Wood and Abraham C. Schneider of Potter Anderson & Corroon LLP.

The case is In re Sears Hometown and Outlet Stores Inc. Stockholders Litigation., case number 2019-0798, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Rose Krebs. Editing by Kelly Duncan.

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DraftKings Must Face Securities Suit Over NFTs

By **Sydney Price**

Law360 (July 2, 2024, 9:32 PM EDT) -- A Massachusetts federal judge won't toss a proposed class action claiming that DraftKings Inc. sold unregistered non-fungible tokens on its marketplace, ruling that the suit plausibly alleges that the company falsely advertised that its NFTs would appreciate in value.

On Tuesday, U.S. District Judge Denise J. Casper denied the entirety of DraftKing's motion to dismiss the suit, concluding that the plaintiff has plausibly pled that DraftKings' NFT's were investment contracts, and thus securities within the meaning of the Securities Act and the Securities and Exchange Act.

Plaintiff Justin Dufoe hit DraftKings with the proposed class action in March 2023, saying he lost \$14,000 buying and selling the digital assets on the company's platform. DraftKings previously claimed Dufoe's logic fails the Howey test, referring to the 1946 Supreme Court decision in [SEC v. W.J. Howey Co](#) .

A financial instrument is considered a security under the test if it requires buyers to invest money in a common enterprise with an expectation of profits based on the efforts of the promoter or a third party.

Dufoe claims that videos and other content DraftKings posted online contained statements alleging the cryptocurrency had room to grow.

Judge Casper said that Dufoe has sufficiently alleged the pooling of assets requirement, because the revenue generated by the sale of NFTs was reinvested into DraftKings's business, including through the promotion of the company's online marketplace.

DraftKings has argued that the NFTs are collectibles, similar to baseball or Pokémon cards, not securities.

But the court concluded Tuesday that Dufoe has plausibly claimed that he was led to reasonably expect profits from his NFT purchase. Statements made by DraftKings' North American president Matthew Kalish, who is also a defendant in the suit, regarding "guaranteed scarcity" of certain NFTs can be plausibly interpreted as creating an expectation of profit for early purchasers of the NFTs by controlling the available supply.

"Scarcity guarantees have been found to contribute to a reasonable expectation of profits in analogous cases," Judge Casper said.

The order states that the suit also sufficiently shows that the tokens' value depended on the efforts of the defendants. Although the price of NFTs does not uniformly rise and fall, the court said that it could still reasonably infer that if DraftKings created more demand for its NFTs while limiting the supply, that the value of most NFTs in the ecosystem would rise.

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

Dufoe is represented by Patrick T. Egan and Justin N. Saif of Berman Tabacco, Anthony F. Fata, Faisal Qazi Haider and Sarah Flohr of Kirby McInerney LLP and Blake T. Hannafan of Hannafan & Hannafan Ltd.

DraftKings is represented by Michael G. Bongiorno and Andrew S. Dulberg of WilmerHale and Brian Frawley, Benjamin Walker, Charles Sullivan and Howard Kim of Sullivan & Cromwell LLP.

The case is Dufoe v. DraftKings Inc. et al., case number 1:23-cv-10524, in the U.S. District Court for the District of Massachusetts.

--Editing by Michael Watanabe.

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Pharma Co. Scores Exit In Investor Suit Over Primate Imports

By **Sydney Price**

Law360 (July 2, 2024, 5:28 PM EDT) -- A Massachusetts federal judge tossed every claim in a proposed class action claiming that pharmaceutical company Charles River Laboratories and its executives concealed their involvement in the illegal importation of nonhuman primates for research, ruling that the disputed statements are not false or misleading.

U.S. District Judge Denise J. Casper said Monday the State Teachers Retirement System of Ohio failed to show in its amended complaint that Charles River and the suit's other defendants made any actionable misleading statements, or that they acted with scienter. Judge Casper did not grant the plaintiff's informal request to refile the suit.

The amended complaint filed in November alleges Charles River's stock price fell by \$24.51, or 10%, to close at \$219.09 per share on Feb. 22, 2023, when the company revealed that it had received a subpoena from the U.S. Department of Justice related to an ongoing investigation in conjunction with the U.S. Fish and Wildlife Service, which was looking into the supply chain and illegal importation of nonhuman primates caught in the wild — even though they were listed as bred in captivity — for research.

Charles River was informed that the investigation related to several shipments it received of nonhuman primates from its Cambodia supplier, the suit says.

According to the suit, when the company revealed this news, it also noted that it was voluntarily suspending shipments of primates from Cambodia, and disclosed that this suspension would negatively affect its earnings for the year and would reduce revenue growth by 200 to 400 basis points.

But Judge Casper said on Monday that none of the cited misstatements, including those regarding Charles River's legal compliance, are actionable. The suit does not allege that the defendants were violating any applicable laws when asserting their belief in Charles River's compliance with the law. The plaintiff only alleges that the company had engaged in conduct that "substantially and materially increased the risk to the company."

"[E]ven assuming investigations could establish illegal conduct, allegations that investigations were ongoing at the supplier level would not necessarily undercut the truth of defendants' opinion or belief that Charles River itself was in compliance with the law," the order states. "Charles River, thus, was not required to disclose any further information when it asserted a genuine belief."

In addition to Charles River, the suit also names its CEO James Foster and former Chief Financial Officer David Smith.

Judge Casper said that Foster and Smith's sale of over \$67 million of their company shares at the time of the alleged misrepresentations does not support a strong inference of scienter because they frequently traded shares throughout the entirety of the class period.

"Although plaintiff insists that Foster and Smith sold or gifted stock 'around the time of their misrepresentations' and 'shortly before stock crashed,' the amended complaint makes plain that Foster and Smith frequently sold or gifted their shares, on at least thirty-two occasions throughout the class period," Judge Casper said.

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

State Teachers Retirement System of Ohio is represented by Frederic S. Fox, Donald R. Hall, Jeffrey P. Campisi and Pamela A. Mayer of Kaplan Fox & Kilsheimer LLP, and Edward F. Haber of Shapiro Haber & Urmy LLP.

Charles River and the individual defendants are represented by Charles Duggan, David B. Toscano and Luca Marzorati of Davis Polk & Wardwell LLP and Mara Theophila of McDermott Will & Emery LLP.

The case is Coleman v. Charles River Laboratories International Inc. et al., case number 1:23-cv-11132, in the U.S. District Court for the District of Massachusetts.

--Editing by Michael Watanabe.

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Harvest Capital Class Ends Chancery Merger Suit For \$3.85M

By **Jeff Montgomery**

Law360 (July 2, 2024, 7:14 PM EDT) -- Stockholder attorneys who secured a \$3.85 million pretrial class settlement for an allegedly unfair Harvest Capital Credit Corp. merger deal won an above-average 25% share of the award Tuesday, in what a Delaware vice chancellor indicated was a move to reward top-flight attention to smaller-stakes litigation.

During a hearing Tuesday, Vice Chancellor J. Travis Laster approved a \$952,500 fee for the team of Monteverde & Associates PC, Kahn Swick & Foti LLC and Cooch & Taylor PA amounting to a 25% share of a relatively early stage settlement that might ordinarily command only up to 15%.

"All else equal, if there was an area we thought that private attorneys of the plaintiff's bar should be posting efforts with a goal of improving market practice, it would be small cap companies," the vice chancellor said. "The fact is, that's not where the money is. The money is in big-dollar deals."

At issue in the case was Harvest Capital's acquisition in 2021 by Portman Ridge Finance Corp. under terms that the stockholders alleged were the result of an unfair and conflicted process.

The merger, announced in December 2020, was described as unfairly benefiting Harvest Capital's controlling stockholder, JMP Group, and Joseph Jolson, JMP's co-founder and the CEO and chairman of both Harvest Capital and JMP.

Portman Ridge announced it had completed its acquisition of Harvest at an expected total asset value of about \$614 million and net asset value of approximately \$268 million after closing. The combined company would be managed by Sierra Crest Investment Management LLC, an affiliate of private equity firm BC Partners Advisors LP.

As part of the deal, HCAP Advisors LLC, an affiliate of the controlling stockholder, received a \$3.85 million payment for transition services, later disputed as unfair and conflicted.

"The fact that the offeror proposed the side payment does not in any way immunize the side payment from challenge," Vice Chancellor Laster said. "In a world where, essentially, the practice is that the seller gets a side payment, you're going to see side payments in all the transactions," skewing the incentives of the seller.

"Market practice has evolved to the point where everyone offers this. It's analogous to a country where the rule of law is so desiccated that everyone knows when you want something from a government official, you offer a bribe," the vice chancellor added.

Juan E. Monteverde of Monteverde & Associates, counsel for the class, told the vice chancellor that the controller received other unique benefits, as well, some not identified until after pretrial discovery began.

"You got the same result, if not better results" with the settlement "that we would have if we had gone to trial," Monteverde said.

Monteverde said stockholder attorneys were able to get access to 78,000 pages of digital documents, including forensic evidence showing that deal architects were trading the \$3.85 million transition services agreement "as a potential diversion of capital from the shareholders to the controllers."

Although the vice chancellor found that the settlement merited bumping up the fee from a presumptive 10% to 15% of the settlement amount for early resolution, he declined an attorney proposal for a 30% share, saying that the percentage is ordinarily reserved for a "late-stage" settlement.

The vice chancellor said it is nevertheless important "to provide some incentive to bring cases in these smaller markets. That's where, in my opinion, most of the bad things happen."

S&P 500 companies are more likely to be well advised throughout the process, the vice chancellor also noted, adding that smaller-capitalized companies, "in my experience, are much more of a Wild West situation. That's where you get more conflict from the board, less-highly qualified lawyers advising."

Under the final deal, Harvest stockholders were to receive a cash payment from Sierra Crest of \$2.15 million, or approximately 36 cents per share of Harvest common stock, along with \$18.5 million in cash from Portman Ridge and 15.3 million shares of Portman Ridge common stock, according to a June 2021 merger closing announcement.

The shareholders are represented by Juan E. Monteverde of Monteverde & Associates PC, Michael J. Palestina of Kahn Swick & Foti LLC and Blake A. Bennett of Cooch & Taylor PA.

JMP Group, Jolson, and Richard P. Buckanavage are represented by Matthew E. Fischer, Jacqueline A. Rogers, Christopher D. Renaud, Charles P. Wood and Emily M. Marco of Potter Anderson & Corroon LLP.

William Alvarez Jr. is represented by Rebecca L. Butcher, Jennifer L. Cree and Howard W. Robertson of Landis Rath & Cobb LLP.

Dorian B. Klein, Jack G. Levin and Richard A. Sebastiao are represented by Blake Rohrbacher of Richards Layton & Finger PA.

The case is In re: Harvest Capital Credit Corp. Stockholder Litigation, case number 2021-0164, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Levi & Korsinsky Appointed Lead In Instacart Pre-IPO Action

By **Sydney Price**

Law360 (July 2, 2024, 4:50 PM EDT) -- Levi & Korsinsky LLP has been appointed lead counsel for the investors in a suit alleging the grocery delivery company Instacart misrepresented its growth potential in the lead-up to its initial public offering.

U.S. District Judge Edward J. Davila determined that investor James Cheng's alleged loss of more than \$200,000 was the most significant among the proposed class and appointed him lead plaintiff, according to a **Monday memorandum** filed in California federal court.

Cheng and his counsel from Levi & Korsinsky beat out a competing bid from Pomerantz LLP whose client alleged a loss of approximately \$60,000. A Rosen Law Firm PA client alleging a \$156 loss filed a statement of non-opposition in April, and the court terminated his motion.

Judge Davila said Cheng's claims are typical of the proposed class and that he can be expected to fairly and adequately protect class interests.

Shareholder Andy Dean Stephens **launched the suit** in January, alleging Instacart downplayed the competition it faces in the online grocery shopping and delivery market when it filed its registration statement with the U.S. Securities and Exchange Commission before its **September IPO**.

The offering documents included a letter from Instacart CEO Fidji Simo, in which she told investors that Instacart demonstrated the ability to "help retail partners drive strong growth and stay competitive in a complex and increasingly digital industry," the suit states.

The company went public on Sept. 19, when its shares began trading on the Nasdaq for \$30 each, the investors noted.

But the truth regarding Instacart's business prospects emerged a few days later, on Sept. 22, when a news article with analyst commentary revealed Instacart faced major competition from DoorDash and Uber in the "slowly expanding" grocery delivery market, according to the investors.

Following the article, Instacart's shares fell 65 cents, or about 2%, to close at \$30 per share on Sept. 22, according to the suit.

A couple of weeks later, on Oct. 2, investment research firm Gordon Haskett issued a "hold" rating for Instacart, saying decreased consumer spending and competition threatened the business, the investors noted.

They also alleged Instacart and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Securities Act and the Exchange Act.

Counsel for Cheng and Instacart declined to comment on Tuesday.

Cheng and the proposed class are represented by Adam M. Apton of Levi & Korsinsky LLP.

Instacart is represented by Boris Feldman, Doru Gavril, Olivia W. Rosen and Eunice Leong of Freshfields Bruckhaus Deringer LLP.

The case is Stephens v. Maplebear Inc. dba Instacart et al., case number 3:24-cv-00465, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.

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Bond-Rigging Suit Revived Over Judge's Wife's Stock Conflict

By **Katryna Perera**

Law360 (July 2, 2024, 4:16 PM EDT) -- The Second Circuit on Tuesday revived a proposed class action accusing big banks of rigging corporate bonds, ruling that the New York federal judge who previously dismissed the suit should have recused himself due to his wife's ownership of Bank of America stock.

In a per curiam **opinion**, a three-judge panel vacated U.S. District Judge Lewis J. Liman's 2021 dismissal of the investor suit and remanded it to the district court.

Investors filed the action in 2020 alleging a group of big banks, including Bank of America Corp., Wells Fargo & Co. and JPMorgan Chase & Co., conspired to fix the prices of corporate bonds to the detriment of others trading those instruments.

The banks lodged a joint motion to dismiss in December 2020, arguing the investors' argument was "impossibly broad" and "legally insufficient." Judge Liman agreed and **dismissed the case** in October 2021.

After the investors filed their notice of appeal, the court clerk informed them that Judge Liman's wife owned stock in Bank of America while he was presiding over the case.

Although **the clerk reported** that Judge Liman's wife's stock ownership had "neither affected nor impacted his decisions" in the case, he eventually recused himself, and the case was reassigned.

On Tuesday, the Second Circuit judges said they agree with the investors that vacatur of Judge Liman's ruling is required under U.S. Code Section 455(a), which states that judges must recuse themselves from a proceeding in which their impartiality "might be reasonably questioned."

According to the opinion, Section 455(a) has been described as a "catchall recusal provision" that "governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown."

In the current case, the panel said it is probable that Judge Liman did not know of his wife's **conflict** until the issue was reported by The Wall Street Journal, months after he issued his ruling. However, because he presided over the litigation while his wife held ownership interest in a party to the suit, recusal was necessary.

"This conflict-creating ownership and financial interest existed until some time after the briefing on the instant motion to dismiss was fully submitted," the panel said. "Looking at these facts 'fully from the perspective of an 'objective, disinterested observer,'" ... we conclude that it is reasonable to question the partiality of a judge presiding over a case in which his spouse holds an ownership interest in a party. We therefore hold that the district court violated [Section] 455(a)."

The panel clarified that it does not question Judge Liman's "reasoned judgment," and it is not suggesting that he treated any of the parties in the case unfairly. But the point of Section 455(a) is to avoid even the appearance of partiality, "even absent an explicit showing of it," the judges said.

The panel further stated that vacatur is necessary because the "type" of conflict of interest present in the action risks injustices in future cases.

"That injustice, as highlighted by the press coverage of this and other cases regarding disqualification, is that federal judges will fail to recuse themselves in future cases, which — as plaintiffs correctly argue — may 'increas[e] the likelihood that conflicts [] go unnoticed and unremedied,'" the panel said.

Additionally, the panel found that if the dismissal is not vacated, it risks undermining the public's confidence in the judicial process.

Counsel for the investors declined to comment Tuesday. Counsel for the banks did not immediately respond to requests for comment.

U.S. Circuit Judges Eunice C. Lee and Alison J. Nathan and U.S. District Judge Jed S. Rakoff sat on the panel for the Second Circuit.

The investors are represented by Kellogg Hansen Todd Figel & Frederick PLLC, Korein Tillery LLC and Bartlit Beck LLP.

The banks are represented by Sullivan & Cromwell LLP, Allen Overy Shearman Sterling, Paul Hastings LLP, Cahill Gordon & Reindel LLP, Covington & Burling LLP, Davis Polk & Wardwell LLP, Skadden Arps Slate Meagher & Flom LLP, Simpson Thacher & Bartlett LLP, Paul Weiss Rifkind Wharton & Garrison LLP and Jones Day.

The case is Litovich v. Bank of America Corp., case number 21-2905, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Lakshna Mehta.

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