

AdaptHealth Investors Win Approval of \$51 Million Settlement

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Bloomberg Law

July 11, 2024, 8:36 AM PDT



Matthew Bultman

Reporter

- Deal includes 1 million company shares, corporate changes
- Court approved \$12.8 million in fees for lead counsel

AdaptHealth Corp. will pay \$51 million to end a shareholder lawsuit alleging the home medical equipment company inflated growth metrics and failed to tell investors about its former CEO's role in a tax scheme.

The deal also includes 1 million common shares of AdaptHealth, valued at over \$9.8 million, and requires that the company put in place a series of corporate governance changes.

Judge Harvey Bartle in the US District Court for the Eastern District of Pennsylvania gave the deal final approval Wednesday.

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

Investors filed the lawsuit in 2021, days after short-seller Jehoshaphat Research said AdaptHealth's organic revenue growth for first half of 2021 was negative when calculated in line with industry standards, despite the company's reports of strong growth.

Three months earlier, AdaptHealth had announced that co-CEO Luke McGee would be on unpaid leave after he was charged in Denmark with tax fraud. McGee struck a deal with Danish tax authorities to pay 1.55 billion Kroner, the equivalent of almost \$226 million, according to court documents.

Investors' \$51 million deal includes \$1 million from McGee.

Bartle also approved about \$12.8 million in fees, along with 250,000 AdaptHealth shares, for investors' lead counsel, Robbins Geller Rudman & Dowd LLP. Robbins Geller was also awarded nearly \$670,000 in litigation expenses.

AdaptHealth is represented by Willkie Farr & Gallagher LLP and Saxton & Stump.

The case is Delaware County Employees Retirement System v. AdaptHealth Corp. , E.D. Pa., No. 21-cv-3382, 7/10/24 .

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Amyris, Board Member Settle With Investor After Trip to 9th Cir.

By Martina Barash

- Suit looked at cosmetics maker's transactions with fund
- Settlement leaves remanded exemption issue unresolved

Bloomberg Law News 2024-07-11T09:50:57128531118-04:00

Amyris, Board Member Settle With Investor After Trip to 9th Cir.

By Martina Barash 2024-07-10T17:55:16000-04:00

- Suit looked at cosmetics maker's transactions with fund
- Settlement leaves remanded exemption issue unresolved

An Amyris Inc. shareholder has dropped his derivative suit over alleged short-swing trading by a board member's investment fund because the parties have reached a settlement, according to a court filing.

The voluntary dismissal Tuesday in the US District Court for the Northern District of California leaves unresolved an issue that the US Court of Appeals for the Ninth Circuit sent back to the lower court last year: whether the Amyris board's exemption for the trades extended to the fund, which wasn't a director, as well as covering the fund's indirect owner, who was one.

The dismissal notice didn't specify the terms of investor Andrew Roth's settlement with Amyris, director L. John Doerr, and his Foris Ventures LLC fund.

Attorneys for the parties didn't immediately respond to emails seeking information about the settlement Wednesday.

Amyris, a biotechnology company that makes cosmetics, flavors, and fragrances, is now in Chapter 11 bankruptcy proceedings.

Roth sued Doerr, Foris Ventures, and others in a derivative suit on behalf of Amyris. He sought disgorgement of \$6.4 million from four transactions between Amyris and Foris Ventures, its largest shareholder.

The Amyris board had approved the transactions. Doerr and Foris Ventures said the transactions were therefore exempt under the SEC rule from a law against short-swing trading. But, the court denied their motion to dismiss Roth's complaint because the board hadn't approved the transactions specifically for the purpose of exempting them.

The Ninth Circuit reversed the lower court on that point. But the appellate panel said the district court should determine whether Foris Ventures qualified as a "director by deputization" that could be covered by the exemption.

Schubert Jonckheer & Kolbe LLP and Ostrager Chong Flaherty & Broitman PC represented Roth. Goodwin Procter LLP represented Doerr, Foris Ventures, and affiliated defendants. Gibson, Dunn & Crutcher LLP represented Amyris.

The case is Roth v. Foris Ventures, LLC , N.D. Cal., No. 4:21-cv-04288, stipulation of voluntary dismissal 7/9/24 .

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[Securities Law News](#)

July 10, 2024, 9:35 AM PDT; Updated: July 10, 2024, 10:15 AM PDT

Direct Digital Sued By Shareholder Over Ad Cookie Phaseout (1)

By Matthew Bultman

- **COURT:** S.D. Tex.
- **TRACK DOCKET:** [4:24-cv-02567](#)

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Direct Digital Sued By Shareholder Over Ad Cookie Phaseout (1)

By Matthew Bultman 2024-07-10T12:35:39000-04:00

- **COURT:** S.D. Tex.
- **TRACK DOCKET:** [4:24-cv-02567](#)

Direct Digital Holdings Inc. was sued by a shareholder who alleges investors were misled about the advertising platform's reliance on user-tracking technologies.

Direct Digital executives downplayed the platform's dependence on cookies and other tracking mechanisms but didn't have adequate solutions to deal with Google's plan to phase cookies out of its Chrome browser, the suit said.

The would-be class lawsuit, filed Tuesday in the US District Court for the Southern District of Texas, follows a short-seller report in December that said Direct Digital was "practically broke" and the company's March announcement that it missed a revenue estimate.

"As a result of Defendants' misleading statements and omissions, investors were unaware of the true impacts of the decline of third-party cookie usage on Direct Digital's advertising business," the lawsuit said.

Houston-based Direct Digital said in a statement it "believes that the claims raised in the action are without merit and intends to defend against them vigorously."

Direct Digital uses third-party cookies and other tracking technologies to record information, such as when people view or click on an ad, the suit said. The data helps advertisers decide how to price an ad impression.

Alphabet Inc.'s Google hopes to eliminate cookies early next year. Investors said Direct Digital failed to disclose its transition was accelerated and would affect revenue this year.

Direct Digital's stock price dipped in March after the company announced it missed revenue estimates for the fourth quarter of 2023, the suit said.

"The decline in Direct Digital's stock price is directly attributable to the announcements of missed revenue estimates due in large part to its accelerated transition to a 'cookie-less' advertising platform and material weaknesses in its internal controls," the suit said.

Pomerantz LLP and Bronstein Gewirtz & Grossman LLC represent the investor.

The case is Serrano v. Direct Digital Holdings, Inc. , S.D. Tex., No. 24-cv-02567, 7/9/24 .

(Updated with comment from Direct Digital in fifth paragraph.)

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[NEWS](#)

44 Class Actions: Lawsuits Are Flying Over a Data Breach. But Can They Succeed?

"The fallout from this data breach has and will continue to wreak havoc on the healthcare industry," one complaint said.

July 10, 2024 at 05:15 PM

Cybersecurity



Emily Cousins
Litigation Reporter



Data breach class actions nationwide are amassing against Change Healthcare, reaching at least 44 filed since the beginning of March, according to a count on Law.com Radar.

But the next question for litigators is this: Can the plaintiffs prevail?

The number of affected victims is staggering, with a data breach that could affect up to one-third of Americans, according to the Connecticut Attorney General's Office.

And as the pressure from pending class actions ramps up, [22 attorneys general joined](#) in April to send a letter to UnitedHealth Group Inc., the parent company of Change Healthcare, exhorting the chief executive officer to go further to protect the health care system and patients.

Change Healthcare processes 15 billion transactions per year through its payment and revenue payment cycle management service. It connects providers and patients in the U.S. health care system, according to one complaint, *Ingraham Counseling Services v. Change Healthcare*.

The cyberattack occurred in February, but Change Healthcare allegedly has yet to notify individual customers who have been affected, [stating on its website](#) that it could take several months to identify those directly impacted.

Meanwhile on Tuesday, Connecticut Attorney General William Tong urged all Connecticut residents who might have been affected to use the free credit-monitoring and identity-theft protection services [provided by Change Healthcare](#).

"The Change Healthcare breach was one of the most significant breaches we have seen, impacting the entire health care delivery system, hospitals, providers, and patients alike," Tong said. "Nearly five months later, Change Healthcare has yet to provide necessary notice to impacted consumers. Connecticut consumers cannot wait any longer to take protective steps."

A spokesperson for UnitedHealth, Tyler Mason, said Change Healthcare is working with regulators on the notification process.

“We are committed to notifying potentially impacted individuals as quickly as possible and are immediately providing support and robust protections to people concerned about their data potentially being impacted,” Mason said.

The most recent class action was filed on Tuesday in Minnesota federal court. This complaint was surfaced on [Law.com Radar](#).

According to the complaint, Change Healthcare took revenue cycle management services offline, which impacted tens of thousands of practitioners and health services providers, such as Ingraham Counseling.

“The fallout from this data breach has and will continue to wreak havoc on the healthcare industry,” the complaint said. “Without the Change platform, the healthcare industry is immobilized. Patients are stuck in prescription purgatory without access to their vital medications.”

As a result, health care providers are now struggling to verify “patient eligibility and coverage, filing claims, and billing patients,” the complaint said. “This leaves small and mid-sized practices especially vulnerable without normal cash flow to sustain operations.”

Poor Odds?

But despite the volume of litigation, how likely are the plaintiffs to prevail?

Michael Menapace, an experienced cybersecurity partner at Wiggin and Dana, said the dozens of suits might not be successful.

“Many times, the consumer class actions don’t get very far because one of the threshold issues is for the consumer to show actual injury, and that’s a difficult thing to show. It’s hard to show a direct line between a breach and how they’ve been injured.”

Some states have passed laws to strengthen data protection and allow an easier route to obtain damages when a data breach occurs. For example, the Illinois Biometric Information Privacy Act, passed in 2008, resulted in a high volume of class actions. In 2019, the Illinois Supreme Court ruled in [Rosenbach v. Six Flags Entertainment](#) that plaintiffs do not need to prove actual injury to seek damages.

The breach allegedly occurred because the defendant “failed to implement one of the most basic and industry standard cybersecurity safeguards, multi-factor authentication,” the court said.

Menapace said companies need a game plan for potential data breaches.

“Companies have to assume that at some point, they are going to be impacted by some bad actor,” Menapace said. “The preparation of having good data practices in place, having the incident response plan and practicing it, and having the cyber insurance in place is key. It could make the difference between a company who’s able to respond and recover ... or a company that is so overwhelmed that they can’t go on operating.”

Change Healthcare has paid a ransom of \$22 million to the cybercrime group Blackcat, but one of its affiliates still possesses a copy of the stolen data, and claims “it was not paid its share of the ransom,” the complaint said.

Menapace said it is rare to be able to identify who the bad actor is during a forensic analysis, and even if the cybercriminals are located, it is often in a country that is not interesting in cooperating with U.S. law enforcement.

According to Reuters, the U.S. State Department offered up to \$10 million at the end of May for information relating to Blackcat.

Menapace said, “If a company that has been breached is hoping to recover from the bad actor directly, while there’s nothing stopping them from trying that, it’s very unlikely, which is one reason why companies need to do everything they can to mitigate the risk.”

This suits were surfaced by [Law.com](#) Radar, a cutting-edge solution for new suit alerts from federal and state courts. [Law.com](#) Radar delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts, all backed by the industry’s most trusted source for legal news and data. [Click here](#) to get started and be first to act on opportunities in your region, practice area or client sector.

Read the complaint:

CASE 0:24-cv-02661-DWF-DJF Doc. 1 Filed 05/29/24 Page 1 of 32

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

INGRAHAM COUNSELING SERVICES,
PLLC, individually and on behalf of all
others similarly situated,

Plaintiff(s),

v.

CHANGE HEALTHCARE INC. and
UNITEDHEALTH GROUP INC.,

Defendant.

CASE NO.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Ingraham Counseling Services, PLLC (“Plaintiff”), by and through the undersigned counsel, brings this class action complaint against Defendant Change Healthcare Inc. (“Defendant” or “Change Healthcare Inc.”). Plaintiff makes the following allegations and upon information

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<https://www.law.com/ctlawtribune/2024/07/10/44-class-actions-lawsuits-are-flying-over-a-data-breach-but-can-they-succeed/>

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Patelco Credit Union Hit With Four Suits Over June Data Breach

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XCB0QBPS000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XCB0QBPS000000)

Patelco Credit Union failed to protect the personal information of thousands of people that was exposed in a June ransomware attack and data breach, four proposed federal class actions said.

Eileen Poluk, Josh Warren, Siobhan Gallagher, and Sean McGinty alleged in separate complaints that Patelco failed to implement adequate data-security practices, encrypt or redact sensitive data, or comply with industry standards and the guidelines of the Federal Trade Commission.

Information exposed in the breach included names, addresses, contact information, Social Security numbers, and financial-account numbers, according to complaints filed between July 1 and Wednesday in the US District Court for the Northern District of California.

Patelco, which operates throughout Northern California, said in a statement on its website that the attack occurred June 29 and led to the disruption of many bank operations and services, including online banking, check cashing, balance inquiries, and debit- and credit-card transactions.

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

Victims have been injured in the form of invasion of privacy, diminished value of personal information, lost time responding to the breach, out-of-pocket costs from mitigation measures, payment for data security that wasn't provided, increased risk of fraud and identity theft, emotional distress, and increased spam calls and texts, the complaints said.

Each of the plaintiffs seeks to represent a nationwide class of people whose information was compromised in the incident. Warren also seeks to represent a California subclass of affected people.

The lawsuits bring a variety of claims, including negligence, negligence per se, breach of implied contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, invasion of privacy, and violations of the California Consumer Privacy Act, the Unfair Competition Law, and the Customer Records Act.

The plaintiffs are seeking actual, compensatory, nominal, statutory, and punitive damages; restitution; injunctive relief; attorneys' fees and costs; and pre- and post-judgment interest.

Cole & Van Note represents Poluk; Wolf Haldenstein Adler Freeman & Herz LLP represents Warren; Strauss Borrelli PLLC represents Gallagher; and Kopelowitz Ostrow Ferguson Weiselberg Gilbert represents McGinty.

The cases are Poluk v. Patelco Credit Union , N.D. Cal., No. 4:24-cv-03962, complaint filed 7/1/24 , Warren v. Patelco Credit Union , N.D. Cal., No. 3:24-cv-04036, complaint filed 7/3/24 , Gallagher v. Patelco Credit Union , N.D. Cal., No. 3:24-cv-04127, complaint filed 7/9/24 , and McGinty v. Patelco Credit Union , N.D. Cal., No. 4:24-cv-04154, complaint filed 7/10/24 .

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NEWS

First Infant Formula Trial Against Abbott Begins in Missouri

Jake Plattenberger told jurors in an opening statement on Tuesday that Abbott’s cow’s milk-based formula, sold under the Similac brand, caused plaintiff Margo Gill’s premature daughter, Robynn Davis, to get necrotizing enterocolitis, or NEC, a gastrointestinal inflammation.

July 10, 2024 at 09:51 PM



Amanda Bronstad
staff reporter



What You Need to Know

- Abbott attorney James Hurst said the plaintiff's daughter had a 'major hypoxic event' after her 2021 birth unrelated to its formula.
- On March 13, a jury in Illinois’ St. Clair County Circuit Court awarded \$60 million to the mother of a premature baby who died after receiving Enfamil infant formula made by Mead Johnson.
- Thousands more NEC lawsuits are pending in Illinois courts, and there are cases in California, Florida and Pennsylvania.

The first trial against Abbott Laboratories Inc. involving infant formula designed for premature babies began on Tuesday in Missouri.

Attorney Jake Plattenberger told jurors in an opening statement that Abbott’s cow’s milk-based formula, sold under the Similac brand, caused plaintiff Margo Gill’s daughter, Robynn Davis, to get necrotizing enterocolitis, or NEC, a gastrointestinal inflammation.

“There’s a lot of people watching what happens in this trial,” Plattenberger, of TorHoerman Law’s Chicago office, told jurors, according to Courtroom View Network’s live stream of the trial.

Abbott aggressively marketed its product to hospitals and doctors, so that parents will remain Similac customers, but didn’t warn about the risks of NEC on its bottle, the box or in product guides.

“Despite all that opportunity, they have never, not once, told parents the truth about this product,” he said.

Abbott attorney James Hurst, of Kirkland & Ellis in Chicago, said the science didn’t back up the plaintiffs’ claims. Davis had a “major hypoxic event” when she was born in 2021, he said, which caused permanent brain injuries. She suffered several pulmonary hemorrhages and underwent surgery before receiving any of Abbott’s formula, which has been on

the market for 45 years.

“Formula did not cause Robynn’s NEC, and formula certainly did not cause her current neurological problems,” Hurst said, according to the livestream.

The trial is the second involving cow’s milk-based infant formula designed for premature babies. Sold in hospitals, not in retail stores, the formula is touted as a life-saving alternative to breast milk, but lawsuits contend that it’s linked to NEC, which sickens or kills premature babies.

On March 13, a jury in Illinois’ St. Clair County Circuit Court awarded \$60 million to the mother of a premature baby who died after receiving Enfamil infant formula made by Mead Johnson. The [jury’s verdict](#), which found Mead Johnson failed to warn about the risks of its product, was the first in the nation involving NEC. The award was 100% compensatory damages because punitive damages were not allowed in wrongful-death cases in Illinois at the time of the lawsuit’s filing.

A ‘Serious Problem’?

Punitive damages are on the table in the Missouri trial, which comes as Abbott’s stock has fallen since the Illinois verdict.

On Tuesday, Plattenberger cited Abbott’s internal documents and studies showing its formula at least doubled the risk of NEC in babies born at less than 34 weeks.

“It just goes on and on and on about Abbott knowing internally that its product has this serious problem,” he told jurors.

But the NEC Society, a nonprofit organization focused on preventing and treating the disease, has opposed the litigation.

Thousands more NEC lawsuits are pending in Illinois courts, and there are cases in California, Florida and Pennsylvania. Another [400 cases were coordinated](#) in the U.S. District Court for the Northern District of Illinois before Judge Rebecca Pallmeyer.

The lawsuits over NEC are separate from cases brought against Abbott over its 2022 recall of infant formula. The recall, tied to [formula made at its plant in Sturgis, Michigan](#), came as both Abbott and Mead Johnson faced supply chain issues after the COVID-19 pandemic caused shortages of infant formula.

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California settles price-fixing claims against fuel traders for \$50 million

 [courthousenews.com/california-settles-price-fixing-claims-against-fuel-traders-for-50-million](https://www.courthousenews.com/california-settles-price-fixing-claims-against-fuel-traders-for-50-million)

Hillel Aron

(CN) — California Attorney General Rob Bonta on Wednesday announced a \$50 million settlement with two gasoline trading firms accused of price-fixing.

Bonta sued the two firms — Switzerland-based Vitol, Inc. and South Korea-based SK Trading International — in 2020, accusing the two corporations of manipulating the price of gasoline through a series of trades on the futures market, following an explosion at an oil refinery in Torrance in 2015. The two companies used traders who were friends with each other to collude and cause large spikes in the oil market. The market manipulation may have cost California drivers as much as \$150 million in 2015 alone.

According to the complaint, the two firms "may not have created the supply disruption that impacted California starting in February 2015, but they exacerbated the effects of that disruption to illegally enrich themselves at great cost to California consumers."

According to the American Automobile Association, California has the highest average gas prices in the nation, and by some distance. The state averages \$4.78 per gallon — more than a dollar higher than the national average of \$3.54, and nearly 10 cents higher than the second most expensive state, Hawaii. Some of the discrepancy can be chalked off to taxes — California has the highest gasoline tax in the country. The state also has environmental regulations that drive up the cost, and requires a special blend of fuel that has lower emissions that only 11 of its refineries can produce.

Some have argued those two reasons don't fully explain such a large price difference, which they have dubbed the "Mystery Gasoline Surcharge." The man who coined that term, economist Severin Borenstein, has argued that part of the mystery can be explained by market manipulation and price gouging.

"Petroleum companies should not get to reap mass profits out of the pockets of hardworking Californians through illegal market manipulation," Bonta said in the announcement of the settlement. "Market manipulation and price gouging are illegal and unacceptable, particularly during times of crisis when people are most vulnerable."

California drivers can apply to receive a small part of the \$50 million settlement by going to the website www.calgaslitigation.com, though it has not yet been set up.

Representatives for Vitol and SK Trading did not immediately respond to emails requesting a comment on the settlement.

In 2023, California lawmakers passed Senate Bill X1-2 which gave the California Energy Commission the power to penalize oil companies for price gouging.

“When oil companies manipulate markets to line their own pockets, California will hold them accountable, and I commend my former colleagues in the Department of Justice on seeing this landmark case through to a successful conclusion,” said Tai Milder, director of the Division of Petroleum Market Oversight, in a written statement. “Today, with Senate Bill X1-2 — the Gas Price Gouging and Transparency Law — California has even stronger tools to monitor the oil industry, expose bad actors, and protect consumers. These tools make it harder for industry actors like these firms to engage in this kind of misconduct in the first place.”

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California drivers overcharged for gas in 2015, could be repaid

 [10news.com/news/local-news/california-drivers-overcharged-for-gas-in-2015-could-be-repaid](https://www.10news.com/news/local-news/california-drivers-overcharged-for-gas-in-2015-could-be-repaid)

Perla Shaheen

July 11, 2024

SAN DIEGO (KGTV) — If you filled up gas in Southern California in 2015, two major trading companies probably ripped you off. That's according to the California Attorney General, who announced a \$50 million settlement that could put some money in your pocket.

"In San Diego, it's crazy," said Dustin Hayes while paying for gas.

'Atrocious' and 'horrible' are just some of the words San Diegans use to describe the cost of filling their tanks.

"I'm on empty, and I'm just putting two gallons for the rest of the work week, so Thursday and Friday and I try not to drive for the rest of the weekend," said Andy Pedroza at the pump.

"Yeah, I can't afford it."

Although we cannot do much about today's high gas prices, the Attorney General announced that some California drivers could be reimbursed for gas they bought in 2015.

It's part of a \$50 million settlement with gas trading firms Vitol and SK Energy Americas on Wednesday. The lawsuit claims that the companies worked together to manipulate the spot market in California, overcharging gas stations and raising the price at the pump.

"These two traders- they claimed gas was sold and bought- but it was just a scam to drive up the price of gas on the spot market," said Jamie Court with Consumer Watch Dog.

Court works with an advocacy nonprofit that helped pass SBX1-2 last year to prevent this type of market manipulation in the future.

"Now every trade has to be recorded and told to the state," Court said. "Prior to that, there was no official record of the trades."

It's still unclear how much money each driver can receive from the settlement. The number is determined by the number of people who submit a claim.

"Yes, I'll definitely file a claim now that I know about it," Pedroza said.

"Is it worth getting \$20 back? \$30? I don't know," Hayes said.

Once the court authorizes the issuance of notice to California residents, you can submit a claim online at www.CalGasLitigation.com

After lawyers exceed status-letter limit by 'whopping' 70 pages, judge sees echoes of fictional Jarndyce case

 [abajournal.com/news/article/after-lawyers-exceed-status-letter-limit-by-whopping-70-pages-judge-sees-echoes-of-jarndyce-v-jarndyce](https://www.abajournal.com/news/article/after-lawyers-exceed-status-letter-limit-by-whopping-70-pages-judge-sees-echoes-of-jarndyce-v-jarndyce)

Discovery

By Debra Cassens Weiss

July 11, 2024, 10:36 am CDT

The handiwork of lawyers who crafted a joint 73-page monthly status letter won't appear on the federal docket after a magistrate judge noted last week that it was a "whopping" 70 pages over the limit. (Image from Shutterstock)

The handiwork of lawyers who crafted a joint 73-page monthly status letter won't appear on the federal docket after a magistrate judge noted last week that it was a "whopping" 70 pages over the limit.

U.S. Magistrate Judge Ona T. Wang of the Southern District of New York ordered the letter to be removed from the docket, along with a filing that followed, Law360 reports.

The lengthy letter was filed amid discovery disputes in a lawsuit alleging that a Pakistani bank funded terrorism in Afghanistan.

The law firms representing the plaintiffs are Sparacino and Susman Godfrey, according to Law360. The firm representing the defendant Habib Bank is White & Case.

Wang told the parties at the last status conference "not to have the protracted letter-writing campaigns where you go back and forth arguing with each other," she said in her July 1 order.

The warning was not heeded.

"It has become apparent that no amount of nudging or admonishing from the bench will curb these 'letter-writing campaigns,'" Wang wrote in the order.

Wang said the parties must meet and confer in good faith to resolve their discovery disputes. If the parties still can't reach agreement on their "myriad issues," they must file a joint status letter limited to five, single-spaced pages. That page limit applies to future status letters, as well.

Wang also said she will “very likely” apportion or grant costs in rulings on future motions to compel discovery or to grant protective orders. She pointed to a civil procedural rule authorizing imposition of attorney fees when motions are not made in good faith or when objections are not substantially justified.

Wang saw parallels to the long-running contested-will case in the 1852 novel *Bleak House* by Charles Dickens.

“Discovery in this litigation is at risk of devolving into a modern-day *Jarndyce v. Jarndyce*, as it has ‘become so complicated, that no man alive knows what it means.’ and ‘no two ... lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises,’” Wang wrote.

The case is *King v. Habib Bank Limited*.

Tesla delays robotaxi launch to October from August, Bloomberg News reports

 [reuters.com/business/autos-transportation/tesla-delays-robotaxi-launch-october-august-bloomberg-news-reports-2024-07-11](https://www.reuters.com/business/autos-transportation/tesla-delays-robotaxi-launch-october-august-bloomberg-news-reports-2024-07-11)

Reuters

The front hood logo on a 2018 Tesla Model 3 electric vehicle is shown in this photo illustration taken in Cardiff, California, U.S., June 1, 2018. Picture taken June 1, 2018. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

July 11 (Reuters) - Tesla (TSLA.O) , opens new tab is delaying the launch of robotaxi by about two months to October as the design team was told to rework some elements of the car, Bloomberg News reported on Thursday, citing people familiar with the decision. Shares of Tesla, which is betting on self-driving vehicles over less-expensive cars, fell more than 6% following the news, ending 11 straight sessions of gains that had pushed the stock up 44%.

Tesla did not immediately respond to a Reuters request for comment.

Musk had announced the unveiling of robotaxi on Aug. 8, after Reuters reported on April 5 that Tesla had canceled its long-promised inexpensive car and would continue developing self-driving robotaxis on the same small-vehicle platform.

"Tesla has been playing this game for nearly a decade of promising 'next year, next year'. And I've seen no indication that Tesla...is on track for a meaningful deployment of the kind of automated driving system that Tesla has consistently promised," said University of South Carolina law professor Bryant Walker Smith, with expertise in autonomous vehicle law.

Except for announcing an unveiling date, Musk has given minimal details about robotaxi so far. He has only said that some vehicles will be owned and operated by Tesla, while others will be owned by individuals but rented out on Tesla's network.

Analysts and industry experts have said the race to develop autonomous driving systems and robotaxis will be arduous and take years as the technology faces engineering and regulatory hurdles.

Tesla hikes prices in Europe over China EV tariffs

"I think the (launch) event will be a disappointment as we were probably gonna get a CyberTaxi, not a RoboTaxi. Another hyperbolic exaggeration will likely be exposed. Nobody's going to be able to knit socks on their way to work or nap while the vehicle brings you to grandma's," Craig Irwin, senior research analyst at Roth MKM, said.

Musk has been focusing on artificial intelligence, autonomous driving software, robotaxis and the humanoid robot named Optimus to combat a slowdown in EV sales, which generate more than 80% of Tesla's quarterly revenue.

He said in the company's first-quarter earnings conference call in April that Tesla would introduce "new models" by early 2025 using its current platforms and production lines.

During the call, he had outlined ambitious visions for diversifying Tesla's business into artificial intelligence, humanoid robots, and operating a fleet of millions of autonomous vehicles - all based on software and hardware products the automaker has not yet fully developed.

A source told Reuters that the billionaire visited Beijing in April on an unannounced visit to discuss the rollout of its full self-driving software and other data-transfer permissions. 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 Deborah Sophia, Akash Sriram and Harshita Mary Varghese in Bengaluru;
Editing by Shinjini Ganguli

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Tesla gets more time to defend against driver class action over insurance

 [reuters.com/legal/government/tesla-gets-more-time-defend-against-driver-class-action-over-insurance-2024-07-10](https://www.reuters.com/legal/government/tesla-gets-more-time-defend-against-driver-class-action-over-insurance-2024-07-10)

Mike Scarcella

File Photo: A Tesla logo is seen in Los Angeles, California U.S. January 12, 2018.

REUTERS/Lucy Nicholson Purchase Licensing Rights , opens new tab

July 10 (Reuters) - A judge in California said he would give Tesla (TSLA.O) , opens new tab more time to build its defenses against a proposed class action accusing it of overcharging for insurance, after an outside lawyer for the electric vehicle maker pointed to delays in collecting information.

Oakland-based Judge Michael Markman of Alameda Superior Court said at a hearing on Tuesday that he would hold a hearing in October 2025 on whether to certify the case as a class action, later than the plaintiff's lawyers had suggested.

A Tesla customer sued the company last year on behalf of drivers in 11 states, claiming it inflated insurance premiums based on "false" crash warnings instead of actual driving behavior.

The lawsuit said Tesla, which sells insurance for its vehicles directly to customers, violated California's sweeping unfair competition law, in addition to breaking contracts with drivers.

A lawyer for Tesla said at Tuesday's hearing that it was taking "a lot longer" than expected to gather information to defend against the case because of the number of states involved and the departure of a Tesla employee who had been working with its outside attorneys.

"Just last week we lost our main contact at the company," said attorney Min Kang, representing Tesla.

Kang did not name the official or the person's role at Tesla, but she said the company was in the process of hiring a replacement. "So that is complicating things," she said.

Austin, Texas-based Tesla, Kang and an attorney for the named plaintiff did not immediately respond to requests for comment.

Tesla, which has denied any wrongdoing, lost separate bids last year and in June to throw out some claims in the case.

Tesla offers insurance that relies on real-time driving behavior. The company says premiums are based on factors including a "safety score," which includes vehicle data related to hard-braking, "aggressive" turning and "forward collision warning alerts."

Many Tesla drivers have "reported suffering sporadic and random Forward Collision Warnings when there is no danger in sight," which affects their safety score and drives up their premiums, the complaint said.

A Reuters special report published last year and that was part of a Pulitzer-prize winning series detailed how complaints about Tesla's insurance unit had drawn scrutiny from state regulators and plaintiffs' lawyers.

The lawsuit in Alameda was filed on behalf of Tesla drivers who purchased the company's insurance in Arizona, Colorado, Illinois, Maryland, Minnesota, Nevada, Ohio, Oregon, Texas, Utah and Virginia.

The case is Ricky Stephens v. Tesla Insurance Services, Alameda County Superior Court, No. 23CV031800.

For Stephens: Eugene Turin of McGuire Law

For Tesla: Min Kang of Hinshaw & Culbertson

Read more:

Tesla launched its own car insurance. These drivers say it's a lemon.

Tesla laying off more than 10% of staff globally as sales fall

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Reporting by Mike Scarcella

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NEWS

Judge Tosses Ex-Twitter Workers' \$500M Severance Case

The case, brought on behalf of about 6,000 Twitter workers, alleged Elon Musk violated a federal law that governs benefit plans. U.S. District Judge Trina Thompson said ERISA did not apply to the severance program at issue but gave the plaintiffs the opportunity to refile using a different legal basis.

July 10, 2024 at 05:31 PM

Litigation

By Maria Dinzeo | July 10, 2024 at 05:31 PM

The original version of this story was published on [Corporate Counsel](#)

Thousands of Twitter employees fired after Elon Musk took control of the social media company in November 2022 are not entitled to \$500 million in unpaid severance under the Employee Retirement Income Security Act, a federal judge ruled.

Lead plaintiff Courtney McMillian, vice president of total rewards at Twitter before she was laid off in 2022, brought the case on behalf of about 6,000 employees terminated following Musk's takeover.

It's one of a string of lawsuits brought by former employees of the company, now known as X Corp., that are winding through the courts as a result of Musk's \$44 billion purchase of the San Francisco-based social media giant and the cost-cutting spree he unleashed afterward.

In most of the cases, employees allege that after the sale they were denied severance and bonuses they were entitled to. In perhaps the highest-profile case, Chief Executive Officer Parag Agrawal, Chief Financial Officer Ned Segal, Chief Legal Officer Vijaya Gadde and General Counsel Sean Edgett alleged that they are owed \$200 million.

The McMillian suit alleged that most laid-off workers were entitled to at least two months of severance pay under a 2019 benefit plan controlled by ERISA.

U.S. District Judge Trina Thompson of the Northern District of California dismissed the case on Tuesday, writing that ERISA, a federal law governing benefit plans, does not govern the severance at issue, which was a fixed, lump-sum payout.

"[T]here are insufficient facts alleged in the operative complaint that the putative ERISA plan is an 'ongoing administrative scheme' so that it would be ERISA governed," Thompson said in the 23-page decision, noting that the buyout plan did not "involve a 'case-by-case' analysis or 'discretionary application' of the Twitter severance benefits' terms."

She said the plaintiffs are not without recourse, however, adding, "Indeed, there are other cases brought against Twitter for the failure to pay wages or provide employee severance benefits during the same or overlapping period that plaintiffs allege defendants denied them and the putative class sufficient severance benefits under the severance plan at issue here."

Thompson gave the plaintiffs leave to amend their lawsuit only as to claims not governed by ERISA.

“We are disappointed in the ruling and considering our options for moving forward,” the plaintiffs’ lawyers, Kate Mueting and Charles Field of Sanford Heisler Sharp, said through a spokesperson for the firm.

Lawyers for Musk and X on Wednesday did not respond to a request for comment from Law.com.

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<https://www.wsj.com/articles/jury-finds-healthcare-company-ceo-misled-investors-over-covid-19-tests-25d608c7>

RISK & COMPLIANCE JOURNAL

Jury Finds Healthcare Company CEO Misled Investors Over Covid-19 Tests

Marc Schessel, now the former CEO of SCWorx, claimed the company had a contract to acquire millions of test kits

By [Sabela Ojea](#) [Follow](#)

July 10, 2024 3:33 pm ET



The U.S. attorney for New Jersey said the former CEO took advantage of the pandemic to pump up SCWorx's stock. PHOTO: PATRICK SEMANSKY/ASSOCIATED PRESS

A federal jury has found SCWorx's former Chief Executive Marc Schessel guilty for his participation in a scheme to mislead investors about the healthcare company's procurement of Covid-19 rapid test kits.

The jury convicted Schessel, who founded the company in 2012 and headed it until 2021, of two counts of securities fraud, the U.S. Attorney's Office of the District of New Jersey said Wednesday.

Schessel made false claims in the early days of the Covid-19 pandemic about having a binding contract to acquire millions of Covid tests from an Australian

supplier, the prosecutor's office said, leading to a surge in the company's share price.

SCWorx and Schessel never obtained the promised Covid test kits despite the statements, according to the prosecutor's office. The company said it was ending the agreements without procuring any tests, causing its stock to crash.

Schessel wasn't immediately available for comment.

"This defendant took advantage of the global Covid pandemic by illegally pumping up the value of SCWorx's stock by over 400% with multiple fraudulent public statements," said Philip Sellinger, the U.S. attorney for New Jersey.

"Duping investors out of millions of dollars in the middle of a serious health emergency to salvage a failing business is especially egregious," he added.

Write to Sabela Ojea at sabela.ojea@wsj.com

US FTC to sue drug middlemen over insulin prices, source says

 [reuters.com/business/healthcare-pharmaceuticals/us-ftc-sue-drug-middlemen-over-insulin-prices-wsj-reports-2024-07-10](https://www.reuters.com/business/healthcare-pharmaceuticals/us-ftc-sue-drug-middlemen-over-insulin-prices-wsj-reports-2024-07-10)

Jody Godoy, Mariam Sunny

Item 1 of 3 The corporate logo of the UnitedHealth Group appears on the side of one of their office buildings in Santa Ana, California, U.S., April 13, 2020. REUTERS/Mike Blake/File Photo/File Photo

[1/3]The corporate logo of the UnitedHealth Group appears on the side of one of their office buildings in Santa Ana, California, U.S., April 13, 2020. REUTERS/Mike Blake/File Photo/File Photo Purchase Licensing Rights , opens new tab

July 10 (Reuters) - The U.S. Federal Trade Commission is planning to sue UnitedHealth (UNH.N) , opens new tab, Cigna (CI.N) , opens new tab and CVS Health (CVS.N) , opens new tab over their tactics as middlemen in negotiating prices for drugs including insulin, a person familiar with the matter said on Wednesday.

The three companies own the largest pharmacy benefit managers, or PBMs, which are being investigated for the rebates, or volume-based discounts, they negotiate with drug manufacturers, and how these influence drug access and pricing.

CVS said the company intends to defend itself vigorously. UnitedHealth declined to comment; Cigna was not immediately available for comment.

"Any action that limits the use of these PBM negotiating tools would reward the pharmaceutical industry and return the market to a broken state, leaving American businesses and patients at the mercy of the prices drugmakers set," a CVS spokesperson said.

The FTC is also looking at drugmakers as part of the insulin probe, the source said. The three largest insulin makers include Sanofi (SASY.PA) , opens new tab, Novo Nordisk (NOVOB.CO) , opens new tab and Eli Lilly (LLY.N) , opens new tab.

Sanofi said its pricing practices have always complied with the law and that the company is committed to helping patients access the medicine they need at the lowest possible price.

Novo declined to comment and Lilly did not immediately respond to Reuters request for comment.

U.S. President Joe Biden's Inflation Reduction Act capped insulin prices for government-backed Medicare insurance recipients at \$35 per month but that cap does not apply to patients with private insurance or without insurance.

Americans without health insurance pay an average of \$98 for Eli Lilly's generic insulin despite the company's May 1 pledge to cut its list price to \$25 per vial, according to a survey of more than 300 U.S. pharmacies by U.S. Senator Elizabeth Warren's office released a year ago.

As of 2023, around 8.4 million people in the United States with diabetes used insulin, according to the American Diabetes Association.

Insulin is vital for patients with type 1 diabetes to control their blood sugar and for some patients with the more common type 2 diabetes.

On Tuesday, the FTC issued an interim report, saying the three biggest middlemen - managing 79% of U.S. prescription drug claims - have used years of dealmaking to gain outsized influence on drug prices. The report said the companies enriched themselves at the expense of smaller pharmacies and consumers.

UnitedHealth's Optum unit, CVS Health's CVS Caremark and Cigna's Express Scripts all disputed the report's findings.

Keep up with the latest medical breakthroughs and healthcare trends with the Reuters Health Rounds newsletter. [Sign up here.](#)

Reporting by Mariam Sunny in Bengaluru and Jody Godoy in New York; Editing by Maju Samuel and David Gregorio

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Banks Can Outsource Their Trades

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By Matt Levine

(Bloomberg Opinion) --

White label

If you are a retail stock investor in the US, you have a broker. Your broker is a company — Robinhood or Charles Schwab or E*Trade — that is in the business of having account relationships with retail investors. It advertises to attract your business, it has a nice website and app for you to make trades, it accepts transfers from your bank so you can buy stocks, it sends you account statements and keeps track of your stocks for you.

But what the broker typically does not do is *trade stocks for you*. If you want to trade stocks, you go to your broker's app and click the buttons for "buy 100 shares of XYZ," and the broker's computer gets the order, and then it ships the order out to someone *else*, some *different* company, called a "market maker,"¹ whose job is to get you the stock at the best available price. Sometimes this will involve sending your order on to the New York Stock Exchange, or some other trading venue: The market maker buys 100 shares of XYZ on the exchange at the market price and then hands them over to you. Often, though, the market maker will instead sell you the stock out of its inventory: It is in the business of trading stocks for its own account, so when it gets your order to buy 100 shares of XYZ, it will sell you 100 shares of XYZ as a principal, charging you slightly less than the market price on the exchange.

You do *not* have a direct account relationship with the market maker, and you might not know who the market maker is on any stock trade that you do, though you can get some general idea from public disclosures. If you are a customer of Robinhood, for instance, your stock orders are probably being executed by Virtu Americas, Citadel Securities, Jane Street Capital, G1 Execution Services or Two Sigma Securities. That's a pretty typical list; those are some of the biggest market makers for retail stock trades.

Why is there this division of labor? Well, why is there any division of labor? The people who run Robinhood and Charles Schwab are in the business of advertising and providing customer service to retail investors; the people who run Virtu and Citadel Securities are in the business of buying stocks at low prices and selling them at slightly higher prices. The skill sets do not have a ton of overlap. You've got Robinhood bopping around building fun apps that make people trade more stocks, but do

you want Robinhood risk-managing a big trading book? No, you do not. So Virtu or Citadel Securities or Jane Street comes to Robinhood and says “hey, let us risk-manage the actual trading for you, so you can stick to what you are good at.” And they set up some sort of outsourcing arrangement where your broker sends your orders to a market maker to actually trade.

The economics of these relationships are controversial, and we talk about them from time to time, but for now let’s not worry about that.

I should add that things are slightly different if you are a customer of Merrill Lynch. In that case, your order might get executed by those same guys — Virtu, Citadel Securities, Jane Street, G1 and Two Sigma all trade some Merrill Lynch orders — but it will *most likely* be executed by another market maker, BofA Securities. Like Merrill Lynch, BofA Securities is a division of Bank of America Corp.: They are technically separate entities, but they have the same owner. Loosely speaking, if your broker is Merrill Lynch, or JPMorgan or Goldman Sachs or Morgan Stanley,² your broker probably *does* trade stocks for you: Your broker is part of a big bank that handles *both* the customer-service side of the business *and* the trading side of the business. Historically, the core business of a brokerage included *both* customer service *and* trading, but over time people realized that they could be unbundled efficiently.

All of this could *in principle* be true of institutional investors too. You could imagine a world in which:

1. Institutional investors have account relationships with big Wall Street investment banks, who provide them with customer service: account statements, custody, a person they can call when they want to trade.³
2. But the actual trades are done by some third-party market maker: The institution calls their bank to say “I want to buy 1 million shares of XYZ,” and the person at the bank who takes the call says “I’ll get right on that,” and she types “buy 1 million shares of XYZ” into her system, and the system sends that order to some third-party market maker who actually does the trade.

You don’t see a ton of this at the high end, because if you are an institutional investor you probably care less about the snazziness of your broker’s app and more about the broker’s ability to *actually do the trades*: You want a bank that is willing to take some risk to quote you the best prices on the stuff you want to trade. And traditionally that was the thing banks were good at. They had lots of money, they employed the best traders and risk managers, of course they would do the actual trades.

Now, less so. Bloomberg’s Katherine Doherty and Sridhar Natarajan report:

Inside Ken Griffin’s Citadel Securities, a new strategy for handling even more of Wall Street’s trading is starting to take shape — with implications for struggling banks and brokerages around the world.

The goal is to offer such firms a white-label trading service: They would deal with customers while Citadel Securities manages the guts of their trading desks, including technology, analytics and order execution.

The nascent plan, described by people with direct knowledge of the matter, could be pitched as a solution for units where profits are getting eroded by stiffer capital rules, competitive pressures to lower fees and the need to make costly upgrades. Firms including Deutsche Bank AG have responded to narrowing margins in stock trading in recent years by shuttering some desks, ceding market share to top players such as JPMorgan Chase & Co. and Goldman Sachs Group Inc.

“Banks and brokers are getting squeezed on both ends, which is where we are seeing customer service deteriorating,” said Jesse Forster, a senior analyst of market structure and technology at Coalition Greenwich. “Investors are not getting their proper trading coverage, and they have been vocal about that.”

Citadel Securities’ move underscores the ambitions afoot inside billionaire Griffin’s massive trading operation, led by Chief Executive Officer Peng Zhao. The firm would likely pitch such partnerships as a way for embattled banks and brokerages to shave costs and offer customers better pricing with superior technology.

It used to be that, if you wanted to trade an exotic derivative or sell a portfolio of high-yield bonds, you could call like eight banks and they would each quote you an aggressive price to win your business. Each of them was willing to *take risk* to quote you that price: They wanted to be your counterparty on the derivative, or to buy the bonds from you for their own account. Now, banks in general have less capacity to take those risks, and if you call your eight banks some of them will refuse to quote you a price, or will quote you a price that is not very attractive. And you will be aggrieved. “We are seeing customer service deteriorating,” not in the sense that Deutsche Bank doesn’t give its institutional customers a snazzy app that rains confetti when they do a trade — the institutional customers don’t want that! — but in the sense that Deutsche Bank doesn’t give its institutional customers aggressive, or any, quotes on some of the trades that they want to do.

Meanwhile Citadel Securities really is in the business of taking trading risk, and it can hire risk-takers who would formerly have gone to banks. Also the business of taking trading risk (particularly in equities) is much more automated and algorithmic than it used to be, so Citadel Securities’ computers can do the trades that would once have been done by a bank’s humans.

We talk about this theme from time to time around here. The potted history is something like:

1. Once, when investors wanted to buy and sell securities, they called up an independent dealer or

investment bank, which traded with them for its own account.

2. Over time, as regulatory restrictions eased and as the need for scale increased, those dealers increasingly became *banks*, or rather affiliates of banks: The firms that had the most capacity to take big trading positions were those with access to a bank's balance sheet.
3. After 2008, regulatory restrictions on banks increased, they became less interested in risk-taking, and they became less able to take big trading positions.
4. And so now the people who have the most capacity to take big trading positions are *not* banks. They're hedge funds, or proprietary trading firms, or alternative asset managers, or whatever.
5. Kind of like the dealers in Step 1, except now they have better computers.

The banks still have the relationships, though.

Bill Hwang

Bill Hwang was charged with market manipulation because his family office, Archegos Capital Management, bought a ton of shares of about a dozen stocks, as sloppily as possible, with the effect and apparent intention of making those stocks go up. Yesterday a jury convicted him.⁴ After the trial, it seems reasonably clear that Hwang wanted to buy a ton of those stocks to push their prices up, and he told his trader to do so. He wasn't *just* buying lots of those stocks because he liked them, with the accidental side effect of pushing up the prices; he really wanted to push up the prices, and bought in an aggressive manner to achieve that goal.

And that's probably illegal: Buying a ton of stock with the *intention* of pushing up the price is market manipulation; it's causing the price of the stock to reflect something other than real supply and demand.⁵

Still, the trial is unsatisfying. Normally, in this sort of market manipulation — “open market manipulation,” where you artificially inflate the price of a stock just by buying a lot of it, without also going around telling lies about how the company has a cure for cancer or whatever — you also have *some plan to make money*. Right? It's easy, with enough money, to make a stock go up: You just buy a lot of it, and the price will go up. But then what? Then you sell a lot of it, and the price will go right back down. You have big paper profits on the way up, but you cannot realize those profits, and by the time you sell the stock you end up losing money. This certainly happened to Hwang: He started off with hundreds of millions of dollars, briefly manipulated his way to \$36 billion, sold his stocks and ended up at zero.

There *are* ways to make money from this sort of market manipulation, but they require some sort of additional plan. We have talked about Avi Eisenberg, the Mango Markets guy, who artificially inflated the price of a crypto token (by buying a lot of it), created large paper profits on a derivative position,

and then was able to withdraw those profits from a somewhat dumb decentralized finance protocol. *That's* how you do market manipulation: Buy a lot of a thing, yes, but also (1) have a bigger derivative position that profits from your buying and/or (2) trick someone into lending you money against your artificially inflated asset so you don't have to sell it and drive down the price. (Eisenberg was also convicted.) *That* makes sense: You inflate the price of the thing, and you have some plan to make money.

From the beginning, the mystery of Bill Hwang is that there has never been any real evidence that he had a plan to make money. He bought stocks, he pushed them up, he had paper profits, he had capacity to withdraw or borrow against some of those paper profits, and he plowed basically all of them back into buying more of the same stocks. He never took his foot off the gas; he was pouring more money into those stocks the week they all collapsed. I have speculated that it would be cool if at some point he withdrew a billion dollars of profits and buried them in his backyard, but even after the trial I have never seen any evidence of that.⁶ “What was in it for him,” the judge asked before the trial, and I don't think there was ever really an answer.

It doesn't matter! Manipulating stocks for no reason is illegal, just like manipulating them for profit would be. It's just narratively unsatisfying.

Greenshoes

When a US company does an initial public offering of its stock, there is normally a “greenshoe.” Let's say the company plans to sell 10 million shares in its IPO. The company hires investment banks to sell the stock, they go out and market the stock and take orders, and eventually they come back to the company and say “we think you can sell your 10 million shares at \$20 each.” The company agrees, the deal is priced, and the banks go off and allocate the stock to the investors who put in orders.

But the banks do not allocate 10 million shares to investors. They allocate 11.5 million shares, 15% more than the size of the offering. The company sells 10 million shares to the banks for \$200 million, but the banks sell 11.5 million shares to investors for \$230 million.⁷ The banks are, effectively, *short* 1.5 million shares. Sort of. Actually, in addition to the 10 million shares that it sells to the banks, the company also gives the banks an *option* to buy another 1.5 million shares, at the IPO price, within the next few weeks. The option is called a “greenshoe option,” named after the first company to do it.

And then the stock opens for trading, and it either trades up or down. Ordinarily it trades up. If the stock ends its first day of trading at, say, \$27, then the banks come to the company and say “the stock traded well, everything's great and we're exercising the greenshoe.” The company gives the banks the extra 1.5 million shares, the banks give the company the extra \$30 million, and the number

of shares issued by the company (11.5 million) matches the number of shares sold in the IPO.

Sometimes it trades down, though. If, on the first day, the stock falls from \$20 to \$19.75, the banks will start *buying back* some of the stock they sold. This has the effect of keeping the price up: If nobody else is buying the stock, the banks will. They will keep going until they have bought back 1.5 million shares, “using” the greenshoe to “defend” the IPO price. If the banks buy back all 1.5 million shares, then they close out their short that way: They never exercise the greenshoe option, the company only issues 10 million shares, and after the IPO is done only 10 million shares are outstanding. The banks sold 11.5 million and bought back 1.5 million to defend the price.

This is called “stabilization,” and it is a sort of legal form of market manipulation: The banks that do an IPO are allowed to buy back stock to try to stop it falling below the IPO price. It is a longstanding part of US stock offerings, and bankers will tell companies that it is essential. Because the banks stand ready to defend the IPO price, investors have more confidence that the IPO price is good, and are more likely to buy the IPO. And so most US IPOs feature greenshoes: Investors like them, banks insist on them, and companies want their IPOs to go well and don’t want to leave out a feature that investors want. I have never been all that convinced that greenshoes are necessary, and you probably could do an IPO without one, but most companies end up doing the standard thing.

Every so often, though, the greenshoe leads to a weird result. The IPO prices at \$20, and the next day it opens for trading at, like, \$16. The deal is just mispriced, the investors who buy in the IPO are hoping to flip it, there are no real buyers, and the stock immediately falls well below the IPO price. In that case, there is not a ton that the banks can do, but they’ll do what they can: They buy back the 1.5 million shares, at \$16 each, to stop the price going even lower.

The weird result is that they sold those 1.5 million shares for \$20 and bought them back at \$16, making a profit of \$6 million. *They shorted the stock of the IPO they were selling, and made money when it went down.* That looks bad!

And in fact some form of this has happened in several high-profile IPOs — including Facebook Inc. and Uber Technologies Inc. — and each time there is a little controversy about the fact that the banks make money by pricing IPOs too high and betting against them.

Now, this is not a particularly serious controversy, because it’s pretty clear that the banks are not doing this nefariously. If they were, they’d do it more often! In fact, most IPOs are clearly priced to go *up*, and the more frequent complaint is “banks underprice IPOs to benefit their investor clients at the expense of the IPO companies,” not “banks overprice IPOs to make money trading the greenshoe.”

Still it’s all a little weird, and companies that pay attention sometimes find it annoying. Why should the banks be able to make money on the greenshoe? Maybe you have to have this mechanism

— greenshoes, short selling, stabilization, etc. — to attract investors to the IPO, but why is it necessary for the *banks* to profit from it? I once talked to a startup founder who was thinking of going public and who was contemplating demanding that, if the banks *do* make any money trading the greenshoe, they give it back to the company: Shouldn't that money belong to the company, not its banks?

Well Bill Ackman is actually doing it. Here is the latest prospectus for Pershing Square USA Ltd., his proposed US public investment vehicle. In the description of the greenshoe, it says: “To the extent the Underwriters generate a net profit from purchasing Common Shares at prices below the initial public offering price to close out any syndicate short position, the Underwriters have agreed to pay any such net profit to the Company.” If PSUS falls below its IPO price and the banks make money buying back stock, they have to pay it to PSUS.

Now, this is a bit of an odd case. PSUS's initial public offering price is fixed at \$50 per share, and in a sense it can't really be over- or undervalued: PSUS will initially be just a pot of money that Pershing Square will use to invest in companies, so each share will initially represent \$50 worth of money in the pot. The stock might end up trading at a discount or a premium to that value — Pershing Square Holdings, its similar European vehicle, trades at about a 20% discount to net asset value, while a more US-friendly vehicle, given Ackman's track record and social media presence, could trade at a premium — but it's not going to drop 50% on the first day. (Not investment advice!) The *pricing* of this IPO is much less uncertain than the pricing of the typical tech startup IPO, so the chances of making a big profit trading the greenshoe are lower.

Nonetheless it's a precedent. If the banks agree to pay over their greenshoe profits here, what's to stop the next tech startup IPO company from asking for the same deal? “No, PSUS was different, it was a pot of cash, the expected greenshoe profits were zero” is not a very good argument: The greenshoe profits are *supposed* to be zero on every deal, and if the banks make money on the greenshoe it is because something has gone wrong. Why should they profit from that?

Sacklers

The Purdue Pharma LP situation is:

1. Purdue Pharma makes opioid painkillers that led to an addiction crisis and killed a lot of people. Various people sued, and Purdue owes them far more money than it has, so it filed for bankruptcy.
2. In the years before it went bankrupt, Purdue Pharma kicked out something like \$11.5 billion to its owners, the Sackler family, some of whose members ran the company and were involved in its opioid marketing.

3. In addition to *Purdue's* money, the various victims want the *Sacklers'* money, since that money largely comes from Purdue and since the Sacklers were largely responsible for Purdue's opioid work.
4. But suing the Sacklers is complicated: They're rich and have good lawyers and a lot of the money is now offshore or in trusts that will be hard to access.
5. So a settlement was worked out: The Sacklers would give about \$6 billion of their money to the Purdue bankruptcy estate to pay claims, and in exchange no one would be able to sue them anymore. All their opioid liability would go away.
6. This is called a "nonconsensual third-party release": Purdue's bankruptcy would end all opioid-related lawsuits against the Sacklers, even though they are not bankrupt themselves.
7. A bankruptcy court signed off on this, a district court found it was not allowed, an appeals court found that it was, and finally last month the US Supreme Court overruled that decision and found that it is in fact not allowed. The bankruptcy court can't just end all the lawsuits against the Sacklers.
8. Now what?

Well, part of the answer is that there are two sorts of claims against the Sacklers. The most straightforward ones are *Purdue's* claims. The rough idea is that bankruptcy courts can travel back in time a bit. When a company goes bankrupt, you add up its assets and liabilities and then divvy up the money (1) fairly and (2) based on the seniority of claims. So if the company has \$100 of assets, \$50 of senior debt, \$100 of junior debt and then some shareholders, the bankruptcy court gives the senior creditors 100 cents on the dollar, the junior creditors 50 cents on the dollar, and the shareholders nothing.

But if the shareholders paid themselves a dividend the day before the bankruptcy, that would obviously be cheating: The bankruptcy was imminent, and the shareholders are supposed to get nothing! Or even if the junior creditors got paid off in full the day before the bankruptcy — even if they were totally innocent and really owed the money — that's not fair either, because the company was *basically* bankrupt, and they should be behind the senior creditors in line.

And so bankruptcy courts have various ways to claw back money that went out the door *before* the bankruptcy. We talked the other day about how some customers of Celsius, the bankrupt crypto firm, withdrew their money shortly before it went bankrupt, and so got back 100 cents on the dollar, while other customers waited until bankruptcy and will get back less. Celsius is trying to take their money back, under rules about avoidable transfers: If the company is insolvent and pays back some creditors shortly before bankruptcy, and they get more than they would get in bankruptcy, the bankruptcy court can undo those payments and make the creditors give back the money. The court can also claw back "fraudulent transfers," which covers actual fraud — payments that were made before bankruptcy "with actual intent to hinder, delay, or defraud" creditors — but also *dividends*

made while the company was insolvent. The idea is that, if the company is going bankrupt, the shareholders should be last in line; if they paid themselves before bankruptcy, they have to give the money back.

Again, the Sacklers paid themselves \$11.5 billion over the years before bankruptcy, and there's some argument that at least some of that money can be clawed back. Also, some of them were officers and directors of Purdue Pharma, which might have claims against them for violating their fiduciary duties. Intuitively, Purdue Pharma is worth a large negative amount of money due to the actions of the Sacklers — both in running the company and in stripping it of cash as the end approached — and so it has various potential lawsuits against them.

But there is also another sort of claim: everyone else's personal claims against the Sacklers for everything else. There are various legal theories that might make members of the Sackler family personally liable for Purdue Pharma's opioid marketing, so victims or state attorneys general could sue them under those theories. Not "you owe this money to Purdue, which owes it to me," but "you owe this money to me directly."

The Supreme Court essentially ruled that the bankruptcy court can't release the second category of claims: The Sacklers aren't bankrupt, so if some attorney general wants to bring some personal lawsuit against one of them, the bankruptcy court can't stop it. But the bankruptcy court can clearly release the first category of claims: Those claims belong to Purdue Pharma, and Purdue Pharma is in bankruptcy, and if Purdue Pharma wants to settle a lawsuit against the Sacklers, the bankruptcy court is the court that will sign off on that.

The Sacklers don't want that: They don't want to settle *only* Purdue's claims; they want to settle *everyone's* claims and get a full release. They don't want to pay 90% of their money to Purdue, only to get sued for another 300% of their money by other people. They want a global settlement. And the Supreme Court said that they can't get it.

To be clear, Purdue's bankruptcy estate — the lawyers and judges working on the case, including most of the victims and creditors — wanted that too. They wanted a global settlement because that maximized the amount of money the Sacklers were willing to put in. Without a global settlement, the Sacklers will be less inclined to settle any individual case.

But that's not an option anymore, so the obvious next step is for the bankruptcy estate to try to settle *its* claims against the Sacklers. And the first step in *that* process is pretty much to rattle some swords and make it clear that (1) Purdue Pharma *has* claims against the Sacklers, (2) those claims are good and big and (3) it will pursue them aggressively. So the Wall Street Journal reports:

Bankrupt opioid maker Purdue Pharma is backing an effort by its top creditors to sue

members of the Sackler family who own the company over allegations that they illegally transferred billions of dollars to private trusts before Purdue's 2019 bankruptcy filing.

The official committee of Purdue's creditors filed a proposed complaint against the Sacklers on Monday after the Supreme Court last month rejected a \$6 billion settlement agreement to resolve the mass opioid-related lawsuits against the company's family owners.

Purdue supports granting the creditors committee the legal standing to sue, according to Monday's filing. The company also is seeking to restart negotiations with the Sacklers, whose wealth has been estimated near \$11 billion.

Here is the proposed complaint, which is quite punchy:

To guarantee their family remained ultrawealthy for generations to come, the Sacklers also had to siphon those profits out of the Debtors, and (they hoped) beyond the reach of Purdue's creditors, including the individual and governmental victims of the opioid crisis that Purdue and the Sacklers helped create and fuel. Indeed, the Sacklers' efforts to move assets out of Purdue and away from its creditors are at the heart of this Complaint. The experience of Purdue's guilty plea in 2007 particularly alarmed the Sacklers and drove home the danger that opioid-related litigation could swamp Purdue and threaten their wealth. Just a few days after entry of the first guilty plea in 2007, the Sacklers panicked and asked each other, *"We're rich? For how long? Until which suits get through to the family?"* A few months later, Peter Boer, a close family advisor and soon-to-be Purdue director, advised the Sacklers to "take defensive measures" against Purdue's "uncapped liabilities," including by sending assets overseas. Boer counseled the Sacklers to deprive litigants of a "deep pocket" from which to recover damages inflicted by Purdue.

Consistent with that advice, the Sacklers spent the next decade siphoning off the proceeds of their illegal marketing and sale of opioids from Purdue just as Boer and others had counseled. The Sacklers transferred billions into an elaborate system of trusts and offshore entities in a manner designed to defraud the Debtors and the Debtors' creditors and frustrate any effort at recovery by the individuals and governments that have been devastated by Purdue's crimes. The family hoped they had created "layers and layers that would have to be penetrated" before litigation could threaten the "vast fortune" the family had built. Immediately following the 2007 guilty plea, the Sacklers dramatically increased distributions from the company, transferring more than \$11.5 billion in cash and property offshore and to spendthrift trusts in less than a decade.

And the Journal quotes the Sacklers' punchy response:

Representatives for the families of the late Mortimer Sackler and the late Raymond Sackler said the creditors' filing "is riddled with factual errors, ignores that about half the money was paid in taxes and is contrary to the goal of working together towards a resolution that provides billions of dollars for communities and people in need."

But all of this is probably part of negotiations. Purdue Pharma wrote a statement supporting the lawsuit, saying that "the Debtors' claims against third parties are the estates' most valuable assets—they underlay the settlement under which the Sacklers had previously agreed to pay \$5.5-6 billion." But it adds that that "the Debtors are hopeful that mediation will lead to a consensual resolution of these chapter 11 cases."

Basically: The Sacklers agreed to pay up to \$6 billion of their own money to opioid victims, because they figured that was better than fighting a million lawsuits. In exchange, they wanted those lawsuits to all go away. The Supreme Court said that that is not allowed. Now, Purdue Pharma would like the Sacklers to pay up to \$6 billion of their own money to opioid victims, because they figure that is better than fighting *one* lawsuit — the biggest and most straightforward one — from Purdue itself. That negotiation starts by threatening the lawsuit.

Oh Elon

I dunno, this is kind of cool:

[Elon] Musk, 53, has directed SpaceX employees to drill into the design and details of a Martian city, according to five people with knowledge of the efforts and documents viewed by The New York Times. One team is drawing up plans for small dome habitats, including the materials that could be used to build them. Another is working on spacesuits to combat Mars's hostile environment, while a medical team is researching whether humans can have children there. Mr. Musk has volunteered his sperm to help seed a colony, two people familiar with his comments said.

The initiatives, which are in their infancy, are a shift toward more concrete planning for life on Mars as Mr. Musk's timeline has hastened. While he said in 2016 that it would take 40 to 100 years to have a self-sustaining civilization on the planet, Mr. Musk told SpaceX employees in April that he now expects one million people to be living there in about 20 years. ...

Mr. Musk is so wedded to the idea of creating a civilization on Mars — he once said he plans to die there — that it has propelled nearly every business endeavor he has undertaken on Earth. His vision for Mars underlies most of the six companies that he leads or owns, each of which could potentially contribute to an extraterrestrial colony,

according to the documents and the people with knowledge of the efforts.

The Boring Company, a private tunneling venture founded by Mr. Musk, was started in part to ready equipment to burrow under Mars's surface, two of the people said. Mr. Musk has told people that he bought X, the social media platform, partly to help test how a citizen-led government that rules by consensus might work on Mars. He has also said that he envisions residents on the planet will drive a version of the steel-paneled Cybertrucks made by Tesla, his electric vehicle company.

I can't help but appreciate a coherent vision, you know? The guy has tons of money, boundless energy, and an extremely specific weird vision of what interplanetary life will be like. He has a picture in his head of life on Mars, apparently inspired by consuming a certain amount of science fiction, and it involves tunnels, sure, but it also involves governance by Twitter poll (?) and driving around in cars with a particular cyberpunk aesthetic. And he runs a car company, so he had that company build the car to match what he thinks Mars traffic should look like. Also I guess everyone on Mars will share his DNA? Again an *idiosyncratic* vision of a sci-fi future, but at least it is authentically his.

As a financial columnist and everything-is-securities-fraud guy, I suppose I could ask questions like "if you are a Tesla shareholder, how should you feel about the fact that the company's chief executive officer is pushing some weird truck design not because it makes economic sense but because it matches the pictures in his head of what life on Mars will be like?" But I don't really care; if you're a Tesla shareholder you signed up for all of this. So far the pictures in the guy's head have mostly worked out for his investors.

Things happen

Pimco, Silver Point Lose Fight Over 2022 Incora Debt Package. Milder Inflation Keeps Door Open to September Rate Cut. Deutsche Bank settles with trader who alleged he was Libor 'fall guy.' RBC Shakes Up Leadership, Splits P&C Banking Unit Into Two. How Rivian Became the Anti-Tesla. "Payment requests of \$5 or less are considered rude by 72% of people ages 16 to 26."

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1. This seems to be the most normal way to refer to this company, though “dealer” or “wholesaler” or “internalizer” or “electronic trading firm” are all possibilities.
2. Morgan Stanley owns E*Trade, and from its routing disclosure I gather that (1) if you have an account at Morgan Stanley Smith Barney, probably your order is executed by Morgan Stanley, but (2) if you have an account at E*Trade, probably your order is executed by the usual crew of outside market makers.
3. There is a third important category here, which is leverage: If you are a hedge fund, one thing that you want from your bank relationships is to be able to borrow money to do trades. This is probably a business that makes more sense at a bank than at Citadel Securities, but who knows.
4. Somewhat inexplicably, he was acquitted of manipulating one stock, though convicted on the rest. He was also convicted of lying to his banks to get them to lend him more money, which is probably the more serious offense here, but it’s also more straightforward; the market manipulation case is weirder.
5. Not legal advice, and I don’t love this analysis and think it’s pretty fuzzy, but I do think it’s sufficient to get you convicted of market manipulation.
6. He did squirrel a certain amount of money away into his nonprofit foundation, which pays generous salaries to some of his former Archegos employees, but still.
7. For simplicity, in all of these numbers I am ignoring the banks’ fee for doing the IPO, which is normally a discount to the stock price. So really it’s like “the company sells 10 million shares to the banks for \$190 million,” because the banks buy the shares at \$19 and resell them at \$20.

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Matt Levine's Money Stuff: Jefferies Funded Some Fake Water (Correct)

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Jefferies Funded Some Fake Water (Correct)

By Matt Levine 2024-07-11T09:03:56904-04:00

Water ... Ponzi ... ?

This is a fun one:

A hedge fund that's part of Jefferies Financial Group sued its former portfolio manager, claiming he orchestrated an investment of more than \$100 million in a Ponzi-like scam.

The fund, 352 Capital, filed a lawsuit last week against Jordan Chirico, saying he directed the purchase of a large quantity of bonds issued by a company that claimed to operate thousands of filtered water vending machines. According to the suit, Chirico knew these machines didn't exist but put 352's money in the scheme in part to recoup his own investment.

Chirico, who earlier this month joined restaurant chain FAT Brands Inc. as its head of debt capital markets, referred comment to his lawyer. The lawyer, Bob Gage, didn't immediately respond to a request for comment.

The water machine company, WaterStation Management, and several people associated with it, including founder Ryan Wear, were also sued by 352. Neither Wear nor WaterStation could be reached for comment.

Here is the complaint, which is just wild. 352's theory is that WaterStation has "been operating a Ponzi scheme for years," involving water vending machines:

Water Station Management and another Wear-owned company, Creative Technologies, held themselves out as the manufacturer, operator and manager of thousands of self-service water station machines, known as WST-700s, which filter water from a local source for purchase by consumers (the "Water Machines"). ... Water Station Management also sold "franchises," or "joint ventures," under which third-party investors could purportedly purchase Water Machines that would be placed and managed by Water Station Management for a fee, with the remaining revenue generated by the machines being paid to the investors. Wear and Water Station Management also agreed to guarantee to some franchisees a "too good to be true" fixed return of as much as 28% on their investments in lieu of payments tied to fluctuating revenues.

You give WaterStation money and it gives you a fixed return of 28%. Where does it get the money to pay your 28% returns? WaterStation's answer is apparently "from selling lots of filtered water to customers," but 352 suggests that the answer is "from new investors, like a Ponzi scheme."

Actually 352's proposed explanation is far more baroque than that. Its story is that the franchisees got their payments not (just) from new franchisees but from a \$100 million bond offering. And the main buyer of the bonds was 352 Capital, which bought the bonds because its portfolio manager was secretly also a WaterStation franchisee who wanted to get his Ponzi payments and who saw his own fund's clients as the best way to get the money.

In 352's telling, Jordan Chirico, who managed the 352 fund for Leucadia Asset Management (a division of Jefferies), was also a WaterStation franchisee, having invested some \$7 million of his own money (through a vehicle called C3 Capital) in 700 WaterStation franchises in 2018, before he joined Leucadia. He joined Leucadia in 2020 to start the 352 fund, investing in asset-backed securities. And in 2022, "Chirico arranged for the 352 Fund and its affiliate to invest in Water Station Management through a bond offering." In this offering, WaterStation sold \$56.3 million of Class A bonds to another investor (Heartland Financial), and \$15 million of Class B bonds to 352. The money was supposed to be used to acquire more water machines, and the machines would be collateral for the bonds.

Chirico allegedly didn't tell anyone at Jefferies that he was a WaterStation franchisee. Also his friends and family were franchisees. "Water Station Management failed to make payments with regard to these Chirico-related franchise holdings," and so "Chirico personally paid them a total of \$300,000 for the purpose of servicing their debts and discouraging them from commencing litigation against Water Station Management and Wear." Also somehow "Kaiwing Fung ('Fung'), the former Head of Credit for the 352 Fund, also failed to adequately disclose that he owned Water Station Management franchises at the time of the 352 Fund's investment." Chirico led "a three-person (later four-person) team" at 352, and two of them were also WaterStation franchisees.

Anyway the money allegedly did not go to buy water machines:

By no later than August 2023, REVL [Capital Management, the collateral manager for the bond] knew that thousands of Water Station Machines allegedly purchased with the bond proceeds did not exist and that millions of dollars of bond proceeds had not been used by Water Station Management for their intended purpose. REVL attempted to perform a physical inspection of the machines that Water Station Management claimed both to own and to use as collateral for the bonds. REVL determined that 163 of the 164 machines in its sample set for inspection did not exist. REVL then discovered that more than 3,000 machines that were supposed to be operating in Family Dollar stores, and in other locations, were “actually missing.” ...

There was (or should have been) no doubt, by at least August 2023, that Water Station Management was perpetrating a fraud. To this point, Water Station Management had been submitting to REVL purchase orders and invoices for the purchase of Water Machines, all to convince REVL to authorize the release of bond proceeds for those purchases—but those machines did not exist. The purchase orders and invoices were falsified. The collateral and revenue reports that purported to show the machines were installed and generating revenue were likewise fabricated. On information and belief, instead of purchasing and operating Water Machines, Water Station Management used the bond proceeds primarily to pay “franchisees” their guaranteed returns on their “investment,” or to buy out franchisees who had raised complaints about the business—a classic Ponzi scheme. Because Chirico was owed money in connection with his “investment” in the scheme, and his friends and family were likewise “investors,” he stood to directly, personally benefit from these payouts.

Seems bad. But “REVL only reported what it discovered to Wear and Chirico,” which makes a sort of sense: WaterStation was the debtor, 352 was the creditor, and if WaterStation was defrauding 352 then the people to notify would be WaterStation and 352. It’s just that the *person* at 352 who got the notification was allegedly in on the scheme.

Actually that is oversimplified: There was another creditor involved, Heartland Financial, who owned the Class A bonds and who does not seem to have anything to do with the alleged scheme. That was inconvenient for the alleged Ponzi, so Chirico allegedly had 352 *buy them out*:

Then, in December 2023, despite being fully aware of the ongoing fraud at Water Station Management, Chirico made the inexplicable decision to cause the 352 Fund and its affiliate to buy out the Class A bondholder at a purchase price of \$57.6 million. There was no legitimate business or investment rationale for quadrupling the exposure of the 352 Fund to Water Station Management when Chirico knew that Water Station Management was committing a fraud, and that the bonds were undercollateralized by tens of millions of dollars (if not more). On information and belief, one contributing factor to Chirico’s decision was to remove any oversight by the Class A investor, which would allow him to loosen the indenture’s restrictions and requirements for the benefit of Water Station Management, and direct further funds from the 352 Fund to Water Station Management to prop up the failing company and the ongoing Ponzi scheme.

And, right, that is how a Ponzi works: There are always some investors who want their money back, or who get suspicious, or who *might* get suspicious, and the way to solve that problem is to raise some money from new investors to kick out the suspicious ones. And Chirico had access to a good supply of new investors: He ran a bond fund that could provide the money.

Somehow Jefferies has Chirico's texts with his wife sort of ... saying ... this?

Indeed, in a September 2023 text message exchange with his wife, who was a co-owner of C3 Capital, Chirico expressed that he was "pissed at Ryan [Wear]" because "he's not going to be able to make our 300k payment on time either from selling C3 so need to address that as well." When his wife asked, "Does that worry you about the bond deal," Chirico responded: "Yes for bond deal **but I care as much or more about the personal investors that are with him still ...**" (Emphasis added).

Still needed more money though:

By no later than January 2024, Water Station Management was insolvent and unable to meet basic day-to-day funding obligations, including making payroll. REVL had confirmed that thousands of Water Machines that were supposed to have been purchased with bond proceeds were "missing." In a January 2024 telephone call with Wear and his CFO, [Tyler] Sadek, Chirico (who recorded the call) acknowledged that the 352 Fund's \$87.9 million bond investment was undercollateralized by at least \$46 million. On that call, Sadek admitted this was " **the largest franchise fraud in the history of the United States** " and told Wear that he " **was going to jail** ." Notwithstanding his having knowledge of the fraud, and on information and belief in furtherance of that fraud, Chirico directed the 352 Fund to upsize the bond offering and, in February 2024, provided Water Station Management with an additional \$19 million of funds.

If you do a due diligence call with a company, and the company's chief financial officer tells its chief executive officer, on a recorded line, that he is going to jail, and you hear that and your reaction is "we need to buy even more of those bonds" ... I mean part of me wants to say "you are a bold contrarian risk-taker and a lot of asset managers would want to hire you." That's coolness under pressure right there. But yes another possibility is that you are in on the scam.

If you believe 352's allegations, then obviously WaterStation and Chirico look bad, but Jefferies and Leucadia don't look great either. The 352 fund has something like \$255 million of assets under management, and apparently \$107 million of that is in WaterStation bonds? (Which went into default this month.) Was that ... allowed? Chirico was the manager of the fund, but it is part of Leucadia, which is part of Jefferies, and it is a bit embarrassing that his bosses were not keeping a closer eye on him. The lawsuit says :

Throughout this period, Chirico never disclosed his personal conflicts of interest to the 352 Fund, that Water Station Management was committing fraud, that the Water Machines securing the bonds largely did not exist, or that he was directing the 352 Fund to substantially increase its exposure while it was already undercollateralized by tens of millions of dollars. Chirico deliberately provided vague and misleading explanations for increasing the 352 Fund's positions and for changes to the indenture's terms to convince the 352 Fund's investment manager, and other stakeholders, to "sign off" on those changes, while withholding critical information that would have caused any rational investment manager to cease contributing to the Water Station Management scheme and take immediate action to protect investors.

Still seems weird. I guess if you run an asset management firm and one of your portfolio managers wants to quadruple his allocation to some water-machine-backed bonds, your first thought will not be "perhaps this water machine company is a Ponzi scheme, and our portfolio manager is involved in it." Just seems like running a bond fund at Leucadia is a *better* job than being a franchisee of a water filtration Ponzi scheme, so you'd expect him to prioritize his bond-investing job over his water-Ponzi job. Apparently not.

Aspiration

An extremely simple business model, which we discuss a lot around here, is:

1. Found a company that makes something cheap. Make (or buy and resell) widgets that cost you \$1.
- 2. Sell it at a high price, say \$10 per widget.
- 3. Go to customers and say "look, I know I am selling you a \$1 widget for \$10 and that doesn't make sense. But I will pay you \$11 to buy the widget, so you'll come out ahead."
- 4. Customers say "sure that sounds good," and you get lots of customers.
- 5. The customers write checks for \$10, payable to your company, which books \$10 of revenue and \$9 of profit (\$10 of revenue minus \$1 of cost of goods sold).
- 6. You write the customers checks for \$11, out of your personal account (or the account of another business).
- 7. Economically, you are losing \$2 per widget (the \$1 it costs to make it, plus the \$11 it costs to bribe the customer, minus \$10 of revenue), but the split is +\$9 for your company and -\$11 for your personal account.
- 8. Go to investors and say "hi, my company has lots of customers and revenue, it's growing fast, and it's profitable," would you like to buy some?
- 9. Sell 10% of your company to investors at a multiple of like 30 times earnings.
- 10. If you sell 1 million widgets a year, that costs you \$11 million a year in your personal account, but makes \$9 million a year for the company. At 30x earnings, that's a \$270 million valuation. If you sell 10% of that, you get \$27 million, and you're ahead by \$16 million.
- 11. Then, uh. Then you do Step 11.

What is Step 11? The good answer is something like “your idea gets so much traction and so much customer demand, it has such good branding and network effects, that customers now flock to you to buy your widgets for \$10, you don’t have to pay them anymore, and the business remains fast-growing and profitable, but for real now.” This is good for your investors, who bought into a strong and growing company at a \$270 million valuation, and for you, because you own the other 90% of that strong and growing company, which is now worth a lot of money. (And you’re no longer paying customers out of your personal account.)

The bad answer is “you do this for a year, you collect your \$16 million, you stop paying the customers, the business collapses, the valuation goes to zero and your investors lose their \$27 million.” This is bad for your investors, who cashed you out of a worthless business. It is ... not *as* good for you as building a successful business would be, but it is *easier*, and it does make you a lot of money.

There are variations on this business model — sometimes the company pays the customers directly, because the investors care only about revenue growth and not profits; sometimes crypto is involved — but the basic idea is old and popular. It helps, if you are doing this, to sell something *buzzy*. A fast-growing ball bearings business is less interesting than a fast-growing ridesharing business, or crypto business, or artificial intelligence business, or whatever venture capitalists are excited about this year.

Carbon removal, for instance:

Three years ago, Aspiration Partners had turned a debit card designed for sustainable shopping and investment accounts that promised complete exclusion of fossil-fuel stocks into a high-flying climate startup. The Los Angeles-based company had set itself on the verge of a stock market debut with an expected valuation of more than \$2 billion. ...

But today Aspiration is struggling to stay afloat and faces an investigation by US authorities, including the Department of Justice and the Securities and Exchange Commission. The inside story of the unraveling of this once-promising climate company comes down to its hurried effort to start a new business line—and boost its revenues—by selling sustainability services, such as tree planting, to other companies.

In late 2020, just as company executives began holding meetings about a potential public offering, Aspiration signed its first deals with corporate clients. Within a year, this new unit leapt to more than half of Aspiration’s sales—accounting for \$56 million of the \$100 million in revenues it reported for 2021. But the explosive growth in Aspiration’s new business was driven in part by dubious deals that inflated the company’s revenue, according to a Bloomberg Green investigation that relied on interviews with 28 former employees and several of Aspiration’s corporate customers, as well as a review of numerous internal company documents.

Aspiration seems to have been a tree-planting reseller — “most of these agreements involved reselling reforestation services performed by others, at a very high markup” — and you can guess how the dubious deals worked:

An unusual number of customers were Colombian celebrities, including an actor and several retired soccer players. Two of them told Bloomberg Green that they had signed agreements simultaneously with Apogee Pacific LLC—an entity that was controlled by Joseph Sanberg, Aspiration's co-founder, board member and a major shareholder—which would cover the costs they were supposed to pay Aspiration.

"It sounded very weird," says Juan Pablo Llano, a Colombian actor who signed deals with both Aspiration and Apogee Pacific, but never exchanged funds with either company. "I smelled something I didn't like."

Or there is a Colombian model who "signed a letter of intent in English, which stated, in part, that her nonprofit foundation would pay Aspiration a monthly sum of \$50,000, allowing her to say she had planted 50,000 trees," and who simultaneously signed a contract with Apogee Pacific that "would pay Loaiza \$55,000 per month for 'marketing and branding services' and would 'last for as long as' she worked with Aspiration." Paying \$55,000 for \$50,000 of revenue *sounds* like a bad investment, but if it gets you to a \$2 billion initial public offering it could be worth it.

OpenAI

One very funny model of OpenAI is that it is a nonprofit organization with an independent board of directors whose only duties are to its mission — "building safe and beneficial artificial general intelligence for the benefit of humanity" — and not to its investors. Those investors are not really shareholders, are explicitly told to think of their investments "in the spirit of a donation," and have no rights to elect or remove directors. The board is in charge, pursuing only its mission, with no concern for the interests of investors.

There was like a weekend last year when it looked like that model might be correct, and that was a fun time. OpenAI's board fired its chief executive officer, Sam Altman, apparently thinking that he was good for investors but bad for humanity. Eventually, though, Altman came back, much of the board left, and the investors — led by Microsoft Corp. — asserted their power.

An alternative model of OpenAI is that it is a totally normal corporation, with a powerful CEO and employees paid in stock, but everyone has to use slightly different words for antitrust reasons: If Microsoft is in fact a big shareholder of a big AI company, US and European antitrust regulators will have questions, so Microsoft has to instead be a big non-shareholder of a big AI nonprofit. We talked last year about how OpenAI's website once had an org chart describing Microsoft as a "minority owner" of its for-profit subsidiary, but then changed the chart to refer to Microsoft's "minority economic interest." "Owner" bad, "economic interest" fine.

Anyway here's the latest on that:

Microsoft Corp. and Apple Inc. dropped plans to take board roles at OpenAI in a surprise decision that underscores growing regulatory scrutiny of Big Tech's influence over artificial intelligence.

Microsoft, which invested \$13 billion in the ChatGPT creator, will withdraw from its observer role on the board, the company said in a letter to OpenAI on Tuesday, which was seen by Bloomberg News. Apple was due to take up a similar role, but an OpenAI spokesperson said the startup won't have board observers after Microsoft's departure.

Regulators in the US and Europe had expressed concerns about Microsoft's sway over OpenAI, applying pressure on one of the world's most valuable companies to show that it's keeping the relationship at arm's length. ...

OpenAI said that moving forward, the company will host regular stakeholder meetings with partners and investors, including Thrive Capital and Khosla Ventures, "to share progress on our mission and ensure stronger collaboration across safety and security."

Microsoft won't *observe the board meetings*, it will just *go to the regular stakeholder meetings*, completely different thing, no antitrust problem here!

Pranks

A pretty frequent theme around here is something like "once Wall Street was dominated by former college athletes shouting swears and playing pranks on each other, and now it is dominated by computers." Just this week we discussed a Bloomberg story headlined "Old School FX Traders Are Being Replaced By Algos With Names Like Viper," and I reminisced that once upon a time the old-school FX traders themselves had names like Viper. But here's a Bloomberg profile of Pat Haskell, the new head of BlackRock Inc.'s municipal bonds business, that begins with him at his previous job handing out "rubber bracelets with the letters 'EFD'" on them because "he wanted his team to bring their best every f---ing day." Also he "was a defensive lineman at Union College before entering Wall Street," "associates describe him as gregarious with a strong personality," and he does pranks:

In one instance, he spied a co-worker sitting on a balance ball at his desk instead of chair. He snuck up behind the employee with a pair of scissors and popped the ball, sending his friend tumbling, people familiar with the incident said.

Obviously I look forward to one day reading a profile of a computer trading algorithm that pranks its human colleagues by causing their chairs to collapse. That's the real start of the AI takeover right there; the first thing the robots will do is take all the screws out of our chairs so they fall apart when we sit in them. Then they'll have us exactly where they want us.

Things happen

How UBS fell out with Switzerland's establishment after rescuing Credit Suisse. HSBC Reshapes Investment Banking to Look More Like Rivals. Big Pharmacy-Benefit Managers Increase Drug Costs, FTC Says. Goldman Buying Majority Stake in Taylor Swift Stage Builder TAIT. Exclusive Ivy League Social Clubs Are Desperate for Members. "I'll double-click on my business, double-click on my life. ... I double-click on everything now."

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(Corrects description of Aspiration's business in the second section by removing reference to carbon credits.)

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- 1. Also, later: "To obtain the necessary signatures from Leucadia for the bond upsize and amendment, Chirico directed a 352 Fund employee to draft a misleading email explanation that purposely avoided any mention of the dire state of the investment. For example, the email falsely stated that the purpose of the upsize was to 'increase [the] collateral base and support long term revenue growth of the collateral securing the bond deal,' even though he knew that Water Station Management had no plans to purchase Water Machines or any other assets that could be used as collateral, but instead that the bond proceeds would be used to meet ordinary business expenses because the company was insolvent, and to pay out franchisees on their 'investments.' Chirico also suggested that the amendment would allow Water Station Management to 'kick out underperforming collateral and replace [it] with stronger revenue performing assets,' without mentioning that the Water Machines—the supposed collateral—were 'underperforming' because the majority of them did not exist. He falsely described the waivers of events of default as relating to a 'technical EOD on the real estate assets,' without mentioning that he was also purporting to waive the right to declare an event of default because of the major ongoing fraud and misuse of bond proceeds."

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Government fines Citigroup \$136 million for failing to fix longstanding internal control issues

 [courthousenews.com/government-fines-citigroup-136-million-for-failing-to-fix-longstanding-internal-control-issues](https://www.courthousenews.com/government-fines-citigroup-136-million-for-failing-to-fix-longstanding-internal-control-issues)

Associated Press

NEW YORK (AP) — A pair of government regulators slapped Citigroup with a \$135.6 million fine on Wednesday, saying the bank has made insufficient progress in resolving longstanding internal control and risk issues. It's a major blow to Jane Fraser, the bank's CEO, who has staked her career on making Citi leaner and less complex.

The fines come from the Federal Reserve and the Office of the Comptroller of the Currency, which said in separate releases that Citigroup had failed to meet its obligations stemming from a 2020 consent order related to the bank's risk and control issues. While the regulators said the bank had made progress, there were still significant problems at the bank that required the OCC and Fed to assess additional penalties.

"Citibank must see through its transformation and fully address in a timely manner its longstanding deficiencies," said Acting Comptroller of the Currency Michael J. Hsu, in a statement.

The \$135.6 million fine is on top of the \$400 million fine that Citi paid back in 2020 when the original consent order was signed.

In a statement, Fraser acknowledged the bank hasn't made progress quickly enough and that it is possible for Citi make itself less risky.

"We've always said that progress wouldn't be linear, and we have no doubt that we will be successful in getting our firm where it needs to be in terms of our transformation," she said.

Citigroup was the go-to example of "too big to fail" after the 2008 financial crisis. Its near collapse and government rescue required Citi executives to slim down its massive balance sheet, sell off businesses it no longer needed and exit financial markets that it couldn't have a dominant position in.

But because Citi was built up in the 1990s and early 2000s through a series of acquisitions and mergers, the company has numerous versions of software and internal systems that do not cooperate with one another. So while Citi is less complicated than it was in 2008, it's still a bank that regulators harbor serious concerns about to this day.

Banking regulators rejected Citi's "living will" in June. That document was supposed to show how Citigroup could be wound down safely and orderly in case of failure.

Autonomy Corp PLC

UK accounting watchdog bans Autonomy CFO jailed over fraud

Financial Reporting Council also hits Sushovan Hussain with £450,000 bill to cover costs of probe



Sushovan Hussain was previously convicted in the US on 16 counts of wire and securities fraud

Simon Foy in London 6 HOURS AGO



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The UK accounting watchdog has hit [Autonomy](#)'s former finance chief Sushovan Hussain with a £450,000 bill and banned him from working in Britain's accounting industry for two decades following "admissions of misconduct" relating to a 2018 fraud conviction.

The Financial Reporting Council said on Thursday that it had agreed a settlement with Hussain, who was sentenced to five years in prison in the US in 2019 for accounting fraud linked to the \$11bn sale of the software company to Hewlett-Packard.

The [regulator said](#) that Hussain, a British citizen, agreed to pay £450,000 to cover the costs of its investigation and was handed a ban from the accountancy profession in the UK until November 2038.

“The long period of exclusion reflects the seriousness of the misconduct as evidenced by the fraud offences under the US criminal conviction,” the FRC said. “The misconduct seriously undermines public confidence in the standards of conduct of members and has brought discredit to the accountancy profession.”

Hussain’s ban comes a month after [the acquittal of Mike Lynch](#), Autonomy’s former chief executive, by a jury in San Francisco, ending a 12-year legal battle. Lynch, once one of the UK’s leading tech entrepreneurs, was accused of falsely inflating Autonomy’s revenues ahead of its sale to HP.

However, Hussain was [previously convicted in the US](#) on 16 counts of wire and securities fraud. A court in San Francisco found in 2018 that he had made false statements to investors about Autonomy’s performance ahead of the 2011 sale, which subsequently saw HP write down the value of its acquisition by \$8.8bn.

At the time, Hussain was also fined \$4mn, while the judge in the case set the forfeiture payment at \$6.1mn, the gain he personally made as a result of the premium paid by HP for Autonomy.

The FRC said that in light of the extensive financial penalties previously imposed on Hussain, the regulator’s executive counsel did not consider it “appropriate or necessary” to impose any further financial sanctions on him, other than paying costs of £450,000.

The FRC said Hussain’s conviction in the US was “conclusive evidence of misconduct” regarding a member of the Institute of Chartered Accountants in England and Wales (ICAEW).

“Mr Hussain accepts that the US criminal conviction therefore amounts to misconduct, and further accepts that such conduct is in breach of the fundamental principle of the ICAEW code of ethics to act with integrity,” the FRC said.

Hussain, who signed the settlement agreement with the FRC on January 15 of this year, could not immediately be reached for comment. He was released from jail in January after serving his sentence.

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July 10, 2024, 8:33 AM PDT

ADM Taps 3M Executive as New CFO in Wake of Accounting Scandal

By Nicola M. White

Bloomberg Law News 2024-07-11T09:48:20212171192-04:00

ADM Taps 3M Executive as New CFO in Wake of Accounting Scandal

By Nicola M. White 2024-07-10T11:33:23000-04:00

Archer-Daniels-Midland Co. appointed a new chief financial officer on Wednesday, almost six months after the global food processing and commodities giant suspended its finance chief as US regulators probed its accounting.

Monish Patolawala, former CFO of 3M Co., will start his new role on Aug. 1, the agriculture supply company said in a securities filing.

- Patolawala replaces ADM's ex-CFO Vikram Luthar . ADM stunned the market in January when it put Luthar on leave as CFO after announcing the Securities and Exchange Commission was probing inter-segment sales between the company's nutrition segment and its other business arms. The company launched an internal investigation and appointed an interim CFO.
- The company later reported a probe from the Department of Justice.
- ADM's nutrition segment, a unit of its business that includes livestock feed and pet food, is the smallest of the company's operating segments, but its performance had a big impact on executive bonuses in 2020 and 2021, Bloomberg reported in January.

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AdaptHealth Investor Attys Get 25% Of \$51M Deal, With Caveat

By **Sydney Price**

Law360 (July 10, 2024, 7:18 PM EDT) -- A Pennsylvania federal judge on Wednesday granted final approval to a \$51 million settlement between AdaptHealth and investors over allegations tied to its merger with a blank check company, but the plaintiffs' counsel must wait for certain shares to be sold before they can collect their \$12.8 million fee.

U.S. District Judge Harvey Bartle III signed off on the deal, under which AdaptHealth has agreed to pay shareholders \$51 million in cash, and former AdaptHealth CEO Luke McGee has agreed to personally pay \$1 million, which is not funded by insurance or corporate funds.

The company has also agreed to provide 1 million shares of common stock for the benefit of the class and to make corporate governance changes. The court told the parties Wednesday that the shares must be sold before lead counsel from Robbins Geller Rudman & Dowd LLP can collect 25% of the fund, or approximately \$12.8 million, in fees. The attorneys will also receive 25%, or about 250,000, of the settlement shares, according to the memo.

"[Lead counsel] will share equally with the class members in the risks and benefits of the sale," the memo states. "Therefore, inclusion of proceeds from the sale of settlement shares is appropriate."

Additionally, the attorneys will be reimbursed approximately \$670,000 for expenses, according to the memo.

The deal ends shareholder litigation initially launched by investor Robert Charles Faille Jr. in 2021 on behalf of a proposed class of its investors who bought shares from November 2019 through July 2021.

The litigation accused the company and a dozen executives of materially overstating its financial prospects in its public statements regarding AdaptHealth's merger with special purpose acquisition company DFB Healthcare.

Years after the deal closed, the purported truth of the company's financial performance was allegedly revealed in a July 2021 report published by Jehoshaphat Research, according to the suit. The report accused AdaptHealth and its executives of obscuring the methodology used to calculate the company's organic growth by retroactively changing past organic growth numbers to be higher, with no disclosure about the change, and publicly claiming AdaptHealth would grow 8% to 10% when in reality, the company was experiencing double-digit declines.

Following the report, AdaptHealth's stock price fell \$1.51 per share, or 5.93%, in one day to close at \$23.96 per share on July 19, 2021, according to the complaint.

In October 2021, Judge Bartle appointed Bucks County Employees' Retirement System and Delaware County Employees Retirement System as lead plaintiffs and Robbins Geller was selected as lead counsel.

The consolidated complaint additionally accused the company of hiding McGee's involvement in an alleged foreign tax fraud arising from certain past private activity. McGee resigned as co-CEO in June 2021, according to court documents.

After surviving a motion to dismiss, the case entered discovery and in July 2022, the investors asked the court to certify a class of investors, but before the court ruled on the motion, the parties struck a settlement in principle, according to court documents. The settlement was preliminarily approved in March after being **submitted** to the court the previous month.

Counsel for the parties and representatives for AdaptHealth did not immediately respond to requests for comment Wednesday.

The investors are represented by Douglas R. Britton, Kevin A. Lavelle and Joseph J. Tull of Robbins Geller Rudman & Dowd LLP and Andrew L. Zivitz and Helen J. Bass of Kessler Topaz Meltzer & Check LLP.

AdaptHealth is represented by Todd G. Cosenza, Zeh S. Ek Ono and Vincent P. Iannece of Willkie Farr & Gallagher LLP and Steven D. Costello of Saxton & Stump.

Luke McGee is represented by Dani R. James, Majorie E. Sheldon and Ryan Gander of Kramer Levin Naftalis & Frankel LLP and Francine Friedman Griesing and Melissa Hazell Davis of Griesing Mazzeo Law LLC.

The case is Delaware County Employees Retirement System et al. v. AdaptHealth Corp. f/k/a DFB Healthcare Acquisitions Corp. et al., case number 2:21-cv-03382, in U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Dorothy Atkins. Editing by Vaqas Asghar.

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Rite Aid, DOJ Craft \$410M Settlement Of Opioid Sale Claims

By **Emlyn Cameron**

Law360 (July 10, 2024, 10:46 PM EDT) -- Rite Aid agreed to a nearly \$410 million settlement with the U.S. Department of Justice, the bulk of which will be an unsecured claim in the company's Chapter 11 case, that will put to bed allegations the pharmacy chain dispensed opioids illegally, the DOJ announced Wednesday.

In an announcement, the DOJ said Rite Aid had agreed to settle claims that from May 2014 through June 2019 the company violated the False Claims Act and Controlled Substances Act by fulfilling "at least hundreds of thousands of unlawful prescriptions for controlled substances," including for highly addictive opioids, and pursuing reimbursement from the government. Under the settlement, Rite Aid will pay the U.S. government \$7.5 million within 10 days of the debtor's reorganization plan becoming effective and grant the government an unsecured claim of nearly \$402 million in the case, according to a copy of **the document**.

"Filling unnecessary prescriptions for powerful and addictive opioids, as the government alleged here, not only takes a toll on our communities, but also violates the law," Principal Deputy Assistant Attorney General Brian M. Boynton said in a statement.

Philadelphia-based Rite Aid and several dozen affiliates hit Chapter 11 in October hoping to trim more than \$3 billion in debt, close some of the drugstore chain's more than 2,100 locations, sell Elixir, its prescription benefits subsidiary, and resolve tort liability stemming from opioid sales. U.S. Bankruptcy Judge Michael B. Kaplan **approved** the sale of Elixir to MedImpact Healthcare Systems for \$575 million in January.

In late June, Judge Kaplan **approved** the pharmacy chain's Chapter 11 restructuring plan after the company said it had resolved objections from its insurance carriers to how the plan treats their policies. He dismissed the remaining objections to Rite Aid's plan and confirmed it in a bench ruling, saying it was the product of "meaningful accommodations and cooperative effort by nearly all stakeholders."

The proposed plan would pay \$2.6 billion in term and asset-based loans in cash and exchange \$1.2 billion in senior notes for equity. The plan valued the more than 1,600 opioid claims brought by state and local governments, Native American tribes, hospitals and individuals at \$2.3 billion and said they would be paid with \$43 million in cash from Rite Aid and the proceeds of the company's insurance policies.

Tort claimants and unsecured creditors would also receive 10% of the reorganized company's equity, and share in any post-confirmation proceeds with second-lien creditors.

According to the DOJ's announcement, its nearly \$410 million settlement was approved the same day as the plan of which it forms a part. The announcement said 17% of the proceeds from the settlement of the FCA claims will go to relators, whistle-blowers who initiated the suit on behalf of the U.S. government.

"We are pleased that our clients will be rewarded for their courage to come forward and expose the harmful practices of major retail pharmacies, like Rite Aid," Will Powers, a shareholder in Baron & Budd — a firm representing the relators in the case — said in a statement.

Also Wednesday, the DOJ separately announced another settlement, worth roughly \$121 million, with Rite Aid and its subsidiaries in a different civil case. The settlement would take care of allegations Rite Aid and its subsidiaries violated the False Claims Act by misreporting rebates from drug manufacturers as service fees to the Centers for Medicare and Medicaid Services between 2014 and 2020, the DOJ said.

"Participants in Medicare's drug program must accurately report price concessions, including drug manufacturer rebates, to ensure that the government receives the benefit of those concessions," Boynton said in a statement.

Under the provisions of **that settlement**, Rite Aid and a subsidiary it retained called Elixir Insurance Co., will pay the government \$101 million in restitution, plus interest starting in February 2025. Two other subsidiaries will each grant an unsecured claim of \$10 million in the Chapter 11 case, the settlement said.

This settlement was also approved on June 28 as part of the reorganization plan, the release said.

Representatives for Rite Aid did not respond to requests for comment.

The Department of Justice declined to comment beyond the content of its release.

The debtors are represented in the bankruptcy case by Edward O. Sassower, Joshua A. Sussberg, Aparna Yenamandra, Ross J. Fiedler and Zachary R. Manning of Kirkland & Ellis LLP and Michael D. Sirota, Warren A. Usatine, Felice R. Yudkin and Seth Van Aalten of Cole Schotz PC.

Rite Aid is represented in one of the civil cases by Daniel M. Finer, Eric W. Sitarchuk and Kelly A. Moore of Morgan, Lewis & Bockius LLP. Counsel information for Rite Aid in the other civil case was not immediately available.

The Department of Justice is represented in the bankruptcy case by Mary Schmergel, Gregory Werkheiser and Ryan W. Lamb and in the civil cases by Jackson Froliklong, Dan Schiffer, Christopher G. Wilson, Elizabeth L. Berry, Patricia M. Fitzgerald and Kathryn G. Andrachik.

The relators in the civil case that resulted in the roughly \$410 million settlement are represented by W. Scott Simmer, William G. Powers and Zachary C. Schaengold of Baron & Budd and Donald P. Screen and Subodh Chandra of Chandra Law.

The cases are In re: Rite Aid Corp., et al., case number 3:23-bk-18993, in the U.S. Bankruptcy Court for the District of New Jersey, and U.S. et al. v. Rite Aid Corporation et al., case number 5:21-cv-00574, and Andrew White et al. v. Rite Aid Corporation et al., case number 1:21-cv-01239, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Rick Archer, Vince Sullivan and Hilary Russ. Editing by Alex Hubbard.



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Skin Care Tech Co. Says Suit Shows 'Rough' Year, Not Fraud

By **Sydney Price**

Law360 (July 10, 2024, 8:34 PM EDT) -- Skin care and beauty technology company Cutera Inc. asked a federal judge to toss a shareholder lawsuit that alleged the company exaggerated its financial sustainability and hid compliance issues, saying the company's "rough" year does not establish securities fraud.

The suit, which was recently amended in May by lead plaintiff the New England Teamsters Pension Fund, said Cutera executives damaged the company by failing to monitor and maintain inventory, refusing to implement effective internal controls and rushing the rollout of Cutera's acne-treating laser device AviClear. The complaint said Cutera was motivated by an executive compensation plan associated with the quantity and speed of placing the devices.

In 2023 and 2024, Cutera eventually disclosed poor AviClear utilization trends and numerous delays in making routine filings with the U.S. Securities and Exchange Commission, causing the company to restate financials for multiple quarters, according to the complaint.

In **the motion to dismiss** the suit filed Monday, Cutera said the complaint does not clearly allege that it was incentivized by money to dupe investors about AviClear.

"What can be gleaned from the complaint is a company enduring a rough year, including strategic business decisions that, with the benefit of hindsight, were not as successful as initially hoped — not securities fraud," the motion said.

"[M]ost of the financial incentives (some 70%) required customers actually to use AviClear," the motion said.

Additionally, the motion says several of the challenged, positive claims the company and its executives made about AviClear are no more than corporate puffery. For example, the suit claims the executives touted Cutera's "first-mover advantage" with AviClear, the excitement over its "successful" launch and the growing "momentum" of the product.

But the motion to dismiss claims that those "mildly optimistic," subjective assessments of Cutera's business hardly amount to a securities violation.

According to the complaint, Cutera filed restated financial statements for the first and second quarters of 2023 on March 5, 2024. The executives told investors the restatements were due to a "shortfall of inventory relative to the company's system of record," which resulted in an overstatement of inventory and a corresponding understatement of cost of revenue.

Cutera, however, said the New England Teamsters Pension Fund wrongly points to former Senior Vice President and general counsel Vikram Varma's signature on SEC filings as an attempt to show scienter. Varma started in his position in November 2022 — just six months before the documents at issue were signed.

"Courts, however, consistently hold that signing an SEC filing that turns out to be false or misleading does not even imply, let alone establish, that the signatory had any knowledge of the inaccuracy," the motion said.

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

The New England Teamsters Pension Fund is represented by Michael P. Canty, Michael H. Rogers and Philip J. Leggio of Labaton Keller Sucharow LLP and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP.

Cutera is represented by Brendan P. Cullen and Alexis C. Holmes of Sullivan & Cromwell LLP.

The case is Erie County Employees' Retirement System v. Cutera Inc. et al., case number 4:23-cv-02560, in the U.S. District Court for the Northern District of California.

--Editing by Stephen Berg.

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Peloton Investors Get Final OK For \$14M Settlement

By **Katryna Perera**

Law360 (July 10, 2024, 6:55 PM EDT) -- A New York magistrate judge has given the final approval to a \$14 million settlement between Peloton and investors over claims that the home exercise equipment maker failed to properly disclose issues with its treadmills after a 6-year-old was killed by one.

U.S. Magistrate Judge Peggy Kuo issued an **order** on Tuesday granting final approval to the settlement amount and certifying a settlement class that includes all individuals and entities who purchased or acquired Peloton securities between Sept. 11, 2020, and May 5, 2021.

Judge Kuo further stated that lead counsel from Faruqi & Faruqi LLP fairly and adequately protected the interests of the class throughout the litigation, and she granted their request for \$3.9 million in attorney fees and roughly \$89,000 in litigation costs. The attorney fee award reflects approximately 28% of the settlement fund.

"The fee award is justified by the work that lead counsel did conducting the litigation, negotiating the settlement, achieving the ultimate recovery, and by the risk that lead counsel undertook in bringing the claims," the order states.

Judge Kuo also granted a \$5,000 service award to lead plaintiff Richard Neswick.

The settlement will end claims the exercise equipment manufacturer misled investors about the safety of treadmills that were recalled after a 6-year-old was pulled underneath one and died.

According to the consolidated proposed class action, Peloton began receiving reports in December 2018 of incidents and injuries associated with its Tread+, but it didn't alert the U.S. Consumer Product Safety Commission of the problem for months. When the agency caught wind of the issues, it issued a warning in April 2021 to consumers that there were more than 70 reports of people, pets or objects being pulled under the rear of the product and 29 reports of children being injured, with one child dying.

Peloton initially pushed back against the CPSC's statement, with co-founder and CEO John Foley calling it "misleading and inaccurate." But on May 5, 2021, the company **issued a recall**, and Foley issued a statement to investors saying, "I want to be clear, Peloton made a mistake in our initial response to the [CPSC's] request that we recall the Tread+. We should have engaged more productively with them from the outset."

In January 2023, Peloton agreed to pay **\$19 million in civil penalties** to settle charges from the CPSC that it didn't immediately report a defect.

Peloton's stock suffered several drops during the first half of 2021 as the injuries and recall became public. Ultimately, company shares fell from \$107 — the closing price the day before Peloton announced the child's death on March 18, 2021 — to \$82 when it finally issued the recall, according to court documents.

Should every person eligible under the settlement agreement apply for benefit, the average payout per share would be 10 cents before subtracting fees and expenses, according to filings by class counsel.

Neswick is represented by James M. Wilson Jr. and Robert W. Killorin of Faruqi & Faruqi LLP.

Peloton is represented by Andrew Brian Clubok, Michele D. Johnson, Nicholas J. Siciliano, Steve Feldman, Susan Engel and William Trach of Latham & Watkins LLP.

The case is In re: Peloton Interactive Inc. Securities Litigation, case number 1:21-cv-02369, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Jonathan Capriel. Editing by Jay Jackson Jr.

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Wells Fargo Knew of 'Free Trial' Marketing Scam, Plaintiffs Say

By **Katryna Perera**

Law360 (July 10, 2024, 7:55 PM EDT) -- A California federal judge was asked to keep alive a lawsuit alleging that through its problematic sales practices, Wells Fargo played a supporting role in two "free trial" marketing scams that pulled \$200 million from consumers, with the plaintiffs arguing evidence shows Wells Fargo knew about the alleged fraud.

The **suit**, launched in 2021, accuses Wells Fargo & Co. of providing "substantial, knowing assistance" to the schemes, which were the subject of since-settled Federal Trade Commission cases **brought in 2018** against Triangle Media Corp. and Apex Capital Group LLC.

Thomas McNamara, the court-appointed receiver in the FTC cases, and a proposed class of alleged scheme victims are behind the action. They filed an **opposition** Monday to Wells Fargo's June summary judgment motion.

The plaintiffs argue that a "mountain of facts" shows Wells Fargo knew of the fraud and that it provided "atypical" services to assist the defendants.

Wells Fargo's assistance to the enterprises allegedly involved opening more than 150 fraudulent bank accounts used for credit card laundering in the schemes, where consumers were allegedly duped with bait-and-switch offers of "risk-free" product trials that converted into expensive, hard-to-cancel subscriptions.

In last month's summary judgment motion, Wells Fargo **claims** there is no evidence supporting the underlying alleged wrongs, let alone that the bank had actual knowledge or provided substantial assistance of them.

Monday's brief states that while aiding and abetting liability requires actual knowledge of the underlying wrongs, it does not require Wells Fargo to have known "every detail" of the scheme.

"Thus, it is sufficient to show, for example, Wells Fargo knew the enterprises were deceptive consumer internet sales businesses that required a constant stream of new accounts on which the principals' ownership interest needed to be hidden, or that the principals were diverting money from accounts supposedly owned by others, and that the resulting harms were foreseeable. Ample evidence supports these conclusions," the brief states.

According to the brief, Wells Fargo is attempting to argue otherwise "based on a smattering of self-serving 'I didn't know' statements from employees, but the facts establish that the bank knew of the scheme.

For example, according to the plaintiffs, Wells Fargo deleted bank records that had evidence of the fraud, rubber-stamped suspicious applications for dozens of LLCs registered in Wyoming using the same mail-drop address, and allowed the same person to regularly wire millions of dollars from several accounts, among other actions.

The plaintiffs also contend there is evidence of the fraud itself. According to the brief, when McNamara took over Apex and Triangle's operations, he found evidence confirming that the businesses were "based in fraud."

"The receiver determined Apex 'cannot operate lawfully and profitably,' and '[t]he consumer product sales of these businesses were premised on, and could not continue without, misrepresentations about 'risk free' trials ... and rampant credit card laundering,'" the brief states.

"The receiver similarly reported to the court that Triangle's 'fraud is simple in concept — bait consumers with internet ads offering risk free product trials for only the cost of shipping, but then use the consumers' billing information to charge for the product and impose a monthly continuity charge,'" the plaintiffs contend.

The plaintiffs also note that Wells Fargo has not identified a single consumer who intentionally participated in the companies' recurring billing.

The suit blames the account openings on the same "toxic sales culture" that fueled the massive fake accounts scandal at Wells Fargo. Although the bank **has paid** heavy fines and restitution to affected consumers since the scandal came to light **in 2016**, the suit says Wells Fargo has yet to compensate the thousands of Triangle and Apex victims hurt by the bank's sales practices.

The plaintiffs claim Wells Fargo employees were incentivized by the bank's quota-driven sales culture to look the other way and open accounts for dozens of sham shell companies that the Triangle and Apex schemes used to maintain access to payment processing services and cover their tracks.

The operators of the Triangle and Apex schemes, in turn, came to depend on the bank's willingness to provide them with "lax oversight and atypical banking services," according to the suit.

What emerged over time was a "symbiotic relationship" in which the Triangle and Apex schemes kept needing new shell bank accounts to circumvent payment processors' anti-fraud measures, while Wells Fargo employees, under pressure to meet sales goals, kept obliging in the face of obvious signs of fraud, the plaintiffs assert.

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

The plaintiffs are represented by Jonathan M. Rotter, Melissa C. Wright, Garth A. Spencer and Gregory B. Linkh of Glancy Prongay & Murray LLP, and Logan D. Smith of McNamara Smith LLP.

Wells Fargo is represented by David C. Powell, Alicia A. Baiardo, Molly M. White and Anthony Q. Le of McGuireWoods LLP.

The case is McNamara v. Wells Fargo & Co. et al., case number 3:21-cv-01245, in the U.S. District Court for the Southern District of California.



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2 Roundup MDL Cases Axed After Plaintiffs Fail To Act

By **Emily Sawicki**

Law360 (July 10, 2024, 3:36 PM EDT) -- A California federal judge presiding over multidistrict personal injury litigation related to the Monsanto herbicide Roundup has ended two of the numerous cases, with one tossed for failure to prosecute and the second ending in an early win for Monsanto after the plaintiff failed to file a response, amid ongoing concerns that plaintiffs' attorneys are overtaxed.

In separate orders filed Monday, U.S. District Judge Vince Chhabria granted Monsanto the win in a case brought by Washingtonian Ricky Beavers Jr. after Beavers did not respond to a summary judgment bid by Monsanto. The judge also tossed claims brought by Minnesotan Kenneth Bull, citing a lack of prosecution.

In a text order also entered Monday, Judge Chhabria requested parties file case management statements addressing various items related to the pending litigation, including "whether plaintiffs' counsel are taking on more cases than they can actually litigate."

Beavers, Bull and thousands of other plaintiffs have filed suits accusing Monsanto and its parent, Bayer AG, of failing to warn regulators and consumers of cancer risks associated with the use of Roundup.

While Beavers was handed an early loss, Bull's dismissal came without prejudice, meaning the door remains open for him to refile his claims down the road.

Bull is among more than 150 current and former plaintiffs represented by Charles H. Johnson of Charles H. Johnson & Associates PA, according to the MDL case docket.

Beavers is the only MDL client of Charles Lewis Meyer, according to the docket.

Weeks before issuing the orders Monday, Judge Chhabria told some of the plaintiffs' attorneys at a hearing that he worried they had bitten off more than they could chew by bringing so many cases at once.

In a June 6 virtual hearing, the judge said he was concerned that some of the plaintiffs' firms had initiated litigation on behalf of numerous clients with a goal of settling for "pennies-on-the-dollar" instead of seeing litigation through. At the time, Judge Chhabria said he was not sure he had authority to "do anything about it."

The virtual hearing was held on McCune Law Group's motions to withdraw as counsel for two plaintiffs involved in the sprawling multidistrict litigation.

At the time the MDL was formed in 2016, there were 21 cases pending in 14 districts across the country; since then, more than 4,000 complaints have been included in the MDL, with more continuing to be filed.

Monsanto has been engaged in product liability litigation related to Roundup for years, and although the company has won some trials, it has also faced billion-dollar jury awards, although trial judges across the country **have slashed** 10-figure verdicts for being excessive.

In 2020, Monsanto entered into a \$9.6 billion settlement that ended most of the cases involved in the MDL at the time. The following year, Judge Chhabria **refused to sign off** on a deal that would have

limited future claims to a \$2 billion settlement cap.

Counsel for Beavers, Bull and defendants did not immediately respond to requests for comment Wednesday.

Beavers is represented by Charles L. Meyer.

Bull is represented by Charles H. Johnson of the Law Offices of Charles H. Johnson PA.

Bayer and Monsanto are represented by Jed P. White and Linda C. Hsu of Bryan Cave Leighton Paisner LLP and Jennise Walker-Stubbs and Anthony R. Martinez of Shook Hardy & Bacon LLP.

The MDL is In re: Roundup Products Liability Litigation, case number 3:16-md-02741, and the individual cases are Bull v. Monsanto Co., case number 3:22-cv-03380, and Beavers v. Bayer Co. et al., case number 3:20-cv-08799, all in the Northern District of California.

--Additional reporting by Dorothy Atkins. Editing by Stephen Berg.

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NFL Asks Court Not To Act On Sunday Ticket Judgment

By **Bryan Koenig**

Law360 (July 10, 2024, 8:24 PM EDT) -- The NFL urged a California federal judge Tuesday to hold off on any entry of judgment enshrining a jury's blockbuster \$4.7 billion antitrust verdict against the league over the DirecTV Sunday Ticket package, arguing there are outstanding issues to be decided that make partial judgment now impractical.

Just a week after the NFL asked the judge **to upend the "runaway verdict,"** the league and its 32 member teams said in a brief Tuesday that a court order memorializing the judgment against them would be premature, as individual consumers and bars and restaurants who subscribed to Sunday Ticket are still seeking injunctive relief to curtail the allegedly anticompetitive practices spiking costs.

"Resolving the injunctive claim, if doing so is even necessary in light of the failures of plaintiffs' case ... will involve many of the same issues that were submitted to the jury, including (but not limited to) the relevant antitrust market, the existence of anticompetitive and procompetitive effects, and the implication of the Sports Broadcasting Act on plaintiffs' claims," the brief states. "Entering judgment as to the damages claim at this point would thus lead to multiple appeals of identical and overlapping issues."

The subscribers responded to the objection with a brief filing Tuesday asserting that they were simply responding to the court's direction "to prepare a judgment consistent with the jury's verdict, to which the defendants did not object," while specifically leaving the door open to further proceedings, including on injunctive relief.

"In addition, plaintiffs did not request that a separate final judgment be entered," the subscribers said

The eight-person jury handed the NFL **the stunning courtroom defeat** on June 27, following a monthlong trial and about six hours of deliberations. Jurors found that between 2011 and 2023, the league, its 32 teams and DirecTV violated Section I and Section II of the Sherman Act by overcharging Sunday Ticket subscribers, which resulted from an unreasonable restraint of trade and an illegal monopoly.

During the trial, the plaintiffs argued that there is evidence the NFL and DirecTV reached side agreements to keep the price of the Sunday Ticket artificially inflated in order to appease CBS and Fox, networks that viewed the Sunday Ticket as a threat to their free, over-the-air broadcast of Sunday NFL games.

The plaintiffs also argued that the NFL's policy of pooling the television rights for its out-of-market games violated antitrust laws.

During the class period, the Sunday Ticket offered subscribers every Sunday afternoon an NFL game that did not air free on CBS or Fox in a local market. The price varied by year, but was always hundreds of dollars.

DirecTV was not a defendant in the case, but the jury had to find that DirecTV was part of the antitrust conspiracy in order to find for the plaintiffs, according to several questions on the jury's verdict form.

The verdict's total was a bit of a head scratcher, as it did not track anywhere close to three distinct totals sought by the subscribers. Those totals were \$7.01 billion, \$3.48 billion or \$1.7 billion.

The jury's divergence from any of those estimates was a central part of the NFL's July 3 motion seeking judgment as a matter of law or a new trial, arguing the members rejected the subscribers' damages models, which "were the only evidence of class-wide injury."

The NFL referenced those arguments Tuesday in objecting to the plaintiffs' July 2 lodging of the proposed judgment. Asserting that the plaintiffs don't appear to be seeking entry of judgment at this point, the NFL still argued that even the damages claim itself is not "ripe for judgment, because the court has yet to determine apportionment of the verdict among class members."

In addition, the NFL argued that entering partial judgment "prematurely" would amount to a significant prejudice to the defendants because they'd have to put up a bond against the massive penalty.

"The court would have discretion over the existence and amount of the bond," the league said. "But the potential difficulty and actual prejudice of any bond requirement cannot be overstated, and the premium alone would be significantly prejudicial to defendants given the unwarranted size of the verdict."

Representatives for the subscribers and the NFL did not immediately respond Wednesday to request for comment.

The subscribers are represented by Ian B. Crosby, Marc M. Seltzer, Kalpana Srinivasan, Amanda Bonn, William C. Carmody, Seth Ard, Tyler Finn, Eliza Finley and Ian M. Gore of Susman Godfrey LLP, Scott Martin, Sathya S. Gosselin, Christopher L. Lebsock, Samuel Maida and Farhad Mirzadeh of Hausfeld LLP, and Howard Langer, Edward Diver, Peter Leckman and Kevin Trainer of Langer Grogan & Diver PC.

The NFL and individual NFL clubs are represented by Rakesh N. Kilaru, Beth A. Wilkinson, Brian L. Stekloff, Max J. Warren, Anastasia M. Pastan and Jeremy S. Barber of Wilkinson Stekloff LLP, and by Neema T. Sahni, Gregg H. Levy, Derek Ludwin and John S. Playforth of Covington & Burling LLP.

The case is In re: National Football League's Sunday Ticket Antitrust Litigation, case number 2:15-ml-02668, in the U.S. District Court for the Central District of California.

--Additional reporting by Craig Clough. Editing by Amy French.



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Best Text Practices In Light Of Terraform's \$4.5B Fraud Deal

By **Josh Sohn and Alicia Clausen** (July 10, 2024, 5:40 PM EDT)

Text messages and other non-email, electronic communications have become increasingly important in securities fraud matters. These communications are often sent from personal mobile devices and often provide key evidence. It has become clear that the most interesting — and sometimes most problematic — communications often do not take place via email.

Since 2021, the U.S. Securities and Exchange Commission has investigated large trading firms for so-called off-channel communications, business-related communications through platforms that are not monitored or firm-approved, e.g., text messages. As a result, the SEC has fined financial firms a total of over \$1.7 billion for failure to maintain and preserve electronic communications.[1]

Following a civil trial in April, now-bankrupt Terraform Labs **agreed** to a \$4.47 billion settlement in June to resolve an SEC lawsuit, after Do Kwon, its co-founder, was found liable of fraud. This settlement will be treated as an unsecured claim in Terraform's Chapter 11 case.[2]

At trial, the SEC offered into evidence text messages among employees that detailed a secret arrangement between Terraform and Jump, a crypto trading platform, to prop up Terraform's cryptocurrency before it collapsed. These text messages included a message from Terraform's head of communications stating that Kwon "said if Jump hadn't stepped in we actually might've been fucked." The business development head responded, "I know they saved our ass." [3]

After a discussion with the crypto trading platform, the communications head texted "Spoke with Do [Kwan], we're gonna deploy \$250 million from stability reserve through Jump to stabilize the peg." He followed up with, "Jump has already started buying ... May not need entire \$250 million."

The next day, Terraform's official Twitter account posted "Terra's not going anywhere ... \$1 parity on UST already recovered."

This is just one example of a case where the preservation, collection and production of text messages were critical to its outcome.

There are at least three areas where companies should examine their internal policies concerning mobile device data: (1) policies and procedures for mobile device use and off-channel communications; (2) preservation and collection obligations regarding employee communications on mobile devices, including personal devices, in litigation; and (3) content of mobile messages that will be produced in litigation.

Policies and Procedures

Internal policies governing the use of mobile devices and any off-channel communications should be in place and discussed with employees as a critical part of onboarding, as well as during ongoing human resources conversations.



Josh Sohn



Alicia Clausen

Business-related communications via messaging applications that are not monitored or maintained by their employers have dramatically increased since the beginning of the COVID-19 pandemic. For those working in financial services, including investment bankers and securities traders, the existence of communications about firm business on messaging applications like iMessage, WhatsApp, Slack, or Signal risks scrutiny and fines from government regulators.

Additionally, employees at financial firms may be more likely to send problematic or even illegal messages through unmonitored channels if they believe the messages will not be subject to scrutiny, particularly on their personal devices. These messages may give rise to civil liability for both regulators and private plaintiffs.

When developing a mobile device policy, companies should consider the following questions.

Whether employees use company-issued devices or not, is there a policy for employees who bring their own devices?

Many employees prefer to use a single device for both personal and work-related purposes, even when a corporate device is offered. They should, however, be informed of the risks of intermingling business and personal communications, particularly if their good friends are also business contacts.

U.S. v. Blaszcak, a case decided by the U.S. Court of Appeals for the Second Circuit last year, involved a Centers for Medicare and Medicaid Services employee who had remained friends with David Blaszcak, the defendant, after he left the organization to work for a hedge fund.[4] The employee provided inside information via their phone calls, emails and text messages on CMS rate changes that lowered reimbursement rates.

Are employees required to cooperate with requests for access to their devices during litigation?

This consideration underscores the requirement for a bring-your-own-device policy or corporate device policy. Either of these policies should specifically articulate the requirement of providing access to business-related communications, documents, photographs and other data stored on mobile devices in case of litigation.

Policies should also discuss an employee's expectation of privacy with respect to the personal data on a device that is used for business purposes. This will also help employees make informed decisions about how and when to communicate on a mobile device for work purposes before the information is discoverable.

How are the mobile device policies enforced? Which applications are employees allowed to use for work purposes?

It is important to consider mobile device management and mobile device data-archiving tools, and other corporate access to mobile devices that will be used for business purposes. The software can allow companies to remotely monitor, update, secure, and even delete data from personal smartphones or tablets that are used for business purposes. Employers can designate applications for business use.

As an example, Microsoft Office 365 provides a full suite of applications, including Outlook, Teams, and applications to view and edit documents. These and other similar applications can be protected by passwords and/or two-factor authentication.

Importantly, data from applications designed for corporate use can also be stored on a company server.

What are the policies and procedures for departing employees?

If the departing employee used a corporate device, internal policies should require the employer's IT department to verify whether there is an obligation to preserve the data on the device before it is erased. If the departing employee used a personal device, the company should collect any data that

may be relevant to an ongoing or foreseeable litigation.

If it is not possible to collect the data prior to the employee's departure, the employee should be reminded of the potential obligation.

Preservation and Collection

In litigation, companies are required to produce data that is within their possession, custody and control.

As part of this determination, courts will consider the following factors when it comes to mobile data: (1) whether the employer issued the devices, (2) how frequently the devices were used for business purposes, (3) whether the employer had a legal right to obtain communications from the devices, and (4) whether company policies address access to communications on personal devices.[5]

Here are some considerations related to the preservation and collection of mobile data.

What communications may be relevant?

Any employee who may possess information relevant to the litigation may also possess relevant mobile data. Counsel, along with forensic examiners, will often interview employees who likely have information relevant to the litigation to identify the type and frequency of business communications, applications used for business purposes, and the amount of potentially relevant information the employee possesses on their mobile device.

Other details may help focus the text message collection, including the relevant time periods of the conversation, e.g., the time periods surrounding a particular trade or release of information; the communication platforms used, e.g., iMessage, WhatsApp or Signal; and the parties of interest.

In *U.S. v. Buyer*, before the U.S. District Court for the Southern District of New York in 2023, the defendant, former U.S. Rep. Stephen Buyer, was **convicted** of trading on inside information related to a proposed acquisition of Navigant by Guidehouse.[6] He admitted to phone calls and text exchanges with a Guidehouse employee right before he purchased Navigant stock.

The government also presented a Signal message from the defendant as evidence of an attempted cover-up. The message read: "I need to see you. Please ... I will catch next flight. I was interviewed and told them I bought." The defendant had intended for this message to be deleted after five minutes.

What is the level of technical sophistication of the employees?

Data may be inadvertently lost in a number of ways, including a failure to follow a litigation hold; accidental deletion of messages, e.g., auto-delete; upgrading the device to a different model without transferring or backing up its data; or performing a factory reset. It is important to assess whether to trust an employee to properly manage their device settings, or whether it may be necessary to preemptively collect mobile data to ensure that it is preserved.

It is important to be aware of the default settings in place before a litigation hold is in effect, both on mobile devices and corporate servers, as these settings may need to be adjusted. Mobile device management systems and applications backed up to a remote server, e.g., Microsoft Outlook and Teams, make it easier to preserve data at a global level and eliminate user error.

If an employee uses text messages or other messaging apps to communicate for business purposes, it will be important to instruct the employee to change their device settings to ensure that no information will be inadvertently deleted, particularly because courts will likely consider business communications to be within the employer's control.

Although proper preservation of mobile data often does not require a substantial effort, a failure to adequately preserve relevant mobile data can result in monetary sanctions and/or adverse inferences at trial.

In *Hunters Capital LLC v. City of Seattle*, the Seattle mayor deleted thousands of text messages from her employer-owned phone, claiming that this was partly because she inadvertently set all text messages to auto-delete after 30 days.[7] The U.S. District Court for the Western District of Washington in 2023 issued an adverse inference instruction to the jury, telling them they could presume that the text messages were unfavorable to the defendant.

What are the technical requirements and procedures for collection?

The collection process can often be performed remotely, but the forensic examiner will sometimes require physical possession of the device. If the mobile data in question is backed up on a remote server, it can be collected remotely, and with minimal disruption to the employee.

Apple iPhone data can typically be collected remotely through iCloud, while Android data typically must be collected from the device itself. Messages and other data from mobile devices that are not available on a remote server are typically collected through a logical extraction, which creates a forensic image of the entire phone, preserving the integrity of the data at the time of the collection.

Importantly, however, logical extraction cannot recover deleted files or be used on a locked device. Ephemeral messaging applications, e.g., Signal and Telegram, which do not permit archiving or remote storage of messages, can only be collected through screenshots or manual collection methods. Additionally, if an employee has very few relevant messages, a screenshot or other manual collection may be appropriate.

Content of Mobile Messages

In litigation, as opposed to regulatory investigations, the parties may have more room to negotiate the scope and relevancy of mobile messages to be produced to the other side. The legal team can opt to produce only the relevant portions of message threads, redacting nonrelevant messages and images — including personal messages and photos.

In some instances, however, it may be necessary to produce nonrelevant messages to provide context.[8] Additionally, one-off messages, gifs or emojis can sometimes provide important evidence if they are understood to have a certain meaning in the relevant industry-specific communications.

For example, in *In re: Bed Bath & Beyond Corp. Securities Litigation*, the U.S. District Court for the District of Columbia in 2023 found that a message with an emoji provided potentially key evidence of securities fraud.[9]



In denying a motion to dismiss, the court noted: "Some online communities understand the smiley moon emoji to mean 'to the moon' or 'take it to the moon.' ... In other words, according to Plaintiff,

Cohen was telling his hundreds of thousands of followers that Bed Bath's stock was going up and that they should buy or hold. They did so, sending the price soaring."

Similarly, in *Friel v. Dapper Labs Inc.*, for example, the Southern District of New York **reasoned** last year that "the 'rocket ship' emoji, 'stock chart' emoji, and 'money bags' emoji objectively mean one thing: a financial return on investment."^[10]

Even metadata can contain damaging information, as in the case of the now-defunct cryptocurrency exchange FTX, where Sam Bankman-Fried and other staff had a Signal chat group named "Wirefraud."^[11]

Final Considerations

Given the proliferation of these communications and their probative value in the cases discussed above, it is undeniable that litigants in securities fraud cases need to have robust mobile data policies that address the content and retention of messages, applications used for messaging, and the obligations of employees to allow for collection, in addition to an IT infrastructure that facilitates all of the processes outlined above.

It is also important to ensure that employees understand the risks of communicating about business on a personal device, as well as the discovery obligations related to those communications.

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[1] <https://www.reuters.com/legal/government/sec-sued-by-trade-association-details-record-keeping-probe-2024-06-06/>.

[2] <https://www.reuters.com/legal/crypto-firm-terraform-labs-agrees-pay-447-bl- resolve-dispute-with-sec-2024-06-12/>.

[3] **SEC v. Terraform Labs PTE LTD** , 23-cv-1346 (JSR) (July 31, 2023).

[4] 947 F.3d 19 (2d Cir. 2019).

[5] See, e.g., **Miramontes v. Peraton, Inc.** , No. 3:21-CV-3019-B, 2023 WL 3855603 (N.D. Tex. June 6, 2023).

[6] 22 CR. 397 (RMB) (S.D.N.Y. Mar. 14, 2023).

[7] 2023 WL 184208 (W.D. Wash. Jan. 13, 2023).

[8] See **Al Thani v. Hanke** , No. 20 CIV. 4765 (JPC), 2022 WL 1684271, at *2 (S.D.N.Y. May 26, 2022) ("a single text message, standing alone, is oftentimes meaningless without other messages in the text chain to provide context").

[9] U.S. Dist. LEXIS 129613 (D.D.C. July 27, 2023).

[10] No. 21-cv-5837, 2023 WL 2162747, at *17 (S.D.N.Y. Feb. 22, 2023).

[11] <https://www.theguardian.com/business/2022/dec/13/sam-bankman-fried-ftx-signal-wirefraud-chat-alameda>.