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Judge denies Zymergen pre-IPO investors' bid to exit class action

2024 SECDBRF 0164

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By Nicole Banas

WESTLAW Securities Enforcement & Litigation Daily Briefing

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August 19, 2024

(August 19, 2024) - Venture capital funds that invested in Zymergen Inc. before its 2021 initial public offering must face a class action related to misstatements in the bankrupt biotechnology firm's IPO materials, a California federal judge has ruled.

Wang v. Zymergen Inc. et al., No. 21-cv-6028, 2024 WL 3811844 (N.D. Cal. Aug. 14, 2024). The shareholder lawsuit sufficiently pleads that True Venture Management LLC, SB Investment Advisers U.S. Inc. and the VC funds they managed controlled Zymergen when it allegedly issued misleading statements, U.S. District Judge P. Casey Pitts of the Northern District of California ruled Aug. 14.

The judge partially dismissed claims against DCVC Management Co. LLC and related VC funds, but he gave lead plaintiff Biao Wang an opportunity to amend the complaint.

Sudden 'implosion'

The lawsuit alleges that Zymergen insiders made false and misleading statements in IPO documents about the company's ability to produce microbes for industrial use.

The offering materials stated that the company expected to generate revenue in the second half of 2021. They also said the market for Zymergen's products was \$1.2 trillion, according to the suit.

The company's share price fell from \$31 in the IPO on April 22, 2021, to \$8.25 on Aug. 4, 2021, after Zymergen disclosed that commercial pipeline issues would prevent it from earning substantial revenue through 2022.

The company's "implosion" prompted comparisons to Theranos, as media reports in late 2021 said that former Zymergen CEO Joshua Hoffman had exaggerated financial figures and projections, according to the suit.

The defendants include Zymergen, Hoffman and nine other officers and directors, plus the three groups of VC funds, which owned most of the company's shares before the IPO.

The District Court in November 2022 denied the Zymergen defendants' motions to dismiss claims under Section 11 of the Securities Act of 1933, 15 U.S.C.A. § 77k, but dismissed claims for liability as control persons under Section 15 of the Act, 15 U.S.C.A. § 77o, against the funds.

The court certified a class of IPO investors in August 2023. Zymergen's Chapter 11 bankruptcy filing in October 2023 triggered an automatic stay of the claims against it.

In February, Judge Pitts granted Wang's motion for leave to file a second amended complaint, which added the VC funds' management companies as controlling stockholder defendants and repleaded claims against the dismissed funds.

The managers and their funds are liable under Section 15 and under the doctrine of respondeat superior because they controlled Zymergen and the individual directors they appointed to its board, the revised complaint says.

Most claims proceed

The controlling stockholder defendants moved to dismiss the complaint pursuant to a one-year statute of limitations applicable to Section 15 claims.

Judge Pitts said the claims against the funds relate back to the filing of the amended complaint and are therefore not time-barred.

The judge also ruled that the suit sufficiently pleads control-person claims against the True Venture and SB defendants. The complaint shows that those defendants approved the decisions their board appointees made, he said.

The allegations against DCVC are "more difficult" because its board appointee was a DCVC co-owner rather than an employee, Judge Pitts said. He dismissed claims that DCVC controlled its appointee, but sustained allegations related to its control of Zymergen.

The suit shows that the controlling stockholders approved most of Zymergen's business decisions and agreed to vote their shares together on certain issues, the judge said. They also authorized the IPO and helped write the registration statement, he said.

Shawn A. Williams and Daniel J. Pfefferbaum of Robbins Geller Rudman & Dowd LLP represent Wang.

Attorneys at Goodwin Procter LLP and Quinn Emanuel Urquhart & Sullivan LLP represent True Venture and SB, and Gibson, Dunn & Crutcher LLP represents DCVC.

By Nicole Banas

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Bloomberg Law News 2024-08-23T13:30:5796213467-04:00

Cantor, Lutnick Pay \$12 Million to Settle View Inc. SPAC Case

By Mike Leonard 2024-08-23T11:05:59000-04:00

- Lawsuit said deal insiders duped investors to gain windfall
- Case part of a wave targeting blank-check merger incentives

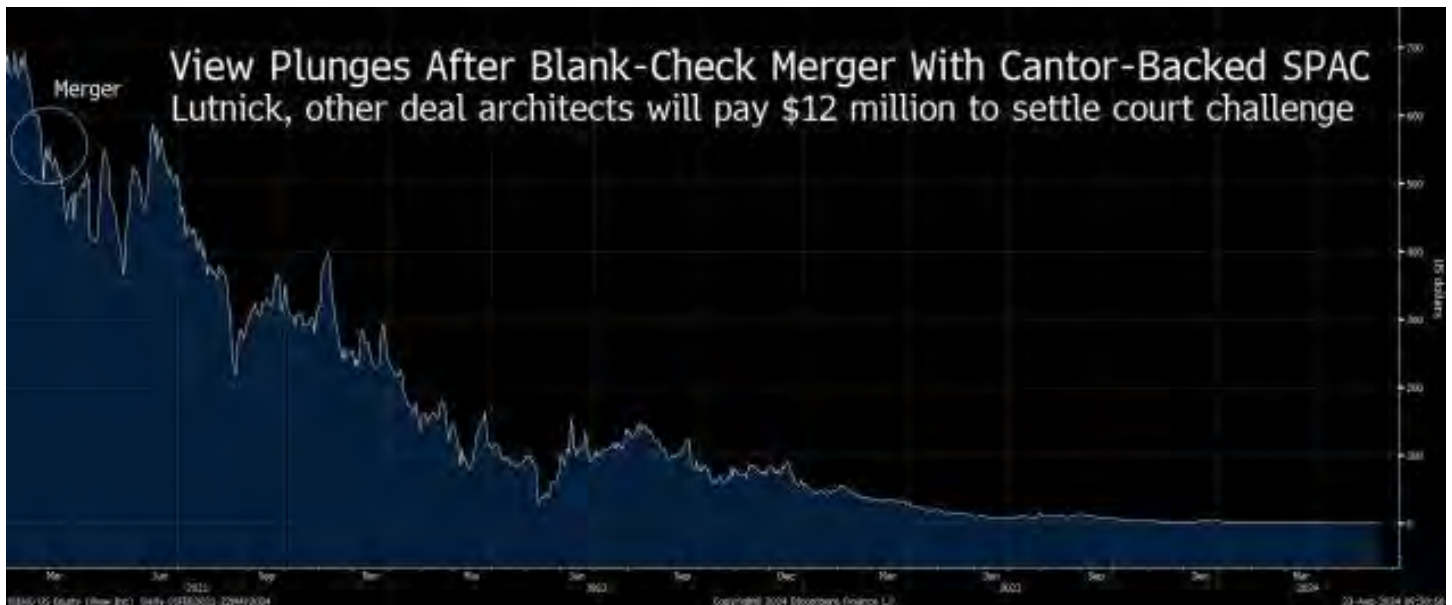
[Cantor Fitzgerald LP](#), billionaire chief [Howard Lutnick](#), and other architects of View Inc.'s blank-check merger agreed to pay \$12 million to end litigation challenging the deal.

The settlement disclosed Thursday would resolve shareholder claims targeting the 2021 transaction, which took the “smart glass” maker public by combining it with a special purpose acquisition company.

The lawsuit, filed in November, said Lutnick and the others were driven by lopsided incentives to dupe the SPAC’s investors into a doomed deal that gave insiders a windfall.

The case was one of scores filed in Delaware’s Chancery Court over SPAC mergers since the wave of blank-check deals began to recede from a boom in 2020 and 2021. The transactions—designed to let startups bypass initial public offerings—have [landed in courts nationwide](#) after the sector [underperformed in the open market](#).

Like most of those other suits, the View case targeted a standard feature of the transactions: “founder shares” costing fractions of a penny that soar in value by a factor of thousands if a merger closes. Those shares given to insiders become worthless if no transaction is found, if investors vote one down, or if they exercise their right to cash out.



According to the shareholder complaint, founder shares worth nearly \$115 million at closing gave Lutnick and other sponsors of CF Finance Acquisition Corp. II—one of several SPACs backed by Cantor—a powerful incentive to tell a false narrative about the merger’s prospects. As a result, they drastically misrepresented View’s financial health to ensure the deal closed, the suit said.

As the truth emerged in fits and starts over the following years, View’s shares plunged from the SPAC’s \$10 IPO price to “the functional equivalent” of \$0.05, discounting a reverse stock split, according to the court complaint last year. View [announced in April](#) that it would go private and file for Chapter 11 as part of a deal with Cantor.

The legal settlement is designed to put the allegations “to rest, finally and forever, without in any way acknowledging any wrongdoing, fault, liability, or damages,” Thursday’s joint filing says.

Because the case is a class action, the accord requires the approval of the presiding judge, Vice Chancellor [J. Travis Laster](#).

The investors, Mariano Siseles and Zalmon Uyaydov, are represented by Grant & Eisenhofer PA, Robbins Geller Rudman & Dowd LLP, Robbins LLP, Morris Kandinov LLP, and Stanford University law professor [Michael Klausner](#), who [developed a leading legal theory](#) for challenging SPAC mergers.

Cantor, Lutnick, and the other deal sponsors are represented by Young Conaway Stargatt & Taylor LLP and Latham & Watkins LLP.

The case is [Siseles v. Lutnick](#) , Del. Ch., No. 2023-1152, 8/22/24 .

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Aug. 19, 2024, 1:55 PM PDT

Oak Street Health Settles Investors' Probe Suit for \$60 Million

By Martina Barash

Bloomberg Law News 2024-08-23T10:38:36257898377-04:00

Oak Street Health Settles Investors' Probe Suit for \$60 Million

By Martina Barash 2024-08-19T16:55:51000-04:00

Oak Street Health Inc. has reached a \$60 million settlement of securities claims over a marketing approach that allegedly led to a government investigation over kickbacks, investors told a federal court.

The agreement merits preliminary approval, the lead plaintiffs told the US District Court for the Northern District of Illinois. The deal would recover nearly 16% of the investors' \$386 million in recoverable damages as estimated by their expert, according to the Aug. 16 filing.

- The investors allege that as Covid-19 shutdowns halted Oak Street's community outreach to new Medicare Advantage patients, it began to pay marketing agents \$200 per patient referral and offered free transportation to prospective customers
- But its public offering registration statements allegedly included language indicating compliance with the Anti-Kickback Statute, inflating its share price, they say
- Judge Matthew F. Kennelly ruled in February 2023 that the plaintiffs adequately pleaded most of their claims

Robbins Geller Rudman & Dowd LLP and Labaton Sucharow LLP are lead counsel for the plaintiffs. Paul, Weiss, Rifkind, Wharton & Garrison LLP, Henderson Parks, and Smith, Gambrell & Russell LLP represent Oak Street and the individual defendants.

The case is Allison v. Oak St. Health, Inc. , N.D. Ill., No. 1:22-cv-00149, motion 8/16/24 .

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Visa-Mastercard settlement claims deadline postponed

 [paymentsdive.com/news/visa-mastercard-merchant-litigation-settlement-claims-deadline/724525](https://www.paymentsdive.com/news/visa-mastercard-merchant-litigation-settlement-claims-deadline/724525)

Lynne Marek

A federal judge has granted U.S. merchants who processed Visa and Mastercard payments during a 15-year period additional time to seek their share of a \$5.5 billion class-action settlement.

It was the second time this year that Judge Margo Brodie extended the deadline. This extension delays the former Aug. 30 claims filing deadline to Feb. 4, 2025.

Plaintiffs' lawyers for the class of merchants wrote in court papers that the extension they requested would allow for the mailing of claim forms to additional potential claimants.

Merchants can file claims online and the amount of money eligible businesses may each receive from the settlement could be as much as hundreds of thousands of dollars.

The merchant litigants in the class action are represented by attorneys from the law firms Robins Kaplan, Robbins Geller Rudman & Dowd and Berger Montague.

Ryan Marth, a Robins Kaplan partner who is one of the co-lead counsel for the class of merchants, said the filing extension is good news for merchants as it "ensures that as many eligible merchants as possible can rightfully claim their share" of the settlement.

Meanwhile, a federal magistrate judge assigned to the case, Judge Joseph Marutollo, held an Aug. 13 hearing in which he urged lawyers for the class to ensure they efficiently and properly address any concerns raised by merchants and their representatives about the claims submission process.

The \$5.5 billion settlement partially resolved a long-running antitrust case in which the two credit card network giants were alleged to have overcharged merchants by exacting excessive interchange fees, often known as swipe fees.

The class of merchants includes any U.S. businesses that accepted Visa and/or Mastercard credit or debit cards between Jan. 1, 2004, and Jan. 25, 2019.

Visa and Mastercard didn't admit to any wrongdoing in the case, which only pertained to civil matters.

More claimants?

Starting in late 2023, class-action claim forms were sent to about 18.6 million merchants across the U.S. who processed Visa and Mastercard payments during the class period.

Lawyers for the class of merchants have worked closely with the official settlement administrator in the case, Epiq Systems, on the claims process.

In a document filed with class counsel's recent request for the claims deadline extension, an Epiq official said the company had received additional data from "Visa and others" that revealed "a significant number of additional Class Members who did not receive claim forms sent in 2023."

Keep up with the story. Subscribe to the Payments Dive free daily newsletter

"The Class Administrator recommends mailing Claim Forms to those Class Members after it concludes necessary analysis of the data at issue," wrote Loree Kovach, a senior vice president for Epiq's class action & claims solutions unit, in the court filing.

Marth declined to comment on the number of class members who did not receive claim forms last year and will now be sent them.

Marth also declined to provide the number of merchant claims filed to date but said "we can confirm claims are trending on pace with what counsel and the claims administrator expect."

When seeking an extension of the original claims filing deadline of May 31, class counsel highlighted the thousands of claim conflicts that still needed to be resolved.

A conflict occurs when multiple parties have filed claims for the same business, and Kovach told the court in May that there were more than 30,000 claim conflicts pending resolution.

Marth declined to comment on the number of conflicts that still need to be resolved.

Claims issues

The landmark \$5.5 billion settlement is under the jurisdiction of the U.S. District Court for the Eastern District of New York.

During the Aug. 13 Zoom hearing, Marutollo highlighted that the court had received four letters in recent months raising concerns or questions about the claims administration process overseen by Epiq.

One letter to the court was from James Sammon, the general counsel of Jenne, a technology distributor that has filed a claim in the class action.

In his letter, Sammon expressed concern that the numbers in the claims administrator's portal "were woefully low for the amount and volume of credit card transactions undertaken by our company over the class period."

Marth told the court that he had been in touch with Sammon, and both class counsel and Epiq were working to address the company's concerns.

Marutollo encouraged class counsel to "look into these issues as they arise and really ensure that these letters are not getting lost in the shuffle of the many other filings that are made in the months to come."

Alexandra "Xan" Bernay, a partner at Robbins Geller Rudman & Dowd and one of the co-lead counsel for the class, said class counsel and Epiq are working to address claims-related issues as quickly as possible.

"Class counsel takes this extremely seriously," Bernay told the court. "We want this to be as easy of a process as possible for those class members."

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Aug. 21, 2024, 12:05 PM PDT

FirstEnergy Must Resume Information Exchange in Bribery Case

By Martina Barash

Bloomberg Law News 2024-08-23T11:10:07067138682-04:00

FirstEnergy Must Resume Information Exchange in Bribery Case

By Martina Barash 2024-08-21T15:05:46000-04:00

FirstEnergy Corp.'s pending appeal of class status for investors will no longer halt the exchange of information on factual issues in a securities case stemming from a bribery scandal, a federal court ruled.

But the parties' sharing of scientific and other expert reports and testimony will remain on pause until the appeal is resolved or the court orders it to resume, Chief Judge Algenon L. Marbley said Tuesday for the US District Court for the Southern District of Ohio.

- Investors accused the energy company of misleading them about a nuclear plant subsidy bribery scandal involving Ohio's state legislature, with a loss of billions of dollars in market value
- FirstEnergy appealed Marbley's March 2023 certification of a class of investors to the US Court of Appeals for the Sixth Circuit, which heard argument July 17
- Marbley said several factors, including witnesses' fading memories, weigh against FirstEnergy's request to continue pausing the costly discovery phase of the proceedings during the appeal

Robbins Geller Rudman & Dowd LLP are class counsel. Sullivan & Cromwell LLP and Dickie, McCamey & Chilcote PC represent FirstEnergy.

The case is Owens v. FirstEnergy Corp. , S.D. Ohio, No. 2:20-cv-03785, 8/20/24 .

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FirstEnergy exec was fired amid bribery probe after his daughter pitched a \$44k/month contract, records show

[cleveland.com/open/2024/08/firstenergy-exec-was-fired-amid-bribery-probe-after-his-daughter-pitched-a-44kmonth-contract-records-show.html](https://www.cleveland.com/open/2024/08/firstenergy-exec-was-fired-amid-bribery-probe-after-his-daughter-pitched-a-44kmonth-contract-records-show.html)

By Jake Zuckerman, jzuckerman@cleveland.com Adam Ferrise, adamferrise@cleveland.com

August 23, 2024

1. Ohio Politics

Published: Aug. 23, 2024, 1:29 p.m.



FirstEnergy's former headquarters in downtown Akron. (Rich Exner/Cleveland.com) Rich Exner, [cleveland.com](mailto:richexner@cleveland.com)

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CLEVELAND, Ohio – A former FirstEnergy Corp. executive, fired amid the House Bill 6 bribery scandal, was sent a \$44,000 per month contract proposal by his daughter for billboard advertisements, according to new records released in a related lawsuit against the company.

The records shed new light on the firing of Dennis Chack, the former senior vice president of product development, marketing and branding in October 2020. He was released alongside CEO Chuck Jones and fellow executive Mike Dowling.

Jones and Dowling have since been charged with public corruption offenses. Chack has not been criminally accused.

Their departures came after authorities unraveled the Akron utility's \$60 million bribery scheme to pass a \$1.3 billion legislative bailout for two nuclear plants that had been owned by a FirstEnergy subsidiary. Eight men have been charged in the scandal. Two were

convicted of racketeering, two have pleaded guilty and await sentencing, two await trial, and two have since died by suicide.

At the time of the firings, the company only said in a news release that Jones, Dowling and Chack “violated certain FirstEnergy policies and its code of conduct.” But in a newly released memo dated November 2020, FirstEnergy Vice President, Controller and Chief Accounting Officer Jason Lisowski wrote that Chack “may have had an immediate family member who worked at a vendor company that resulted in a conflict of interest.”

Lisowski’s memorandum is circumspect in describing what happened regarding Chack, but other depositions and documents released in the various civil, criminal and regulatory investigations into the scandal offer insight.

A PUCO audit, launched after the initial arrests in the case, found FirstEnergy paid millions of dollars worth of contracts to businesses owned by Tony George, a prominent businessman and FirstEnergy ally who owns billboards, including many around Cleveland.

The audit states FirstEnergy lacked supporting documentation behind many of these payments, and the utilities it owns “do not know why such information is not available.”

Emails released as part of the lawsuit show Denise Angerstien, Chack’s daughter, emailed her father in November 2018 an unsigned contract for outdoor advertising that would have paid her business, DMA Consulting, \$44,000 per month from Jan. 1, 2019, through Dec. 31, 2024.

Plaintiffs suing the company suggested during a deposition with Chack that Angerstien planned to split the work with one of George’s companies. Chack didn’t answer the question, instead invoking his Fifth Amendment right against self-incrimination more than 100 times during the interview.

Jason Forge, a plaintiffs attorney in the securities lawsuit against the company, asked Chack about the emails, describing them as an arrangement that would enable his daughter to “collect hundreds of thousands of dollars from FirstEnergy’s marketing campaign” in support of the bailout legislation.

“On the advice of counsel, I invoke the Fifth,” Chack said.

State prosecutors accused Jones and Dowling of paying a \$4.3 million bribe to Sam Randazzo, shortly before he was appointed to chair the Public Utilities Commission of Ohio.

In return, Randazzo led the commission on a ruling that waived a previously ordered review of FirstEnergy’s spending and costs to customers. Texts indicate Jones and Dowling saw the rate review as a financial threat. But the memorandum raises the possibility of other motives behind avoiding the regulatory scrutiny.

The FirstEnergy internal memo also lists two other incidents of potential wrongdoing, including that Chuck backdated a \$400,000 contract to “a vendor in which he had a conflict of interest.”

The memo said the company, at Chuck’s direction, issued and forgave a \$175,000 loan with a vendor who “has a personal relationship” with Jones, the former CEO.

“The true nature and business purpose of the loan was not documented,” the memo said.

FirstEnergy spokeswoman Jennifer Young declined comment, citing pending litigation, but she said the company has improved its internal controls.

“Our focus today is investing in our regulated electric companies to improve the customer experience and to meet their energy needs today and into the future,” she said.

Neither Chuck, his attorney, nor Chuck’s daughter, Denise Angerstien, responded to inquiries. Tony George terminated a phone call with a reporter.

Chuck started at the Ohio Edison Co., now owned by FirstEnergy, as a draftsman. He worked his way up the ladder, having been appointed to oversee all three of FirstEnergy’s Ohio utilities in 2011 before a promotion to the executive-level role.

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

Adam Ferrise covers federal courts for Cleveland.com and The Plain Dealer.

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FirstEnergy's chief ethics officer knew about \$4.3 million payment the company said was a bribe

[cleveland.com/open/2024/08/firstenergys-chief-ethics-officer-knew-about-43-million-payment-the-company-said-was-a-bribe.html](https://www.cleveland.com/open/2024/08/firstenergys-chief-ethics-officer-knew-about-43-million-payment-the-company-said-was-a-bribe.html)

August 23, 2024

1. Ohio Politics

- Updated: Aug. 23, 2024, 7:54 a.m.
- |Published: Aug. 23, 2024, 5:30 a.m.



FBI agents carry boxes and bags out of the Columbus home of Public Utilities Commission of Ohio Chairman Sam Randazzo on Monday, Nov. 16, 2020.

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – Two top lawyers at FirstEnergy, plus the company's most senior accountant, knew about and helped process a \$4.3 million payment that the company later said was a bribe to a top state regulator, according to a newly unearthed memorandum and deposition.

Up to now, the heaviest scrutiny in Ohio's epic statehouse bribery scandal has fallen on those facing criminal charges: two FirstEnergy executives – CEO Chuck Jones and senior vice president Mike Dowling – and Sam Randazzo, the Public Utilities Commission of Ohio chairman accused of taking their bribe. However, the memorandum sheds light on senior company officials who knew about the transfer, which occurred one month before Gov. Mike DeWine appointed Randazzo to the high post in February 2019.

Keep Watching

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Authorities: Former Stony Brook attorney sentenced to prison for stealing over \$800,000 from clients
Authorities: Former Stony Brook attorney sentenced to prison for stealing over \$800,000 from clients

About four months after the July 2020 arrest of ex-Ohio House Speaker Larry Householder but before an FBI raid at Randazzo's house, FirstEnergy's current chief accounting officer authored a memo titled "Tone at the Top Control Deficiency (Material Weakness)."

The November 2020 memo by Jason Lisowski, FirstEnergy's chief accounting officer, was prepared for the company's external auditors, who needed to sign off on its quarterly financial statement. Its purpose, Lisowski wrote, was to review why FirstEnergy's internal controls didn't stop the bribery scheme that was unfolding as a federal case.

The filing would be the first time the company publicly revealed its payment to Randazzo, the top state official tasked with regulating FirstEnergy and its peers, who has since died by suicide. The payment is the center point of the criminal cases against Jones and Dowling.

The memo was released by the Ohio Consumers Counsel this week as part of the latest trove of documents, including several depositions, from a lawsuit that investors filed against FirstEnergy.

In the memo and a deposition Lisowski gave last year, Lisowski said Chief Legal Officer and Senior Vice President Robert Reffner; Chief Ethics Officer Ebony Yeboah-Amankwah; and Lisowski himself were all aware of a \$4.3 million payment to Randazzo that the company internally referred to as a termination payment related to a consulting contract. Both FirstEnergy and Lisowski say the company had no legal obligation make the payment ordered by Jones and Dowling.

On Dec. 18, 2018, Jones and Dowling dined with Gov. Mike DeWine and Lt. Gov. Jon Husted, fresh off an election victory, according to previously released court documents, texts, emails, and interviews. After the dinner, Jones and Dowling drove to Randazzo's house in

Columbus to discuss a gubernatorial appointment to lead the PUCO and the \$4.3 million payment. Jones and Randazzo shortly afterward exchanged text messages about making the payment “in full.”

The next day, Dowling, Reffner and Yeboah-Amankwah summoned Lisowski into a meeting, as Lisowski described it in an August 2023 deposition. The goal was to discuss the accounting implications of paying out a terminated contract. He said the conversation didn’t trigger any red flags in his mind, given it was coming from the company’s top legal and ethics executives.

FirstEnergy transferred the funds to Randazzo’s companies just after the new year. DeWine appointed Randazzo to the PUCO soon thereafter. Plaintiffs suing the company alleging securities fraud asked Lisowski in the deposition if he was concerned following the appointment.

“No, because our general counsel, Bob Reffner; our chief ethics officer, Ebony Yeboah; and another senior executive, Mike Dowling, were all aware of that and I didn’t think that there was anything inappropriate at the time,” Lisowski said.

“I didn’t have any concerns about it or thought there was anything inappropriate in part because both Bob and Ebony were familiar with these payments and contracts.”

Attorneys for Reffner and Yeboah-Amankwah didn’t respond to inquiries.

Both Jones and Dowling have been criminally charged in connection with the \$4.3 million payment. They have pleaded not guilty, insisting the money was a legitimate and obligatory termination fee of a contract. But FirstEnergy admitted to federal prosecutors in July 2021 the money was a bribe paid to Randazzo to use his power as PUCO chairman to waive a regulatory review of the company’s spending and charges to ratepayers, among other favors. The company in the filing also admitted to bribing Householder, who has been convicted of racketeering and sentenced to 20 years in prison.

In exchange for the company’s cooperation, prosecutors agreed to drop an indictment of honest services wire fraud against the company pending the end of their investigation. FirstEnergy also agreed to pay a \$230 million penalty.

While Jones and Dowling were both “terminated” from the company, Reffner and Yeboah-Amankwah were “separated.” Lisowski’s memo specifically faults Yeboah-Amankwah for a “failure to perform due diligence and raise a questionable payment to a higher level as a result of pressure from above.” Neither Reffner nor Yeboah-Amankwah have been charged with any crimes.

Adam Ferrise contributed reporting.



Stories by Jake Zuckerman

- FirstEnergy exec was fired amid bribery probe after his daughter pitched a \$44k/month contract, records show
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Jake Zuckerman covers state politics and policy for Cleveland.com

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New documents in Ohio's HB6 corruption scandal renew the question: Why no federal indictments of FirstEnergy execs? Today in Ohio

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August 23, 2024

1. News

Published: Aug. 23, 2024, 10:11 a.m.

Today in Ohio, the daily news podcast of cleveland.com and The Plain Dealer.

By

Laura Johnston, cleveland.com

CLEVELAND, Ohio -- The chief ethics officer at FirstEnergy, plus another lawyer and the company's most senior accountant, helped process a \$4.3 million payment that the company later said was a bribe.

We're talking about the newly unearthed memorandum and deposition showing what the company new on Today in Ohio.

Listen online here.

Editor Chris Quinn hosts our daily half-hour news podcast, with editorial board member Lisa Garvin, impact editor Leila Atassi and content director Laura Johnston.

You've been sending Chris lots of thoughts and suggestions on our from-the-newsroom text account, in which he shares what we're thinking about at cleveland.com. You can sign up here: <https://joinsubtext.com/chrisquinn>.

You can now join the conversation. Call 833-648-6329 (833-OHTODAY) if you'd like to leave a message we can play on the podcast.

Here's what else we're asking about today:

We received another batch of FirstEnergy documents that had not be released publicly before, and they contain some mighty interesting information about the bribes FirstEnergy paid to Sam Randazzo. What did we learn?

Ohio voters amended the constitution decades ago to make sure that the language about proposed amendments on the ballot was accurate and neutral. How did that come together, and how have things gone so wrong?

Without Nick Mileti, we might not have professional basketball in Cleveland. Of course, without Nick Mileti, we wouldn't have had a basketball arena in Richfield for so many years, either. He died at age 93. What was remarkable about him?

We talked yesterday about the increasing demand for power in Ohio without a comparable increase in power generation. We were talking about things like nuclear, wind and solar power. But our illustrious public utilities commission went the anti-green way Thursday. What did it do?

The Democrats have had a week of powerful speeches at their national convention, which seem to be energizing many Americans. How is Ohio's JD Vance trying to shut that down?

There's a just-approved new Covid vaccine coming our way. That's the good news. What's the bad news?

Ohio wine doesn't have the cachet of wines in France, California or, even, New York. But Ohio does have a wine industry. How is Ohio going to help it thrive?

We're not feeling it so much in temperate Northeast Ohio, but much of Ohio is in a serious drought. How remarkable and historic is it?

Summer is quickly coming to a close, but one of the most anticipated attractions of summer 2024 has been a bust. What is going on with Top Thrill 2 at Cedar Point?

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Read the automated transcript below. Because it's a computer-generated transcript, it contains many errors and misspellings.

Chris (00:01.192)

More first energy documents, more shock and awe at how that utility did all its sleazy business at our expense. It's Today in Ohio, the news podcast discussion from cleveland.com and the Plain Dealer. I'm Chris Quinn here with Lisa Garvin, Lara Johnston and Courtney Astolfi finishing up her week filling in for Layla. Thank you very much for doing that Courtney. Next week she'll be back on City Hall doing the great work she does there.

Lisa (00:02.245)

energy documents more shock and awe and how that utility did all its sleazy business and how it experienced today in Ohio who's talking about the discussion.

Chris (00:30.08)

We received another batch of First Energy documents that had not been released publicly before and they contain some mighty interesting information about the bribe First Energy paid to the late Sam Randazzo, who later became head of Ohio's Utilities Commission. Courtney, what did we learn?

Lisa (00:47.419)

Well, these documents folks that we've been getting over time, this could be quite fascinating. And the one we received yesterday included a...

Courtney (00:49.413)

Well, these document troves that we've been getting over time just proved to be quite fascinating. And the one we received yesterday included a newly released memo that tells us that two top lawyers at First Energy and a senior accountant there knew about and helped process a \$4.3 million payment to Randazzo that the company later said was a bribe.

You know, these three top first energy officials who knew about this money to Randazzo was chief legal officer and senior vice president, Robert Reffner, chief ethics officer, Ebony Yaboa-Amanqua, and also a top accountant there by the name of Lissowski, Jason Lissowski. And the info we received really came in the form of

A memo, Luzowski had audited a few years back and a deposition he sat through in 2023. And that's what was really detailed in this new trove of documents. What we learned that was that this transfer to Randazzo happened about one month before DeWine appointed Randazzo to the PUCCO. We've known about this bribe from the criminal proceedings. It's really kind of the heart of the criminal cases against Mike Dowling and Chuck Jones.

But in this memo in deposition from Lizowski, he was telling us about how auditors needed to sign off on FirstEnergy's quarterly financial statement. And this memo he wrote talked about material weaknesses. He was trying to explain to the company's auditors how this payment

to Randazzo happened. This memo was written a few months after Householder was arrested.

but this was before the FBI raided Randazzo's house. And this audit memo was written right in the heart of everything starting to blow up with the feds. And in there, the accounting officer, Lissowski, mentioned this material weakness in the company's books. Anyone who reads an audit knows when you see the term material weakness, you keep your eyes open and you read what it has to say, because that's an important piece here. And Lissowski identified this payment as part of this.

Courtney (03:09.285)

So Luzowski tells us in that memo to auditors and when he was deposed last year, that chief legal officer, that chief ethics officer and himself were all aware of this \$4 .3 million payment to Randazzo that, you know, the company internally referred to it as a termination payment for Randazzo before he was gearing up to take the Pucco chair. But we now know the company says it was a bribe.

Chris (03:36.352)

Well, and we have text messages from Jones that make clear that they're trying to take care of Rondazo as he's headed to to the PUCO. This raises questions yet again about what the heck the federal Justice Department has been doing on this case in not charging the top officials that ran this bribery scheme. They've gone after the company and they've gone after the people that receive the bribes. But the decision makers to pay those bribes

have not been charged federally. And the more we learn about it, the more we realize this investigation by the feds barely existed once Dave DeVillers left the prosecutor's office. There's been almost nothing. We keep learning about key officials that were never interviewed. This is enlightening stuff. It says people should be charged with bribery and yet our federal justice department's not doing it. I think there's a fix in somewhere. This thing's still

stinks to the high heavens and we'll wait to see if Dave Yost gets anywhere with his charges against the top two guys.

Courtney (04:41.445)

Yeah, and some of kind of the nitty gritty details in here does make you raise your eyebrows, right? So as Lodzowski was kind of recounting this to the auditors, let's rewind to that infamous December 2018 meeting with DeWine in Houston. And they talked about the Randazzo appointment and then later Jones and Dowling went to Randazzo's house to talk some more. It was the next day that

This is what Jason Lizowski is telling us. Newly. was the next day after that meeting when Dowling and the chief ethics officer and the chief legal officer summoned Lizowski into a meeting. The goal for that meeting was to discuss the accounting implications of paying out a terminated contract. AKA that's how they were masking the bribe money. And Lizowski said the conversation didn't trigger any red flags in his mind.

especially because it was coming from the company's top legal and ethics executives. You know, it's just like kind of another tangent in this memo that I think is worth mentioning too. Wazowski's memo that we got our hands on also details instances of Chuck Jones and another executive who was fired by the company in 2020, steering contracts to personal acquaintances with no clear business purpose. So what is this pile of allegations and where do they go from here?

Chris (06:06.042)

But they get off. They've been walking free for four years, despite the evidence that has accumulated that is so clear. We have more stories coming from this tranche of documents, so keep checking out cleveland .com as we go through them. You're listening to Today in Ohio. Ohio voters amended the state constitution decades ago to make sure that the language about proposed amendments to the constitution on the ballot were accurate and neutral.

How did that come together, Lisa? And how have things gone so wrong?

Lisa (06:39.703)

The Ohio Ballot Board was established in 1974 after voters approved a proposed constitutional amendment that was proposed by lawmakers actually. So the ballot board was tasked with writing ballot issue summary language, also the language for and against each ballot issue that's normally published in a newspaper or otherwise distributed locally. It currently, you know, it has five members, the Secretary of State,

two Democrats, which are currently Senator Paula Hicks Hudson and Representative Terrence Upchurch, and two Republicans, currently Senator Theresa Gavarone and retired lobbyist William Morgan. Now in 1978, four years later, the ballot board's duties were expanded to include writing language for citizen -initiated amendments, kind of like the marijuana one that we had last fall. So Secretary of State Frank LaRose, his spokesperson, Dan Lushek says, the redistricting ballot language

came from both sides and the amendment itself. They say that this is nothing more than finger wagging bipartisan operatives who wanted the ballot board to favor their agenda. But as we recall, LaRose admitted that anti -abortion groups helped write the ballot language for

the November reproductive rights issue. So, and there's just like history. I mean, back in 1990, apparently there was a Lorraine Casino amendment that they wanted the words

gambling in the ballot language and evaluation of its impacts on the term and economic impact of Lorraine. But the ballot board didn't use gambling. They used games of chance instead and mentioned no impact statement. The issue failed. In 2012, they ordered changes to a similar redistricting reform that we're seeing today. The original language was written by then Secretary of State John Husted.

who omitted relevant information, misstated how the redistricting commission would be funded, and that vote back in 2012 failed two to one. So language can have an impact on outcomes.

Chris (08:42.72)

Yeah, although I do think Houston was more diligent in being neutral than Frank LaRose is. The problem with all of this is pretty much all of our democratic institutions and the way they're designed is that they are predicated on people largely acting in good faith, that they take an oath to serve the Constitution, to serve the people. And while we can disagree about policy and mechanics, it's largely in the public interest. Frank LaRose is none of that.

Frank LaRose is all about serving the Republican Party, not serving the people, in decision after decision. This is not a subjective discussion. It's not about people wanting their party to win. He's breaking the law. He is doing everything he can to turn these things, and his job is to be neutral. It's not to serve Republicans. It's to serve everybody, and it's not in good faith. So what we do as citizens now is we keep coming up with

constitutional amendments like this one that will get around the lack of good faith in our elected leaders. I wish we could get back to a day where the people who got elected lived up to their oaths to serve the Constitution and acted in the interest of us all. Frank LaRose just does not.

Lisa (10:02.619)

And I'm not sure we can get any relief from this current Ohio Supreme Court. I mean, look at the abortion amendment last November. They eliminated some technical phrasing about citizens of state from preventing somebody's abortion, but they left intact the words unborn child, whereas the backers wanted fetus instead. So the thumb is on the scale at all levels here.

Chris (10:24.018)

Except there is a Supreme Court set of races on the ballot and this is so egregious and everybody knows it's egregious that if they don't fix it, the Supreme Court races will be in play. So I think it would be a huge mistake both legally, the law is clear, they should reject this language, Franklin Rose is out of control, and the battle board. I mean, it's a shame that these folks all go along with him, but they also, they want to keep a Republican majority

They're going to endanger that if they do the wrong thing. So they should do the right thing because the right thing to do, but they should also do it for political expedience. You're listening to Today in Ohio. Without Nick Mulady, we might not have professional basketball in Cleveland. Of course, without Nick Mulady, we wouldn't have had a basketball arena in Richfield for all those years either. He died at age 93. Laura, what was remarkable about him?

Laura (11:19.662)

We might not even have the Guardians in Cleveland at this point if he hadn't swooped in to save them from playing 30 games a year in New Orleans. So I had never heard of this man and he was a just the kingpin of sports in Cleveland while he was here. He dominated the sports scene like basically no one has ever done before or since he was president of the Indians, the Cavaliers, two hockey teams all at the same time.

He founded the Cavs, put them in the NBA, built the Coliseum in Richfield Township, opened it up with a giant Frank Sinatra concert, and was basically the toast to the town. One of his favorite sayings was, I want to work hard, have some fun, and leave some footprints. He did leave after a little more than a decade of activity in Cleveland to become a Hollywood movie producer. But his...

His influence is so vast and his criticism was basically like you're not putting a lot of your own money into these teams, but he was really good at finding people who had money combining it, getting a collaborative and then buying that. But he bought and sold teams. He owned the Cleveland Arena for a while. So yeah, just a mastermind here.

Chris (12:33.716)

Yeah, I've been hearing about him the whole time at Ben and Cleveland. What he did all predated me by quite a bit, but he did a lot. The Richfield Coliseum never, never fails to spark a debate among people. They built that thing in the middle of nowhere. Frank Sinatra had a concert there to launch it. Lots of concerts there, famous concerts. We write about them as we write about historical concerts. And the Cavs played out there, but it was the middle of nowhere. And

The thought was for an arena that draws that much traffic, it should be downtown. Very different. You know, we're talking about the Brown Stadium right now. This is very different from that. The Brown Stadium is used for about 30 hours a year. So if that's in the middle of nowhere, who cares? But this really needed to be downtown because 200 nights plus a year, huge crowds go to it and feed the restaurants and everything else that serve Cleveland.

Laura (13:28.398)

So this was the early 70s. So the idea of creating that downtown district was not the same as it was 30 years later or 20 years later when they built Gateway. Now I am from Northern Summit County. So it was very close to my house and that's where we used to go see Cavs games. My parents never go to Cleveland and what Maletti had said to his critics was most of the people who say that are suburbanites, I'll tell them all building Cleveland when they move back to Cleveland. So it had the.

It had the exit ramps and the entrance ramps right there. It had all the parking you could want. I understand it was not creating economic development for the city. I get the whole point of being in a downtown and East Foothill wouldn't exist without Gateway. But at the time, I don't think that's what planners were thinking about. They were thinking about the suburbanites who were spreading further and further out from the city. And yeah, you're right. At this point, it's still not a super developed area. It's in Richfield Township in between Macedonia and the village of Richfield.

So, I mean, Peninsula is like three miles down the road, but it's still pretty as remote as you can get in Northeast Ohio, really.

Lisa (14:32.423)

It's out there. It's out there.

Chris (14:36.386)

It's interesting they called it the Coliseum because you know the original Coliseum lasted for millennia and this one lasted a few decades.

Laura (14:41.058)

Mm -hmm.

Laura (14:44.844)

don't think there was anything wrong with it when they tore it down. It wasn't like it was structurally unsound or there was a problem. When I was a freshman in high school, of the first things I ever wrote for my high school paper was an editorial on why they should not

build gateway because the Coliseum was just fine. But the loge was a new idea then, but it never really gained super amount of traction at the Coliseum because it was the highest you could go. It was not a good seat to see any.

Lisa (15:13.285)

I guess I'm the only one here on this podcast from the Nick Mulletti era and we loved him and loved what he did for Cleveland. Yeah, so I don't know. I never liked the Richfield Coliseum. I have a long story about a Led Zeppelin concert that didn't happen there, but anyway.

Chris (15:13.375)

All right.

Chris (15:30.13)

Okay. Like I said, you bring up the Richfield Calcium, it sparks a conversation in Northeast Ohio. And you are listening to Today in Ohio. We talked yesterday about the increasing demand for power in Ohio without a comparable increase in power generation. We were talking, hopefully, about things like nuclear wind and solar power, but our illustrious Public Utilities Commission went the anti -green way Thursday. Laura, what did these folks do?

Laura (16:00.046)

Well, could you expect more from the PUCO because they approved \$105 million for coal subsidies that the Ohio Consumer Council was saying, no, you shouldn't do this, but hey, it's in the law. It's approved as part of HB6 that never got repealed. So they're just handing over these subsidies to coal plants. And this was part of a bunch of subsidy charges that were approved by the PUCO that the Ohio Consumers Council and other advocates argued

for rehearings basically not to pass it. But they said that the coal plant subsidies that the utilities failed to demonstrate the plants were operated prudently in the best interest of consumers and consistent with how a reasonable merchant coal plant operator would have bid the plants into the market. My guess is these are not profitable without our subsidies.

Chris (16:49.73)

Well, and let's remember, all made possible by the very corrupt House Bill 6.

Laura (16:53.186)

Yeah. And householder and first energy.

Chris (16:57.196)

Yeah, it's just a shame. We really should be moving forward with energy generation. We have plenty of space to put up more wind farms and solar and, you know, start putting in the plans for the long process of another nuclear plant. But we go with coal, which we know is a disaster for our area.

Laura (17:16.022)

And remember, one other part about HB6 is it stripped Ohio law of any kind of green energy requirements, that we were on the road to having to get some of our electricity from that, and we've killed the wind farm that was supposed to be for Lake Erie. yeah, we have no plans. Remember, we've talked on this podcast about how local governments can outlaw solar and wind farms, but they can't outlaw natural gas drilling.

Chris (17:21.74)

Right.

Chris (17:37.537)

I

Chris (17:40.818)

I know it's just there are legislature because of gerrymandering. just cheat. The PUCO is a disaster. We probably need a constitutional amendment to redo it and put real people on it who represent us instead of people who are bought and paid for by the utilities. And you're listening to Today in Ohio. The Democrats have had a week of powerful speeches at their national convention, which seem to be energizing many Americans. Not all.

We are focusing now and through the election on our Ohio guy who's on the presidential ballot, JD Vance. How is he trying to shut down the energy that's been coming out of the speeches this week, Lisa?

Lisa (18:21.019)

This is my third Vance story this week. guess I'm on the Vance beat. But if this isn't the pot calling the kettle black, I don't know what is. But at a Wednesday rally with Donald Trump in North Carolina, JD Vance urged his Democratic friends, if he has any, to pump the brakes on anti -Trump rhetoric while talking with, he was saying this while talking with reporters. And he told them, when you tell people that he must be stopped at all costs, some people will take matters into their own hands.

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NEWS

Facebook, Nvidia Make High Court Case Against Investor Suits

The tech giants have filed briefs urging the justices to close the “floodgates” of securities lawsuits the companies claim have been opened by the U.S. Court of Appeals for the Ninth Circuit.

August 21, 2024 at 07:00 PM

United States Supreme Court



Jimmy Hoover



Meta and Nvidia may be trying to position themselves at the forefront of the artificial intelligence, but both companies have been dogged by potentially costly investor lawsuits for years-old stock drops.

In separate cases set to be heard by the U.S. Supreme Court this fall, the tech giants have filed briefs urging the justices to close the “floodgates” of securities lawsuits the companies claim have been opened by the U.S. Court of Appeals for the Ninth Circuit.

Meta, Facebook’s parent company, and Nvidia are defending against claims—revived by the appeals court—that they misled investors in violation of Section 10(b) of the Securities Exchange Act. Facebook’s case centers around two stock price collapses in 2018 that wiped out more than \$200 billion from the company’s market capitalization.

The first occurred after news reports surfaced detailing the exploitation of Facebook user data by political consulting firm Cambridge Analytica to boost former President Donald Trump’s campaign. The second drop occurred a few months later after additional reporting about Facebook’s practice of “whitelisting” Apple, Microsoft and other third parties by giving them access to user friend data.

Nvidia, meanwhile, was sued by investors after reporting low sales and an excess supply of one of its products, a device used in smartphones and computers called a graphics processing unit that increases the speed of rendering graphics. Nvidia’s “GeForce” GPU had been designed for gamers but became very popular with cryptocurrency miners.

When Nvidia launched a cryptocurrency-focused GPU known as “The Crypto SKU,” sales of GeForce slumped and eventually the company’s stock price followed suit.

Opening Salvos to Justices

With oral arguments slated for November, the companies filed their opening merits briefs this month urging the Supreme Court to reverse the Ninth Circuit and have both cases thrown out.

Although the cases involve slightly different legal questions, they both warn that the appeals court’s rulings in their respective cases would expose companies to a tide of litigation, or else lead to unnecessary “overdisclosure” in securities filings.

“Public companies often cannot afford to gamble on the ruinous liability that securities class actions can impose, leading to extortionate settlements if early dismissal is denied,” Facebook wrote. “[The] strong financial incentive for public companies to settle securities class actions, even for substantial amounts, underscores the need to weed out meritless claims as early as possible.”

In Facebook’s case, lead plaintiff Amalgamated Bank claims the company submitted a false Form 10-K to the U.S. Securities and Exchange Commission in 2016 by casting misuse of user data as a hypothetical risk that could harm the company’s bottom line. In reality, the lawsuit alleges, that misuse was already occurring when harvested user data was sold to Cambridge Analytica to influence American elections.

A panel of the Ninth Circuit held that the plaintiffs’ allegations about the Form 10-K were sufficient to meet the heightened pleading standards of the 1995 Private Securities Litigation Reform Act, enacted to deter frivolous securities lawsuits.

But Facebook said public companies need not disclose whether something that poses a future risk has occurred when that past event had no effect on their bottom line.

“A reasonable investor reading a risk disclosure required by Item 105 would understand the statement to advise only about the possibility of a risk that may affect the company in the future,” Facebook’s lawyers wrote in their opening brief. “Put simply, forward-looking risk disclosures do not make any implied assertion about previous events and the present risk of harm they created.”

Facebook’s lead Supreme Court attorney is Kannon Shanmugam of Paul Weiss Rifkind Wharton & Garrison.

In support of Facebook’s position, a number of groups filed amicus briefs warning that the Ninth Circuit’s rule would lead to lengthy and unnecessary risk disclosures in securities filings, despite the SEC’s efforts to simplify those disclosures for investors.

“The SEC and its officials have recognized that information overload can hinder informed decision making,” argued a group of former SEC officials. “Nevertheless, the decision below demands that companies saturate their disclosures with overwhelming information about past events despite no reasonable belief that these events present risks of harm to the business.

Paying for Pleading?

Investors suing Nvidia claim its CEO, Jensen Huang, made statements concealing the company’s reliance on the volatile crypto market, in contradiction of internal company sales data allegedly reviewed by Huang. But rather than actually pleading the content of those internal documents, Nvidia says the plaintiffs simply hired an expert firm, the Prysm Group, to “create data” about the company’s sales that the company would have known about.

In accepting that theory, [Nvidia said](#) the appeals court disregarded the Private Securities Litigation Reform Act.

“The Ninth Circuit’s lax interpretation renders the PSLRA toothless,” the company wrote in a brief filed by veteran Supreme Court attorney Neal Katyal of Hogan Lovells.

“In sum, Plaintiffs lacked a factual basis to claim that Nvidia’s statements were false, so they hired an expert to manufacture the facts they needed,” the company said. “That is precisely the kind of fishing expedition that the PSLRA was supposed to stop. Affirming the decision below would create an easy roadmap for any future plaintiffs to implement, threatening to take the nation back to the pre-PSLRA era when ‘nuisance filings’ were ‘rampant.’”

In support of the company’s position, former SEC commissioner Joseph Grundfest, now a law professor at Stanford, argued in [an amicus brief](#) that the Ninth Circuit’s decision will “open the floodgates to a new form of securities fraud pleading in which plaintiffs recruit paid experts to generate opinions based on sources of questionable reliability, and then rely on those opinions masquerading as ‘facts’ to defeat motions to dismiss.”

“The opinion below is thus a roadmap for plaintiffs seeking to buy their way out of PSLRA pleading requirements,” he wrote. “Congress never intended this result.”

The cases are *Facebook v. Amalgamated Bank*, No. 23-980, and *Nvidia v. E. Ohman J:Or Fonder AB*, No. 23-970.

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Nvidia has more friends than Facebook in cases at US Supreme Court

 [reuters.com/legal/transactional/column-nvidia-has-more-friends-than-facebook-cases-us-supreme-court-2024-08-21](https://www.reuters.com/legal/transactional/column-nvidia-has-more-friends-than-facebook-cases-us-supreme-court-2024-08-21)

Alison Frankel

The logo of Nvidia Corporation is seen during the annual Computex computer exhibition in Taipei, Taiwan May 30, 2017. REUTERS/Tyrone Siu/File Photo Purchase Licensing Rights , opens new tab

Aug 21 (Reuters) - For securities class action defendants at the U.S. Supreme Court, calamity is always imminent.

In case after case, businesses and their backers routinely warn the justices that unless they tighten standards and make it harder for investors to prevail, plaintiffs' lawyers will flood the courts with dubious class actions whenever a company's share price declines.

That was certainly true earlier this year when both chipmaker Nvidia (NVDA.O) , opens new tab and Meta Platforms' (META.O) , opens new tab subsidiary Facebook asked the Supreme Court to grant review of decisions by the 9th U.S. Circuit Court of Appeals that allowed shareholders to proceed with fraud class actions.

Though their cases present quite idiosyncratic facts, the two companies, as I've told you, both argued that the 9th Circuit improperly lowered the high pleading standard for shareholder suits. The Supreme Court will presumably use the two cases to clarify that standard.

Both Nvidia , opens new tab and Facebook , opens new tab filed their opening merits briefs earlier this month. Both, predictably, asserted that the issues they have presented to the court have implications far beyond their particular cases.

Facebook's case revolves around risk disclosure. The 9th Circuit allowed investors to proceed with their theory that the company's 2016 annual filing to the U.S. Securities and Exchange Commission was fraudulent because even though Facebook warned in its "risk factor" disclosures that third parties might misuse data collected from Facebook customers, the company did not reveal that Cambridge Analytica had already done so.

Facebook's Supreme Court counsel from Paul, Weiss, Rifkind, Wharton & Garrison argued in their Aug. 9 brief that the Supreme Court must confirm that companies are not required to include past events in forward-looking risk disclosures. Otherwise, Facebook said, businesses will be forced to lard up their disclosures to the point that they're useless to investors — or else face "gotcha" class actions alleging inadequate risk disclosures.

Nvidia, represented by Hogan Lovells, contends in its Aug. 13 brief that the 9th Circuit erred by allowing shareholders to cite an expert witness report in a class action accusing the company of misrepresenting its dependence on the volatile crypto mining industry in 2017 and 2018. In Nvidia's telling, shareholders hired an economics expert to estimate Nvidia's sales to crypto miners, then relied on the expert's analysis — rather than actual internal Nvidia documents — to allege the falsity and fraudulent intent of the company's statements.

Like Facebook, Nvidia argued that shareholder lawyers will be emboldened to file meritless class actions unless the Supreme Court overturns the 9th Circuit's decision.

So how worried are other businesses about the issues presented in the Nvidia and Facebook cases?

Friend-of-the-court briefs can be a rough proxy for corporate concern, so I've been tracking amicus filings in the Supreme Court dockets for the Nvidia [\[link\]](#), opens new tab and Facebook [\[link\]](#), opens new tab cases. The final tally: Nvidia received amicus backing from seven pro-business groups; Facebook attracted support from four.

That doesn't necessarily mean potential corporate defendants are more afraid of shareholder class actions that rely on expert witness reports than of securities litigation based on the failure to disclose the risk of past events. But since the briefing schedules in the two cases are quite similar, it's fun to compare who showed up in which.

The U.S. Chamber of Commerce, the Washington Legal Foundation and the Securities Industry and Financial Markets Association made appearances in both cases, echoing warnings from Nvidia and Facebook about unwarranted shareholder litigation unless the Supreme Court reins in the 9th Circuit.

In Nvidia, those three groups were joined by the National Association of Manufacturers and the National Retail Federation in a single amicus brief [\[link\]](#), opens new tab. In Facebook, the Chamber and SIFMA teamed up [\[link\]](#), opens new tab, but the Washington Legal Foundation filed its own brief [\[link\]](#), opens new tab.

Facebook also got backing from the Society for Corporate Governance, which told [\[link\]](#), opens new tab the Supreme Court that investors will be worse off if companies must defensively list every past event with future consequences in their risk disclosures.

In the Nvidia case, the Atlantic Legal Foundation [\[link\]](#), opens new tab and The Digital Chamber [\[link\]](#), opens new tab filed solo briefs, each arguing that the Supreme Court should not countenance the use of an expert witness report to meet pleading standards for securities class action claims. The Digital Chamber said that concern is especially acute for cutting-edge crypto companies, "where the relative unknown can be spun by opportunistic plaintiffs and their experts into fraud-by-hindsight allegations."

Facebook, meanwhile, got amicus backing from a bigger array of law professors than Nvidia. Eight academics and former SEC officials filed a joint brief [\[link\]](#), opens new tab arguing that the

9th Circuit's decision undermines the SEC's recent efforts to help investors distinguish between material risks and overly cautious, litigation-driven disclosures.

Only one law professor, Joseph Grundfest of Stanford University, filed an amicus brief [↗](#), opens new tab in the Nvidia case. Grundfest argued, with his trademark verve, that expert reports are opinions, not facts, so under the law governing private securities litigation, cannot be the basis of shareholder fraud complaints.

"This case can be resolved with one of the shorter opinions in recent Supreme Court history," Grundfest argued.

Nvidia counsel Neal Katyal of Hogan Lovells, Facebook counsel Kannon Shanmugam of Paul Weiss and Facebook shareholders' counsel Kevin Russell of Goldstein, Russell & Woofert all declined to comment on the amicus filings in support of the companies.

Deepak Gupta of Gupta Wessler, who represents Nvidia shareholders, sent an email statement. "The corporate bar has long sought to roll back the rights of investors and shareholders, so it's no surprise to see these amicus briefs," Gupta said. "The plaintiffs here provided specific allegations about how the company and its CEO hid their reliance on the unstable crypto mining market. We look forward to arguing before the U.S. Supreme Court to protect investors' access to justice."

Read more:

In Nvidia and Meta cases, Supreme Court will review shareholder class action dismissal rules

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Reporting By Alison Frankel

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



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Federal Judge Awards \$1M to Plaintiff's Counsel Following No Payment Shareholder Derivative Settlement

The plaintiff noted the substantial benefits of the reforms, which included the creation of a new audit committee and an independent director position to sit on the board.

August 16, 2024 at 03:06 PM

Securities Litigation

By Allison Dunn | August 16, 2024 at 03:06 PM



The original version of this story was published on [Law.com](https://www.law.com)

A federal judge this week [awarded plaintiff's counsel \\$1 million](#) after having approved a shareholder derivative settlement against a renewable energy company's board of directors and executives this month.

On Wednesday, U.S. District Judge Nathaniel M. Gorton of the District of Massachusetts made the award to Thomas J. McKenna of the New York-based firm Gainey McKenna & Egleston and local attorney Michael P. Utke.

The attorneys represented the plaintiff in a securities derivative settlement against XL Fleet over its 2020 merger with XL Hybrids. In the case, captioned *Kay v. Frodl*, the settlement comprised a series of immediate corporate reforms to strengthen the company's oversight on compliance that are to remain in effect for four years, the order said.

The parties ultimately disputed the degree of complexity involved in the securities litigation. The plaintiff's counsel pushed for a multiplier of approximately 2.5, given the range approved in other security and stockholder derivative actions.

The defendants, represented by counsel with Troutman Pepper Hamilton Sanders, argued that the reforms were "not nearly as significant as plaintiff suggests." The defendants also claimed that the mean multiplier in similar litigation was around 0.94 and said that no more than \$200,000 in fees should be awarded, according to the order.

The court concluded that both parties made "persuasive arguments in different respects." In part siding with the defendants, Gorton agreed that the plaintiff relied on cases that are distinguishable and acknowledged a 2014 California district court ruling in *In re Oclaro Derivative Litigation* in which the fees were reduced, because the plaintiffs "essentially piggybacked" on related securities actions.

However, Gorton said that the present case was not settled immediately, and the court gave "credence to plaintiff's effort to facilitate a global resolution," which also resolved a related action against the company, now known as Spruce Power, in a Delaware federal court.

"An analysis of the factors above demonstrates that both parties make persuasive arguments in different respects. Defendant understates the impact of the independent director and plaintiff overstates the comparability of the cases she cites as analogous. The appropriate award is in between the divergent poles suggested by the parties," Gorton said, concluding a multiplier of one was suitable in the present case.

The case centered on the plaintiff shareholder, Val Kay, who accused the Boston-based company's board members and executives—including Deb Frodl, XL Fleet's chair, the former chief executive officer, Eric Tech, among others—of approving the merge/r through a series of false and misleading statements about the company's prospects and future revenue projections. A 2021 report detailed the alleged misrepresentations and actual condition of the company, which led stock prices to significantly decline, according to the court's order.

Kay filed the action against XL Fleet's leaders in 2022.

After granting the plaintiff's motion for final approval of the settlement on Aug. 8, Gorton considered the \$2.5 million attorney fee award requested by the plaintiff. The plaintiff noted the substantial benefits of the reforms, which included the creation of a new audit committee and an independent director position to sit on the board, among others. Plaintiff's counsel further argued their efficiency in the matter supported such an award.

"At oral argument, plaintiff clarified that, while a majority of directors prior to the settlement were 'independent' as defined by the New York Stock Exchange guidelines, the board was not majority independent in practical terms because three of the six directors were allegedly involved with the purported misrepresentations at the heart of the derivative action," Gorton wrote. "The court agrees that to the extent several of the reforms are redundant of preexisting conditions at the company, the formalization of good governance practices is essential to maintaining compliance with the security laws on a permanent basis."

The plaintiff pointed to several awards that supported the higher amount, including a \$4.16 million fee award in the 2022 case, *In re Southern Co. Shareholder Derivative Litigation* in the U.S. District Court for the Northern District of Georgia, as well as a \$3.5 million award in a similar derivatives action that was settled at the pleading stage in *In re CoreCivic, Inc. Shareholder Derivative Litigation* in 2022 in the U.S. District Court for the Middle District of Tennessee.

The defendants claimed that such cases were distinguishable from the present, because most of the attorney fees were negotiated and agreed to by all parties, and the settlements included significant payments on top of governance reforms.

"The company is pleased that the judge denied the plaintiff's attorneys' request for \$2.5 million in fees and reduced the amount by over 50%," said the defendants' counsel, Jay Dubow, who is based in Philadelphia and co-leads Troutman Pepper's Securities Investigation and Enforcement Practice Group.

A message seeking comment from the plaintiff's attorneys was not immediately returned.

Ardelyx Hit With Investor Suit Over Medicare Program Choice (1)

By Matthew Bultman

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 1:24-cv-12119](#)

Bloomberg Law News 2024-08-23T10:39:3595606927-04:00

Ardelyx Hit With Investor Suit Over Medicare Program Choice (1)

By Matthew Bultman 2024-08-19T11:30:08000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 1:24-cv-12119](#)

Ardelyx Inc. was sued by a shareholder who alleges the biotech company misled investors about whether it would seek to include its kidney disease treatment in a Medicare program.

Ardelyx “shocked the market” when it announced it wasn’t applying to include Xphozah in the transitional drug add-on payment adjustment program, causing a drop in its stock price, investors said in a proposed class action filed Friday in the US District Court for the District of Massachusetts.

“Had Plaintiff and the other members of the Class known the truth, they would not have purchased or otherwise acquired said securities, or would not have purchased or otherwise acquired them at the inflated prices that were paid,” the complaint said.

Xphozah is approved to reduce elevated levels of phosphorus in the bloodstream in patients who have chronic kidney disease and are on dialysis.

The Centers for Medicare and Medicaid Services has plans to include Xphozah and other oral-only drugs in a payment bundle system that reimburses facilities that provide renal dialysis services.

Manufacturers can apply to include their drugs in the transitional program, known as TDAPA, which the government says helps facilities incorporate new drugs and provides additional payments for associated costs.

Opting not to apply to include Xphozah in TDAPA, Massachusetts-based Ardelyx said adding it to the program could restrict patient use of the drug. The company has also sued CMS over its plan to include Xphozah in the payment bundle system.

“This sudden change in strategy for XPHOZAH shocked the market,” the lawsuit said. Ardelyx had indicated in previous filings with the Securities and Exchange Commission it intended to apply for TDAPA, the lawsuit said.

An Ardelyx spokesperson said the company is aware of the lawsuit but doesn’t comment on pending litigation.

Pomerantz LLP and Wohl & Fruchter LLP represent the investor.

The case is Yarborough v. Ardelyx, Inc. , D. Mass., No. 24-cv-12119, complaint 8/16/24 .

(Updates with response from Ardelyx in ninth paragraph.)

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Satellite Company Spire Sued Over 'Space as Service' Accounting

By Martina Barash

- **COURT:** E.D. Va.
- **TRACK DOCKET:** [No. 1:24-cv-01458](#)

Bloomberg Law News 2024-08-23T11:09:20230246715-04:00

Satellite Company Spire Sued Over 'Space as Service' Accounting

By Martina Barash 2024-08-21T11:59:26000-04:00

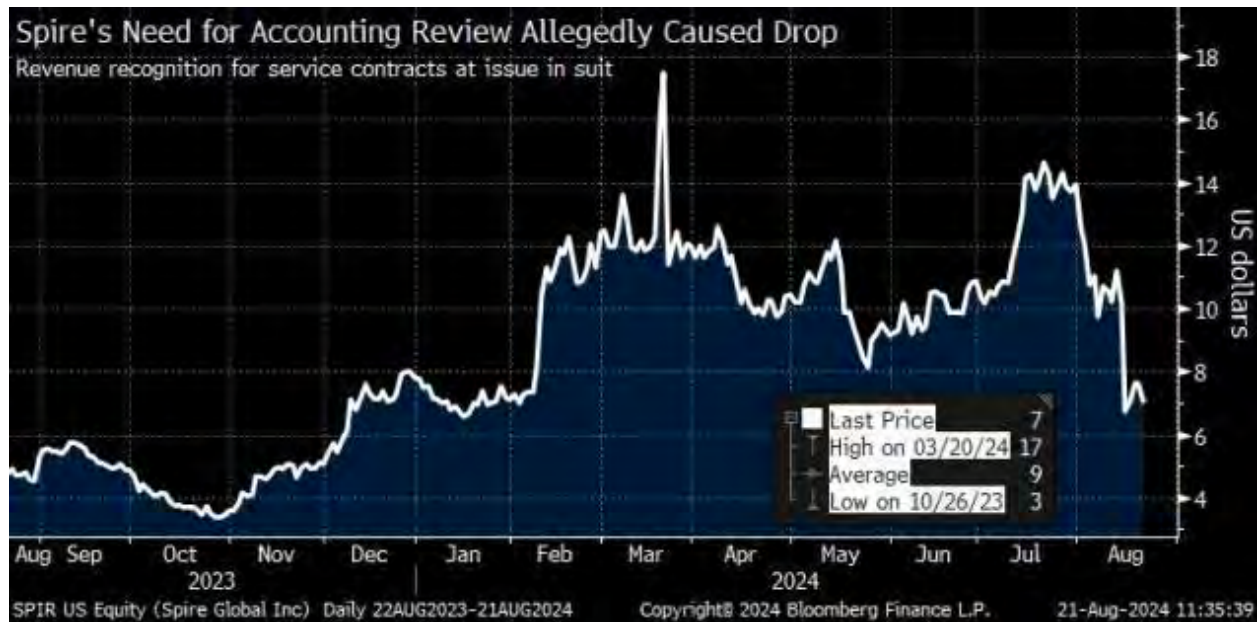
- **COURT:** E.D. Va.
- **TRACK DOCKET:** [No. 1:24-cv-01458](#)

Spire Global Inc. misled the market with financial reports that reflected improper accounting for multi-phase satellite services, leading to a 34% stock drop when it announced a review, an investor alleges.

The company operates "nanosatellites" and provides data for industries such as shipping, aviation, and weather forecasting, according to the complaint, which was filed Tuesday in the US District Court for the Eastern District of Virginia. Spire offers bundled services that allow clients to send their own sensors and software into space, shareholder Michal Bousso says.

Spire's financial reporting for fiscal year 2023 and the first quarter of 2024 was called into question when it announced on Aug. 14 that it was reviewing its accounting practices for contracts in its "Space as a Service" business, Bousso says. The company pointed to "the potential existence of embedded leases of identifiable assets in the Contracts and the related recognition of revenue for pre-space mission activities," according to the complaint.

Spire's stock price fell 34% the following day, closing at \$6.75 per share. The stock has experienced at least two steeper percentage drops, according to data compiled by Bloomberg.



There are hundreds or thousands of members of the proposed class, comprised of those who acquired Spire stock between March 6, 2024 and Aug. 14, 2024, inclusive, the complaint says.

Bousso seeks damages on his securities fraud claims.

Spire didn't immediately respond to an email requesting comment.

Butler Curwood PLC, Glancy Prongay & Murray LLP, and Frank Cruz, who practices in Century City, Calif., represent Bousso.

The case is Bousso v. Spire Global, Inc., E.D. Va., No. 1:24-cv-01458, complaint 8/20/24.

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Musk's \$56 Billion Pay Gambit Risks Endless Corporate Do-Overs

By Mike Leonard

- Judge weighs reinstating pay package after shareholder vote
- Unprecedented move could be felt in boardrooms, courtrooms

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Musk's \$56 Billion Pay Gambit Risks Endless Corporate Do-Overs

By Mike Leonard 2024-08-20T13:09:09000-04:00

- Judge weighs reinstating pay package after shareholder vote
- Unprecedented move could be felt in boardrooms, courtrooms

Elon Musk's attempt to revive his record \$56 billion compensation at Tesla Inc. breaks from a pillar of corporate law by raising the specter of deals that never really close and court fights that never truly end.

The billionaire, wielding an unprecedented investor vote, is seeking a redo of the landmark ruling that knocked him off his perch as the world's wealthiest person. "Tesla's stockholders have spoken," Musk and other board members said in a court filing. They called the vote to reinstate Musk's pay package an example of corporate democracy in action.

The judge who issued the decision indicated at a hearing this month that she's skeptical of the effort, and there's a consensus that she's unlikely to grant the request. But if she were to hold 18 months after trial that investors had retroactively ratified the equity grant to Musk, the novel move could ripple across courtrooms and boardrooms.

A ruling for Musk would spell "a dangerous paradigm shift," opening the way for corporate governance by mob, according to the shareholder who challenged the compensation deal. "Courts would be subject to vox populi, and stockholders could overturn trial judgments." It would "dramatically upend settled principles of Delaware law," retired University of Delaware law professor Charles Elson said in a friend-of-the-court brief.

"It's never been done before, and there's a really good reason why," said Tulane University law professor Ann Lipton. "Every time something is challenged, if you don't like how it came out at trial, do you just hold another shareholder vote, and then you have to analyze whether that vote was sufficient and proper? How many times do we have to try this case?"

There are reasons to think the impact might be more limited, though, stemming from the "deeply unusual circumstances" posed by Musk's combination of wealth, influence, and litigiousness, according to University of Michigan law professor Gabriel Rauterberg. It seems unlikely most other corporate leaders would even try to override a court ruling at the shareholder ballot, let alone prevail, Rauterberg said.

What looks like a corporate law problem, in other words, may be an Elon Musk problem.

'The System Breaks Down'

The twist in the long-running case comes about six months after Chancellor Kathaleen St. J. McCormick, chief judge of Delaware's Chancery Court, ruled that a Tesla board dominated by Musk shirked its duties in yielding to the clout of its "superstar CEO" when it set his pay in 2018.

The decision in January inspired a barrage of attacks by Musk and Tesla's retail investors on the elite business court that delivered the ruling. With some worrying publicly about Delaware's standing as America's corporate capital, Musk pledged to move the pioneering electric-vehicle maker to Texas, a state seen as friendlier to controlling stockholders.

For months it looked like the only major issue left for McCormick was the fee request by the lawyers leading the litigation, who were asking to be paid in Tesla shares worth about \$7 billion. But as the company meeting approached, the plan to reincorporate and the proposal to restore Musk's compensation began to dominate increasingly acrimonious court filings. Tesla's investors overwhelmingly approved both proposals in June.

The judge's apparent reluctance to revise her 200-page ruling reflects concerns about its potential to undermine the integrity of the court, according to Lipton. A central issue in corporate cases involving a shareholder vote is whether investors were given truthful information and the chance to make an uncoerced choice. McCormick signaled she's leery of tackling those questions from scratch after six years of litigation.

"I understand from a straight-up business perspective, if shareholders want it, shareholders should have it," Lipton said. "But this process is meant to determine if shareholders really do want it. There has to be some kind of respect for court procedures, or the system breaks down."

There's really no legal mechanism for an outright do-over, even if there's little question Tesla's investors now favor the pay package, according to Southern Methodist University law professor Carliss Chatman. "The litigation is still about the original vote," Chatman said. "We can't just reverse-engineer it."

Deal Leverage

What happens when a transaction finally lands before a judge is only one concern. The prospect of multiple mulligans could also open a side door around corporate laws that encourage dealmakers to commit to minority shareholder protections up front, said University of Pennsylvania law professor Jill Fisch. That would tilt the scales even further toward powerful insiders during merger or compensation talks, according to Fisch.

"There are lots of situations where shareholders might be kind of over a barrel, and half a loaf is better than none," she said. "Then if a judge doesn't find it fair, and you can go back and have another vote—that seems to completely undo the process Delaware law has designed to limit controlling stockholder leverage."

Mergers and buyouts, in particular, often represent take-it-or-leave-it propositions for minority investors, and the prospect of losing in court can keep insiders honest when they set the terms unilaterally, according to Fisch. If there's no downside for the dealmakers other than the chance of a redo, they have little incentive to propose a fair transaction in the first place, she said.

But the idea of writing off the pay proposal's greater than 70% support among shareholders is troubling, said Widener University law professor Lawrence Hamermesh. Tesla's investors weren't "so much rejecting the court's decision as affirming the equity grant with the benefit of 20/20 hindsight," according to Hamermesh.

"If you think stockholder voting means anything, why would you not give that effect?" he said.

On the other hand, a decision restoring the pay package would risk "destroying the fiduciary duty of loyalty"—the bedrock of corporate law—by giving insiders endless bites at the apple when they betray the companies they lead, according to Elson. "If you don't like a ruling, you can just ask shareholders to overturn it," he said.

Musk the Outlier

Loyalty to shareholders is a broad category, though, and not all fiduciary breaches are unforgivable, according to Rauterberg. Approving of Musk's pay and his outsize role in setting it is a far cry from voting to excuse fraud or looting, and the nature of the breaches at Tesla would likely "limit the precedential impact" of restoring the compensation, he said.

"It's actually pretty unusual for a loyalty violation to be a colorable candidate for this type of ratification," Rauterberg said. "Loyalty is sort of a continuum between things that are just about price and process, versus extremely problematic, deviously self-interested or predatory behavior. This feels like it's on the more innocent end."

Musk also undeniably represents a special case, according to Chatman. "It's possible no one else tries this and it never comes up again," she said.

Chatman pointed to his “cult of personality” among Tesla’s base of retail investors, who have written to McCormick by the thousands urging her to deny the \$7 billion fee bid.

“He’s an outlier, but every generation has an outlier,” she said. “There’s always some demagogue with a whole lot of money who tests the checks on our system. What’s even the point of all these rules and processes if Elon can just have his shareholders vote over and over again until he finally ends up getting what he wants?”

The case is *Tornetta v. Musk*, Del. Ch., No. 2024-0862 .

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Macquarie 'Half-Truth' Claims OK'd After Supreme Court Ruling

By Martina Barash

- Several claims return to district court under 2nd Cir.
- Top court decision left various allegations untouched

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Macquarie 'Half-Truth' Claims OK'd After Supreme Court Ruling

By Martina Barash 2024-08-19T15:22:32000-04:00

- Several claims return to district court under 2nd Cir.
- Top court decision left various allegations untouched

A suit by Macquarie Infrastructure Holdings LLP investors has mostly survived a recent US Supreme Court decision in their case holding that a "pure omission" can't support a securities fraud claim, the Second Circuit ruled Monday.

Allegations that the conglomerate omitted information about a regulatory trend and its effect on Macquarie's fuel oil storage business must be excised from the proposed class action under the high court's ruling, the appeals panel said. But securities fraud claims under Section 10(b)(5) of the Securities Exchange Act that are based on alleged "half-truths" can still proceed, the panel said in an unsigned, unpublished order.

Further, the Supreme Court's opinion didn't disturb the panel's previous analysis green-lighting Macquarie investor claims related to insider trading and for misrepresentations in registration statements and prospectuses, Judges Pierre N. Leval, Reena Raggi, and Myrna Pérez said.

Investors sued Macquarie in 2018, then known as Macquarie Infrastructure Corp., for failing to disclose that a new rule would eliminate nearly half of its business. The lead plaintiff, Moab Partners LP, alleged the International Maritime Organization's impending regulation restricting No. 6 fuel oil would affect Macquarie because it owned numerous fuel tanks for that type, which would have to be repurposed at considerable expense. But Macquarie didn't disclose the extent of its No. 6 tank holdings, the anticipated repurposing expense, and other factors, the investor said.

The suit included the public offering-related claims, which also pulled in underwriter Barclays Capital Inc. as a defendant.

The US District Court for the Southern District of New York dismissed the suit in its entirety. The US Court of Appeals for the Second Circuit in December 2022 agreed that some challenged statements couldn't be sued over but revived the rest of the suit, saying Moab adequately alleged "actionable omissions," including half-truths.

Macquarie brought the case to the Supreme Court on the question of whether the failure to make a required disclosure of known trends under Item 303 of the Security and Exchange Commission's Regulation S-K can support a claim under Section 10(b), "even in the absence of an otherwise-misleading statement."

The parties appeared to be in agreement on that relatively narrow question at oral argument. The justices ruled unanimously in April that a "pure omission" in an SEC filing can't give rise to a securities class action without some statement shareholders can point to that's misleading, and they sent the case back to the Second Circuit.

"In the Macquarie opinion, the Supreme Court did not question this Court's previous analysis of Moab's Count One claims under Rule 10b-5(b) pertaining to 'half-truths,'" the Second Circuit said. And the high court declined to give an opinion about whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions, the appeals court said. Those provisions address a "device, scheme, or artifice to defraud" and a fraudulent "act, practice, or course of business," respectively.

The Second Circuit panel reiterated its previous conclusions reviving the case, except for the now forbidden Section 10(b) and Rule 10b-5(b) claims relying on a "pure omission" theory.

Bernstein Litowitz Berger & Grossmann LLP represented Moab and the proposed class. Winston & Strawn LLP and Richard W. Reinthaler, who practices in Pinehurst, N.C., represented Macquarie and the individual defendants. Steptoe LLP represented a unit of Macquarie, and Paul, Weiss, Rifkind, Wharton & Garrison LLP represented Barclays.

The case is *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, 2d Cir., No. 21-02524, unpublished 8/19/24.

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MediaAlpha Sued by Investor for Info on Insider Trading Claims

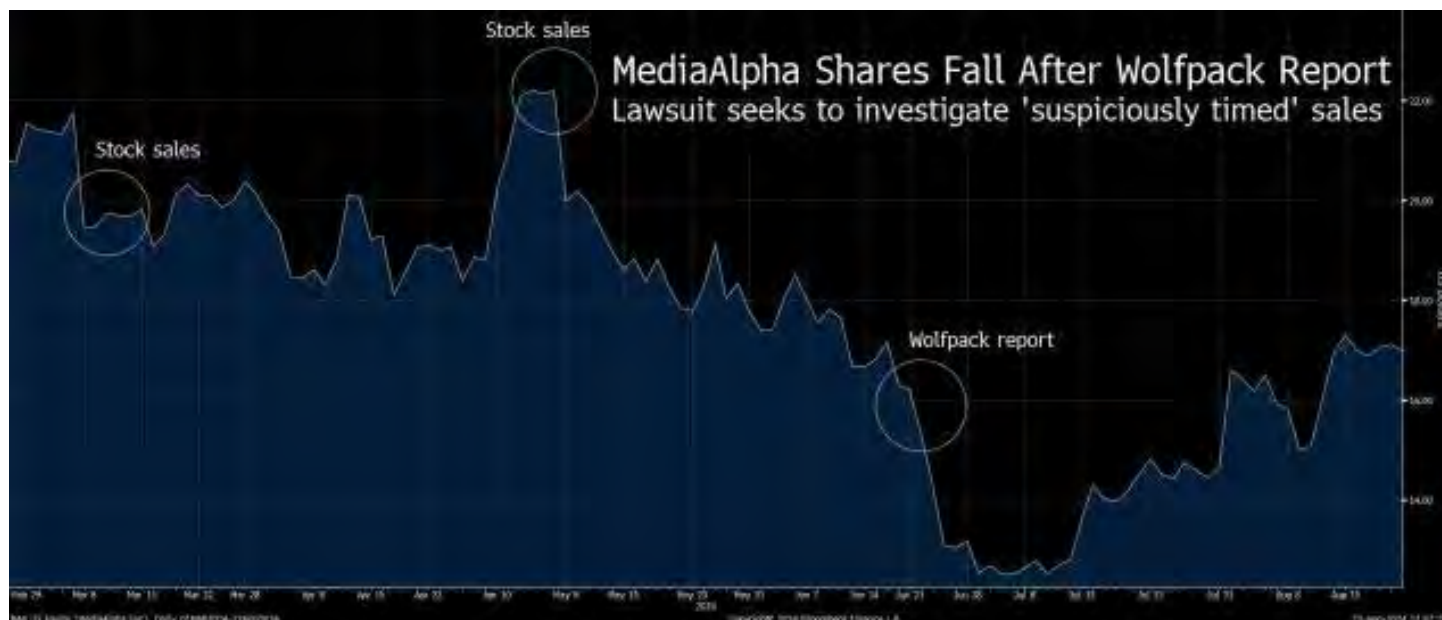
By Mike Leonard 2024-08-23T13:05:35000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0879](#)

[MediaAlpha Inc.](#)'s principal financial backers may have dodged \$66 million in losses by illegally dumping shares ahead of a damaging report about its data practices, according to a lawsuit.

An investor sued the insurance analytics company Thursday, seeking internal documents to investigate \$200 million in insider sales by its alleged controlling stockholders, [White Mountains Insurance Group Ltd.](#) and [Insignia Capital Partners LP](#). The “suspiciously timed” transactions in March and May preceded a June 24 report by [Wolfpack Research LLC](#) that suggested the company uses fraudulent ads to trick investors into turning over personal information it resells, the lawsuit says.

There’s reason to think White Mountains and Insignia—which collectively own 44% of MediaAlpha—made the opportunistic sales based on inside information gleaned from directors they nominated, according to the shareholder complaint. White Mountains, an insurance holding company, and Insignia, a private equity firm, control a majority of the board thanks to a stockholder agreement giving them the right to fill four seats, the suit says.



MediaAlpha said through a spokesperson Friday that it doesn't comment on ongoing litigation. White Mountains and Insignia, which aren't named as defendants, didn't immediately respond to requests for comment.

According to the court complaint, MediaAlpha's shares plunged 20% in the week after Wolfpack published its report, which said White Mountains "knew of the severity of the wrongdoing."

The lawsuit in Delaware's Chancery Court seeks files under a law giving investors broad access to corporate records if they have credible but preliminary suspicions of self-dealing or legal violations by company leaders. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The investor who filed the suit, Michael O'Neill, is represented by Bernstein Litowitz Berger & Grossmann LLP, Bishop Partnoy LLP, and RM Law PC. MediaAlpha hasn't yet made a court appearance.

The case is [O'Neill v. MediaAlpha Inc.](#) , Del. Ch., No. 2024-0879, complaint filed 8/22/24 .

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Device Maker Orthofix Sued by Investor Over Executives' Firings

By Matthew Bultman

- **COURT:** E.D. Tex.
- **TRACK DOCKET:** [2:24-cv-00690](#)

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Device Maker Orthofix Sued by Investor Over Executives' Firings

By Matthew Bultman 2024-08-21T17:22:00000-04:00

- **COURT:** E.D. Tex.
- **TRACK DOCKET:** [2:24-cv-00690](#)

An Orthofix Medical Inc. shareholder sued the spine device maker for allegedly misleading investors about its management team.

The lawsuit comes almost 12 months after Texas-based Orthofix fired CEO Keith Valentine, CFO John Bostjancic, and chief legal officer Patrick Keran. An internal investigation revealed they engaged in repeated "inappropriate and offensive conduct," the company said at the time.

The suit, filed Wednesday in the US District Court for the Eastern District of Texas, accused Orthofix of falsely assuring investors that its management team was committed to conducting business according to the highest ethical and legal standards.

"In fact, as was later revealed, Orthofix's management team was engaged in 'repeated inappropriate and offensive conduct that violated multiple code of conduct requirements,'" the complaint said.

Valentine, Bostjancic, and Keran were named to their respective positions following Orthofix's 2023 merger with medical technology company SeaSpine Holdings Corp. Each worked previously at SeaSpine.

Orthofix announced the firings in September 2023, causing a drop in the company's stock price. The company didn't immediately respond to a request for comment.

Scott+Scott Attorneys at Law LLP, The Schall Law Firm, and Ward Smith & Hill PLLC represent the investor.

The case is Bernal v. Orthofix Medical Inc. , E.D. Tex., No. 24-cv-00690, complaint 8/21/24 .

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NOT FOR REPRINT

Argentina Owes Bondholders More Than \$300 Million, 2nd Circuit Rules

A unanimous three-judge panel affirmed a lower court’s finding that investors were owed reversionary interests in collateral backing the bonds, which recently matured.

August 22, 2024 at 04:27 PM

Civil Appeals



Emily Saul



The original version of this story was published on [New York Law Journal](#)

Argentina must turn over more than \$300 million in cash to bondholders, the U.S. Court of Appeals for the Second Circuit ruled on Wednesday.

A unanimous three-judge panel affirmed a lower court’s finding that investors were owed reversionary interests in collateral backing the bonds, which recently matured.

The judges rejected arguments by Argentina that the country’s reversionary interests were protected by the Foreign Sovereign Immunities Act, as the interest had been used for commercial purposes in the United States.

“Argentina used the interests in commercial activity in the United States, rendering them subject to attachment,” reads the 25-page opinion, written by Second Circuit Judge Michael Park. “And Argentina’s arguments that its attached assets are not amenable to turnover under New York law are meritless, so we affirm the turnover order too.”

Argentina in the early 1990s issued collateralized bonds as part of a sovereign debt relief plan. The bonds became known as Brady Plan bonds, as the debt relief program was organized by then-U.S. Treasury Secretary Nicholas Brady.

In March 2023, the bonds matured and were secured by either special nonmarketable, zero-coupon U.S. Treasury bonds or Deutsche Mark bonds.

Argentina kept reversionary interests in the collateral, but in 2001 defaulted on the bonds.

Plaintiffs in the case are seven investment funds that purchased the bonds in 1994. They became pre- and post-judgment creditors when the county defaulted on the \$400 million in bond payments. The funds then sought to recover any Brady Plan bond collateral assets held in the U.S., as well as any reversionary interests held by Argentina in Swiss and German banks.

Following years of litigation, U.S. District Judge Loretta Preska of the Southern District of New York granted the attachment on any collateral held in European banks. Preska ordered Argentina to turn over reversionary interest to the funds.

Argentina appealed, arguing that under the collateral pledge agreements, the reversionary interest in the collateral was actually owned by the Banco Central de la Republica Argentina and not by the county’s government itself.

Even if the republic did own the interest, it would be protected from attachment under the FSIA, the appellees told the court.

The panel wholly rejected Argentina’s arguments, finding the circuit had concluded 20 years ago that the reversionary interests were owned by the republic and not the bank.

The judges also found Argentina had used the reversionary interests in commercial activity “at least twice” before their current attachment and had clearly waived any immunity under the FSIA.

All rights to the collateral will revert to Argentina once the debt is repaid, the panel said.

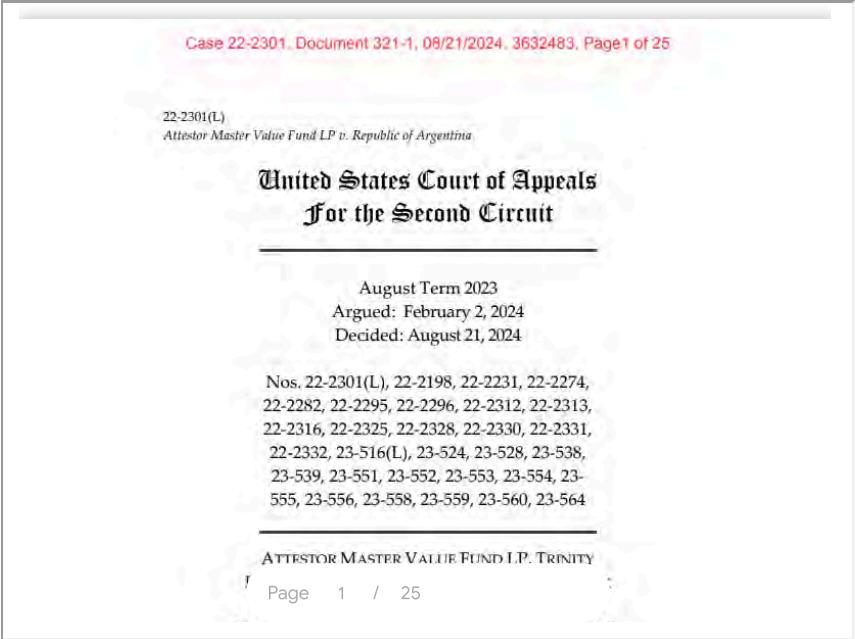
The funds are represented by Dennis Hranitzky, John Bash, Alex Loomis and Kevin Reed of Quinn Emanuel Urquhart & Sullivan.

“We are thrilled by this decision, which will result in a recovery of over \$310 million to my clients, and comes nearly 23 years after Argentina defaulted on the underlying bonds,” Hranitzky said in a statement.

Hranitzky said his team “will soldier on” until they’ve collected an additional \$150 million he says plaintiffs are owed by Argentina.

Argentina is represented by Carmine Boccuzzi Jr., Abigail Gotter-Nugent, and Rathna Ramamurthi of Cleary Gottlieb Steen & Hamilton. They did not immediately return a request for comment.

Read the ruling:



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Adidas Defeats Stock Suit Over Rapper Ye's 'Racist' Remarks (1)

By Martina Barash

Documents

 [Opinion](#)

 [Docket](#)

Bloomberg Law News 2024-08-23T10:39:11782377011-04:00

Adidas Defeats Stock Suit Over Rapper Ye's 'Racist' Remarks (1)

By Martina Barash 2024-08-19T07:52:45000-04:00

An Adidas AG investor failed to show the footwear company could be liable for not disclosing issues with its celebrity business partner Kanye West, known as Ye, a federal court ruled.

The investor didn't adequately allege that the company's risk disclosures, diversity statements, or alleged violations of European Union disclosure requirements were misleading, Judge Karin J. Immergut said Aug. 16 for the US District Court for the District of Oregon.

The union funds suing on behalf of a proposed class alleged that Ye's "antisemitic and racist" statements led to stock drops. First, two sets of Ye's own comments caused Adidas' stock price to fall, the Hampton Roads Shipping Association—International Longshoremen's Association's investment funds said. Then the price declined due to a news report that company officials had known that working with the rapper and designer presented workplace mistreatment issues for its staff, and it declined again after the company reported on some financial effects of its split with him, including potential losses tied to its inventory of the Yeezy line of shoes, HRSA-ILA said.

"The allegations here show that Ye engaged in erratic, inappropriate, and antisemitic behavior between 2013 to 2018 and beyond," Immergut said.

"But the question before this Court is not whether to admonish Ye or hold Adidas morally accountable for Ye's conduct," she said. None of the targeted company statements are actionable for securities fraud, she said.

She rejected HRSA-ILA's argument that Adidas' disclosures about business partner risks were couched in hypothetical terms even though the risks had come to fruition. "To the contrary, the Business Partner Risk disclosures took such 'improper behavior' as a given, and the warned-of risk in the disclosures was a hypothetical 'negative spill-over effect' on the Company," she said.

Immergut distinguished the language in the risk disclosures from Facebook Inc.'s privacy risk disclosures, which the US Court of Appeals for the Ninth Circuit decided were actionable. The company, now Meta Platforms Inc., has taken the case to the US Supreme Court.

The investors also faulted various Adidas statements about its commitment to diversity, equity, and inclusion and about its anti-discrimination efforts.

But "Adidas's asserted benchmarks for its reforms were incapable of measurement and therefore incapable of objective verification by a reasonable investor," Immergut said. "Adidas's DEI statements thus could not have been material misrepresentations."

And claims based on Adidas' alleged failure to provide required information under European Union rules also fail, she said. The provisions are "too broad and flexible for the reasonable investor to have relied on them," she said.

The Rosen Law Firm PA and Ransom Gilbertson Martin & Ratliff LLP represented HRSA-ILA and the proposed class. Markowitz Herbold PC and Debevoise & Plimpton LLP represented Adidas.

The case is HRSA-ILA Funds v. Adidas AG , 2024 BL 284987, D. Or., No. 3:23-cv-00629, 8/16/24 .

(Updated with additional court analysis throughout.)

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Furniture Maker Lovesac's Leaders Sued Over Accounting Problems

By Martina Barash

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 3:24-cv-0132](#)

Bloomberg Law News 2024-08-23T11:02:33190087013-04:00

Furniture Maker Lovesac's Leaders Sued Over Accounting Problems

By Martina Barash 2024-08-20T12:57:51000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 3:24-cv-0132](#)

Lovesac Co. directors and executives face an investor suit claiming they are responsible for accounting improprieties and related misrepresentations, particularly related to the direct-to-consumer furniture brand's shipping costs.

Shipping, however, wasn't the only accounting area that contributed to Lovesac's need to restate its financial reporting for its fiscal year 2023 and first quarter of fiscal 2024, investor Diego Valle said on behalf of the company. The company improperly accounted for leases, inventory, and the cost of goods sold, and it improperly recognized revenue and misclassified cash flows, he said in a derivative suit filed Monday in the US District Court for the District of Connecticut.

The harm to the company from the directors' failures includes the financial restatements, reputational harm, and potential legal liability from a proposed securities class action over the accounting issues, according to Valle.

"Lovesac admitted to improperly capitalizing \$2.2 million of shipping expenses from fiscal year 2023 in the first quarter of fiscal year 2024," he said.

The August 2023 restatements for fiscal 2023, which ended Jan. 29, 2023, and the following quarter, ending April 30 of that year, showed the company "had materially overstated its gross profit, operating income, and net income, while understating its shipping and handling costs and accrued freight and shipping expenses," Valle said.

The judge overseeing the class case, which is also in the District of Connecticut, on Aug. 1 granted preliminary approval to a \$615,000 settlement.

Valle's suit brings claims for breach of fiduciary duties, contribution for potential class action liability under the Securities Exchange Act, a misleading proxy statement, unjust enrichment, and waste of corporate assets. He seeks damages and injunctive relief.

Lovesac didn't immediately respond to a request for comment on behalf of itself or the individual defendants.

Levi & Korsinsky LLP and Bragar Egel & Squire PC represent Valle.

The case is Valle v. Dellomo , D. Mass., No. 3:24-cv-01327, complaint 8/19/24 .

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Dexcom Stock Fell 41% Due to Sales Force Issues, Investor Says

By Martina Barash

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-01485](#)

Bloomberg Law News 2024-08-23T11:25:47218601477-04:00

Dexcom Stock Fell 41% Due to Sales Force Issues, Investor Says

By Martina Barash 2024-08-22T15:17:15000-04:00

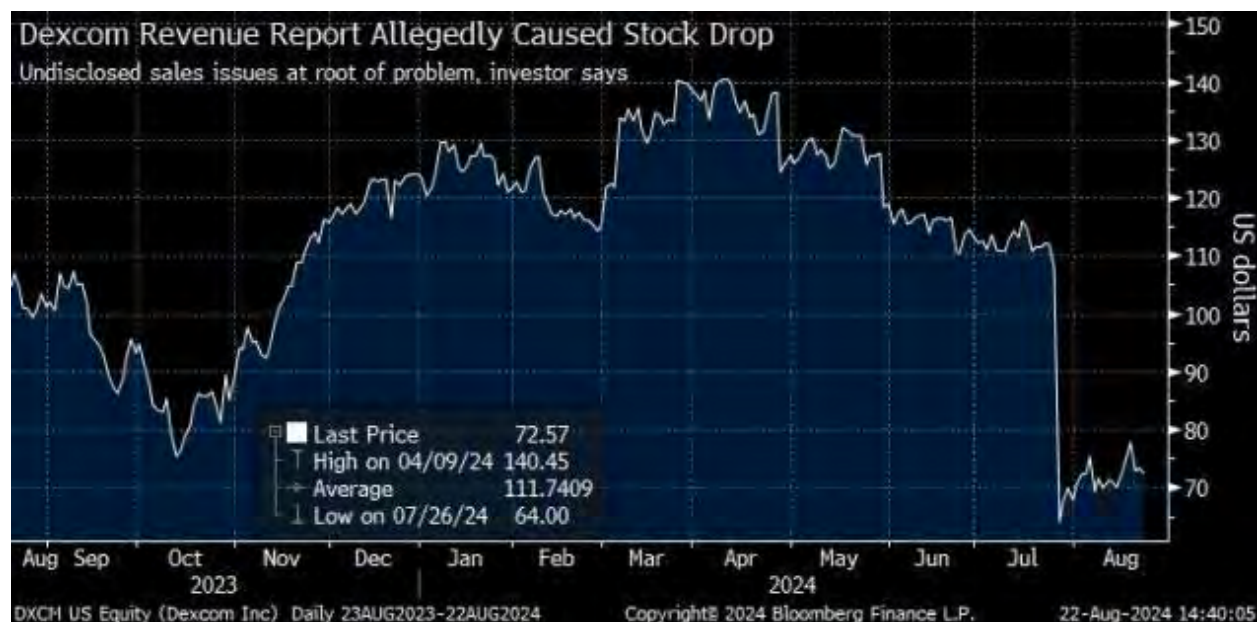
- **COURT:** S.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-01485](#)

Dexcom Inc. failed to tell investors that its sales force was poorly equipped to execute its ambitious growth plans, according to a suit over the company's largest stock selloff.

The glucose monitor maker's July 25 announcement of financial results for the second quarter of fiscal year 2024 and reduced revenue guidance for the full fiscal year caused the tumble, Charlene Alonzo says on behalf of a proposed class of investors. She filed her suit Thursday in the US District Court for the Southern District of California.

Dexcom made statements expressing confidence in its "ability to capitalize on its growth potential to reach the projected record number of new patients and simultaneously outpace the prior fiscal year's gross margins," Alonzo says. But it concealed sales force weaknesses, she says.

The company's stock price fell 41% on July 26, closing at \$64.00 per share. The decline was the steepest in the medical device maker's history, according to data compiled by Bloomberg.



The proposed class, consisting of those who acquired Dexcom stock between Jan. 8, 2024, and July 25, 2024, inclusive, consists of hundreds or thousands of members, the complaint says.

Alonzo seeks damages on her securities fraud claims.

Dexcom didn't immediately respond to an emailed request for comment.

Levi & Korsinsky LLP represents Alonzo.

The case is Alonzo v. Dexcom Inc. , S.D. Cal., No. 3:24-cv-01485, complaint 8/21/24 .

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Lawyers Assemble Across Country for Securities Class Action

The complaint filed Wednesday alleges an unexpected shakeup of the company's top executives on Sept. 13, 2023 caused Orthofix stock to fall by more than 30%.

August 22, 2024 at 03:10 PM

Securities Litigation



Adolfo Pesquera



What You Need to Know

- A coalition of law firms are representing a class in a securities violations lawsuit against Orthofix Medical.
- The proposed class action alleges the company conspired to inflate stock price during a merger.
- The investors complain their stock value fell after a top management shakeup after the merger.

A coast-to-coast legal team has assembled to represent stockholders as a class in a securities case against Lewisville, Texas-based Orthofix Medical Inc., a global spine and orthopedics company.

Attorneys with Scott+Scott Attorneys at Law in New York, along with Los Angeles, California-based Brian J. Schall of The Schall Law Firm and Andrea L. Fair on Ward, Smith & Hill as local counsel in Longview filed suit in the U.S. Eastern District of Texas-Marshall Division.

The complaint filed Wednesday alleges an unexpected shakeup of the company’s top executives on Sept. 13, 2023 caused Orthofix stock to fall by more than 30%.

“According to our complaint, Orthofix engaged in a plan, scheme, conspiracy, and recklessly deceived investors by making false statements and omitting key facts about the company’s trajectory. As a result, thousands of shareholders suffered significant financial harm, Scott+Scott partner Thomas L. Laughlin said.

The lead plaintiff is Matthew Bernal, a North Carolina resident and investor. However, Scott+Scott said any investors wishing to apply to be lead plaintiff must file a motion.

According to the Orthofix website, the company has a comprehensive portfolio of biologics, innovative spinal hardware, bone growth therapies, specialized orthopedic solutions and a leading surgical navigation system. Its products are distributed in more than 60 countries.

No counsel for Orthofix has yet given notice to the court, and the Orthofix corporate office said the company does not comment on pending litigation.

The complaint seeks class certification for investors of Orthofix common stock between Oct. 11, 2022 and Sept. 12, 2023.

Plaintiffs allege that when Orthofix announced its intent to merge with SeaSpine on Oct. 11, 2022 the defendants issued false and misleading statements about the company’s management team.

The merging companies said Keith Valentine would be chief executive officer; John Bostjancic would be chief financial officer; and Patrick Keran would be chief legal officer.

However, on Sept. 12, 2023, just over nine months after the merger was completed, the company’s independent directors allegedly terminated all three officers and replaced them with interim appointments.

The board’s decision followed an investigation conducted by independent legal counsel, the complaint claims.

“As a result of the investigation, the board determined that each of these executives engaged in repeated inappropriate and offensive conduct that violated multiple code of conduct requirements and was inconsistent with the company’s values and culture,” the board announced, as recited in the complaint.

Overnight, company stock declined \$5.62 per share on unusually heavy volume.

The complaint alleges the “scheme was intended to” deceive the investing public, artificially inflate and maintain the market price, and caused class members to buy stock at artificially inflated prices.

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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/08/three-things-make-a-post.html

Friday, August 23, 2024

Three Things Make a Post

By Ann Lipton

Thing One: I jotted! Which is to say, I wrote a Jotwell review of Hilary Allen's *Interest Rates, Venture Capital, and Financial Stability*, forthcoming in the University of Illinois Law Review. Her paper is [here](#), and you can find my review [here](#).

Thing Two: I have a new paper-ish thing. As y'all know, I've been keeping an eye on litigation-limiting bylaw and charter provisions, including – as I previously posted – the Ninth Circuit's en banc decision in *Lee v. Fisher*, which permitted The Gap to enforce a forum selection bylaw directing derivative Section 14(a) claims to Delaware's Court of Chancery – even though that court has no jurisdiction to hear Section 14(a) claims. In practical effect, then, the bylaw operated as a waiver of the federal claim.

That decision cited a draft version of an article by Professors Mohsen Manesh and Joseph Grundfest, *Abandoned and Split But Never Reversed: Borak and Federal Derivative Litigation*, in which they defended such bylaws. The article was published in the *Business Lawyer* late last year, and is available [here](#).

Anyhoo, I now have a (very short) reply to Professors Manesh and Grundfest, also forthcoming in the *Business Lawyer*, called *Not Dead Yet*. The Reply is available [here](#), and this is the abstract:

In their article, *Abandoned and Split, But Never Reversed: Borak and Federal Derivative Litigation*, Professors Mohsen Manesh and Joseph Grundfest argue that corporations should be permitted to waive derivative Section 14(a) claims in their constitutive documents, partly because such claims are duplicative of other causes of action, and partly because of the weakness of the original Supreme Court case to recognize them. In this Reply, I defend the continuing vitality of the derivative Section 14(a) cause of action, and its necessity as a source of investor protection

But! Mine is not the last word; Mohsen and Joe will have a reply to my reply in the same issue. When that's public, I'll edit this post with a link.

Thing Three: The *Lee v. Fisher* case was one of a series of cases arguing that companies were lying about their efforts to diversify their boards. Another such case was brought against Qualcomm, and it was dismissed by a federal district court in 2021.

The plaintiff in that case then sought books and records in Delaware, and relied on those to file a *state* law complaint, which once again alleged that the company lied about its efforts to diversify when seeking director candidates. This time, however, the complaint was brought for breach of state law fiduciary obligations rather than federal proxy fraud, and the claim was direct rather than derivative. Not long ago, Vice Chancellor Laster dismissed that claim in a bench ruling.

The transcript is worth a read. Among other things, VC Laster explicitly (though not unsurprisingly) held that directors only have a duty to maximize firm value. Demographic diversity may further that goal by fostering innovation; demographic diversity may also further that goal by inspiring the confidence of stakeholders, who would otherwise lose faith if they “only see very few people who look like them.” But boards have discretion to make their own judgment as to the financial value that diversity provides.

What they can’t do, of course, is explicitly lie to shareholders in their proxy statement, or omit material information, which is what the plaintiff was alleging. And here was the second interesting point: VC Laster noted that a voting rights claim based on a misleading or incomplete proxy statement is not, per se, subject to the business judgment rule. As he put it, “Directors have a duty to disclose material information, but there is no separate standard of review that overlays that obligation, such as the business judgment rule.... [I]n a case involving stockholder action, a plaintiff need only plead two elements: First, that there was a request for stockholder action, and certainly there was here. These were elections of directors. And second, that there was a material misrepresentation or omission.”

With that set up, however, he found that Kiger had *not* in fact stated facts that made it reasonably conceivable that Qualcomm misled shareholders about its diversity efforts, and that was the end of that.

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/08/new-securities-law-articles-in-print-1.html

Thursday, August 22, 2024

New Securities Law Articles in Print

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

William S. Dodge, *Extraterritorial Application of Federal Securities Law: What Hath Morrison Wrought?*, 56 N.Y.U. J. Int'l L. & Pol. 199 (2023).

J.D. Larsen, Student Article, *Securities and Exchange Commission v. Ripple Labs, Inc.* - 20 Civ. 10832 (AT) (S.D.N.Y. July 13, 2023), 28 Intell. Prop. & Tech. L. J. 57 (2023).

Emily Strauss & Joseph A. Grundfest, *Mutiny for a Bounty*, 66 Ariz. L. Rev. 191 (2024).

Bryce C. Tingle, *What Do We Know about Shareholders' Potential to Solve Environmental and Social Problems?*, 58 Ga. L. Rev. 169 (2023).

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First Promoters Jimmy Butler, Ben Armstrong to Settle in Binance Litigation

Adam Moskowitz, the managing partner at the Moskowitz Law Firm in Coconut Grove, and David Boies, the chair of Boies Schiller Flexner in New York, have also moved for preliminary approval of the proposed settlement class, to appoint class representatives and to appoint them co-lead class counsel.

August 20, 2024 at 10:32 AM

Cryptocurrency



Michael A. Mora



The original version of this story was published on [Daily Business Review](#)

What You Need to Know

- Attorneys are seeking preliminary approval of the first tranche of settlements in the Binance litigation.
- The settling defendants are Jimmy Butler and Ben Armstrong.
- The attorneys have also moved for other matters, including the appointment of class representatives and co-lead class counsel.

Attorneys for investors who alleged that they were sold unregistered securities on the Binance platform have obtained the first tranche of settlements of litigation in a federal district court in Miami, from NBA star Jimmy Butler and cryptocurrency influencer [Ben Armstrong](#), who were accused of promoting the digital asset platform.

Adam Moskowitz, the managing partner at the [Moskowitz Law Firm](#) in Coconut Grove, and David Boies, the chair of [Boies Schiller Flexner](#) in New York, have also moved for preliminary approval of the proposed settlement class, to appoint class representatives and to appoint them co-lead class counsel.

“One of the main questions pending in most of these crypto cases is whether plaintiffs just state a cause of action under the securities laws,” Moskowitz said. However, a recent federal district court ruling clarified that the precedent promoters relied on was reversed by the U.S. Court of Appeals for the Eleventh Circuit and that the “plaintiffs do state a cause of action for a ‘solicitation’ by promoting unregistered security, and the promoter or the company had a financial incentive.”

That ruling, in turn, provided leverage in the settlement negotiations with Butler and Armstrong, Moskowitz said.

Now, it is up to U.S. District [Judge Roy K. Altman](#) of the Southern District of Florida to grant preliminary approval of the \$340,000 collective settlements with Butler and Armstrong to a common fund and to rule on the other matters proposed in the motion.

Binance, one of the world’s largest crypto-products platforms, has more than 100 million customers, including 1.47 million customers based in the U.S. It offers the ability to buy and trade digital assets, such as the company’s own token, “BNB,” and its own stablecoin, “BUSD.” The plaintiffs alleged those products are unregistered securities that Butler and Armstrong unlawfully sold them and the class.

The plaintiffs brought the proposed class action on behalf of a global class, a nationwide class, and state subclasses, according to the motion. These classes include persons and entities who purchased, held or sold BNB or BUSD, participated in Binance’s “BNB Vault” program, or in any Binance staking program, or purchased, held, or sold various other crypto assets via any Binance platform.

Butler and Armstrong were accused of enabling Binance’s offerings and sales of unregistered securities, which violated various provisions of applicable securities laws and deceptive trade practices statutes. As a result, their actions entitled the plaintiffs and class members to full recessionary damages, for which Butler and Armstrong are jointly and severally liable, according to the motion.

Former Miami-Dade Circuit Judge Michael Hanzman, who is of counsel at Bilzin Sumberg Baena Price & Axelrod in Miami, facilitated the discussion, which led to the settlements. The plaintiffs have also retained JND Legal Administration to craft a notice plan consistent with the court-approved program it created in the *In re Ripple Labs litigation*.

Meanwhile, Armstrong, who was also among the influencers sued in the FTX Trading Ltd. multidistrict litigation, was initially unhappy about it. Armstrong, who has millions of followers across social media, allegedly warned Moskowitz in March 2023 that his followers “are dangerous” and that the legal action against him could result in “you and your family shot.”

“There is only one person who better be careful and it’s Adam Moskowitz,” Armstrong allegedly said, [according to court documents](#). “I’ve already told him privately.”

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SPECIAL COVERAGE

Shaquille O'Neal Loses Bid to Defeat Suit Over Astrals Tokens

By Martina Barash

- Court rules for NFT holders on securities definition
- Opinion a first on celebrities and crypto, attorney says

Bloomberg Law News 2024-08-23T10:24:00022459693-04:00

Shaquille O'Neal Loses Bid to Defeat Suit Over Astrals Tokens

By Martina Barash 2024-08-16T19:16:03000-04:00

- Court rules for NFT holders on securities definition
- Opinion a first on celebrities and crypto, attorney says

Shaquille O'Neal was a "seller" of Astrals and Galaxy nonfungible tokens if the allegations presented in a suit over the digital assets' collapse prove correct, and the tokens meet the definition of securities, a federal court ruled Friday.

The token holders who brought the suit "have plausibly alleged that they were led to reasonably expect profits from the Astrals purchases" and have satisfied other aspects of a legal test for whether something is a security, Judge Federico A. Moreno said for the US District Court for the Southern District of Florida. The ruling allows a claim for the sale of unregistered securities to proceed.

But claims based on Astrals token purchases on or before May 23, 2022, are time-barred, Moreno said. And former basketball star O'Neal can't be held indirectly liable for unregistered securities sales because the token holders didn't show he controlled the actions of the Astrals project, he said. Three Astrals companies are named as defendants in the suit alongside O'Neal.

Adam Moskowitz, who represents the token holders, called Moreno's opinion "the first extensive ruling on cryptocurrency and celebrity promotions."

O'Neal is among several celebrity defendants in a separate suit over the collapse of the FTX cryptocurrency exchange, which he allegedly participated in promoting.

Moskowitz, of the Moskowitz Law Firm in Miami, is among the attorneys representing the FTX plaintiffs as well.

Daniel Harper and other Astrals and Galaxy NFT holders say in the complaint that they “were induced to purchase Astrals Financial Products from the Astrals Project because of O’Neal’s direct, open, and heavy involvement in the project.” The value of the NFTs “was linked almost entirely to O’Neal’s celebrity status,” they say.

Harper says he purchased dozens of the Astrals tokens, which have been described as “metaverse-ready 3D avatars by a world-renowned artist,” and lost money.

An attorney with Fowler White Burnett PA didn’t immediately respond to a request for comment on behalf of O’Neal or the Astrals companies. Brown Rudnick LLP also represents the defendants.

Mark Migdal & Hayden represents the token holders along with the Moskowitz Law Firm.

The case is Harper v. O’Neal , S.D. Fla., No. 1:23-cv-21912, 8/16/24 .

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Shaquille O'Neal must face claims for promoting NFTs as securities. An FTX portent?

 [reuters.com/legal/transactional/column-shaquille-oneal-must-face-claims-promoting-nfts-securities-an-ftx-portent-2024-08-19](https://www.reuters.com/legal/transactional/column-shaquille-oneal-must-face-claims-promoting-nfts-securities-an-ftx-portent-2024-08-19)

Alison Frankel

Jun 6, 2024; Boston, Massachusetts, USA; Shaquille O'Neal looks on before the game between the Boston Celtics and the Dallas Mavericks in game one of the 2024 NBA Finals at TD Garden. Mandatory Credit: David Butler II-USA TODAY Sports Purchase Licensing Rights , opens new tab

Aug 19 (Reuters) - The plaintiffs' lawyer leading litigation against a bevy of sports and entertainment celebrities who endorsed crypto exchange FTX wasted no time after winning a decision on Friday against pro basketball legend Shaquille O'Neal in a separate crypto case.

In the O'Neal decision, as I'll explain, Chief U.S. District Judge Federico Moreno in Miami ruled , opens new tab that purchasers of non-fungible tokens representing avatars for a planned video game adequately alleged that O'Neal engaged in the sale of unregistered securities by promoting the NFTs and related crypto tokens in his social media accounts.

Plaintiffs' lawyer Adam Moskowitz of The Moskowitz Law Firm represents both the NFT purchasers suing O'Neal and FTX customers in a huge consolidated case before U.S. District Judge Michael Moore in Miami. On Friday, Moskowitz immediately filed notice of Moreno's NFT ruling in the Miami FTX litigation, in which plaintiffs have accused O'Neal and several other sports and television stars of illegally promoting unregistered FTX securities.

Will the O'Neal decision help FTX customers make that case?

Moskowitz told me he's confident it will.

Before I explain why, I should note that I reached out to lawyers at Latham & Watkins; Gibson, Dunn & Crutcher; Weil, Gotshal & Manges; and McDermott Will & Emery, all of which represent celebrities in the FTX case. None got back to me.

O'Neal's lawyer in the NFT case, Stephen Best of Brown Rudnick, said by email that his side is pleased with Moreno's ruling that plaintiffs waited too long to assert some of their claims. Best said the judge's statute-of-limitations decision eliminates more than 60% of plaintiffs' alleged damages. He also said the defense is confident that the entire case will eventually be dismissed.

"It's not going to get better for the plaintiffs, only worse," Best said.

Aside from addressing O'Neal's timeliness defense, Moreno answered two key questions in Friday's NFT ruling. First, the judge held that the NFTs, issued by an enterprise called the Astrals Project, are securities under the U.S. Supreme Court's longstanding test. (A federal judge in Boston, as you may recall, reached the same conclusion last month in a case involving DraftKings digital playing cards.) Moreno also held that crypto tokens giving purchasers a say in the governance of the decentralized autonomous organization that operates the Astrals Project are securities.

The second big question in the Astrals case is more relevant for the FTX litigation: Was O'Neal engaged in the sale of unregistered securities when he promoted Astrals NFTs to his social media followers?

O'Neal's lawyers argued [here](#), opens new tab that at most, O'Neal posted a few messages about the NFTs to his social media accounts and displayed an Astrals avatar at an event he was DJing. So even if the NFTs were deemed securities, O'Neal argued, he can't be liable for selling them.

O'Neal's actions show he was a "mere promoter," his lawyers argued. He did not urge anyone in particular to buy the NFTs — and never said anything at all about the tokens.

To hold otherwise, Moreno relied on a 2022 decision [here](#), opens new tab from the 11th U.S. Circuit Court of Appeals in *Wildes v. BitConnect International*. The appeals court ruled in that case that securities promoters can be held liable for soliciting investors through non-traditional communications such as online videos and internet postings even if those communications are not directed to any particular investor.

In the Astrals NFT case, Moreno said, O'Neal's actions were similar to those of the BitConnect promoters: He allegedly told his followers in an online video that the Astrals team had big plans for their NFTs, urging them to "hop on the wave before it's too late." (Plaintiffs also alleged that O'Neal had a direct stake in the success of the Astrals project, in which his son served as the director of investor relations.)

Moreno said that under the 11th Circuit's precedent in the BitConnect case, O'Neal's broadly disseminated online endorsements qualified as investment solicitations, making O'Neal an alleged seller of unregistered securities.

Moskowitz told me that Moreno's reliance on the BitConnect precedent will help plaintiffs show that FTX's celebrity promoters can be liable for touting FTX products in online posts and videos. (FTX plaintiffs are not alleging federal securities claims, instead asserting violations of state securities laws from California, Florida and Oklahoma.)

The FTX "brand ambassador" defendants argued (among many other points) in their joint motion to dismiss [here](#), opens new tab that they cannot be held liable for the alleged sale of unregistered securities simply because they entered garden-variety advertising and

sponsorship agreements with FTX. For one thing, the celebrity defendants said, the allegedly unregistered securities at issue in the FTX case are the native tokens for the imploded exchange, as well as certain interest-bearing accounts for FTX customers. But none of the brand ambassadors specifically mentioned either the tokens or the interest-bearing accounts in their videos and social media posts endorsing FTX.

Moreover, the defendants said, plaintiffs failed to allege that any FTX investor was swayed by an endorsement from a brand ambassador.

Moskowitz said Moreno's NFT opinion bears directly on those arguments because the judge cited the BitConnect precedent to conclude that plaintiffs can adequately allege securities solicitation by showing that defendants had a financial interest in promoting the company on the internet.

The FTX brand ambassador defendants will surely argue that the facts in the NFT case are distinguishable. O'Neal, for instance, allegedly had a bigger role in the Astrals project than FTX's celebrity endorsers had in the crypto exchange. And, as I mentioned, the FTX defendants contend that none of them specifically endorsed the FTX products that were allegedly unregistered securities.

Nevertheless, the FTX case, like the Astrals NFT case, is being litigated in a trial court in the 11th Circuit. So Moreno's analysis of 11th Circuit precedent in the context of a celebrity's endorsement of a crypto products will, at the very least, draw the attention of a fellow Miami federal judge.

Read more:

DraftKings digital trading cards are securities - Boston judge

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters,

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NEWS

Judge Rules Shaquille O'Neal Will Face Lawsuit for Promotion, Sale of 'Securities'

“We are extremely fortunate that Judge Moreno authored the first extensive ruling on cryptocurrency and celebrity promotions,” said Adam Moskowitz, the managing partner at the Moskowitz Law Firm.

August 16, 2024 at 03:13 PM

Cryptocurrency



Michael A. Mora



The original version of this story was published on [Daily Business Review](#)

What You Need to Know

- A federal district court in Miami ruled that former NBA star Shaquille O'Neal will have to face a lawsuit over his promotion of unregistered securities in the form of cryptocurrency tokens.
- Adam Moskowitz, the managing partner at the Moskowitz Law Firm, is the lead attorney for the proposed class of investors in their lawsuit against O’Neal, Astrals LLC and its various subsidiaries in the class action litigation before U.S. District Judge Federico Moreno.
- Moreno ruled that the plaintiffs properly alleged that O'Neal was a

A federal district court in Miami ruled on Friday that former National Basketball Association star Shaquille O’Neal will have to face a lawsuit over his promotion of unregistered securities in the form of cryptocurrency tokens and that he was a “seller” of these unregistered securities.

Adam Moskowitz, the managing partner at the [Moskowitz Law Firm](#) in Coconut Grove, Florida, is the lead attorney for the proposed class of investors in their lawsuit against the defendants, Shaquille O’Neal, Astrals LLC and its various subsidiaries in the class action litigation before U.S. Senior District Judge Federico Moreno of the Southern District of Florida.

“We are extremely fortunate that Judge Moreno authored the first extensive ruling on cryptocurrency and celebrity promotions,” Moskowitz said. “He is the first federal judge to directly address whether celebrity promoters can be liable for promoting these unregistered securities.”

Stephen A. Best, who is among the partners at [Brown Rudnick](#) that represent O’Neal and are joined by Christopher E. Knight, Brian D. Elias, Esther E. Galicia and Alexandra L. Tifford of [Fowler White Burnett](#), said their client is pleased with the motion to dismiss ruling in his favor, which cut out the bulk of the damages at issue, particularly given that all allegations at the motion to dismiss stage are held to be true.

“This ruling in O’Neal’s favor reduces the prospective damages by more than 60%,” Best said in a statement. “We remain confident that fact-finding will support the rest of our claims and will result in a full dismissal of the claims before the court. In short, it’s not going to get better for the plaintiffs, only worse.”

The Astrals Project is a collection of 10,000 metaverse-ready 3D avatars by artist Damien Guimoneau, according to its [whitepaper](#).

These NFTs aim to promote investment in a virtual world in which users could socialize, play and interact with other users, including O’Neal himself, court documents show. Harper alleged that the value of Astrals’ financial products was linked “almost entirely to O’Neal’s celebrity status and many Astrals investors” were induced to purchase them because of his promotion.

The amended complaint alleged that as O’Neal was attempting to distance himself from his FTX promotions, he was doing the same with the Astrals entities.

“Ironically, right before O’Neal decided to run for the hills and abandon his Astrals Project, he posted a meme on the Astrals Discord, a .gif of a scene from the movie ‘The Wolf of Wall Street,’ assuring all of the Astral Investors that ‘I’M NOT F***ING LEAVING,’ implying that he would always be there for his Astrals Investors. But O’Neal has not been seen at Astrals since.”

Soon after, the value of the NFTs plummeted. Plaintiffs, representing themselves and a putative global class of investors who purchased Astrals NFTs and/or Galaxy tokens from the Astrals Project, suffered financial losses and filed a lawsuit in September under an array of securities laws. Unsurprisingly, the defendants disagreed.

The defendants argued that the Astrals Project did not involve a capital investment drive or an appeal to passive investors; rather, the case involved the sale of collectible video game avatars that were “metaverse-ready” upon sale to gamers, court records show.

Now, Moreno has approved in part and denied in part the defendant’s motions to dismiss and additional remedies.

In the 24-page ruling, Moreno held that the plaintiffs properly alleged that O’Neal was a “seller” under Section 12 of the Securities Act of 1933.

However, Moreno held that Section 12(a)(1) claims based on a purchase on or before May 23, 2022, are time-barred, but the claims regarding the Galaxy tokens are not time-barred, according to the ruling. Moreno also dismissed Count II against O’Neal only, as he is not a “control person” under Section 15.

Still, Moreno denied the defendants’ motion to dismiss the amended complaint as the plaintiffs have sufficiently alleged that Astrals and Galaxy tokens are “securities” subject to federal securities laws, the ruling shows.

Moreno also made three additional rulings.

First, Moreno denied the defendants’ motion to strike plaintiffs’ class allegations, noting that the plaintiffs have yet to file a motion to certify a class and it would be premature to “analyze class allegations on their motion to strike as potential barriers may fall away or at least become more manageable after discovery.”

Second, Moreno granted the defendants’ motion to strike plaintiffs’ expert report. The plaintiffs argued that there is “no ‘inflexible rule’ governing what may be attached to a pleading.”

However, the defendants’ argument that “the only legal expert will be the court” resonated with Moreno, who ruled that “all portions of the report that opine on and analyze whether Astrals are unregistered investment contracts must be stricken.” Still, the report’s portion covering governance or NFTs generally is not stricken and may later become relevant.

Third, Moreno denied the defendants’ move to strike the plaintiffs’ numerous references to the now-defunct FTX trading platform, such as O’Neal’s appearance on an episode of the “FTX Podcast.”

Moreno found that these allegations, while referencing FTX, have a relationship to the issues in the case as it is alleged that “Astrals community members were concerned about the future of the project (as the FTX trading platform collapsed) but were reassured by team members that the project would continue as planned with defendant O’Neal’s close involvement.”

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[NEWS](#)

Susman Godfrey Helps Baltimore Secure \$152.5M Opioid Settlement With Cardinal Health

“We continue to be proud to partner with Mayor [Brandon] Scott and the City of Baltimore to fight this deadly epidemic and bring justice to everyone affected by it,” Susman Godfrey partner Bill Carmody said in a statement.

August 21, 2024 at 11:49 AM

Pharmaceuticals



Sulaiman Abdur-Rahman



What You Need to Know

- Baltimore accused Cardinal Health and other distributor defendants of fueling the opioid crisis.
- Susman Godfrey worked closely with Baltimore in pursuing opioid-related litigation.
- Baltimore reached a nine-figure settlement agreement with Cardinal Health, bringing its total opioid-related settlement tab to \$242.5 million.

Baltimore has reached a \$152.5 million settlement with Cardinal Health over allegations the pharmaceutical distributor had contributed to the nation’s opioid epidemic.

Susman Godfrey worked closely with Baltimore’s legal team to reach this settlement and continue collaborating on opioid-related litigation against other parties, the city announced Aug. 16.

“The city and our extraordinary outside counsel built an overwhelming case against the opioid companies,” Baltimore Mayor Brandon M. Scott said in a statement, “and we have recovered vastly more resources than we would have under the global settlements.”

“We continue to be proud to partner with Mayor Scott and the City of Baltimore to fight this deadly epidemic and bring justice to everyone affected by it,” Susman Godfrey partner Bill Carmody said in a statement.

Baltimore accused Cardinal Health and other distributor defendants of fueling the opioid crisis on allegations that they had “failed to limit fraudulent or suspicious distribution of opioids.”

The Cardinal Health settlement agreement brings Baltimore’s total opioid-related settlements tab to \$242.5 million, according to the city, which is scheduled to go on trial Sept. 16 against five remaining defendant groups.

Baltimore’s legal strategy of pursuing opioid-related litigation without relying on other plaintiffs has allowed the city to recover “vastly more resources” than if the city had joined other government plaintiffs in [global settlement agreements](#) with drug companies and distributors, according to Scott.

Baltimore will use the Cardinal Health settlement funds “solely for opioid remediation” and to provide recovery funds to substance use treatment centers, the city announced.

In addition to Carmody, Susman Godfrey attorneys Seth Ard, Sy Polky, Michael Kelso, Rocco Magni, Adam Carlis, Cory Buland, Geng Chen, Krisina Zuniga, Max Straus, Betsy Aronson, Katherine Drews, Jeff Melsheimer and Tom Boardman assisted Baltimore’s Department of Law in the opioid-related litigation.

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NEWS

A Law Firm Was Hacked. Now It Faces a Class Action Lawsuit

The Wacks Law Group of Whippany discovered suspicious activity on its network on March 9. A short time later, a ransomware group called Qilin claimed responsibility for the breach, according to the suit.

August 23, 2024 at 01:56 PM



Charles Toutant



The original version of this story was published on [New Jersey Law Journal](#)

A New Jersey law firm that was the target of a data breach now faces a suit on behalf of individuals whose personal information was targeted.

The Wacks Law Group of Whippany discovered suspicious activity on its network on March 9. A short time later, a ransomware group called Qilin claimed responsibility for the breach, according to the suit.

The breach yielded personal information such as names, Social Security numbers and driver’s license numbers that the law firm collected in connection with the legal service it provides, the suit claims.

The Wacks Law Group focuses on trusts and estates and has six lawyers, according to its website. The firm’s Edward Wacks did not respond to a phone message or text message.

The suit was brought by Milberg Coleman Bryson Phillips Grossman, a leading class action firm, along with Federman & Sherwood of Oklahoma City, Oklahoma.

Qilin, also known as Agenda, likely originates from Russia, and was recently observed recruiting affiliates in late 2023, the suit states. It is an ransomware-as-a-service company, in which one party pays another to launch a ransomware attack, the suit says. It surfaced in 2022 and targets critical infrastructure entities, the suit claims.

Once Qilin gains access to the target system, it proceeds to encrypt valuable information, such as personal details, credit card information or account credentials, which can fetch monetary awards, the suit claims. After encrypting the data, the actors demand a ransom to release a private key required to -decrypt the data, with ransoms typically demanded in cryptocurrencies such as bitcoin or ethereum, to allow the attackers to remain anonymous, the suit claims.

“It is important to note that paying the ransom does not guarantee the release of the private key, and there is no guarantee that the cycle of attacks and ransom demands will cease,” the suit claims.

Lead plaintiff Theresa Beller is a Jacksonville, Florida, resident who received a notice from Wacks Law Group on Aug. 6, notifying her that her name, Social Security number and driver's license number were compromised in the data breach. The class has more than 100 members and the amount in controversy exceeds \$5 million, the suit states.

The law firm offered the plaintiff and class members a "token gesture of a mere 12 months of credit monitoring services," but that offer is "woefully inadequate considering plaintiff and class members will be at a continued risk of fraud and identity theft for the rest of their lives. This gesture does not and will not fully protect plaintiff and the class from cybercriminals and is largely ineffective against protecting data after it has been stolen," the suit claims.

Cybercriminals are aware of the preventative measures taken by entities after data breaches and will often hold onto the stolen data and not use it until after the free service runs out, and long after preventative steps have diminished, the suit claims.

The Wacks Law Group failed to take proper precautions against a cyberattack, despite notice that law firms are prime targets for such crimes, the suit claims. Some notable law firm cyberattacks were at Orrick, Herrington & Sutcliffe; Grubman Shire Meiselas & Sacks; Proskauer Rose; Bermuda-based Appleby; and Mossack Fonseca of Panama, the suit says.

The suit cites the American Bar Association's 2023 Legal Technology Survey, which says approximately 29% of law firms reported experiencing a data breach, up from 26% in 2022. Smaller firms are particularly at risk, with 35% of firms with 10- 49 attorneys reporting breaches compared with 22% of firms with more than 500 attorneys."

The suit also cites an [article in The American Lawyer](#), a Law.com affiliate of the New Jersey Law Journal, which said that "[f]ive months into the year, 2024 is on pace to be the biggest year in the history of law firm data breach reports. At least 21 law firms filed data breach reports to state attorneys general offices this year. By comparison, 2023 saw 28 law firm breach reports, while 2022 had 33 breach reports and 2021 had 38."

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ANALYSIS

'A Wake-Up Call': Experts Assess Impact of SSN Data Breach Case

The breach became public knowledge this month after a California resident filed a class action lawsuit against background check company Jerico Pictures, doing business as National Public Data in Coral Springs, Florida, on Aug. 1 in the Southern District of Florida, Fort Lauderdale Division. The plaintiff is represented by Kopelowitz Ostrow, Arnold Law Firm and Wucetich Korovilas.

August 20, 2024 at 05:04 PM

Cybersecurity



Kat Black



What You Need to Know

- On Aug. 1, a class action was filed in the Southern District of Florida accusing a background check company of failing to prevent a data breach that reportedly exposed the Social Security numbers of 2.9 billion people.
- The suit became mainstream news last week, when the company, National Public Data, confirmed the data leak on its website.
- Cybersecurity experts and attorneys say that litigation has a complex and limited role in addressing the problem of recurring massive data breaches.

A data breach that reportedly exposed the personally identifiable information of 2.9 billion people, including Social Security numbers, has called mainstream attention to the conditions that enable massive data leaks and the complexities of litigating on behalf of their victims.

The breach became public knowledge this month after a California resident filed a class action [lawsuit](#) against background check company Jerico Pictures, doing business as National Public Data in Coral Springs, Florida, on Aug. 1 in the Southern District of Florida, Fort Lauderdale Division. The plaintiff is represented by Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Arnold Law Firm and Wucetich Korovilas.

The suit alleged that NPD failed to prevent an April cyberattack by a “criminal gang” known as USDoD, which claimed to have hijacked the personal information of nearly 3 billion people from the site and offered to sell it for \$3.5 million on the dark web.

According to the complaint, NPD scraped this “unencrypted, unredacted” data, which included names, addresses, SSNs, and information about family members, without users’ consent.

Last week, the defendant confirmed the “data security incident” in a [news release](#) published on its website, which seemed to establish the breach was larger in scope than previously feared and had also compromised users’ email addresses and phone numbers. The statement identified a “third-party bad actor” that tried to infiltrate the company’s database in December 2023, “with potential leaks of certain data in April 2024 and summer 2024.”

Why Do Breaches Like This Keep Occurring?

The SSN breach, though unprecedented in terms of its size, is just one of a number of high-profile 2024 data leaks, including ones targeting [AT&T](#) and [Ticketmaster](#), that are currently being litigated in class actions.

One of the reasons for the continual increase in such breaches, apart from the rise of artificial intelligence, the sheer volume of data that companies have access to and lack of encryption protocols, is the concurrent surge of litigation surrounding it, said James E. Lee, chief operating officer at the Identity Theft Resource Center.

Before late 2021, he said, “virtually 100%” of data breach notices contained information about the breach’s root cause, the number of people affected and steps the company was taking to repair the problem and prevent it from happening again. Now, he said, that number has diminished to “between 25 and 30%.” He said this critical information deficit is helping to fuel data breaches because it leaves businesses ill-equipped to plan for such attacks.

“And that’s largely because of the litigation environment,” he said. “We’ve had federal courts order cases dismissed for lack of standing because ... the plaintiffs could not show actual harm, which is, of course, the standard in court. Data breach notices are based on risk of harm, not the same thing.”

Limited Risks

Lee said that the breach’s impact on individuals will likely be negligible.

“This particular breach ... has done nothing to increase the level of risk because the data has been out there for years,” Lee said. “Every adult Social Security number in the United States has been available in a criminal marketplace for years. So the fact that it included socials really has no particular risk relevance. And the other data around it, in many cases, because this group scrapes data on the website, is public data. So the information that is included in these files is not particularly unique and it adds no new risk. ... I mean, that’s not to diminish the fact that there is risk, because there is. But for an individual, there’s not really anything they need to do that they shouldn’t have already been doing.”

Tim Toohey, head of Greenberg Glusker Fields Claman & Machtinger’s cybersecurity practice in Los Angeles, said it’s “possible to overstate the importance” of this breach.

“It is not qualitatively that different than many, many other breaches,” he said. “This should not be the breach that tells businesses that they need to pay attention to cybersecurity. They have that every day. Many of our small, medium-sized clients suffer ransomware attacks that lead to exposure of information, not necessarily Social Security numbers, but information on W2 forms, other information or proprietary information that could spell the end of their business. I’ve seen this several times within the last few years. So this is dramatic in terms of the numbers, it’s dramatic in terms of the fact that it’s Social Security numbers. But, on the other hand, those who follow this would know that almost everyone’s Social Security number is already exposed. Authentication with the last four digit portions of the Social Security number is practically useless because of the widespread availability of Social Security numbers. Other data brokers have had massive data breaches as well.”

Scott Christie, a partner at McCarter & English who litigates intellectual property, information technology and data privacy cases, said that companies may need to reevaluate and adjust their use of Social Security numbers for their security procedures to preempt the possibility of future litigation.

“If your Social Security number and my Social Security number [were] not already a matter of public record before this incident, it probably is now, along with everyone else in the country,” he said. “That being the case, companies should think long and hard about using Social Security numbers as part of multifactor authentication. I can imagine, at some point in the future, some litigant is going to say, well, after this incident it is unreasonable for you to have been using Social Security numbers going forward since they are almost certainly out in the public domain and are close to worthless as a form of security for my account. I think companies should pay attention to that and perhaps adjust their multifactor authentication processes accordingly.”

‘General Terms’

The role of litigation in addressing data breaches is “not entirely clear,” said Toohey.

The suit filed against NPD, he said, is “framed in terms not of any specific statute that relates to data breaches, but in terms of general principles of negligence, breach of contract, fiduciary duty, and the like. So that immediately presents potential challenges to issues, particularly regarding damages. That is where a lot of data breach lawsuits that are framed in these more general terms can sometimes have difficulties.”

The plaintiff who filed the class action, Christopher Hofmann, is a resident of Fremont, California. Toohey said that this case is particularly notable in the context of California privacy law. The California Consumer Privacy Act is one of the few state privacy laws that grants individuals the right to seek statutory damages from businesses through a private right of action.

“It’s one of the major stumbling blocks ... in trying to have a nationwide data breach notification law because those sponsoring the California law or those defending or vouching for it within Congress want to keep some of the teeth, including this private right of action,” Toohey said. “So it’s hard to predict how [a lawsuit like this] will fare. We know so little about this particular data breach. ... It’s going to be interesting to see how it develops, but certainly a challenge may come to the general nature of the claims and the fact that the challenge may be framed in terms of lack of damages.”

Christie said that the suits are of “limited value to the victims” because it is so difficult to prove material harm caused by online privacy incursions in the courts.

“In many jurisdictions ... the victims are required not only to prove, but also allege that there have been some negative consequences arising from this data breach,” he said. “And it’s very difficult to do that, No. 1. And No. 2 ... it could have been a result of other breaches or other incidents that you don’t know about. So being able to credibly allege demonstrable harm is a challenge, much less linking it to this specific breach incident.”

That said, he continued, given the breadth of this breach, he wouldn’t be surprised if it results in multidistrict litigation.

Prevention

Christie said that, above all, companies need to invest in their security protocols.

“At the end of the day, most companies don’t think that their system is at risk until they experience something, and even though it’s certainly best practice to shore up the security of their databases for a variety of reasons, a company may not do it appropriately,” Christie said. “So I would hope that this, if not the prior incidents, wake[s] people up to the seriousness of the problem. I guess it remains to be seen. But yes, this should clearly be a situation where people are seeing what is happening and taking appropriate precautions and not leaving the data in a manner that it is apparently easily exposed. So hope springs eternal, but it’s a matter of dollars and cents and you have a limited budget. Sometimes companies don’t prioritize data security, and they pay for it for these types of incidents.”

Lee said that in addition to “step[ping] up their game” when it comes to strengthening privacy measures in the age of AI and cloud computing, companies need to be transparent with their customers.

“The analogy I always use is: we haven’t had a fatal commercial aircraft in the United States ... in over a decade,” he said. “And that’s because we have an aviation forensic system that, whenever any kind of accident occurs, there is an investigation that can tell you down to the rivet installed who made it, when they made it. Everything that is known or knowable comes out in an error investigation. ... And then it’s made public. ... We need that same level of information-sharing in cybersecurity, where when something occurs, particularly when it occurs for the first time, we need to make sure that that is disseminated broadly to businesses of all sizes. And the public needs to know as well, because they need to know the risk that they’re facing. Until we can do that without fear of ‘I’m going to be sued into oblivion,’ then we’re going to continue to have an environment where the bad guys have an advantage.”

Toohey said that he hopes that “the drama and the number [of this data breach] will be a wake-up call to everyone who should have already had a hundred wake-up calls in the last five to 10 years.

“To some extent, to say that this is something new is engaging in a kind of form of amnesia,” he said. “The drumbeat on this has been sounded for years and years.”

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Auto tech company CDK settles dealers' antitrust lawsuit for \$100 mln

 [reuters.com/legal/litigation/auto-tech-company-cdk-settles-dealers-antitrust-lawsuit-100-mln-2024-08-16](https://www.reuters.com/legal/litigation/auto-tech-company-cdk-settles-dealers-antitrust-lawsuit-100-mln-2024-08-16)

Mike Scarcella

REUTERS/Rebecca Cook Purchase Licensing Rights , opens new tab

Aug 16 (Reuters) - Automotive technology giant CDK Global has agreed to pay \$100 million to settle a nationwide class action by retail auto dealerships claiming they overpaid for the company's dealer management systems.

Lawyers representing a class of thousands of dealers filed the proposed settlement , opens new tab on Friday in Chicago federal court. The accord requires a judge's approval. Austin, Texas-based CDK sells software platforms to dealers to run their daily sales, financing and service operations.

The plaintiffs alleged CDK violated antitrust law by conspiring to eliminate competition among vendors that need to access dealer data to create apps for dealers. Those apps can include inventory management, repair orders, warranty services and other functions within dealer-management systems.

CDK has denied the claims and did not admit wrongdoing in the settlement.

CDK, its lawyers and plaintiffs' attorneys for the auto dealers did not immediately respond to requests for comment.

The proposed settlement covers purchases of dealer management systems from CDK and a rival, Reynolds & Reynolds, since September 2013. Reynolds in 2018 settled claims lodged by car dealers for nearly \$30 million. It did not admit wrongdoing.

The plaintiffs' lawyers said they would seek up to 33% of the combined settlement funds from CDK and Reynolds for legal fees, or about \$34 million.

A trial in the dealers' case had been set for September.

CDK faces other legal claims over its business practices.

A judge last month ruled software vendors can band together as a class to sue CDK for allegedly restricting access to data and causing them to pay hundreds of millions of dollars in overcharges.

Chief U.S. District Judge Rebecca Pallmeyer said AutoLoop, which sells software to thousands of dealerships, had met the legal standard to certify its 2018 lawsuit as a class action with hundreds of other auto industry vendors.

The case is In re Dealer Management Systems Antitrust Litigation, U.S. District Court for the Northern District of Illinois, No. 1:18-cv-00864.

For dealer class: Peggy J. Wedgworth and Elizabeth McKenna of Milberg Coleman Bryson Phillips Grossman

For CDK: Mark Filip and Craig Primis of Kirkland & Ellis

Read more:

Automotive tech company CDK must face antitrust class action, judge says

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Reporting by Mike Scarcella

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Hawaii law makes insurers wait for Maui fire victims to be paid, attorneys say

DJ [dailyjournal.com/articles/380458-hawaii-law-makes-insurers-wait-for-maui-fire-victims-to-be-paid-attorneys-say](https://www.dailyjournal.com/articles/380458-hawaii-law-makes-insurers-wait-for-maui-fire-victims-to-be-paid-attorneys-say)

Insurance,
Civil Litigation

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Aug. 21, 2024

Making insurers wait for victims to be paid in mass torts could be tried elsewhere, plaintiffs' attorneys in the Maui fire litigation said after Hawaii law was used by a judge who stated just that principle.

A unique Hawaii statutory procedure helped plaintiffs' attorneys in the Maui wildfire litigation stop insurance companies from being reimbursed for their payments to policyholders until all the victims had been made whole, as much as possible, from the limited \$4.02 billion settlement.

After the plaintiffs filed their lawsuits in the 2nd Circuit Court of Hawaii, 100 insurance companies sued the same defendants, but in the 1st Circuit Court, explained Frank Pitre of Cotchett, Pitre & McCarthy LLP in Burlingame. "That was done purposely to be able to prioritize their recovery without having to go through their insureds or deal through settlement for benefits paid out to all their insured. When you have a limited fund, that leaves pennies on the dollar for the insureds to collect," Pitre said.

The insurers' aim was to get their payments first, as they did in the Northern California PG&E wildfire cases, he said. "They want to grab their money and leave the carcass behind."

Attorneys for the insurers indicated through a representative Tuesday that no filings have been made in response to the Monday night order and they declined to comment on the case. The companies argued in court filings that the 2nd Circuit Court did not have jurisdiction over non-party subrogation claims and rejected the argument by the plaintiffs that Hawaii law requires subrogation plaintiffs to seek reimbursement for liens from the insureds, rather than the tortfeasor defendants.

Pitre credited Jesse Creed of Panish Shea Ravipudi LLP in Los Angeles as the "architect who laid out" the plaintiffs' "simply superb argument" for the 2nd Circuit Court relying on Hawaii law HRS 431:13-103(a) (10) and HRS 663-10 to make its decision. Creed suggested the principle, even without the statute, would be applicable in California and elsewhere.

"All I'm doing is interpreting the Hawaii statute on the books," Creed said. "The law says an insurer cannot block its insureds from settling a claim against a tortfeasor, a wrongdoer." When the plaintiffs' claims against the defendants - in this case state agencies and companies accused of not doing their duty to prevent the devastating fire - are settled, "then the claim by the insurance companies would be against the settlement."

"The law requires that the victims of the Maui fires not be held captive by their insurance companies," Creed said. He said he believes the insurance companies want to block a settlement. "Their real motive is to get Hawaiian Electric to go into bankruptcy where they think they can do better."

Both Creed and Pitre referred to the PG&E case.

A similar tactic in the Northern California PG&E fire cases succeeded for the insurers, because they made a separate deal with the bankrupt utility to be repaid \$11 million of the money they had already given to their policyholders. The victims got the same amount, but by then there wasn't enough cash, so the plaintiffs had to take half their settlement in stock in the bankrupt utility.

Pitre, one of the plaintiffs' lead counsel in the PG&E matter, said they had to wait some time to monetize the stock to make it worthwhile. "It was a lesson learned," Pitre said. "We didn't want that to happen again."

Although in California there isn't a similar statute as Hawaii's, Pitre said, "The made-whole doctrine applies, in my view, with equal force to claims of insurance carriers though the process may differ."

The statute was upheld and interpreted by a Hawaii Supreme Court opinion, *Yukumoto v. Tawahara*, Haw. 2017.

Hawaii 2nd Circuit Judge Peter T. Cahill relied upon that decision in his ruling Monday night. *In the Matter of the Petition for Coordination of the Maui Fire Cases*, 2CSP-23-000057 (2nd Circ. Ct. of Haw., filed Aug. 19, 2024); *Stover et al. v. County of Maui et al.*, 1:24-cv-307-JAO-BMK (D. Haw., filed July 24, 2024).

"It hasn't really been tested in California, but I think it should be," Creed said. "The reason is we've already seen the bad incentives the alternative is, the incentive to hold victims hostage to the insurers alleged rights. When you're dealing with these giant mass torts it creates

insolvency concerns for the tortfeasor. I do think other victims need to look at that."

The Hawaii law "says that when you're in a situation where resolution of a case requires handling of liens there is a process where any lien holder must ... have a court review that the claim is valid and what is the amount, and that's what we did here," Pitre said. "There was a fund established of \$4 billion max - the insurance policy limits of all the defendants - created to take care of all the claims by the fire victims including insurers who had subrogation claims to reimburse themselves. But there are some limitations. The insured needs to be made whole for what their claim is, and only then can the insurance company try to get reimbursement through the insured for the amount the insurer paid."

#380458

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Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program

By Emily R. Siegel

- CAMG funder program now more than 50% of business
- Program pairs funders with lawyers to generate leads

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Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program

By Emily R. Siegel 2024-08-20T06:00:01000-04:00

- CAMG funder program now more than 50% of business
- Program pairs funders with lawyers to generate leads

A large mass tort marketing firm has tapped litigation finance veteran Max Doyle to lead a growing program aimed directly at funders.

Consumer Attorney Marketing Group hired Doyle as chief strategy officer, the company said Tuesday. He will focus on expanding its funder program, which CAMG says now accounts for more than half of its business.

Billion Dollar Lawsuits: Wh...

WATCH: Billion Dollar Lawsuits: When Litigation Finance Met Mass Torts

Marketers traditionally work for law firms pursuing mass tort and personal injury cases on behalf of millions of people claiming they have been harmed by large companies. Marketers create leads—people who want to join the suits as plaintiffs—by advertising on television, radio, and social media.

CAMG is working directly with litigation funders and pairing them with lawyers to generate leads. It's a sign that funders have become increasingly intertwined with marketing as they set their sights on mass torts.

The company works with funders to curate investment strategies, according to Doyle, who starts in September. Funders can create their own lists of cases and have more control over how their capital is deployed.



Max Doyle
Consumer Attorney Marketing Group

"I want to be the person who I suppose can speak in that language with the funders or investors or alternative asset managers or hedge funds or whoever it is, but be able to not start off with the law, but start off with the potential returns," said Doyle.

"Large alternative asset managers have to be efficient in terms of how they invest and they want to manage exposures and get to the bottom of what the risk-adjusted returns look like," he said. "We want to try and make that a bit easier for them."

Instead of lending to a law firm on its existing set of cases and spending time finding clients, the funder's capital is used to create a new docket through advertising with CAMG. The arrangement looks different with every investor but involves an intermediary firm serving as middleman, helping to sign paperwork and accounting and management.

Once cases are acquired, the intermediary will then co-counsel with a separate law firm that does the litigation. The funding is secured against those cases.

Non-Lawyer Ownership

Rules changes in places like Arizona, where non-lawyers can take equity stakes in law firms and split fees with attorneys, offer more options for mass tort investment, according to Doyle. They make it easier to create portfolios of cases for investors.

"It puts investors in a very different position and there's more clarity over the collateral," said Doyle. "Funders spend a lot of time ensuring that the collateral is locked down and safe and liens are renewed, so I think there are better ways to structure it."

Arizona in 2020 became one of a handful of states that eliminated a rule that forbids nonlawyers from owning law firms. Utah and Washington D.C. have also made changes to the rule.

Private equity firms and funders have flocked to Arizona to take advantage of the state's looser rules on law firm ownership. Mass tort firms in particular have taken to alternative business structures for lead generation and advertisement nationally while allowing outside capital to have an ownership stake in the firms.

California-based CAMG, which says it's one of the largest mass tort marketers, has been operating in the space for almost 15 years. Along with lead generation, it also handles public relations, medical record retrieval, and intake services.

Money has poured into dockets for Johnson & Johnson talcum powder and Camp Lejeune, inundating airwaves with law firm advertisements. Though many of those torts are in later stages, Steve Nober, founder and CEO of CAMG, says the company is most active in litigation over PFAs water contamination and Monsanto's weedkiller Round Up. He also sees weight-loss drug Ozempic as the most interesting newer entrant in the space.

"This is a really interesting time for mass torts and let's not forget it's probably the last bastion of a consumer's ability to take on a large company that has caused an injury there," said Doyle. "There are heartbreaking cases, and as it turns out, it's also a really interesting place to invest funds."

The commercial litigation finance industry has experienced growing pains in recent years with firms conducting layoffs during a challenging fundraising environment.

Doyle previously spent a year as CEO of litigation funder LexShares, which recently announced it entered harvest mode after large delays in case resolutions due to the pandemic. He also led North America operations at UK-based funder Augusta Ventures which lost five employees from its investment team to Omni Bridgeway after significant layoffs last year.

Doyle said his move to mass torts was purposeful. He acknowledged some of the tumult in the commercial funding sector.

"It's harder to raise money, you need a good strategy, a good team, a good track record, and a receptive market," he said. "If any one of those is out, it's going to be difficult."

Camp Lejeune claims over contaminated water exceed 500,000

 [reuters.com/legal/government/camp-lejeune-claims-over-contaminated-water-exceed-500000-2024-08-21](https://www.reuters.com/legal/government/camp-lejeune-claims-over-contaminated-water-exceed-500000-2024-08-21)

Diana Jones

A sign at the entrance to U.S. Marine Corps Base Camp Lejeune, in eastern North Carolina, U.S., sits in this undated handout photo. U.S. Marine Corps/Handout via REUTERS
Purchase Licensing Rights , opens new tab

Aug 21 (Reuters) - The U.S. Navy has received more than 546,500 claims for compensation from people impacted by decades of contaminated water at Marine Corps Base Camp Lejeune in North Carolina, a new court filing shows, putting it squarely among the largest injury cases of all time.

That number may fluctuate up or down by a few thousand, the government said in the filing , opens new tab. The U.S. Navy is reviewing additional claims received up to the Aug. 10 deadline and removing claims that are found to be duplicates.

The number of administrative claims filed with the U.S. Navy – a step claimants must have taken by the Aug. 10 deadline to receive compensation for injuries they attribute to the water – surpasses the nearly 400,000 lawsuits filed over 3M Co's military-issue earplugs, which is regarded as the largest multidistrict litigation in history.

The Navy did not provide details on the final number of claims, but said it was reviewing each claim and "is committed to resolving every valid CLJA claim as fairly and expeditiously as possible."

The U.S. Marines first discovered dangerous chemicals in the water at Camp Lejeune in 1982, and the U.S. Department of Health and Human Services later acknowledged that between 1953 and 1987 chemicals in the water on the base may have affected a million people, leading to diseases like kidney cancer, leukemia and bladder cancer.

The Aug. 10 deadline marked two years since President Joe Biden signed legislation that included the Camp Lejeune Justice Act. After years of state and federal court dismissals of lawsuits over the water based on North Carolina state law, the act opened a two-year window for Camp Lejeune claims, requiring people seeking compensation from their injuries to file an administrative claim with the U.S. Navy before they can file a federal lawsuit.

So far, just over 2,000 lawsuits have been filed by people whose claims were not resolved at the administrative level, the court filing said. Those cases go to a single federal court in North Carolina. The first trials aren't expected until later next year.

The process of resolving administrative claims has been slow, and many more lawsuits could be on the way. As of earlier this month, only about 150 cases have been resolved, according

to a tally from the U.S. Navy.

The ongoing litigation over 3M's earplugs has included more than 390,000 lawsuits since the MDL's creation in 2019. The 3M earplugs were widely used in both Afghanistan and Iraq between 2001 and 2015.

Last year, the company agreed to pay \$6.01 billion to settle nearly 260,000 remaining lawsuits by current and former U.S. military service members who say they suffered hearing loss from using the company's earplugs.

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Diana Novak Jones
Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

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GM Diesel Truck Owners Revive Emissions Deception Case on Appeal

By Shayna Greene 2024-08-21T15:14:07000-04:00

- Consumers say suit is about deception, not EPA authority
- GM says lawsuit challenges EPA's decision-making ability

A group of individuals who purchased General Motors LLC diesel vehicles partially won their bid Wednesday to revive their class suit over allegedly deceptive “clean” truck advertising.

The plaintiffs’ state law claims that the engines were deceptively advertised as, among other things, “clean” diesels aren’t preempted by the Clean Air Act, a divided panel of the US Court of Appeals for the Sixth Circuit said.

The consumers alleged GM deceptively marketed trucks with Duramax diesel engines, including certain models of the Chevy Silverado and GMC Sierra, as low-emission vehicles. They **claimed** the vehicles were designed to reduce the effectiveness of the nitrogen oxide reduction systems in real-world driving conditions in order to achieve better fuel economy, power, and durability—and that GM didn’t disclose that fact.

GM argued that the Environmental Protection Agency granted the company emissions compliance certifications for the trucks, so the consumers were really challenging the EPA’s authority.

The consumers appealed a 2023 decision from the US District Court for the Eastern District of Michigan that granted summary judgment to GM. They asked the Sixth Circuit to reverse that judgment, which said the state law claims were preempted and that the consumers lacked standing to pursue their Racketeer Influenced and Corrupt Organizations Act claims.

The Sixth Circuit agreed with the consumers as to the preemption argument, saying that the state law claims exist independently of federal law and the EPA, and don’t rely on proving a fraud on the agency.

The court however affirmed summary judgment on the RICO claim, holding that the plaintiffs were

indirect purchasers for purposes of that law.

Judge [Karen Nelson Moore](#) wrote the opinion. Judge [Rachel S. Bloomekatz](#) joined in full.

Judge [Raymond M. Kethledge](#) dissented on the preemption issue, saying he would have affirmed the lower court in full.

The consumers are represented by Hagens Berman Sobol Shapiro LLP. GM is represented by Kirkland & Ellis LLP.

The case is [Fenner v. Gen. Motors LLC](#) , 6th Cir., No. 23-01648, 8/21/24 .

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'Tacit Collusion'?: Verizon Slams Class Action Demanding \$268B in Restitution

“The factual allegations are baseless, the legal claims are frivolous, and the damages figure is pure fantasy,” a Verizon spokesperson said of the antitrust class action. “We are confident a court will see this complaint for what it is while Verizon customers continue to enjoy Wi-Fi calling and mobile data as features of their service plans.”

August 19, 2024 at 05:31 PM

Antitrust



Sulaiman Abdur-Rahman



What You Need to Know

- An antitrust class action accuses AT&T, T-Mobile and Verizon of tacit collusion and demands more than \$268 billion in restitution.
- Boutique law firm Holmes, Pittman & Haraguchi represents the plaintiffs.
- Verizon slams the allegations as frivolous and baseless.

An antitrust class action demanding more than \$268 billion in restitution and a related complaint filed over the weekend accuse AT&T, T-Mobile and Verizon of tacit collusion, price-fixing and other alleged anticompetitive conduct in the American telecommunications market.

Holmes, Pittman & Haraguchi partner John Travis Pittman filed an initial antitrust complaint Saturday and this class action Sunday on behalf of VoIP-Pal.Com Inc. and individual telecom subscribers.

Both complaints, filed in District of Columbia federal court, were surfaced by [Law.com Radar](#).

Ray Leon, Richard Inza and Michael Inza accuse the telecoms of “predatory pricing” and “unjust enrichment” in violation of the Clayton and Sherman acts, according to the allegations in their class action.

VoIP-Pal accuses the carriers of “forced bundling of Wi-Fi calling with cellular services and mobile data with texting, which has perpetuated an unfair market dominance,” according to the allegations in its antitrust complaint.

Seeking \$268.56 billion in restitution for themselves and members of the proposed class, the plaintiffs also demand monetary damages, civil and criminal penalties and court orders requiring the carriers to “immediately unbundle compulsory Wi-Fi calling and texting services from cellular calling and texting services.”

Counsel for the plaintiffs also seek an injunction halting AT&T, T-Mobile and Verizon from engaging in alleged price-fixing and request legal consolidation of both cases in U.S. District Court for the District of Columbia.

Verizon described the allegations as “frivolous” and “baseless,” while AT&T vowed to mount a rigorous defense in court.

“This lawsuit is yet more nonsense by an unsuccessful serial litigant seeking a windfall,” a Verizon spokesperson said Monday in a statement. “The factual allegations are baseless, the legal claims are frivolous, and the damages figure is pure fantasy. We are confident a court will see this complaint for what it is while Verizon customers continue to enjoy WiFi calling and mobile data as features of their service plans.”

“We dispute the allegations in these lawsuits and will vigorously defend ourselves in court,” an AT&T spokesperson said Monday in a statement.

The class action describes the restitution demand as a “substantial but fair figure that reflects the magnitude of the damages without demanding an immediate cash outlay from the Defendants.”

The proposed restitution plan would provide a \$144 annual bill reduction for each affected subscriber for five consecutive years.

“Around 373 million major carrier subscribers are subjected to misleading marketing practices and coercive tactics that push them into purchasing expensive bundled plans,” according to the allegations in the class action. “These consumers are denied the option to choose more affordable, standalone services, leading to inflated costs and diminished consumer satisfaction.”

VoIP-Pal, a Nevada corporation with principal offices in Waco, Texas, owns Wi-Fi calling, routing and classification technology. The company accuses the defendants of “patent infringement” but asks the court to prioritize the antitrust claims over any ongoing patent litigation.

“The coordinated actions across major carriers point to collusion, maintaining artificially high prices and stifling competition,” VoIP-Pal alleges in its complaint. “This directly harms VoIP-Pal by devaluing its Wi-Fi calling routing and classification technology, undermining its market potential.”

T-Mobile did not immediately respond to a request for comment on this article.

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

DOJ Pilot Starts Race to Disclose Potential Criminal Misconduct

- *MoloLamken attorneys share corporate guidelines for new pilot*
- *Companies should follow timelines to make informed decisions*

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DOJ Pilot Starts Race to Disclose Potential Criminal Misconduct

By Walter Hawes and Caleb Hayes-Deats 2024-08-23T04:30:03000-04:00

- *MoloLamken attorneys share corporate guidelines for new pilot*
- *Companies should follow timelines to make informed decisions*

Earlier this month, the Department of Justice announced the latest tool in corporate enforcement—the DOJ whistleblower awards pilot program. The new pilot program relies on the US Attorney General's statutory discretion to distribute “awards for information or assistance leading to a civil or criminal forfeiture” to incentivize whistleblowers to come forward regarding corporate misconduct.

Through this initiative, the DOJ seeks to address gaps in existing whistleblower programs, including those run by the Securities and Exchange Commission, Commodity Futures Trading Commission, IRS, and Financial Crimes Enforcement Network.

The new pilot offers a potential award only for information relating to specific categories of federal criminal activity: crimes involving financial institutions, domestic corruption involving companies, foreign corruption involving companies, and health-care violations involving private actors.

The DOJ stated that one goal of the program is “incentiviz[e] companies to invest in strong internal reporting structures and to report crime when they learn about it.” The pilot program thus includes many features that will impact corporate compliance and risk functions in several ways.

First, the pilot program will increase the number of internal whistleblower reports. Recognizing the value of internal reporting, the DOJ explicitly “designed the pilot program to encourage employees to report misconduct internally before submitting information.”

Several aspects of the program encourage internal reporting. The program permits awards where whistleblowers report internally first, so long as they provide the same information to the DOJ within 120 days of the internal report.

The DOJ also states in guidance that it will consider whether whistleblowers reported potential misconduct internally and cooperated with any resulting internal investigation as a positive factor that will increase the amount of any award. Although not required under the program, those provisions together provide clear incentives for whistleblowers to report internally first, prior to bringing information to the DOJ.

Companies should make sure they have effective mechanisms—such as anonymous hotlines or submission portals—to process the potential increase in internal reports. Ensuring compliance functions have adequate capacity to process new reports will enable companies to make informed decisions on whether to report to the DOJ—a decision that’s now subject to additional time pressure.

Second, the pilot program creates a race to disclose corporate misconduct. In conjunction with implementing the program, the DOJ has amended its corporate voluntary self-disclosure policy. That policy generally offers companies reduced penalties—including declinations—when they timely report wrongdoing, cooperate with the government’s investigation, and undertake appropriate remediation.

Under the DOJ’s amendment to its voluntary disclosure policy, a company that receives an internal whistleblower report remains eligible for the full benefit of the voluntary disclosure only if it discloses allegations to the DOJ within 120 days of receiving them (and before the DOJ reaches out proactively). This effectively imposes a 120-day reporting requirement—and effectively pits whistleblowers and companies against each other in a race to disclose potential misconduct to the DOJ.

The narrow 120-day window—which may be further reduced if the DOJ reaches out proactively—puts significant pressure on companies to quickly review potential reports. And because whistleblowers must report their allegations to the DOJ within the 120-day period to be eligible for an award, companies should expect the DOJ will become aware of the allegations regardless of whether they self-disclose.

To ensure they can take advantage of the benefits of the policy, companies must receive, review, and evaluate internal whistleblower reports within at least 120 days of receipt. There are practical difficulties and factual complexities in reviewing all internal reports within that condensed timeline.

Companies may need to revise their internal policies and procedures to ensure complaints are reviewed and escalated quickly. It might also be necessary to revise the timelines for seeking outside counsel’s input regarding the decision to self-disclose.

Finally, the program also raises the prospect of additional multi-agency inquiries related to the same underlying conduct. Although the program generally covers misconduct that wasn’t covered by existing whistleblower programs, some overlap exists.

For example, the SEC whistleblower program covers certain foreign corruption violations, including where a US issuer violates the Foreign Corrupt Practices Act. As whistleblowers struggle to determine which program applies to their allegations, they may decide to file with multiple agencies.

The DOJ's guidance explicitly encourages that approach. That guidance explains that whistleblowers will not be eligible for an award under the pilot program to the extent they "would be eligible for an award through another U.S. government or statutory whistleblower, qui tam, or similar program" for an identical report. It clarifies, however, that whistleblowers may "submit information to [multiple] programs" to the extent confusion exists regarding whether a violation is covered by an existing program. That instruction will likely make multi-agency submissions more common.

Regulators frequently coordinate regulatory responses to avoid wasting government resources. But practical hurdles and the reality of inter-agency competition regarding certain enforcement areas preclude efficient solutions in every case. The prospect of more multi-agency reports thus presents the risk that companies will be forced to coordinate responses to multiple agencies regarding the same conduct more frequently.

As a result of this new program, companies face greater pressure to implement compliance procedures that can efficiently and effectively review internal complaints and, where appropriate, report potential misconduct to the government. Companies must be capable of performing that review and preparing a potential disclosure on an expedited timeline.

Adjustments may be necessary to resource-allocation and internal compliance procedures. While those adjustments may come with costs, any additional expense must be weighed against the threat of DOJ scrutiny and loss of potential benefits under the government's existing self-disclosure policies.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Block's Muddy Waters Accused of Paying Techtronic Report Author

By John Holland

Exclusive

- Lawsuits allege Muddy Waters helped spread false report
- Block fighting to prevent disclosure of dealings with Jehoshaphat

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Block's Muddy Waters Accused of Paying Techtronic Report Author

By John Holland 2024-08-16T09:13:53000-04:00

- Lawsuits allege Muddy Waters helped spread false report
- Block fighting to prevent disclosure of dealings with Jehoshaphat

Investor Carson Block's Muddy Waters financed a short-seller whose allegations of accounting fraud at power tool giant Techtronic Industries Co. shaved \$3.5 billion off its market value in a matter of hours, the company alleges in a series of federal court filings.

Muddy Waters gave an unspecified amount of money to a trader calling himself "Jehoshaphat Research," and helped promote his February 22, 2023 research report that falsely claimed Techtronic's books were a "web of deceit," according to documents and pleadings the company filed in federal courts in Florida and Texas. Shares of Techtronic, the Hong Kong-based maker of Ryobi and other major brands, plunged 19% before the Hong Kong stock exchange halted trading.

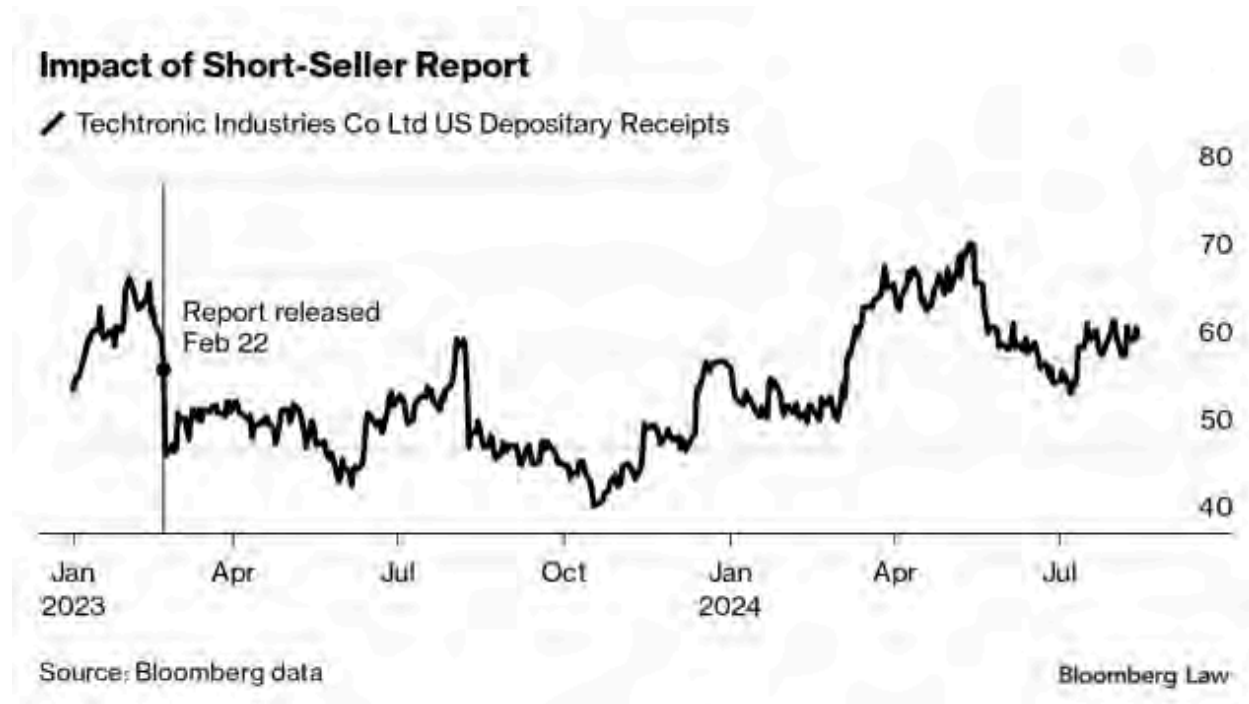
Jehoshaphat was actually a pseudonym used by Victor Bonilla, a Tampa-based fund manager who makes money by reporting on companies and shorting their shares, Bonilla's lawyer confirmed in an interview this week. The company sued Bonilla last year in US District Court for the Middle District of Florida, alleging his February report and a second one in June were fiction designed to drive its shares down.

Block's connection to Jehoshaphat, which hasn't been previously reported, is now the subject of dueling lawsuits in the US District Court for the Western District of Texas, where Block is based. Neither Block or Muddy Waters are defendants in Bonilla's Tampa lawsuit, but Techtronic's attorneys say records produced in that case led them to Block's firm.

"TTI uncovered through discovery that Muddy Waters was intimately involved in Bonilla's scheme," attorneys from Quinn Emanuel wrote in a July 29 motion seeking to enforce a subpoena for Block's financial records. "In conjunction with publishing, Bonilla either shorts the stock of the company that he reports upon or coordinates with Muddy Waters to short the stock and pay him a portion of the profits."

Bonilla's report shocked markets when it came out, partly because of the mystery about who wrote it and because it came on the heels of a blockbuster report by Hindenburg Research alleging wrongdoing at Indian conglomerate Adani Group. Hindenburg's report knocked \$140 billion off Adani's market value and sparked investigations that continue today. By contrast, Techtronic's stock bounced back 9% a day later as some analysts came to its defense. It has recovered to previous levels.

The report's release came while the Department of Justice and federal regulators were investigating whether funds and researchers improperly coordinated trades or broke laws to profit.. Federal agents seized Block's cell phone and other records as part of a court-ordered search, Bloomberg News reported. Reuters reported this week that the federal investigation into Block has closed without charges.



Techtronic's Texas filing seeks records that could shed light on whether Block sold the company's shares short as they plummeted, and provide details of his relationship with Bonilla. Block and Muddy Waters produced some records sought by Techtronic, and a Muddy Waters employee has agreed to sit for a deposition.

Block also filed a separate motion to quash the Aug. 2, asserting that much of what Techtronic seeks is exempt for several reasons, including that Block is a journalist whose actions are protected by the First Amendment. He also sought an order blocking Techtronic from taking his deposition. All motions remain pending.

Block's attorney, David Lawrence of Rigby Slack Lawrence and Comerford, said he couldn't comment. Bonilla's attorney, Dilan Esper of Harder Stonerock, said he couldn't talk about the specific claims because of a court protective order, but said his client has a stellar reputation and his work on Techtronic reflected a mix of research and opinions. Attorneys from Quinn Emanuel, representing Techtronic, said they couldn't discuss the case.

Bonilla included a disclaimer in his February 2023 report stating he shorted shares in Techtronic, and repeated that the same day on Block's Zer0es TV internet program, where he was identified as Jehoshaphat and appeared as a computer-generated shadow with his voice altered. He didn't mention any payment from Muddy Waters. But in an email to Quinn Emanuel lawyers during discovery for the Florida case, Esper wrote that "the only financial interest, broadly speaking, that Mr. Bonilla had in the First Report was a payment by Muddy Waters regarding Techtronic."

Zer0es TV website, which says it was founded by Block, includes 10 archived videos featuring "Jehoshaphat Research," including two that discuss Techtronic. Jehoshaphat initially appeared in shadow each time with his voice altered, though some of the videos now have the shadow removed and Bonilla appears as himself.

In response to the Florida lawsuit, Bonilla argued that he was also acting as a journalist. A federal judge rejected the claim that he was protected under Florida's shield law and forced him to turn over the names of sources he used in compiling the two reports. Bonilla also failed to have the case dismissed based on a First Amendment right to air his opinions, with US District Judge Charlene Edwards-Honeywell saying many of the allegations were laid out as facts designed to make readers believe Techtronic engaged in fraud.

She also wrote that even if she accepted Bonilla's claim that Techtronic is a public figure—triggering a higher standard to prove libel—the company "sufficiently alleged facts regarding actual malice." The judge said Techtronic satisfied that standard by alleging that Bonilla knew or should have known his statements were false, or that he acted with reckless disregard for the truth.

Esper of Harder Stonerock, representing Bonilla, said in an interview that his client has built a reputation by accurately reporting on financial problems at publicly traded companies.

"Mr. Bonilla's business model is not a secret, he short stocks of the companies he writes about," Esper said in an interview. "It is a business model that incentivizes truth telling."

The case is Techtronic Industries Company V. Bonilla, M.D. Fla., 23-cv-01734 ,

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B. Riley's Money Machine Ensnared Retail Investors \$25 at a Time

By Jill R Shah and Claire Ballentine2024-08-21T07:00:19764-04:00

Retail investors are caught in the crossfire of [B. Riley Financial Inc.](#)'s downward spiral.

The Los Angeles-based investment firm's mounting problems, from regulatory probes to record losses, are shining a light on one of its favored fundraising strategies. B. Riley is a self-proclaimed leader in baby bonds — fixed-income securities issued in denominations small enough to appeal to everyday investors, rather than the million-dollar increments favored by institutions.

B. Riley raised more than \$1.5 billion in recent years to strengthen its own balance sheet by selling baby bonds for as little as \$25 per note. The acquisition of National Holdings Corp. in 2021 turbocharged the process, giving B. Riley a more direct pipeline to the portfolios of retail investors.

For buyers of the bonds, the investment has since turned sour. The securities, which face less scrutiny than typical fixed-income products, are low on B. Riley's list of repayment obligations if it goes bust. That means the company's growing woes have sent prices for the bonds plummeting — one such note has lost more than half its value in August and now changes hands at a yield of nearly 50%.



“The retail investor is the least informed, and any time an issuer wants to market something to the least informed consumer, that should be a red flag,” said Noah Damsky, principal at Marina Wealth Advisors. “They’re essentially saying smart money is not interested in this debt offering.”

Proliferation

B. Riley stands out for its experience with this fundraising maneuver. Andy Moore, chief executive officer of the company’s securities wing, told investors late last year B. Riley “led the proliferation of the baby bond market” in 2020. He boasted of raising \$3 billion in the ensuing year through the sale of \$25 notes.

And while not all holders of baby bonds are mom-and-pop investors, founder Bryant Riley in a 2020 earnings call acknowledged there was “a fair amount of retail in some of the baby bonds” issued by his own firm and said “we feel really good about our relationship with those investors.”

The company declined to comment for this story.

Much of B. Riley’s debt issuance took place during a period of historically low interest rates. When

they spiked to the highest level seen in decades, some of these debt instruments became either immediately expensive or very costly to refinance.

Institutions sometimes offer baby bonds as a way to broaden their potential customer base, according to Damsky. It's similar to why companies undertake stock splits — higher prices can make small-time investors feel the stock is out of reach, so more people can get involved if the price is lower.

To be sure, it's not the first time baby bonds have collapsed in price. US retailer JCPenney saw some of its notes chopped into tiny increments decades ago, letting them land in the hands of everyday investors. Holders then found themselves way back in the repayment line when the company went bust in 2020. Bondholder lawyers ended up supporting JCPenney's restructuring plan, one that gave the investors a fraction of a cent for their holdings, because if they fought the deal their clients would have received nothing at all.

Warning of Losses

Now, B. Riley is taking sizable writedowns on its investments in risky companies just as it faces maturities on its own lumbering debt load. B. Riley warned of losses last week as it cut the value of its stake in Franchise Group Inc. and a related loan receivable. It's expecting a non-cash markdown of about \$330 million to \$370 million, according to a company statement.

Robert Van De Veire, a securities lawyer and partner at Kurta Law, said he is representing multiple retail investors who were sold B. Riley baby bonds through their financial advisers. "When you have speculative risks that plant themselves into an asset class viewed as safe, it can create a situation that can be disastrous for a retail investor," he said.

Baby Bond Breakdown		
B. Riley has about \$1.5 billion of the securities due in the next four years		
Issue	Ticker	Amt Outstanding (3/31)
6.375% Sr. Notes due 2025	RILYM	\$146.43M
5% Sr. Notes due 2026	RILYG	324.71M
5.5% Sr. Notes due 2026	RILYK	217.44M
6.5% Sr. Notes due 2026	RILYN	180.53M
5.25% Sr. Notes due 2028	RILYZ	405.48M
6% Sr. Notes due 2028	RILYT	266.06M
Total		1.54B
Source: Company filings and data compiled by Bloomberg		Bloomberg

B. Riley is facing increased scrutiny after the company warned of its largest-ever quarterly loss and suspended its dividend, sending the prices of the baby bonds spiraling alongside its shares.

The B. Riley baby bonds are unsecured, meaning they’re not backed by any specific assets or collateral. That makes them riskier for investors, who are putting their faith in the company’s creditworthiness. In the event of a bankruptcy, the company has at least \$600 million of secured debt it would need to repay before baby bond holders see a dime.

‘Relatively Safe’

Several traders said the bonds seemed relatively safe, especially the nearest-term maturities. But when prices plunged, the risks became clear.

Jack Stein is a 37-year-old in Miami who works in the restaurant industry. He held B. Riley stock in 2021 when its price soared, and then found out the company was offering baby bonds.

“They relied on this unusual method of funding liabilities with retail investor base,” he said. To him, it seemed like “the whole strategy is that they have access to a lower cost of capital.”

He bought in at the end of 2021, attracted by yields as high as 8%. But when the bonds’ price started

dropping in late 2022, he got out.

Stein said he realized that “if things go wrong, the retail investors who own these are going to get wrenched.”

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B. Riley's Rout Forces Reckoning for a Founder's 'Labor of Love'

By Donal Griffin, David Voreacos and Todd Gillespie

Deep Dive

- Bryant Riley tries to craft a buyout after stock collapses
- Partnership with Brian Kahn brings turmoil to brokerage

Bloomberg Law News 2024-08-23T11:01:32795606776-04:00

B. Riley's Rout Forces Reckoning for a Founder's 'Labor of Love'

By Donal Griffin, David Voreacos and Todd Gillespie2024-08-20T12:07:37354-04:00

- Bryant Riley tries to craft a buyout after stock collapses
- Partnership with Brian Kahn brings turmoil to brokerage

Bryant Riley, who built an underdog investment firm into a multibillion-dollar financial empire that bears his name, was defending his close friend and business partner, **Brian Kahn**.



Bryant Riley

Photographer: Jon Kopaloff/Getty Images

It was November 2023, and Kahn had been implicated in a federal investigation of a failed hedge fund that lost hundreds of millions of dollars. Kahn had insisted he hadn't done anything wrong.

"That's good enough for me," Riley said during the quarterly earnings call for B. Riley Financial Inc., which was one of Kahn's biggest financial backers. "We're going to make a lot of money for our shareholders."

It wasn't good enough for US authorities, who've now widened their investigation of Kahn, his dealings with Bryant Riley and the firm Riley co-founded more than 25 years ago. It didn't work out well for shareholders, either. The stock collapsed on Aug. 12 on word that Riley and his firm received subpoenas from the US Securities and Exchange Commission, and that the company was headed for its worst-ever quarterly loss, largely because of its investment in Kahn's business.

Riley tried to stop the bleeding last week with an informal offer to take B. Riley private – he's the biggest stakeholder at about 24%, he wrote. But his letter to the board lacked specifics on who would give him the money to do it, and B. Riley's market value remained mired at a fraction of the \$1.77 billion it commanded little more than a year ago.



For now, it's validation — and probably a massive profit — for short sellers who've attacked B. Riley's deal-making, accounting and overlapping personal connections with Kahn for more than a year. What happens next matters to both Wall Street and Main Street.

B. Riley isn't a blue-chip firm, but the Los Angeles-based company occupies an important niche selling stock, raising debt and providing analyst coverage and investment conferences for hundreds of middle-market companies that might otherwise be overlooked by big investment banks. The brokerage makes a market in over 1,500 securities and counts 1,000 money managers as customers. The wealth-management unit runs about \$25 billion for institutions and retail clients, some of whom bought high-risk debt issued by the firm.

With a total staff of about 2,400, B. Riley also makes direct investments in struggling companies, aiming to sell them later when the investments mature. One of those bets was Kahn's management-led buyout of Franchise Group, a deal that now threatens to unravel much of what Bryant Riley has built.

"It was a good operating company — I don't know how they got so far off track," said **John Lekas**, chief executive and senior portfolio manager at Leader Capital Corp., which invested in B. Riley securities. "If you're serious to make an offer, get your lawyers involved and get the SEC to sign off. If there was ever a time to have a sense of urgency, it's now."

Riley, 57, his company and a Franchise Group official didn't respond to requests for comment. A lawyer for Kahn, 50, declined to comment.

Riley's Startup

Building the firm was a "labor of love," Riley said in last week's letter to the board. He learned the trade after graduating from Lehigh University in 1990 at several small brokerages, and launched B. Riley in 1997 with his wife as well as classmate Tom Kelleher, the firm's co-chief executive.

It was a rocky start. The following year, the National Association of Securities Dealers sought to expel Bryant Riley from the finance industry, according to his BrokerCheck record, which alleged violations on trade reporting and lax supervisory procedures. The watchdog settled for a \$12,000 fine and censure of Riley and his firm, with no admission of wrongdoing.

Riley's company stayed small, employing fewer than 100 people by mid-2014, but business grew at a steady clip as it broadened its M&A advisory, restructuring and investment banking arms. His firm made some good hires, with several analysts ranked among the best in prestigious Wall Street surveys.

The biggest leap came in 2017 with the takeover of FBR Capital Markets, a venerable brokerage with a business model that fit neatly with B. Riley, and profits soared in the following years.

Company Culture

It's been a lucrative ride for Riley. The company said in a filing that Riley was paid \$4.9 million last year, and he was holding almost 7 million shares, which paid a \$1 quarterly dividend before it was cut and then eliminated. Records show a six-bedroom home in his name valued at about \$11 million in the Pacific Palisades neighborhood of Los Angeles and another six-bedroom home in Montana valued at more than \$21 million.

There are touches of glamour, with Riley counting as a friend Sugar Ray Leonard, the legendary boxer, and attending star-studded fundraisers for Leonard's foundation that supports childhood diabetes research.



Bryant Riley with Sugar Ray Leonard at Charity Boxing Night in 2014.

Photographer: Mark Davis/Getty Images for Sugar Ray Leonard Foundation

Riley is known internally as a charismatic and savvy executive who trusts his own judgment and those close to him, according to a dozen current and former employees and managers contacted by Bloomberg News. He prefers to dress casual, going tieless even on special occasions like ringing the Nasdaq opening bell in 2015.

For junior bankers, the culture can be challenging, with long hours, modest base pay and heavy competition for deals and bonuses, said the people, who asked not to be identified to preserve their relationships with the firm. Riley frequently travels to the New York office, jumping on a red-eye flight with little notice if a pitch seems important.

Michael Biener, B. Riley's deputy chief information officer, described the firm as "a family."

"We want this to be a place where people come to work and enjoy it," Biener said in an interview. "That came from the top."

One person familiar with the firm's model said B. Riley layered on more debt than FBR's previous management. The result resembled a leveraged investment portfolio alongside a broker-dealer, similar to the way big Wall Street firms like Lehman Brothers were structured before the financial crisis, the person said.

Echoing a concern that B. Riley has acknowledged in its annual reports, some of the people said internal controls were weak. One employee said they pitched about 30 deals during two-and-a-half years there and none of the details got questioned. B. Riley has a conduct and ethics policy that applies to everyone, and a policy for clawing back incentive pay in the event of a restatement.

Riley himself has flagged some of the risks that come with the firm's mix of "recurring and episodic" businesses, which can make earnings volatile.

"To our shareholders, we know we're a somewhat difficult story, and we have some ups and downs," he said in February 2023 after posting an annual loss. "But overall, I think we performed."

'Accidental Franchisee'



Brian Kahn

Source: SEC Filings

That story included helping Kahn build his own business. He was a Harvard graduate, listed as a 5-foot-10 senior defensive back from Boca Raton on the school's 1995 football team. Three years later he set up what became Vintage Capital Management, described as a value-oriented firm with public and private stakes in various industries.

Kahn has described himself as “an accidental franchisee,” after acquiring two chains of rent-to-own businesses out of receivership in Arizona in the early 2000s. He ended up selling them to Aaron’s Co. under pressure and becoming a franchisee. Kahn said he “learned a ton” about that kind of business and “certainly learned that I’d rather be a franchisor.”

Along the way, Kahn became one of Bryant Riley’s clients for research reports, Riley said in 2020 testimony.

“Our career tracks were somewhat similar,” Riley said. “We each did bigger deals. And we didn’t do a lot together until more recently, the last few years.”

Typically, Kahn would buy a stake in a business, and Riley and his firm often would provide financing and invest directly alongside him. In some cases they’d both serve on the board.

Some deals worked well. One failed spectacularly.

Among the transactions that laid the foundation for Kahn’s empire was the purchase of Liberty Tax Inc. **John Hewitt**, a pioneer of the US tax-services industry, was in a tight spot when he first crossed paths with Kahn around late 2017.

Directors had ousted Hewitt as chief executive of the business he’d founded, after an internal review found that he’d had sex in his office and hired relatives of female employees with whom he’d had romantic relationships, according to court filings. Hewitt denied all of that, and he remained chairman and a major shareholder. The result was months of boardroom conflict, he said in a recent interview.

Read More: Liberty Tax Soars as Founder in Sex Scandal Agrees to Leave Firm



John Hewitt

Photographer: Scott Eells/Bloomberg

An acquaintance put Hewitt in touch with Kahn. Over dinner at Morton's steakhouse in Orlando, Kahn outlined a deal to buy out Hewitt's shares; B. Riley would support the deal and Bryant Riley would join the board.

"He negotiated the whole deal," Hewitt said, referring to Kahn. "The only thing that I was happy about was that I was out of the civil war."

With Liberty in hand, Kahn sought to buy Rent-A-Center Inc., a rent-to-own retailer of furniture and electronics, for \$1.4 billion in 2018. B. Riley agreed to underwrite the purchase in what Riley later described as the largest deal his firm had ever arranged.

Breakup Fee

The merger was headed for completion until disaster struck in December 2018. A US antitrust review had dragged on and a deadline neared for Kahn's firm to send Rent-A-Center an extension notice. As a Delaware judge later wrote after the matter wound up in court, someone on the buyout team — it wasn't clear who — "simply forgot."

The next day, Rent-A-Center stunned Kahn and Riley by canceling the deal and demanding a \$126.5 million breakup fee, later cut to \$92 million by the court.

"It makes you angry, but you feel stupid and then you're humiliated," Kahn testified. "I mean, it's just – it's a disaster. It's an absolute disaster."

That didn't halt his efforts to build his business or his relationship with Riley.

Kahn used Liberty to acquire Buddy's Home Furnishings, changed the name to Franchise Group, and bought the Sears Outlet chain and Vitamin Shoppe. More deals followed: American Freight home furnishings, Pet Supplies Plus and Sylvan Learning. Riley was on FRG's board for some of its deals.

Kahn even made a bid in June 2022 for retailer Kohl's Corp. valued at \$8 billion with Riley's assistance. While that deal wasn't consummated, it showed the scale of their ambitions.

Watching from the sidelines, Hewitt became disillusioned by "know-it-alls" who were assembling what he called "a mismatch of non-quality companies." By 2021, Liberty Tax was gone from FRG's roster, sold to NextPoint Acquisition Corp. for \$249 million.

Furniture Slump

The seeds of FRG's current troubles were planted when Kahn bought still another furniture chain in November 2021, W.S. Badcock, with B. Riley buying two batches of Badcock's customer receivables.

But by then, the consumer buying spree fed by Covid stimulus checks was petering out along with the pandemic. Revenue slid at FRG's furniture chains, and by early 2023, the company was in trouble. B. Riley didn't want any more of Badcock's receivables, leaving FRG facing a potential loan default, according to a regulatory filing.



Bryant Riley in Los Angeles in 2015.

Photographer: Ringo Chiu/ZUMA/Alamy

Riley met with Kahn in March and initially offered to buy his friend's entire company, and let him keep running it, according to the filing, but B. Riley soon re-thought the idea — it didn't want to consolidate FRG onto its own balance sheet.

The result was a \$2.8 billion management-led buyout last August, with B. Riley getting a 31% minority stake. Nomura Holdings Inc. arranged a loan of \$600 million to fund it, and B. Riley loaned about \$200 million to Kahn, with his stake in FRG used as collateral.

"We would have bought all of the Franchise Group — we are a huge fan of that business and it's a really simple analysis," Riley said during last November's call when he was standing up for Kahn. "That was our opportunity, and we would buy that over and over again."

Prophecy's Collapse

Kahn was under pressure on another front. He'd been accused in civil litigation of cheating investors in Prophecy, a hedge fund whose 2020 collapse led to the guilty plea of a top executive on fraud charges last November. Prosecutors tagged Kahn as an unindicted co-conspirator, Bloomberg reported, but Kahn has said he never knew Prophecy was cheating investors and didn't conspire in any fraud.

Short sellers latched on, noting that the lawsuit accused Kahn of diverting money from Prophecy to finance what became FRG. If that's true, short sellers argue, then Kahn didn't have the right to transfer FRG shares to B. Riley or pledge them to Nomura, potentially tainting the finances of both firms.

Or so goes the theory. None of that has been proven in public. B. Riley says its borrowing was sound, and the lawsuit was settled confidentially — with Kahn agreeing to pay more than \$200 million, Bloomberg reported. Riley has said his company had nothing to do with Kahn's role at Prophecy and that regulators will conclude the same thing.

FRG Writedown

In the end, the Prophecy episode may be beside the point for investors. FRG has been so weak lately that B. Riley has written off the bulk of its investment, and the rest could be wiped out, too.

Late last year, FRG persuaded Conn's Inc., another furniture chain that offered subprime financing to its cash-strapped customers, to buy Badcock. For payment, FRG agreed to take shares of Conn's, which collapsed within months into liquidation.

S&P Global Ratings warned in July that this made FRG's capital structure unsustainable and that a default could wipe out junior creditors. In this kind of scenario, equity holders typically wind up with nothing. B. Riley has money at risk, too — a \$93 million balance on a loan made to help Conn's do the deal with FRG. B. Riley has said it still expects to be repaid.

Read More: Conn's Goes Bankrupt With Plans to Wind Down Operations

Pressure was forming elsewhere as other B. Riley investments began to sour. A minority stake in Babcock & Wilcox Enterprises Inc., a producer of power generators, has lost most of its value over the past year. Targus, a maker of computer accessories, was acquired in October 2022 and valued at \$250 million. Writedowns since then have topped \$63 million.

Information Gaps

Questions have swirled for months around whether B. Riley is accurately valuing its assets, fed by criticism from its own auditors about the company's financial controls. The concern was amplified on Aug. 12 when Riley announced a writedown of up to \$370 million on FRG and its loan to Kahn, and it missed a deadline for its quarterly regulatory filing, citing asset valuations.

"If B. Riley is forced to raise cash, they also will be forced sellers of their better positions, leaving problem deals on their balance sheet," said **James Ward**, former head of European high-yield at Axa Investment Managers and now a finance professor at the American University of Paris. "A death spiral in that situation is what management is trying to avoid."

Unofficially, some staffers of the former FBR have been asking whether it's feasible to buy out their old employer, said people familiar with the discussions, adding that the financing and legal liabilities would be difficult to surmount.

For now, Bryant Riley's team is left laboring to catch up on the overdue filings, fend off the US investigators and figure out a way to handle more than \$2 billion of debts due by 2027.

Said Lekas at Leader Capital: "They should have stuck to their knitting."

--With assistance from **John Gittelsohn**, **Jill R. Shah** and **Diana Li**.

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Aug. 16, 2024, 2:48 PM PDT

B. Riley Founder Informally Offers to Buy Embattled Company (4)

By Jenny Surane

Bloomberg Law News 2024-08-23T10:33:13287306593-04:00

B. Riley Founder Informally Offers to Buy Embattled Company (4)

By Jenny Surane2024-08-16T17:48:18899-04:00

Bryant Riley, the co-founder and largest shareholder of B. Riley Financial Inc., informally offered to buy the shares of the embattled investment firm he doesn't already own.

Riley is willing to buy the stock at \$7 a share, according to a regulatory filing Friday. While that represents an almost 40% premium to Thursday's closing price, it's far from the roughly \$50 that the Los Angeles-based brokerage and investment firm was trading at a year ago.

The shares rose 16% to \$5.85 in New York, pegging the company's market value at about \$177 million. In a statement, B. Riley said it would evaluate the proposal, and that there's no assurance a transaction will result.



Riley outlined conditions of a potential bid in a letter to the board, noting that it “does not constitute an offer or proposal capable of acceptance and may be withdrawn at any time.” He won’t proceed unless it’s approved by independent directors and a majority of shares he doesn’t already control, Riley wrote.

The transaction would be financed with debt, and possibly equity “from third-party capital providers with whom I have deep and long-standing relationships,” Riley wrote, without naming the potential backers.

The move comes just days after the company suspended its dividend, disclosed its biggest-ever quarterly loss and confirmed the US Securities and Exchange Commission is investigating the business. That sent B. Riley’s shares into a tailspin this week.

Public Reports

“I want to make it clear that I plan on continuing to report financials to the SEC and our bonds and preferreds will continue to be publicly traded,” Riley said in his letter to the board. “It is possible that I will continue to list on a secondary exchange if there are shareholders that would like to participate in this transaction.”

In addition to the shares, B. Riley has issued various forms of debt totaling more than \$2 billion as of the first quarter, filings show. Part of the company’s financing has come from unsecured “baby bonds” sold to investors in denominations as small as \$25. Some of those have also suffered big price declines as the firm’s troubles mounted.

Read More: B. Riley Struggles to Value Its Assets as SEC Steps Up Scrutiny

Federal regulators are investigating whether B. Riley adequately disclosed the risks embedded in some of its assets, Bloomberg News has reported. The agency is also seeking information on the interactions between Bryant Riley and longtime business partner **Brian Kahn**, the former chief executive of Franchise Group Inc., people familiar with the matter said.

Riley told investors during an Aug. 12 conference call that he and the company received subpoenas from the SEC seeking information about B. Riley's dealings with Kahn. The latter has faced controversy over his alleged role in events that led up to the collapse of a hedge fund he advised, Prophecy Asset Management. Kahn insists he hasn't done anything wrong, and B. Riley has said it didn't have anything to do with Kahn's activities at Prophecy.

"We are responding to the subpoenas and are fully cooperating with the SEC," Riley said at the time. "We are confident that the SEC will reach the same conclusion that our own internal investigation, with the assistance of two separate law firms, did – that we had no involvement with or knowledge of any alleged misconduct concerning Brian Kahn or his affiliates."

Short Sales

B. Riley's stock has been the most shorted US equity, according to data from S3 Partners. **Marc Cohodes**, one of the short sellers who has been criticizing the company's finances and transactions, said that Riley's letter to the board didn't name his potential financial backers, casting doubt on its validity, and Cohodes questioned whether the letter will ever be followed by a formal bid.

In the meantime, Cohodes said, the boost to the stock may help Riley get a better price for some of his shares.

Riley has a personal stake in his offer's outcome, ranking as the biggest holder, with about 24% of the common shares, according to his letter, and he's pledged much of it to secure a loan. Filings show he took out a loan in 2019 from Axos Bank in which he used more than 4.3 million shares as collateral. A plunging stock price can trigger a collateral call on this type of loan, potentially forcing the borrower to sell shares at a deep discount.

Earlier this week, an Axos spokesperson said Riley's loan is secured by multiple collateral types in addition to stock. "This collateral, other than B. Riley stock, is sufficient to secure a majority of the underlying loan," the spokesperson said.

Payout Ended

Riley also lost a substantial amount of income when the company omitted its quarterly dividend, which was \$1 a share as recently as November. It was subsequently cut in half as B. Riley's troubles mounted.

Among B. Riley's troubled assets is Franchise Group, or FRG, which is one of the firm's biggest investments. The firm holds a stake of about 31% in FRG after helping Kahn stage a management-led buyout. B. Riley is now expecting a non-cash writedown of about \$330 million to \$370 million, according to a company statement.

S&P Global Ratings said in a July 24 credit downgrade that FRG is in danger of violating the terms of its loan, and its capital structure “appears to be unsustainable.”

(Updates with company comment in the third paragraph)

--With assistance from **Donal Griffin**.

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Aug 19, 15:44

Robert Wright in London

I. Former Autonomy executive dies after being hit by car

Stephen Chamberlain, the former vice-president of finance who was Mike Lynch's co-defendant in a US fraud case, has died after being hit by a car in Cambridgeshire.

Gary Lincenberg, an attorney at Los Angeles law firm Bird, Marella, Rhow, Lincenberg, Drooks & Nessim, who represented Chamberlain in the case, said Chamberlain was fatally struck by a car while out running on Saturday.

"He was a courageous man with unparalleled integrity, and we deeply miss him," Lincenberg said. "He fought successfully to clear his good name at trial earlier this year, and his good name now lives on through his wonderful family."

Chamberlain and Lynch were [acquitted](#) by a jury in San Francisco in June of criminal charges in connection with HP's \$11bn acquisition of Autonomy.

<https://www.ft.com/content/7103c4c6-f1a2-4d53-a3e6-9e9ceb8da434#post-7d831265-4ef4-4c6e-b652-ed922c8e0a3>

Mike Lynch's co-defendant in US trial dies in UK road accident

 [reuters.com/world/uk/mike-lynchs-co-defendant-us-trial-critically-injured-uk-road-accident-source-2024-08-19](https://www.reuters.com/world/uk/mike-lynchs-co-defendant-us-trial-critically-injured-uk-road-accident-source-2024-08-19)

Paul Sandle, Alistair Smout



LONDON, Aug 20 (Reuters) - Stephen Chamberlain, once Mike Lynch's co-defendant in the U.S. fraud trial over the sale of Autonomy to Hewlett-Packard, has died after a road accident, his lawyer said on Monday, days before Lynch went missing off the coast of Sicily.

Chamberlain, Autonomy's former vice president of finance alongside chief executive Lynch, was hit by a car in Cambridgeshire on Saturday morning and had been placed on life support, a person familiar with the matter told Reuters earlier on Monday.

Chamberlain's lawyer, Gary Lincenberg, who described him as a "dear client and friend", said he had died after being "fatally struck" by a car while out for a run.

Cambridgeshire Police on Tuesday confirmed the 52-year-old had died. They said the car's 49-year-old driver had remained at the scene and was assisting with enquiries.

Chamberlain's family said he was a much-loved husband, father, son, brother and friend.

"He was an amazing individual whose only goal in life was to help others in any way possible," they said in a statement.

Lynch was one of six people reported missing early on Monday after a luxury yacht was struck by an unexpectedly violent storm and sank off Sicily.

Chamberlain faced the same charges of fraud and conspiracy as his former boss for allegedly scheming to inflate the value of Autonomy, then Britain's largest software firm, before it was sold.

Both men were acquitted of all 15 charges by a jury in San Francisco in June.

After leaving Autonomy in 2012, Chamberlain worked as chief operating officer for Darktrace, the cyber security company that was backed by Lynch's Invoke venture capital fund.

A Darktrace spokesperson said the company was saddened to hear of the demise of Chamberlain, who had been "a substantial contributor to the team in its early years".

"Steve was much loved by his colleagues and leaves many friends at Darktrace," the spokesperson said.

"We extend our deepest condolences to his wife, Karen, and the rest of his family who are very much in our thoughts at this challenging time."

Chamberlain also volunteered as a finance director for Cambridge United soccer club, according to his LinkedIn profile.

"He was a courageous man with unparalleled integrity, and we deeply miss him," Lincenberg said. "He fought successfully to clear his good name, which lives on through his wonderful family."

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Reporting by Paul Sandle, Alistair Smout and Andrew MacAskill; Additional reporting by Catarina Demony; Editing by Hugh Lawson, Sandra Maler and Bernadette Baum

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Mike Lynch: Who is UK tech tycoon missing after superyacht sank?

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Paul Sandle



Item 1 of 3 British entrepreneur Mike Lynch leaves the High Court in London, Britain March 25, 2019. REUTERS/Henry Nicholls/File Photo

[1/3] British entrepreneur Mike Lynch leaves the High Court in London, Britain March 25, 2019. REUTERS/Henry Nicholls/File Photo [Purchase Licensing Rights](#)  , opens new tab

LONDON, Aug 19 (Reuters) - Mike Lynch, the tech tycoon missing after his luxury yacht sank off Sicily, spent more than a decade building Britain's biggest software company and then almost as long again fighting fraud charges related to its multi-billion pound sale. Lynch founded Autonomy from his ground-breaking research at Cambridge University in 1996, and was lauded by shareholders, scientists and politicians when he sold it to Hewlett-Packard for \$11 billion 15 years later.

But in late 2012, HP stunned Wall Street and the City of London by alleging a massive accounting scandal at the business, and writing off \$8.8 billion of its value.

Lynch, known for an abrasive intellectual charm, said HP did not know what it was doing with Autonomy, which searched and organised data using patented algorithms based on a mathematics developed in the 18th Century by Reverend Thomas Bayes.

He spent the next 12 years in courts trying to clear his name, locked in some of the biggest legal battles in corporate history.

HP pursued Lynch in London's High Court for \$5 billion. It won most of its case in 2022 and is still awaiting the award of damages.

The judge found that Lynch and another colleague had fraudulently concealed a "fire sale" of hardware and engaged in convoluted reselling schemes to mask a shortfall in sales of Autonomy's software, the business HP coveted.

U.S. authorities filed criminal charges including wire fraud and conspiracy against Lynch and sought his extradition.

The British government came under pressure from Lynch's supporters to block the application. If found guilty, Lynch could have faced decades in jail.

But the appeals failed, and Lynch took the stand in San Francisco in his own defence, where he denied wrongdoing and told jurors that HP had botched the integration of Autonomy.

He was acquitted on all charges and freed after a year under house arrest. Lynch said he was "elated".

"I am looking forward to returning to the UK and getting back to what I love most: my family and innovating in my field," he said.

VIOLENT STORM

A person familiar with the rescue effort said Lynch and his wife, Angela Bacares, were on the 56-metre (184-ft) long British-registered Bayesian sailboat when it was struck by an unexpectedly violent storm and sank off the Sicilian capital Palermo early on Monday.

The yacht was owned by Lynch's family and had 22 people on board when it sank just before sunrise.

Lynch was born in 1965 and was raised in Chelmsford near London where his mother was a nurse and his father a fireman. He said his parents instilled in him an appreciation of the value of education.

At Cambridge University, he studied physics, mathematics and biochemistry, and went on to research signal processing for his doctorate. His thesis is still one of the most widely consulted in the university's library, reports have said.

In 1996, Lynch founded Autonomy which searched and organised complex data such as emails, phones calls and video.

Lynch, who has a herd of rare breed cattle on his estate in Suffolk, East England, used some of the proceeds of the sale of Autonomy to set up venture capital firm Invoke.

It was a major backer of Darktrace, a British cyber security company that U.S. firm Thoma Bravo agreed to buy for \$5.32 billion in cash in April.

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Reporting by Paul Sandle; Editing by Kate Holton and Andrew Heavens

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It Sank in 15 Minutes. How Tragedy Struck Mike Lynch's Yacht.

By *Marcus Walker* [Follow](#), *Max Colchester* [Follow](#) and *Aruna Viswanatha* [Follow](#)

Aug. 23, 2024 1:21 pm ET

PORTICELLO, Italy—The sun set over a calm Mediterranean Sea as the Bayesian approached this small fishing town on the north coast of Sicily.

On the teak deck of the 180-foot superyacht, British tech mogul Mike Lynch was enjoying a new lease on life together with his family, friends and lawyers after his against-the-odds acquittal in a California trial.

The 59-year-old software entrepreneur, once hailed as the British Bill Gates, was celebrating with his wife and daughter, along with big names in law and banking in New York and London, and others who had helped him during his years fighting what the U.S. Justice Department had alleged was a massive accounting fraud. Friends joined and left as Lynch crisscrossed the Mediterranean, including stops at Positano and Palermo.

Lynch vowed to keep the maritime celebration rolling. He told another of his lawyers, Brian Heberlig, who had begged off this summer's festivities because of other travel plans, that he wouldn't be allowed to miss next year's trip.

Amid the festivities came a shock on Sunday. Lynch's co-defendant, Stephen Chamberlain, who had also been acquitted, had just been fatally hit by a car while out for a run at home in England. From the yacht, Chris Morvillo, a former U.S. prosecutor who had helped lead Lynch's defense for more than a decade, emailed Heberlig and other legal colleagues to share the tragic news.

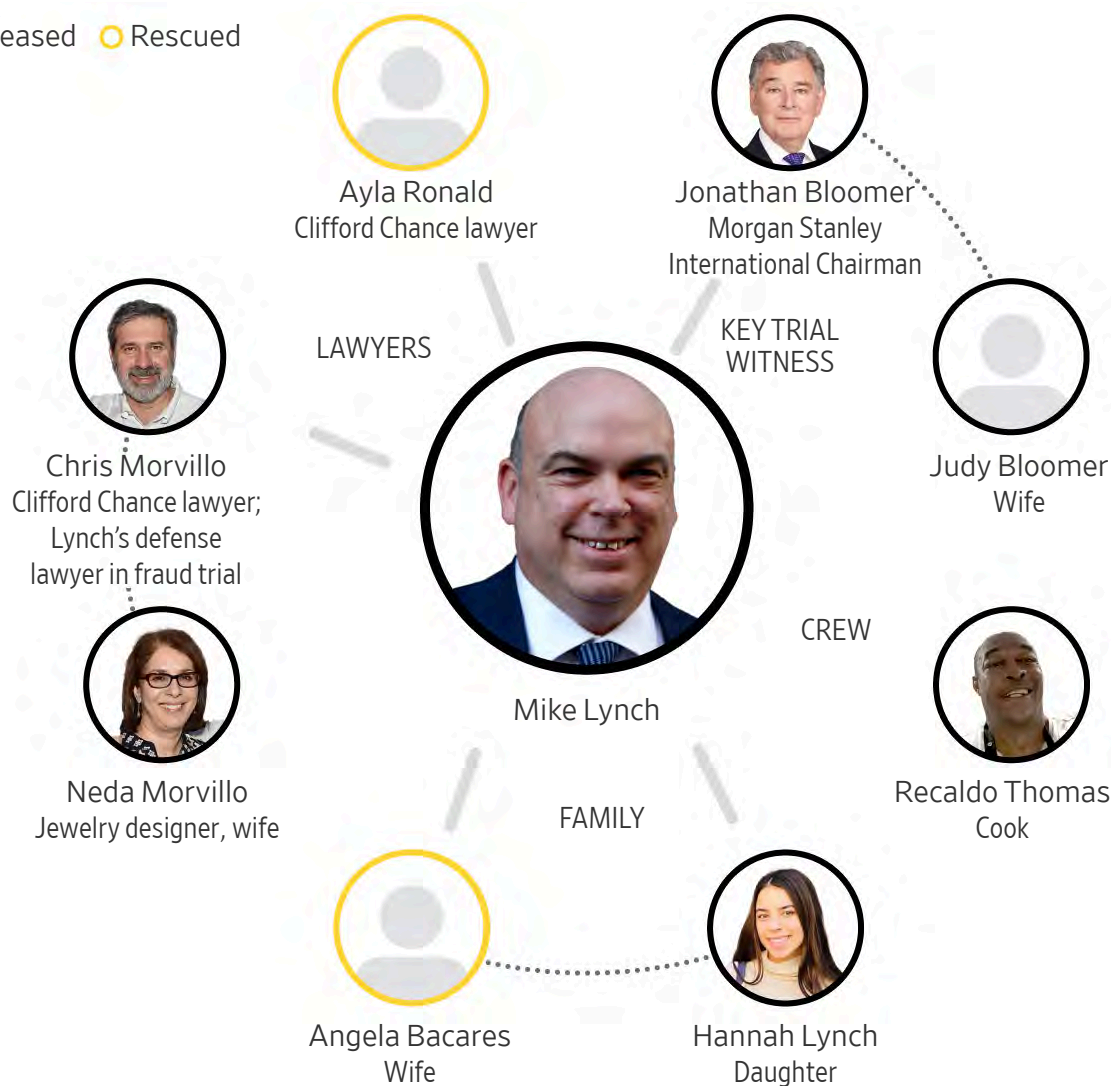
The Bayesian dropped anchor for the night a short distance outside the harbor wall of Porticello, in a wide bay east of Palermo. The lights on its aluminum mast—once the world's

tallest, but now eclipsed by a vessel owned by Jeff Bezos—shone like a Christmas tree as night fell.

Mike Lynch's Circle on the Yacht

Among the 22 aboard the Bayesian were friends who had stood by Lynch during his legal fight

○ Deceased ● Rescued



Photos: Reuters; Getty Images; Zuma Press; Lynch family

Source: staff reports

Another large yacht, the Netherlands-flagged Sir Robert Baden Powell, was at anchor nearby.

The day had been sunny and hot. The night was clear and starry.

It was an unusual place for luxury yachts to linger, said local fishermen. The exposed spot offered less protection than the waters beneath the nearby mountain of Capo Zafferano, or the much larger port of Palermo.

And there was a storm warning. Porticello's fleet of around 30 seaworn fishing boats were all inside the harbor wall as fishermen decided against going out to work that night.

The storm struck shortly before 4 a.m.

“The sea was an inferno for 15 minutes. Then it was calm again,” said local fisherman Giuseppe Balistreri.

When the lashing rain eased, the Bayesian was gone.

Divers struggle



Salvage divers bring a body bag from the Bayesian to shore. PHOTO: LO BIANCO/FOTOGRAMMA/ZUMA PRESS

Heberlig received a phone call on Monday morning from a U.K. number he didn't recognize. He thought it was Morvillo, calling to commiserate about Chamberlain. Instead, it was someone else, calling to tell him that tragedy had also struck Morvillo, Lynch and others on the yacht.

Since Monday, Italian authorities have been investigating what caused the Bayesian to sink in a matter of minutes a few hundred yards from the harbor. They have interviewed survivors, reviewed photos and closed-circuit television footage and are analyzing the wreck, including with an underwater drone.

A prosecutor is probing whether possible crimes were committed, including manslaughter and causing a shipwreck through negligence. No decision to place anyone under investigation has been made yet, according to a judicial official.

It took salvage divers five days and 123 dives to search the yacht for bodies as it lay on its side on the Sicilian seabed. In the darkness 160 feet below the surface, divers found its tight corridors were blocked by furniture, electric cables and other debris.



Hannah Lynch with her father PHOTO: LYNCH FAMILY

On Thursday, Lynch's body arrived in the harbor in a blue body bag. The bodies of five other passengers have also been recovered from the yacht: Morvillo and his wife, Neda, a jewelry designer; Morgan Stanley International chairman Jonathan Bloomer and his wife Judy; and Lynch's 18-year-old daughter Hannah, the last to be brought ashore on Friday.

The ship's cook, Recaldo Thomas, was found lifeless in the sea soon after the boat went down.

Lynch's wife, Angela Bacares, was among the survivors, along with five other guests and nine of the 10 crew.

From the harbor wall of this modest fishing port, international media and curious locals watched the somber progress of coast-guard boats bearing shrouded cadavers. Investigators questioned the yacht's surviving crew and passengers at a nearby vacation resort. Local fishermen wondered how such an impressive vessel could have sunk in a sharp but short tempest.

"It breaks my heart to think that these people died so close to where I cast my nets," said Balistreri.

The surviving crew members of the Bayesian, secluded by Italian authorities, were unavailable for comment. The Lynch, Bloomer and Morvillo families declined to comment.

Gone in minutes



Before the storm hit late that night, the Bayesian, left, and the Dutch sailboat Sir Robert Baden Powell anchored off the Sicilian town of Porticello. The crew of the Sir Robert Baden Powell rescued 15 of the 22 aboard the Bayesian. PHOTO: FABIO LA BIANCA/ASSOCIATED PRESS

Throughout its history, the Mediterranean Sea has been known as much for its treachery as for its beauty. Sudden storms have sunk ships here since humans learned to sail.

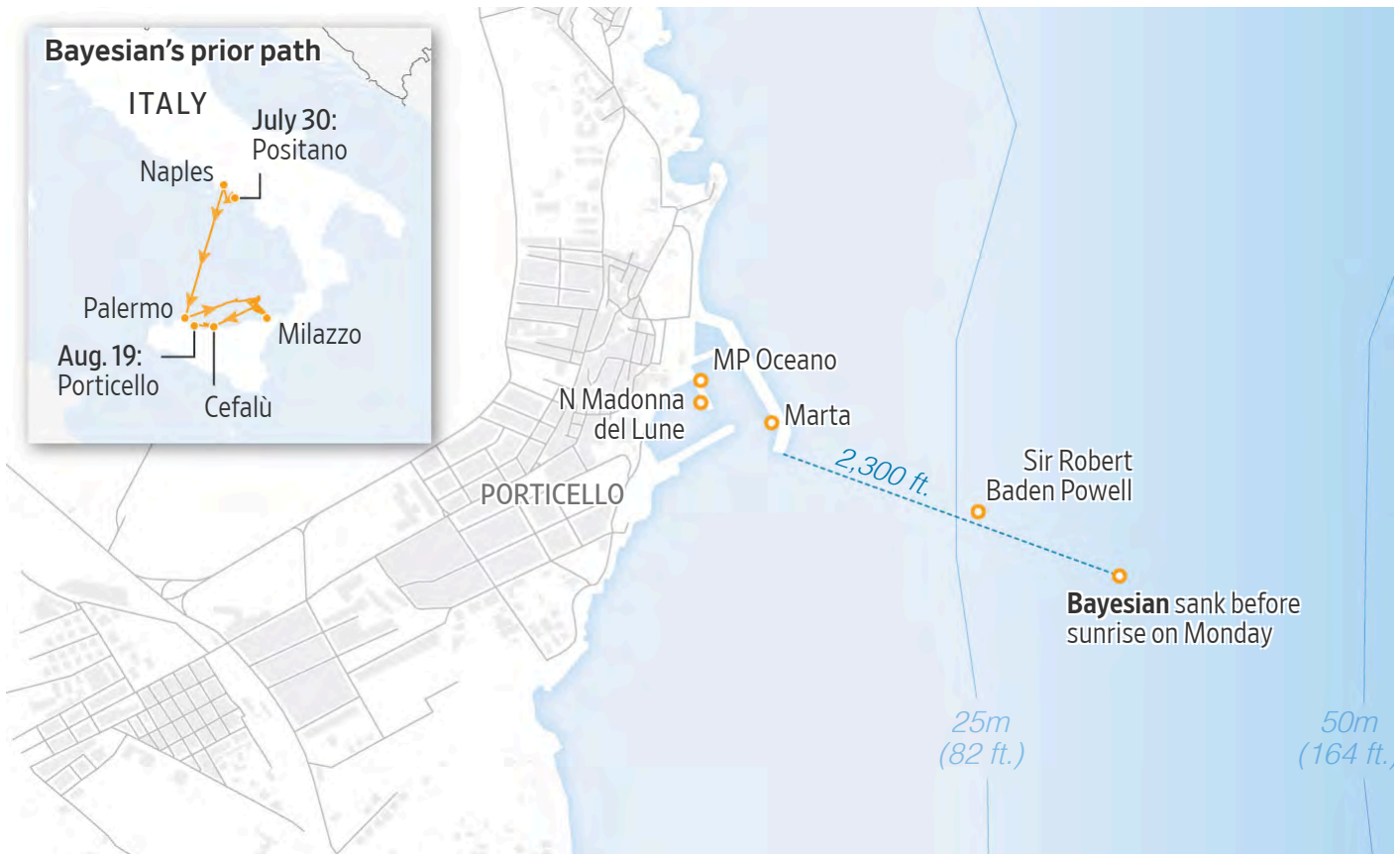
In recent years, the Mediterranean has become a graveyard for thousands of migrants from poor or war-torn countries, who continue to drown while trying to cross the hazardous sea in rickety boats in search of safety or a better life in Europe.

The Bayesian's Italian manufacturer has angrily rejected suggestions by some marine engineers that the yacht's 240-foot-high aluminum mast might have contributed to the accident, instead accusing the crew of a series of mistakes that led to the boat taking on water in the storm until it capsized.

The speed with which the \$35 million boat disappeared under the waves has flummoxed even seasoned maritime accident investigators. "In my many years of accident investigation I can't recall anything similar to this," says Gavin Pritchard, a former investigator at the U.K. Marine Accident Investigation Branch, who probed sunken wrecks for a decade.

The Location of the Yacht

The Lynch family's Bayesian and other yachts anchored off of the port of Porticello



Sources: MarineTraffic (boat positions, route); OpenDem via GEBCO and NaturalEarth (bathymetry)
Emma Brown/WSJ

‘Saying goodbye to everything’

A few weeks earlier, in June, Lynch had hugged his weeping wife in a San Francisco courtroom after a jury found him innocent of fraud and conspiracy. Around him, a legal team co-led by Morvillo, some of whom had devoted many years to Lynch's defense, was also in tears.

The British mogul had earlier resigned himself to spending the rest of his life in a U.S. prison. Lynch was flown in chains last year from London to California to face his trial over allegations that he had artificially inflated the value of Autonomy, a software company he founded, when he sold it to Hewlett-Packard in 2011 for more than \$11 billion. “It’s a 0.7% acquittal rate,” he later said in an interview. “You basically go round saying goodbye to everything.”

It was a twist of fortune for a man who spent most of his career feted as a rare example of a British tech titan. Lynch, who grew up in London, the son of a nurse and firefighter, started out with a secondhand computer and a Ph.D. in mathematical computing from Cambridge University, drawing on the work of 18th-century statistician Thomas Bayes.

In 1996 Autonomy was spun out of a company called Cambridge Neurodynamics, which was an early venture into using machine learning to trawl data sets. Quickly a stock-market darling, Autonomy offered software that used Bayes's techniques to process massive amounts of data for clients ranging from banks to intelligence agencies.



Stephen Chamberlain, Lynch's co-defendant who was also acquitted, was fatally struck by a car the weekend the boat sank. PHOTO: STEPHEN CHAMBERLAIN/REUTERS

Lynch cultivated a hard-charging sales culture, had a piranha tank in the office and named conference rooms after James Bond movies. Lynch drove one of Bond's favorite types of cars, too, a vintage Aston Martin.

HP's acquisition of Autonomy gave Lynch a payday of about \$800 million. Lynch stayed on, while investing some of his wealth in raising rare breeds of cows and pigs at his English farm.

In 2014, a company owned by his wife, Angela, bought the fateful yacht, made six years earlier by Tuscan luxury boat builders Perini Navi, and renamed it Bayesian after the statistician.

HP claimed that Lynch and senior finance executives had cooked Autonomy's books. Lynch, who denied this, was fired from the company in 2012.

Morvillo, 59 years old and a senior partner at law firm Clifford Chance in New York, became Lynch's attorney—a prominent federal prosecutor for the Southern District of New York who had worked on cases linked to the Sept. 11, 2001, terrorist attacks and money laundering. Lynch's case would consume a third of his professional life, and the two men became close friends.

Lynch and Morvillo argued that HP had botched the integration of Autonomy and was trying to pin its wider corporate failings on him. Lynch said that Autonomy's accounting was in line with other software companies'.



Neda and Chris Morvillo, Lynch's defense lawyer, were on the boat to celebrate Lynch's acquittal.

PHOTO: PATRICK MCMULLAN/GETTY IMAGES

In 2018, the U.S. government charged Lynch, alleging that he and his lieutenants had used false and misleading documents to make Autonomy more attractive to a potential buyer.

In May 2023, after losing a fight against extradition to the U.S., Lynch said goodbye to his six dogs, his wife and two daughters, walked around the corner from his West London home, and was ushered into a waiting police car which drove him to Heathrow airport.

He spent the next year living under house arrest in a San Francisco townhouse, with an electronic tag on his ankle, CCTV cameras in multiple rooms, and guarded by armed ex-Navy SEALs to make sure he stayed put. His family had posted a \$100 million bond. He bought a sheepdog puppy for company.

Tears in the courtroom

Lynch faced trial along side Chamberlain, a former finance official at Autonomy. During the three-month trial, which involved around 16 million documents, Lynch's lawyers argued that he had acted in good faith and wasn't an expert in arcane accountancy matters.

Lynch's defense team also leaned on a key witness, Bloomer, a City of London grandee and Chairman of Morgan Stanley International, who had formerly chaired Autonomy's audit

committee.



Jonathan Bloomer, Morgan Stanley International chairman, was a key witness for Lynch in his trial.

PHOTO: ANDY SHAW/BLOOMBERG NEWS

The defense team gambled and got Lynch to testify. “You and I have met a lot, right?,” Morvillo asked Lynch in the witness stand. “You’re probably sick of me at this point?”

“It’s a bit like we’re married sometimes,” Lynch responded, to laughter in the courtroom.

The jury cleared Lynch and Chamberlain on all 15 counts. Bacares rushed into the well of the courtroom, where spectators aren’t allowed, and threw her arms around her husband.

“I’ve never seen a moment like it in the courtroom before,” Morvillo recalled, talking on the podcast For the Defense. “Grown people sobbing, hugging,

people clapping. It was remarkable.”

Lynch described the verdict as a fork in the road of his life. “It’s Schrödinger’s cat,” he later said. “You open the box and you are in one universe or the other.”

‘Only the captain knows the truth’

Rising sea temperatures in the Mediterranean are leading to more frequent maritime tornadoes known as waterspouts: short-lived but powerful twisters made of air and water that can lift up or capsize boats.

Locals in Porticello say such a tornado hit the yacht. But the Bayesian should have been able to withstand it.

“As a fisherman I ask myself: How can a boat of 56 meters sink, even if a waterspout passes directly over it?,” said Balistreri. He said the biggest danger is if a boat at anchor gets sideways in the wind and the sea pours in over the gunwale and into the hold.

“Only the captain knows the truth,” he said.

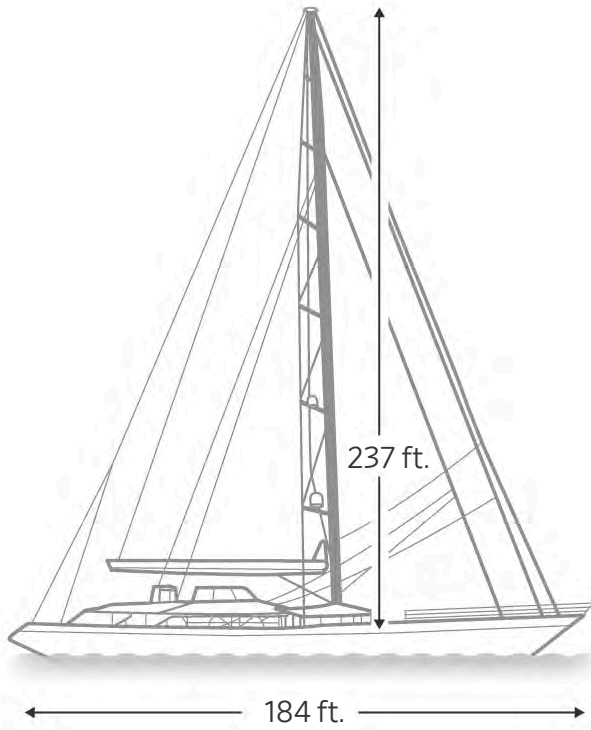
In the last year there were over 600 waterspouts around Europe, according to the European Severe Weather Database.

Giovanni Constantino, chief executive of the Italian Sea Group, parent company of the Bayesian's manufacturer, told Italian media that the yacht could sink in such a storm only if it took on too much water while tilting in the gale with open doors or hatches.

Bayesian Yacht

Builder: Perini Navi

Max speed: 14.7 kt



Source: Perini Navi
Jemal R. Brinson/WSJ

The crew should have prepared the ship, given the storm forecast, including by closing all doors and gathering the passengers, he said.

CCTV footage from the shore shows how the Bayesian with its brightly lit mast leans hard to starboard. The lights go out as the gale hardens. That could indicate a power failure caused by water flooding into the yacht, Constantino said.

The wind and rain intensify so much that the yacht disappears from view in the video.

Data from MarineTraffic, a maritime-information provider, shows both the Bayesian and the Sir Robert Baden Powell, anchored nearby, drifting southeast when the storm hit, suggesting their anchors were slipping. The captain of the Dutch ship, Karsten Börner, turned his engine on and maneuvered to keep his stern to the wind, avoiding being pushed sideways, he told reporters later.

Within minutes, after the storm had passed, Börner said he looked around but could no longer see the Bayesian. The crew of the sinking yacht fired a red flare, spotted also by some local fishermen, who sped out in their boats to help. Börner saw and picked up an orange inflatable life raft, carrying 15 survivors of the Bayesian. Seven people—Lynch and his daughter, the Morvillos and the Bloomers, and the cook Thomas—hadn't made it out of the yacht in time.



A fire-service dive boat returns to Porticello harbor during the search and recovery operation that took days. PHOTO: JONATHAN BRADY/ZUMA PRESS

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<https://www.wsj.com/world/uk/mike-lynch-the-british-bill-gates-who-loathed-silicon-valley-2cb368f8>

WORLD | U.K.

Mike Lynch: The 'British Bill Gates' Who Loathed Silicon Valley

The body of the entrepreneur was found after a storm capsized his yacht off the coast of Sicily

By [Stu Woo](#) [Follow](#)

Updated Aug. 22, 2024 9:44 am ET



Mike Lynch, co-founder of Autonomy and the founder of Invoke Capital, at his offices in London in 2014.

PHOTO: JASON ALDEN FOR THE WALL STREET JOURNAL

The man once hailed as the British Bill Gates spent his career battling the establishment in both the U.K. and U.S.

After a bank rebuffed his loan request early in his career, Mike Lynch persuaded a promoter for the band Genesis to stake him about \$4,000 during a chance meeting at a pub. After being snubbed by the London Stock Exchange, he listed his tech company in Brussels, sold it for \$11 billion to Hewlett Packard—and then spent more than a decade fighting allegations that he fraudulently inflated its value.

That chapter of his life wound down in June, when Lynch was acquitted in a criminal trial brought by the Justice Department in San Francisco.

Lynch was confirmed dead Thursday after a freak storm capsized the yacht he was on as it was anchored near the Italian island of Sicily. One of Lynch's daughters is still missing. His wife, Angela Bacares, was among the survivors rescued on Monday.

Michael Richard Lynch was born in Ireland and raised in Ilford, on the outskirts of London. His mom was an intensive-care nurse, his dad a firefighter. "My father advised against following him, earning a living running into burning buildings," he told an interviewer in 2000.

Lynch attended private school on a scholarship before studying at the University of Cambridge. He stayed there to get his Ph.D. in engineering, focusing on the studies of 18th-century minister Thomas Bayes. Some researchers say Bayes wanted to prove God's existence through mathematics.

"He never succeeded," Lynch said in 2009, "although he probably has an answer by now."



Emergency services searched for the passengers of the sunken yacht in southern Italy on Tuesday.

PHOTO: SALVATORE CAVALLI/ASSOCIATED PRESS

Some of the minister's research, now known as Bayesian inference, would eventually underpin the technology that earned the entrepreneur his fortune.

But first, Lynch needed a loan.

It wasn't coming from a bank manager, who told him to come back when he was older and had more experience, Lynch said in 2000. So instead, he turned to a person whom he has described as an eccentric pop-music promoter he encountered at a pub in London's Soho neighborhood.

"He'd never met me before, but he lent me £2,000 on the spot," Lynch said, a sum that at the time was equivalent to around \$4,000.

With the funds, he bought a secondhand computer and designed a machine to help police match fingerprints. Out of that business eventually grew his most famous company, Autonomy, which used Bayesian inference to sift through mountains of data and present the most relevant information to a person.

With Autonomy's stock soaring in 2000, Lynch became the U.K.'s first internet billionaire and national media dubbed him the British answer to Bill Gates.

The James Bond aficionado ran the company from its Cambridge headquarters, which had 007-inspired names for meeting rooms such as "Goldfinger." He decompressed by tinkering with the miniature steam engine and train set in his garden, driving an Aston Martin DB5 and caring for rare animals at his home in Suffolk, England.

"I have cows that became defunct in the 1940s and pigs that no one's kept since medieval times," he said in an interview.

In a 2000 interview, he said he spent half his time in the company's office in San Francisco, where he learned to hate Silicon Valley culture. "You could turn up with a working time machine and be ignored unless you have got the right person on board," he said.

He said he and his friends invented a game for Silicon Valley parties, where they would spread a rumor about an amazing but fictional startup and wait to see how long the rumor returned to them via cocktail chatter.

It was also Silicon Valley that gave him a windfall. In 2011, he sold Autonomy to Hewlett Packard for \$11.1 billion, one of the biggest acquisitions at the time for both HP and the U.K. tech sector.



The yacht Mike Lynch was on shared its moniker with the work of the mathematician who inspired the entrepreneur's career. PHOTO: PERINI NAVI PRESS OFFICE HANDOUT/ZUMA PRESS

But a year later, in 2012, HP took an \$8.8 billion write down related to the deal, not long after Meg Whitman took over as CEO. The company said that an internal investigation found “serious accounting improprieties” and “outright misrepresentations” in connection with Autonomy.

That began a series of civil and criminal cases for Lynch and other Autonomy executives. Lynch's lawyers said “there was no conspiracy at Autonomy” and that Hewlett Packard “has a long history of failed acquisitions” and was trying to blame Autonomy for its own errors.

A U.S. federal jury in 2018 found Autonomy's former chief financial officer, Sushovan Hussain, guilty of falsifying financial statements and exaggerating Autonomy's value before the acquisition. He was sentenced to five years in prison.

A British judge in 2022 ruled that Lynch had duped HP into overpaying for Autonomy, and a year later he was escorted by U.S. Marshals on an extradition flight to San Francisco. A judge ordered Lynch, who according to his lawyers had a net worth of between \$400 million and \$450 million, to be placed under house arrest.

Thirteen months after his extradition, Lynch was acquitted on all 15 counts in June. “I am looking forward to returning to the U.K. and getting back to what I love most: my family and innovating in my field,” he said at the time.

After selling Autonomy, Lynch focused on his venture-capital firm, Invoke Capital. It invested in European tech companies including Darktrace, a

cybersecurity company that is among the most prominent in England's tech sector.

In an interview with the Sunday Times several weeks after his acquittal, Lynch said he feared he would die in prison and that he planned to fund a U.K. version of the Innocence Project, the U.S. organization that works on behalf of those who believe they are wrongfully accused of serious crimes.

The yacht where the entrepreneur spent his final moments was named Bayesian, sharing the moniker with the work of the mathematician minister who inspired Lynch's career.

Write to Stu Woo at Stu.Woo@wsj.com

Appeared in the August 21, 2024, print edition as 'U.K. Tech Tycoon's Saga Ends In Tragedy'.

Videos

The Big Read Maritime accidents and safety

Mike Lynch and the tragedy of the Bayesian

Having overcome his legal battles in the US, the Autonomy co-founder lost his life weeks later while celebrating his freedom

Henry Mance in London and Marianna Giusti and Giuliana Ricozzi in Porticello AN
HOUR AGO



In June, Mike Lynch walked out of a San Francisco courtroom, a free man under the California sun.

He had been acquitted of fraud in a US federal court, where the conviction rate for those pleading not guilty is above 80 per cent. After 12 years of legal battles over the sale of the company he co-founded, Autonomy, he was “elated” — and ready to resume his position as one of Britain’s most successful tech entrepreneurs.

Lynch had feared that, if he had been convicted, his life would have ended in a US prison. He could not have imagined it would instead end barely two months later on a celebratory sailing trip in the Mediterranean.

Early on Monday morning, the 59-year-old drowned when his yacht the Bayesian sank during a storm off the coast of Sicily. His 18-year-old daughter Hannah, his trial lawyer Christopher Morvillo, trial witness Jonathan Bloomer and three others were also killed.



A small crowd gathers in Porticello to watch Italian divers return from the shipwreck. The Italian coastguard said winds had reached an extraordinary 60 knots, equivalent to a 'violent storm' © Salvatore Cavalli/AP

In a separate tragedy, Lynch's co-defendant, Steve Chamberlain, had been killed two days earlier by a car while running near his home in Cambridgeshire. By macabre coincidence, Lynch died a day after the 13th anniversary of Autonomy announcing its sale to HP for \$11bn.

This series of chance events led some on social media to jump to baseless conspiracy theories. Others complained that the Italian coastguard's search for Lynch and others was attracting far more attention than Mediterranean migrant boat tragedies.

Yet for friends of Lynch and Chamberlain, there was only shock. "The Greeks never wrote tragedy this cruel," says Andy Kanter, a former Autonomy executive who stayed on the Bayesian many times. "The cruelty is just unfathomable."

The sinking of the Bayesian, known for its striking design, also came as a shock to the booming luxury yacht industry — especially for its apparent speed.

“What I don’t understand is how something can happen that quickly, with people not having time to get out of their cabins and up on deck,” says one superyacht expert.



A search party works around the location of the Bayesian on Thursday. The speed of the vessel's sinking came as a shock to the yachting industry © Salvatore Cavalli/AP

According to one doctor, some surviving passengers recalled the sinking “lasted from three to five minutes in total . . . they said the boat was initially lifted, before it sank. They told us they found themselves in the sea without even realising how they got there.”

There are questions about the role of [extreme weather](#): the Mediterranean reached a record median surface temperature of 28.9C this month. One possibility is that a waterspout, a marine typhoon, struck the boat.

“

The vessel had a 72-metre mast, one of the world’s tallest, but was far smaller than the motorised superyachts resembling small cruise liners often favoured by the super wealthy.

Mike enjoyed the wind in the sails, the night skies, the distant horizon, sailing alongside pods of dolphins watching the Italian villages dotted on hillsides go by . . . It was an escape, a refuge

Lynch's friends emphasised that, unlike some large yacht owners, he was not ostentatious. "The Bayesian was not a status symbol," says Vanessa Colomar, a longtime adviser. "Mike enjoyed the wind in the sails, the night skies, the distant horizon, sailing alongside pods of dolphins watching the Italian villages dotted on hillsides go by . . . It was an escape, a refuge and a place to simply be."

The boat, which was in the name of Lynch's wife Angela Bacares, was bought in 2014 for about \$30mn. The couple did not boast about it. "In 30-something years of knowing him, I didn't know he had a boat," says David Tabizel, co-founder of Autonomy.

Another friend who had been due to join Lynch on the yacht this summer was not aware it existed until they received an invitation. Lynch was better known for his love of dogs and his interest in rare-breed pigs and cows at his farm in Suffolk.

Superyacht accidents are not uncommon in the Mediterranean. On August 13, the 30.5-metre sailing boat Wally Love washed ashore in a storm on the Spanish island of Formentera. There were no reported fatalities.

But it remains very rare for a large, modern cruising vessel to founder simply because of the weather — even in a severe storm. The Bayesian's skipper, New Zealander James Cutfield, who survived, was quoted in Italian media saying: "We just didn't see it coming." He hasn't commented publicly since.

The yacht's last signal was captured at 4.06am local time



The bare facts are these: the Bayesian was anchored a few hundred metres from the shore near Porticello in Sicily, near another yacht, the Sir Robert Baden Powell, in a place that should have been sheltered from the predicted bad weather. At 3.50am, the position recorded by the boat's Automatic Identification System (AIS) started to change, suggesting that the Bayesian was dragging its anchor in a strong wind. The last recorded AIS position was at 4.06am, presumably when the boat sank.

The Italian coastguard said winds had reached an extraordinary 60 knots, equivalent to a Force 11 "violent storm" on the Beaufort scale. Karsten Borner, skipper of the Sir Robert Baden Powell, turned on his engine to avoid colliding with the Bayesian. He rescued the 15 survivors. His boat, built in 1957, withstood the storm; the Bayesian, built in 2008, did not.

Giovanni Costantino, chief executive of The Italian Sea Group, which owns the Bayesian's builder, Perini Navi, tells the Financial Times that the crew should have had time to evacuate passengers.

He suggests that the large opening just above the waterline on the stern, which pivots down to make a bathing platform and launching point for small boats, may have been open and become flooded, and the same might have been true for another waterline opening on the side. However, it is not known if these hatches were indeed open.



A rescue team at work in Porticello, near where the yacht sank. Superyacht accidents are not uncommon in the Mediterranean © Vigili del Fuoco/AFP/Getty Images

On Friday it emerged that Italian prosecutors are investigating potential charges of “negligent shipwreck” against persons unknown.

Survivors of the Bayesian spent the week at a hotel, screened from the world’s media by guards, in the fishing village of Santa Flavia, near Palermo. The locals seemed hardened by a history of deaths at sea. As bodies were retrieved from the wreck, 50 metres deep, on Wednesday and Thursday, fishing boats went about their business.

Lynch came from humble beginnings, the son of a fireman and a nurse, both Irish immigrants.

With a PhD from Cambridge, he pioneered the processing of unstructured data, long before artificial intelligence was fashionable, and turned it into a FTSE 100 company, Autonomy. It was “in many ways a precursor” to today’s large language models, says Suranga Chandratillake, a former Autonomy executive.

Lynch’s talent was combining mathematical and engineering precision with commercial focus. “He took a look at my business plan and said, ‘That’s a load of old shit. I can do better than that,’” recalls Autonomy co-founder Tabizel. “We were a billion-dollar company within a year.”

His robust approach — a judge would later describe his style as “controlling and interventionist” — would bring him into conflict with some City analysts, and Autonomy was dogged by questions about its accounting.

Lynch’s tumultuous last years



© Simon Dawson/Bloomberg

JAN 28 2022

An English judge, Mr Justice Hildyard, announces that HP has ‘substantially won’ its civil fraud claim against Lynch and former Autonomy chief financial officer Sushovan Hussain. The full judgment, published later, runs to over 1,000 pages

JAN 29 2022

Following the ruling, home secretary Priti Patel authorises Lynch's extradition to the US

● **MAY 11 2023**

Lynch is extradited, having exhausted legal avenues in the UK

● **MAR 18 2024**

Lynch and co-defendant Steve Chamberlain go on trial in San Francisco, accused of fraud and conspiracy that led HP into overpaying for Autonomy. If convicted, Lynch faced up to 20 years in jail

● **APR 26 2024**

Darktrace, a listed cyber security firm founded by Lynch, agrees a sale to private equity firm Thoma Bravo for £4.3bn. The deal values Lynch and his wife's shares at nearly £300mn

● **JUN 6 2024**

Lynch and Chamberlain are acquitted of all charges by a jury in San Francisco

● **AUG 17 2024**

Chamberlain is killed while jogging in Cambridgeshire

● **AUG 19 2024**

Lynch and six others die after the Bayesian sinks in high winds at its anchorage off the Sicilian coast

But his friends remember him as straightforward, with a sense of fun and a delight for telling stories to children. He became good friends with the guards who kept him under house arrest in San Francisco, during his US trial.

The legal fight began in 2012, barely a year after HP bought Autonomy, when the IT giant accused Lynch and other leaders of fraudulently inflating the company's revenues to overvalue it by \$5bn. Lynch faced court action on both sides of the Atlantic.

Lynch was shunned by many in tech and politics, but largely remained calm. "I remember saying, 'I don't know how you keep going.' He replied, 'I have no choice,'" says Richard Holway, a tech analyst.

“

I remember saying, ‘I don’t know how you keep going.’ He replied, ‘I have no choice’

After being extradited to the US, he brushed aside some advisers’ calls for him to settle, and involved himself in the detail of his legal strategy, including testifying to the jury himself. During his trial, he set Fridays aside for talking to technology companies, including Luminance, an AI legal business that he backed.

Despite legal fees, Lynch’s finances were robust. “My wife has been very good at investing in the things that I’ve told her to from a point of view of technology. We’ve done very well,” he told The Sunday Times. One adviser says Lynch had “got wealthier, not poor, through this entire situation”.

After his acquittal in the US, he said he planned to campaign for reforms to the US-UK extradition treaty, which opponents say is asymmetric. “There was zero sense of bitterness,” says Kanter. But Lynch was also tired: he went to the Bayesian to relax.

Italian and British investigators are looking into the sinking. British police are also conducting inquiries into Chamberlain’s death; they haven’t arrested the driver of the Vauxhall Corsa that was involved.



The Bayesian yacht in Palermo, Sicily. The vessel was far smaller than the motorised superyachts often favoured by the super wealthy © Preini Navy/EPA

Lynch died before he could appeal against a 2022 English civil judgment that held, on the balance of probabilities, he had acted fraudulently. That civil litigation will now likely pass to Bacares, who survived the sinking.

Having ruled in favour of HP, the judge must decide what damages to award against Lynch and Autonomy's former chief financial officer Sushovan Hussain (who was convicted in the US). HP has asked for \$4bn; Lynch had argued for zero. Judgment was expected as early as October, but may be delayed out of sensitivity.

Ultimately, Lynch's estate is likely to be asked to cover HP's legal costs to the tune of double-digit millions. HP would also look to pursue his assets, including those to be passed on to his heirs. But the Bayesian and most of the family's shares in Darktrace, a cyber security company he co-founded, have long been in Bacares' name.

Lynch had promised to appeal against the civil judgment. Even death will not end his legal saga; his grieving heirs must choose whether to seek posthumous vindication.

Additional reporting by Victor Mallet, Tim Bradshaw, and Robert Wright

Cartography by [Aditi Bhandari](#)

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Aug. 22, 2024, 11:58 AM PDT

Chris Morvillo, US Lawyer Who Defended UK's Lynch, Dies at 59

By Harry Wilson, Jonathan Browning and Leonard Kehnscherper

- He won acquittal of Lynch against charges of defrauding HP
- Partner at Clifford Chance was a onetime federal prosecutor

Bloomberg Law News 2024-08-23T11:26:12511931009-04:00

Chris Morvillo, US Lawyer Who Defended UK's Lynch, Dies at 59

By Harry Wilson, Jonathan Browning and Leonard Kehnscherper2024-08-22T14:58:12379-04:00

- He won acquittal of Lynch against charges of defrauding HP
- Partner at Clifford Chance was a onetime federal prosecutor

Chris Morvillo, a partner at law firm Clifford Chance in New York who successfully defended British tech tycoon Mike Lynch in a criminal trial that ended in June, was among those killed in the sinking of a luxury yacht earlier this week. Morvillo was 59.

The deaths of Morvillo and his wife, Neda, were confirmed in a statement by Clifford Chance.

"We are heartbroken at the tragic passing of our partner, Christopher Morvillo, and his wife, Neda," the firm said. "We are deeply saddened and still coming to terms with this terrible loss."



Chris and Neda Morvillo in 2018

Photographer: Patrick McMullan/Getty Images

Lynch was also among those killed when the yacht sank in a severe storm off the coast of Italy on Monday with 22 people on board.

Read more: Mike Lynch, Whose Upended Tech Career Was Unfinished, Dies at 59

A partner at the firm since 2011, Morvillo had held broad oversight of Lynch's two-continent legal defense against charges that he duped Hewlett Packard Co. into overpaying for his software firm, Autonomy Corp.

Lynch's acquittal in June, following a trial in San Francisco, vindicated Morvillo's strategy of highlighting flaws in HP's acquisition of Autonomy. After the acquittal, Morvillo said that the verdict "closes the book" on the long effort to pin the blame on his client.

One unresolved chapter in the dispute, however, was a civil case in the UK that resulted, in 2022, in a judge ruling that Lynch had fraudulently boosted the value of his company. In that case, the judge was still determining what damages Lynch would have to pay.

Before becoming a white-collar-crime defense lawyer, Morvillo worked as a federal prosecutor in the Southern District of New York, where he assisted in the criminal investigations following the 9/11 terror attacks on the World Trade Center and the Pentagon.

He was also a lead prosecutor in the case of Lynne Stewart, the civil-rights defense attorney known for taking on controversial and infamous clients. Stewart was convicted in 2005 on charges of helping a terrorist client communicate with his followers.

Morvillo graduated from Fordham University School of Law in 1992 before starting as an attorney the following year. His father, Robert Morvillo, was a prominent New York defense lawyer whose clients included Martha Stewart when she was facing obstruction-of-justice charges related to illegal stock trading.

--With assistance from **Daniel Taub**.

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Law firm Clifford Chance 'in shock' after lawyer missing in yacht disaster

 [reuters.com/world/law-firm-clifford-chance-in-shock-after-lawyer-missing-yacht-disaster-2024-08-20](https://www.reuters.com/world/law-firm-clifford-chance-in-shock-after-lawyer-missing-yacht-disaster-2024-08-20)

Sara Merken

World

By Sara Merken

August 20, 2024 1:37 PM PDT Updated 3 days ago

Rescue boats operate on the sea to search for the missing, including British entrepreneur Mike Lynch, after a luxury yacht sank off the coast of Porticello, near the Sicilian city of Palermo, Italy August 20, 2024. REUTERS/Guglielmo Mangiapane Purchase Licensing Rights , opens new tab

Aug 20 (Reuters) - A prominent New York lawyer who is among six missing passengers of a sunken yacht off Italy's coast was traveling with his longtime client, British tech entrepreneur Mike Lynch, just weeks after helping him avoid conviction in a 12-year legal saga.

Divers were still searching on Tuesday for the defense lawyer and former federal prosecutor Christopher Morvillo, a partner at law firm Clifford Chance, and his wife Neda, along with Lynch and three other missing passengers. There are 15 known survivors.

The British-flagged Bayesian, a luxury 56-metre-long (184-ft) superyacht, was carrying 22 people and anchored off the Sicilian port of Porticello when it was hit by a fierce, pre-dawn storm on Monday and sank.

Ayla Ronald, a London-based senior associate at Clifford Chance, and her partner were among the survivors, the London-founded global law firm said in a statement on Tuesday. Ronald has also represented Lynch, according to her profile on the firm's website.

"We are in shock and deeply saddened by this tragic incident," a Clifford Chance spokesperson said.

Morvillo, 59, was a lead lawyer for Lynch and won his acquittal in June after a three-month-long San Francisco fraud trial stemming from Hewlett-Packard's ill-fated acquisition of Lynch's software company Autonomy, and has represented the UK entrepreneur since 2012. He is the son of Robert Morvillo, considered one of New York's savviest criminal-defense attorneys before his death in 2011. The younger Morvillo is also a leading white-collar defender and a former assistant U.S. attorney in Manhattan who assisted in the criminal investigation of the Sept. 11 attacks.

Lynch sold Autonomy to HP for \$11 billion in 2011, but the deal spectacularly unraveled with the U.S. tech giant accusing him of fraud.

Morvillo put Lynch on the stand to question his client at the U.S. criminal trial this summer, a bold move that paid off when the jury acquitted him. Lynch testified that he was not involved in the transactions that prosecutors said amounted to a massive accounting fraud at Autonomy.

In a podcast interview with white-collar criminal defense lawyer David Oscar Markus posted last week, Morvillo said he first joined Lynch's legal team in November 2012, soon after HP wrote down Autonomy's value by \$8.8 billion.

"It's covered one third of my career," Morvillo said of his work for Lynch.

Reporting by Sara Merken Editing by David Barrio and Sandra Maler

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NEWS

Mike Lynch's Brush With Prison Taught Him Life Is Precious. Then a Yacht Accident Proved Him Right

As a teenager, Lynch worked as a porter at a hospital, surrounded by elderly and gravely sick patients who know they'd never be discharged. He testified at his trial that the experience helped him appreciate he wasn't invincible and “realize what that arc of existence is.”

August 23, 2024 at 08:00 AM

White Collar Crime



Maria Dinzeo



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

Mike Lynch spent years fighting to exonerate himself of charges of fraud and conspiracy over the sale of his British software startup, Autonomy. When a clerk at the San Francisco federal courthouse read out the verdict of “not guilty” on June 6, Lynch, who had remained largely stoic throughout his three-month criminal trial, began to cry.

His co-defendant, former finance executive Stephen Chamberlain, had been acquitted, too. And before the clerk had even finished speaking, the courtroom erupted into a flurry of sobs, hugs and handshakes. Cries of elation and relief rang out through the gallery. In the hallway, Chamberlain sat on a bench, holding up his phone and beaming. He told the person on the other end that he couldn't wait to get home.

“The government stole 10 years of my life; now I've got it back,” he said to Law.com after ending his call. “I've said from the beginning, ‘I did nothing wrong. I'm not lying.’ First priority, he added, would be to “go home to my children, my mom and dad and my friends.”

Prosecutors had charged that Lynch and Chamberlain used accounting trickery to mask Autonomy's eroding performance and woo HP into paying a whopping \$11 billion to buy it in 2011—a deal that proved disastrous for HP, forcing it write off nearly the entire purchase in barely a year.

2 Fatal Accidents in 3 Days

That both men are now dead, as is New York-based [Clifford Chance partner Chris Morvillo](#), has stunned the world this week—Lynch and Morvillo killed when the [superyacht they were on sank](#) Monday off the coast of Sicily after a sudden storm broke its mast, and Chamberlain killed when he was [struck by a car](#) while jogging near his home in Longstanton, England, two days earlier.

The yacht trip had been organized by Lynch for the purpose of putting a celebratory cap on that chapter of his life. Also killed in the accident was Morvillo's wife, Neda, and Lynch's 18-year-old daughter, Hannah, whose [body was recovered Friday](#).

Lynch’s wife, Angela Bacares, was rescued by a nearby boat and suffered only foot abrasions.

Lynch, Chamberlain and Morvillo all had said they were eager to return to normal life following years of intense trial preparation and the grueling trial itself. Lynch, who died at 59, and Chamberlain, who died at 52, went through all that with the looming fear that they’d be convicted and potentially spend decades in prison.

‘Each Day Is Important’

For Lynch, his return to England after the jury’s acquittal had been especially joyous. Since May 2023, he’d been under house arrest in San Francisco, a humbling turn for a tech entrepreneur once known as Britain’s Bill Gates.

In an exhaustive interview with London’s Sunday Times last month, he said his homecoming felt unreal.

“It’s a very strange situation to now be in a different mindset where you’re back,” he told The Times. “I stood on Piccadilly Circus the other day, which has the most enormous permanent traffic jam, and I’m just thinking, ‘This is the most beautiful thing I have ever seen.’”

The “not guilty” verdict, he said, had been similarly surreal. “If this had gone the wrong way, it would have been the end of life as I have known it in any sense,” he said, musing about his shot at a “second life.”

It wasn’t the first time Lynch’s remarks veered into the existential. Testifying at his trial in May, he recalled working as a teenager as a hospital porter, an experience he called formative. At 16, you’re invincible, he said. But talking to the elderly and gravely sick, those who knew they would never leave the hospital alive, made him “realize what that arc of existence is.”

He continued: “It’s a good lesson, and you realize that each day is important. ... What that led to me doing was realizing, you know, get on with it. Do stuff. Whatever it is you want to do, just do it.”

Following the verdict, jurors met with Lynch’s and Chamberlain’s defense team to debrief, trade notes, and ask one another what they found most significant about the trial.

One juror asked the lawyers, who were largely based in New York, Los Angeles and the United Kingdom, how they had handled being away from their families for so long. It hadn’t been easy, they answered, though some had managed to make trips back and forth. Morvillo joked that his wife probably enjoyed the long stretches of his absence.

Morvillo, who died at 59, later took to LinkedIn to share his thoughts, posting on the platform for the first time in his life. “Not sure why,” he wrote. “The answer must lie somewhere between a fear of social media, an ignorance of the mysteries of this platform and a lack of something meaningful to say. But, following the jury’s swift exoneration of our client, Mike Lynch, and his colleague, Stephen Chamberlain, last week in San Francisco, I finally have something to say that I would like others to hear.”

He went on to thank droves of colleagues and partners for more than a decade of diligent work on the case, saying “this thrilling verdict flows directly from years of painstaking work by an extraordinary cross-border team,”

He closed with this: “And, finally, a huge thank you to my patient and incredible wife, Neda Morvillo, and my two strong, brilliant, and beautiful daughters, Sabrina Morvillo and Sophia Morvillo. None of this would have been possible without your love and support. I am so glad to be home.” he wrote. “And they all lived happily ever after...”

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Case to Watch: SEC faces claims it rushed rules that 'silence' retail investors

 [reuters.com/legal/government/case-watch-sec-faces-claims-it-rushed-rules-that-silence-retail-investors-2022-10-06](https://www.reuters.com/legal/government/case-watch-sec-faces-claims-it-rushed-rules-that-silence-retail-investors-2022-10-06)

Jody Godoy

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

(Reuters) - A federal court in Washington, D.C. is poised to rule on whether the U.S. Securities and Exchange Commission violated the law when it raised the bar on how investors can press for corporate reforms – a move critics say silences Main Street investors.

Under leadership appointed by the Trump administration, the SEC passed a rule in 2020 tightening requirements for shareholders to put proposals on corporate ballots. The rules increased the stock holdings required to participate and limited when proposals can be reintroduced, among other restrictions.

The shift to a Democratic administration in 2020 raised investor hopes that the SEC would undo company-friendly Trump-era rules. But the SEC has not revised the restrictions on shareholder proposals, even though it recently tweaked a related rule about duplicate proposals.

Shareholder advocates including the Interfaith Center on Corporate Responsibility (ICCR), which represents religious groups and other investors, sued the SEC over the rule last year, alleging it failed to conduct an adequate cost-benefit analysis and ignored data suggesting the rule would disqualify many proposals.

The SEC has argued its analysis was appropriate and said the rule was meant to ensure the interests of those who make proposals "are appropriately aligned" with other shareholders.

Companies say the rule helps prevent niche interests from hijacking corporate ballots and wasting management time.

U.S. District Judge Reggie Walton has said he aims to rule by mid-November.

"SILENCING US"

The added requirements have knocked out some proposals from consideration at this year's round of shareholder meetings. Seattle-based investment advisor Newground Social Investment, for example, was unable to re-submit a proposal on behalf of an individual

Chevron shareholder requiring the company's chief executive be an independent director. Nearly 30% of Chevron shareholders had voted for it in 2021.

"It's an unreasonable curb on shareholder prerogative," Newground Chief Executive Bruce Herbert told Reuters in an interview.

Herbert said the rules set back corporate reform efforts, as small investors have been some of the earliest to make environmental, social and governance proposals.

The rules also increase the support proposals must gain to be eligible for re-submission.

That means Cynthia Murray, a Wal-Mart Inc shareholder and employee, won't be able to re-submit a proposal that the company create a group of Wal-Mart workers to advise its board on safety measures during pandemics.

The proposal received 12.7% of the vote this year, enough to clear the previous threshold of 6%, but short of the new threshold of 15%.

"In silencing us, it isn't making the company any better," she told Reuters.

The case is Interfaith Center on Corporate Responsibility et al v. SEC, U.S. District Court, District of Columbia, No. 1:21-cv-01620.

For ICCR: Robert Kry, Sarah Newman and Eric Posner of MoloLamken

For the SEC: Dan Berkovitz, Michael Conley, Tracey Hardin and Daniel Matro

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Starboard Urges Autodesk to Hold CEO Accountable After Probe (2)

By Crystal Tse and Brody Ford

- Activist investor responds to news story on accounting issues
- Documents show software vendor ignored risks raised internally

Bloomberg Law News 2024-08-23T11:25:00991898866-04:00

Starboard Urges Autodesk to Hold CEO Accountable After Probe (2)

By Crystal Tse and Brody Ford2024-08-22T11:42:30271-04:00

- Activist investor responds to news story on accounting issues
- Documents show software vendor ignored risks raised internally

Starboard Value LP urged Autodesk Inc.'s board to evaluate whether Chief Executive Officer **Andrew Anagnost** is the right person to lead the company following recent accounting issues.

"There is an urgent need for significant change at the company," the activist investor said Thursday in a statement.

An Autodesk spokesperson said the company "is fully committed to transparency and focused on creating long-term shareholder value as we execute on our strategy, which is driving strong momentum in our business." Management and the board have met with Starboard multiple times, Autodesk has said.



Andrew Anagnost

Photographer: Chris Ratcliffe/Bloomberg

Accounting problems at Autodesk first came to light in April, when the company delayed its annual financial disclosures and said it was opening a review of processes related to free cash flow and operating margins. In May, the company announced it was replacing **Debbie Clifford** as chief financial officer.

Bloomberg reported last week that documents showed the software company ignored internal warnings about the use of a controversial sales strategy that was central to the accounting probe's findings.

"The recent reporting further confirms that senior executives relied on business practices that were not in Autodesk's best interests and carried significant risks and did so in an attempt to manipulate results in order to meet financial targets," Starboard said in its statement, citing Bloomberg's story. "We urge the board to hold management accountable for its actions."

Read More: Autodesk Executives Ignored Accounting Risks, Documents Show (2)

Starboard disclosed a stake in the California-based software maker in June and has since criticized the company's disclosure practices. The shareholder also has called for board changes and improvement in operations.

Anagnost has been CEO since 2017, when he was appointed following a settlement with activist investors Sachem Head Capital Management and Eminence Capital. The sales practices under scrutiny were made aware to some senior executives, including Chief Operating Officer Steve Blum, who approved some of the transactions, documents show.

The shares were little changed at \$252.06 at 11:40 a.m. Thursday in New York. The stock had gained 3.5% this year through Wednesday's close, including 12% since Starboard's stake was disclosed.

Autodesk is scheduled to report earnings on Aug. 29, with Wall Street expecting revenue to have increased 10% to \$1.48 billion. The company makes industrial design and operation software, serving customers in construction and manufacturing.

(Updates with comment from company in the third paragraph. An earlier version of this story corrected a comment from Starboard.)

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Trump Is About to Get the All-Clear to Cash In on Media Shares

By Bailey Lipschultz

- Some insiders may be able to sell shares as soon as Sept. 20
- Donald Trump has not indicated plans to sell any of 60% stake

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Trump Is About to Get the All-Clear to Cash In on Media Shares

By Bailey Lipschultz2024-08-20T08:07:12604-04:00

- Some insiders may be able to sell shares as soon as Sept. 20
- Donald Trump has not indicated plans to sell any of 60% stake

Donald Trump is a month away from being able to turn his paper social-media fortune into cold, hard cash. The question is, will he?

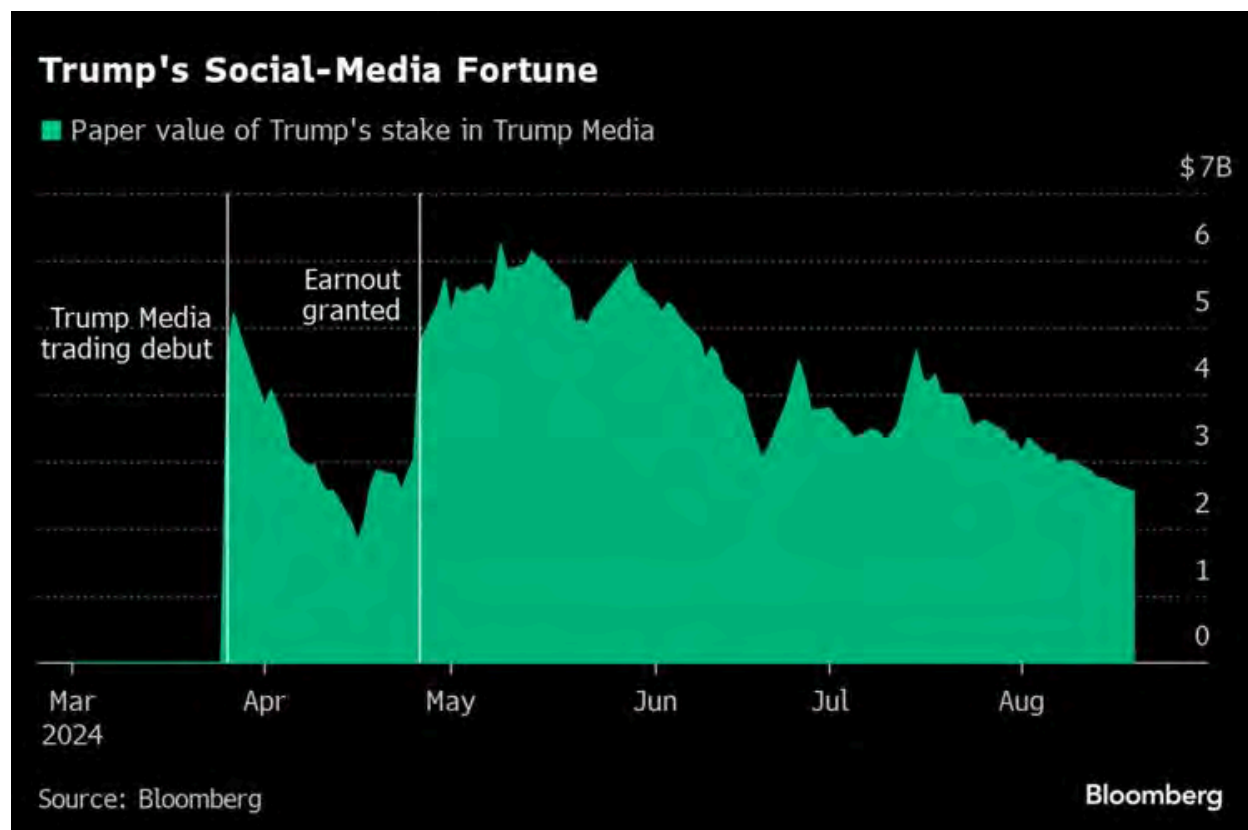
The former president will be able to start selling bits and pieces of his \$2.6 billion ownership in Trump Media & Technology Group Corp., whose share price has fluctuated wildly since going public through a special-purpose acquisition company merger in March.

Trump has not indicated any intention to sell shares in Trump Media, which operates his social-media platform Truth Social. And, doing so could give the impression that Trump is prioritizing personal profits — a criticism pundits often level at him — and alienate loyal followers who poured money into the company's stock as his presidential campaign surged earlier this year.

However, the Republican nominee is also facing massive legal bills that a sale could help cover.

"It's complex," said Michael Ohlrogge, an associate professor at New York University Law School who has researched SPACs. Trump would need to balance the potential profits against any longer-term goals like a return to the White House, he said.

Representatives for Trump Media did not reply to requests for comment. They previously said that reporting on Donald Trump's path to cashing out of the firm would be "utterly baseless" and partisan, "without any conceivable sign anywhere that he plans to do so."



Read more: Trump Media Sheds \$3 Billion in Value as X Return Adds to Issues

Trump, who owns about 60% of Trump Media, is expected to be able to start selling shares as soon as Sept. 20, when a lockup period barring insiders from selling shares is lifted. So will his co-founders, Andy Litinsky and Wes Moss, both former contestants on *The Apprentice*, as well as **Patrick Orlando**, whose fund, ARC Global Investments II LLC, sponsored the SPAC that merged with Trump Media.

Since that deal closed on March 25, the company's shares have fluctuated drastically, trading as high as \$79.38 and as low as \$22.18. They closed at a fresh low of \$22.24 on Monday, giving Trump Media a \$4.3 billion market capitalization.

Trump selling a large number of shares could "be perceived as sending a signal about his lack of confidence in the company," Ohlrogge said. "This could look bad in its own right, and a drop in share price could look bad for him as well."

The volatility seems to have little to do with the underlying business, which is losing money as third-party trackers show stagnant user metrics. The company lost \$344 million in the first six months of the year, mainly because of paper losses on derivatives, and took in just \$1.6 million in sales.

Instead, Trump Media has become a way for investors to bet on Trump's potential return to the White House. Its sharp swings have been mostly driven by retail-trading frenzies fueled on Reddit's WallStreetBets and StockTwits — which can evaporate just as quickly as they start.

The stock's latest slide has coincided with a drop in the implied probability that Trump will win in November, according to PredictIt. The betting market shows his odds have slipped to 46% from 69% last month, as Vice President Kamala Harris, the new Democratic nominee for president, has gathered support. The Democratic National Convention is underway in Chicago this week, with officials and celebrities rallying around her.

Whatever the rationale for Trump Media's valuation, selling shares would help its namesake founder pay for mounting legal bills.

Trump is on the hook for more than half a billion dollars in penalties after losing a pair of lawsuits earlier this year, both of which he has appealed. He also faces an ongoing prosecution over his attempt to overturn the result of the 2020 presidential election he lost to Joe Biden.

The lockup period will likely end just a few days after Trump's sentencing in his hush money criminal trial, set for Sept. 18 in Manhattan. Trump faces as long as four years behind bars on felony counts of falsifying business records to conceal a payment to a porn star before the 2016 election to keep her quiet about an alleged affair.

The exact day the former president and other insiders will be able to sell depends on the stock price. If shares remain at or above \$12 for any 20 trading days starting Aug. 22 then the earliest trading day for insiders to sell shares will commence as soon as Sept. 20. If the stock fails to hold that mark, insiders will be able to sell shares by Sept. 26 regardless of how it's trading.

"If he goes in and starts selling, that will hammer the stock price," said Tuttle Capital Management chief executive officer **Matthew Tuttle**. "It's going to depend on whether he needs the money."

--With assistance from Erik Larson, Jef Feeley, **Hadriana Lowenkron** and **Matt Turner**.

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US government trashes IXL's arbitration bid in parents' data harvesting class action

 [reuters.com/legal/transactional/column-us-government-trashes-ixls-arbitration-bid-parents-data-harvesting-class-2024-08-20](https://www.reuters.com/legal/transactional/column-us-government-trashes-ixls-arbitration-bid-parents-data-harvesting-class-2024-08-20)

Alison Frankel

The keyboard of a computer is pictured at a computer shop in Ciudad Juarez, October 19, 2017. Picture taken October 19, 2017. REUTERS/Jose Luis Gonzalez Purchase Licensing Rights , opens new tab

Aug 20 (Reuters) - The internet was aghast last week at Disney's attempt to force into arbitration the wrongful death claim of a grieving widower whose wife died from an allergic reaction to food after she ate at a restaurant in the Disney Springs shopping complex in Orlando.

Disney (DIS.N) , opens new tab argued , opens new tab in a filing last May that the widower was bound by a mandatory arbitration clause in the contract he accepted in 2019 when he signed up for a trial of the Disney+ streaming service. Its position was actually backed by precedent, as my colleague Jenna Greene wrote in a column last Friday, but after word spread of the company's arbitration demand, Disney announced on Monday that it was dropping the motion and would allow the case to move forward in Florida state court. But the supply of corporate arbitration controversies seems never to run dry.

Last month, educational technology company IXL Learning offered an arbitration theory that is slightly different from Disney's — but no less debatable.

The California-based company filed a motion to compel , opens new tab arbitration in a prospective class action in San Francisco federal court by Kansas parents who accuse , opens new tab IXL of illicitly harvesting and selling data from children whose school districts have contracted to use IXL products. The parents allege federal wiretapping and California data privacy claims.

IXL denies breaching any state or federal laws — but it also contends that the school children and their parents must arbitrate their claims individually because they are bound by arbitration provisions in the contracts between their school districts and IXL.

IXL's argument relies on the federal Children's Online Privacy Protection Act, which, broadly speaking , opens new tab, gives parents control over the information that website operators can collect from children under the age of 13. But IXL asserts that in the rules implementing the 1998 statute, the U.S. Federal Trade Commission has effectively acknowledged that school districts embracing technology can't be expected to obtain consent from every family. Instead, according to IXL, FTC rules empower schools to act as parents' agents when school officials sign contracts with educational technology providers.

So, under IXL's theory, when Kansas school districts signed a contract with IXL that included a mandatory arbitration clause, they were acting as agents for the parents who filed the lawsuit in San Francisco. The parents, according to IXL, are therefore subject to the mandatory arbitration clause in the school districts' contracts.

"An express agency existed between plaintiffs and the relevant school districts as a matter of federal law," IXL said in its motion to compel arbitration. "The school districts consented to [arbitration] as agents of the parents."

The parents' lawyers at Morgan & Morgan and the EdTech Law Center refuted IXL's "extraordinary request" in a brief [\[link\]](#), opens new tab filed on Monday, asserting that the company hasn't even offered evidence that the children's schools signed arbitration agreements. And even if the schools did agree to arbitrate with IXL, the parents' lawyers said, such agreements cannot apply to parents who had no knowledge of the contracts. Crucially, the parents said, IXL is wrong about the Children's Online Privacy Protection Act. The law, they argued, "does not impose a conservatorship on parents or their children in favor of schools for any purpose — especially to bind those parents and children to secret arbitration."

On that point, the parents got important backing on Monday from the federal agency that oversees enforcement of the statute. In an amicus brief [\[link\]](#), opens new tab, the Federal Trade Commission told U.S. District Judge Rita Lin of San Francisco that IXL's assertion of an agency relationship between the Kansas parents and their school districts is unsupported by the children's data privacy statute and the agency's rules implementing it.

IXL, according to the FTC, erroneously relied on various agency statements permitting schools to act as intermediaries for parental consent in limited circumstances, such as allowing kids to use the internet at school or allowing the collection of data for purely school-related, educational purposes. But those government comments and guidance, the brief said, "do not create an agency relationship between plaintiffs and their school district."

The FTC was even more direct in an accompanying press release [\[link\]](#), opens new tab: "Nothing in COPPA or the COPPA rule dictates that parents and children should be bound by every part of the terms of service agreement between a company like IXL Learning and a school district, nor does COPPA support a claim that parents should be bound to arbitration in this case."

FTC Commissioner Andrew Ferguson said in a concurring statement [\[link\]](#), opens new tab that IXL's argument "does not pass the smell test" and is a "brutal misreading" of a statute that makes no mention whatsoever of schools or their agency relationships with parents.

I emailed the FTC to ask how the agency became aware of IXL's motion to compel arbitration. An FTC spokesperson declined to comment.

Plaintiffs' lawyers Julie Liddell of EdTech Law Center and Ryan McGee of Morgan & Morgan said via email that the FTC's brief "is a powerful statement, particularly because it involves matters of significant public concern like the children's privacy violations alleged in this case."

IXL and its Orrick counsel did not respond to my query about the FTC brief. In addition to its bid to compel arbitration, the company has moved to dismiss [\[link\]](#), opens new tab plaintiffs' "baseless" claims, arguing that its data collection practices comply with all applicable state and federal laws.

"While plaintiffs might not like these laws, IXL complies with them," the company said in its dismissal motion. "Plaintiffs' concerns are better addressed through vigorous legislative advocacy."

IXL has until Sept. 9 to respond to plaintiffs and, presumably, the FTC on its bid to arbitrate.

Read more:

Disney agrees to have Florida wrongful death lawsuit decided in court

Disney's bid to arbitrate husband's wrongful death suit has a chance

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Reporting By Alison Frankel

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

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Crypto Owners Sue Binance Over Allegedly Lax Theft Controls

By **Greg Lamm**

Law360 (August 19, 2024, 6:46 PM EDT) -- Three cryptocurrency owners claimed Friday that Binance and founder Changpeng Zhao enabled hackers and thieves to use the exchange to launder millions of dollars stolen from their accounts, activity they say hasn't stopped after the company's blockbuster guilty plea.

The proposed class of crypto owners, led by California resident Philip Martin, allege Binance Holdings Ltd. was a leading conduit of stolen cryptocurrency, aiding bad actors who were seamlessly able to transfer stolen crypto around the U.S. and the world, **according to a civil complaint** filed in Washington federal court.

In November, Binance agreed to a historic **\$4.3 billion in fines** and pled guilty to charges including violations of the Bank Secrecy Act, failure to register Binance.com as a money-transmitting business, and allowing users of its platform to evade U.S. sanctions against Iran.

And in April, a Washington federal judge **sentenced** Zhao to four months in prison for his failure to implement an effective anti-money laundering program at the global exchange.

Zhao had previously pled guilty to one count of failure to maintain an effective anti-money laundering program to end the U.S. Department of Justice's investigation into alleged money laundering and sanctions violations. He agreed to step down from Binance.

The complaint alleges that even after Binance and Zhao agreed to implement know-your-customer rules and anti-money laundering procedures as part of settlements with the DOJ, criminals continued to transfer stolen cryptocurrency to Binance.com accounts and attempted to use the exchange to launder crypto.

According to the complaint, Binance violated U.S. laws and regulations designed to protect consumers, investors and national security.

The complaint alleges Binance made it possible for a global criminal underground to use the platform to conduct cryptocurrency transactions without leaving a permanent record of those transactions on the public blockchain and the chain-of-title of cryptocurrency.

"Therefore, without a place to launder crypto such as Binance.com, if a bad actor steals someone else's crypto, there is a risk the authorities would eventually track them down by retracing their steps on the blockchain, and they would need to constantly look over their proverbial shoulders," according to the complaint, which referred to Zhao as CZ.

"Because CZ and others at Binance put profits before the law, defendants, through the operation of Binance.com, generated substantial amounts of proceeds by offering bad actors a way to remove the connection between the ledger and their digital assets so the digital assets would no longer be traceable," the complaint said.

The complaint alleges anonymous users were able to open accounts, transfer cryptocurrency into Binance, trade that cryptocurrency on the exchange and withdraw the exchanged cryptocurrency without providing any self-identifying information.

Even after Binance announced it would no longer open new accounts without know-your-customer rules, the exchange continued to allow existing customers to use Binance without providing that information, the complaint alleges.

Martin alleges that in December 2021, a third party stole tens of thousands of dollars' worth of cryptocurrency from his Coinbase account, which was allegedly sent to a Binance.com account.

Another plaintiff, New York resident Yatin Khanna, alleges more than \$1.5 million worth of cryptocurrency was stolen in August 2022 and sent to a Binance account. In all, Khanna says thieves stole \$2.4 million.

The plaintiffs said hackers and thieves used a variety of means to steal crypto, including malware and ransomware.

In their complaint, the plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act. The complaint also brings claims of conversion and aiding and abetting conversion.

The plaintiffs are seeking to certify a class of unknown size, as well as a judgment of an unspecified amount of money and legal fees.

Representatives for the crypto owners, Binance and Zhao did not immediately respond to requests for comment on Monday.

The cryptocurrency plaintiffs are represented by Lynn Lincoln Sarko, Derek W. Loeser and Chris N. Ryder of Keller Rohrback LLP, Eric I. Niehaus of Robbins Geller Rudman & Dowd LLP, David C. Silver and Jason S. Miller of Silver Miller Law Firm, and John C. Herman of Herman Jones LLP.

Counsel for Binance and Zhao was not available on Monday.

The case is Martin et al. v. Binance Holdings LTD et al., case number 2:24-cv-01264, in U.S. District Court for the Western District of Washington.

--Editing by Philip Shea.



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Health Co. Investors Fight To Keep Suit Over Migrant Deal

By **Katryna Perera**

Law360 (August 21, 2024, 4:35 PM EDT) -- Investors in mobile medical provider DocGo are urging a New York federal judge not to toss a suit alleging it deceived stockholders before a \$432 million contract with New York City to provide emergency migrant housing came under public scrutiny, saying the complaint sufficiently establishes that the defendants made material misstatements and omissions.

The investors filed an **opposition** Tuesday to dismissal motions filed by DocGo and the individual defendants in June. The suit **alleges** that DocGo "overstated the efficacy of its mobile health and medical transportation services" in earnings calls, press releases and public filings, leading to inflated stock prices, which fell after public reports questioned the business's services to migrants in New York City.

The suit also alleges that Anthony Capone, the company's then-chief executive officer, misrepresented his educational history and claimed that it provided the backbone of the company's "unique technological prowess," according to the case background offered in the opposition.

Finally, the suit claims that toward the end of the proposed class period, when DocGo was reeling from criticism about the controversial \$432 million no-bid contract with New York City to provide migrant services, Capone reassured investors that the company was not facing a "revenue cliff" after the contract ended.

According to Tuesday's filing, Capone stated that DocGo was positioned to win a \$4 billion contract with U.S. Customs and Border Protection and that the company could generate long-term revenue streams from its short-term government contracts by transitioning patients from the company's government vertical — providing care for underserved populations — to its payor vertical providing long-term care to patients through Medicaid.

The investors argued Tuesday that all these statements and the picture they painted of DocGo were a facade, as numerous articles later revealed that the CPB contract was worth less than \$2 billion, that Capone did not have a master's degree as he had claimed, and that Capone's statements about signing migrants onto New York State Medicaid were false, causing the price of DocGo's shares to fall.

The complaint sufficiently pleads all the investors' claims, Tuesday's filing states. First, all the challenged statements in the suit were material because "[W]hen a company makes repeated representations on the same topic, even where those representation[s] would otherwise be puffery, the repetition itself communicates to investors what 'matters [are] particularly important,' and 'those statements may become material to investors,'" the filing states.

The complaint also pleads a strong inference of scienter, or intent, by all the defendants, the filing argues. Capone clearly had actual knowledge that he did not hold a graduate degree, but he continued to lie to investors, and the company's current executives — at a minimum — acted with recklessness in disregarding Capone's false credentials, the filing states.

"It would have taken far less than a 'reasonable investigation — for example, a routine background check — for either [DocGo co-founder Stan Vashovsky] or [former CFO Andre Oberholzer] to discover Capone did not hold the degrees he claimed to hold, if Vashovsky or Oberholzer were not already fully aware of such facts," the filing states.

There is also a strong inference of scienter regarding Capone's misstatements about the CPB contract and the signing up of migrants for Medicaid, the opposition asserts.

"Capone admitted DocGo had been 'working on [the RFP] for seven to eight months,' when he made his statement, and it is implausible to suggest he would not have known the actual size of the contract on which DocGo was bidding," the filing states. "Indeed, it took a reporter, who was not involved in bidding on the contract, mere weeks, if that, to confirm the CBP contract was worth just half of what Capone represented."

Finally, the complaint adequately pleads that each individual defendant is liable as a controlling person, as they were senior members of DocGo's management team, the filing asserts.

"Each made false statements concerning Capone's education ... Vashovsky, as chairman of the board, signed and solicited the false proxy statements on behalf of the board. Oberholzer, as CFO of DocGo, signed the false and misleading Form 8-K. Allegations that a defendant signed a false document are sufficient to allege control," the filing states.

SEC Form 8-K is a filing publicly traded companies must submit to announce significant events that shareholders need to know about.

The investors also argued that the complaint sufficiently pleads loss causation and a scheme to defraud.

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

The investors are represented by Christopher M. Wood, Henry S. Bator, Samuel H. Rudman and David A. Rosenfeld of Robbins Geller Rudman & Dowd LLP, and by Thomas C. Michaud of VanOverbeke Michaud & Timmony PC.

DocGo, Stan Vashovsky and Andre Oberholzer are represented by Jason J. Mendro and Lissa M. Percopo of Gibson Dunn & Crutcher LLP.

Anthony Capone is represented by Evan I. Cohen of Finn Dixon & Herling LLP.

The case is Naclerio et al. v. DocGo Inc. et al, case number 1:23-cv-09476, in the U.S. District Court for the Southern District of New York.

—Additional reporting by Theresa Schliep. Editing by Amy French.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (August 20, 2024, 1:46 PM EDT) -- A nearly record-breaking attorney fee got the nod in Delaware last week, along with Chancery Court settlements involving an international private jet service and a chain of trampoline parks. New disputes involved a famous burger restaurant chain, a computer-chip maker, a now-defunct genomic science company, and a historic manor house in west London.

I case you missed it, here's all the latest from Delaware's Chancery Court.

In the Courtroom

Deutsche Bank AG, **arguing in court** against the dismissal of its 2017 Chancery Court suit, sought to keep in place a temporary restraining order barring interests of Norwegian billionaire investor Alexander Vik from securing the release of more than \$50 million in cash now locked down by a Chancery order.

Jordan Chirico, a former portfolio manager of 3|5|2 Capital ABS Fund LLC and now accused of participating in a wide-ranging Ponzi scheme against the hedge fund and its investors, **urged** Vice Chancellor Nathan A. Cook to move quickly on his lawsuit for legal fee indemnification, citing "great risk" from mounting personal liability exposure.

Decisions

Delaware Superior Court Judge Paul R. Wallace, sitting by designation for the Chancery Court, **dismissed** private equity firm Sunstone Partners' lawsuit accusing Synopsys Inc. of breaching an exclusivity provision for a potential sale of its security testing services business, saying Sunstone failed to adequately allege Synopsys solicited proposals from other potential buyers.

Vice Chancellor Paul A. Fioravanti Jr. found Unisys Corp. **must front the legal fees and expenses** for two executives it hired away from French competitor Atos SE and then sued in Pennsylvania federal court for trade secret infringement after the executives went back to Atos two years later.

Fees, Fees, Fees

Delaware's Supreme Court **affirmed** Vice Chancellor J. Travis Laster's July 2023 decision that awarded a \$266.7 million fee to stockholder attorneys at Labaton Keller Sucharow LLP, Quinn Emanuel Urquhart & Sullivan LLP, Andrews & Springer LLC, Robbins Geller Rudman & Dowd LLP and Friedman Oster & Tejtell PLLC who settled a class action against Dell Technologies Inc. for \$1 billion, saying the Chancery "did not exceed its discretion in setting the fee percentage."

New Cases

Burger King investors **filed a new lawsuit** seeking to look at the burger chain's books and records on the merger with its parent company Restaurant Brands International Inc., arguing the information is necessary to confirm whether the deal was fair.

An Intel Corp. stockholder **sued the chip giant** for derivative damages tied to the company's more than 27% stock drop and \$7 billion production unit loss in 2023 following separation of the company's chip production and design operations, despite prior upbeat forecasts.

A shareholder of 3D spatial mapping company Matterport Inc. **alleged** that when the California company went public by merging with a special acquisition company in 2021, it prevented him from trading his shares for six months through an "invalid transfer restriction."

Oxford Finance LLC, the senior lender to Sequencing Health Inc., **sued former officers and directors** of the now-defunct genomic science company, alleging they squandered the company's assets, awarded themselves big bonuses and shut down the business, costing Oxford tens of millions of dollars in losses.

Robert Chmiel, a director of Quantum Energy Holdings LLC who joined the company after one of its directors was indicted, **sued the firm for access to its books and records**, alleging the company's other directors have "repeatedly thwarted" his efforts to understand the business and its financial condition.

A Florida investor with a 25% stake in Twyford Abbey, a historic manor house in west London, **sued the manager** of the Delaware limited liability company formed to invest in the property, alleging it was sold for about \$18 million but he never got his share of the proceeds.

A former Romeo Power Inc. stockholder **launched a double derivative suit** seeking damages from nine former Romeo directors and officers in part through derivative claims via Nikola Corp., which acquired Romeo in August 2022 for a fraction of the company's once \$1 billion-plus valuation.

Ongoing Disputes

Tesla Inc. **fired back at a stockholder's claim** that the company failed to collect a required two-thirds majority vote to convert from a Delaware to Texas-chartered company, saying the supermajority vote applied to charter changes rather than Tesla's corporate "redomestication."

A Sears Hometown and Outlet Stores stockholder whose share appraisal case was tanked by the company's bankruptcy in late 2022 **got clearance to intervene** with a novel, alternative claim for recovery through a separate, ongoing class damages suit.

Citing "contemptuous disregard" for court orders, two co-founders of Trump Media & Technology Group, the company behind former President Donald Trump's Truth Social platform, **sought a temporary restraining order** to block the social media venture from seeking a Florida court order to stop their sale of some 18 million shares.

A Hong Kong company that sued a California-based private equity firm for refusing to invest the company's \$50 million into Elon Musk's SpaceX **says the firm** has now sued the company's Chinese parent in California, creating "duplicative proceedings" that ought to be brought in Delaware's Chancery Court.

Settlements

John N. Kapoor, the convicted founder of drugmaker Insys Therapeutics Inc., agreed to accept a **\$175 million judgment** as part of a settlement with the company's liquidation trust over his role in an opioid kickback scheme that drove the firm into bankruptcy.

A company led by the grandson of Kazakhstan's former president **agreed to settle a suit** seeking more than \$18 million in damages from private jet service JetSmarter Inc. and its principals — including former Secretary of Homeland Security Tom Ridge — for alleged misrepresentation of JetSmarter's finances and prospects.

Vice Chancellor Morgan T. Zurn **approved a settlement** between the founding investors in a chain of trampoline parks and New York private equity firm Palladium Equity Partners LP on Monday, after the parties made changes to the deal to address her concerns that it might not pass scrutiny from the Delaware Supreme Court.

Mooted

Electric air-taxi developer Archer Aviation Inc. and investor John Solak **told the court in a joint**

filing that their dispute had been mooted after the company failed to get enough shareholder support for a charter amendment that would have insulated its officers from certain kinds of liability.

Quotable

"In Delaware, we are used to big numbers." – Delaware Supreme Court Chief Justice Collins J. Seitz Jr., in a **38-page opinion** affirming a \$266.7 million fee award for stockholder class attorneys who secured a \$1 billion settlement with Dell Technologies.

--Additional reporting by Jeff Montgomery, Emilie Ruscoe, Rae Ann Varona, Lauren Berg, MJ Koo and Katryna Perera. Editing by Philip Shea.

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No Coverage For CVS In Additional Opioid Actions

By **Jennifer Mandato**

Law360 (August 21, 2024, 9:06 PM EDT) -- A Delaware state court ruled that CVS cannot get coverage for over 200 opioid-related actions that remained at issue after the pharmacy chain and its insurers agreed that thousands of other opioid suits aren't covered, finding the remaining suits asserted claims for economic harm, not bodily injury or property damage.

Judge Paul R. Wallace **granted** a partial win Tuesday to a number of insurers, including AIG and Chubb units, finding that CVS Health Corp. failed to prove that the remaining at-issue suits fell within the scope of its general liability policies.

In evaluating the so-called governmental and nongovernmental underlying actions, Judge Wallace said neither identified a specific, individualized injury viable for coverage; rather, they alleged "generalized economic harm" and an "array of opioid-related statistics."

The dispute stems back to 2017, when CVS notified its carriers that it was facing suits brought by local governments over the opioid epidemic. The underlying suits accused the pharmacy giant of profiting off of "flooding the country with prescription opioids" and causing the underlying plaintiffs to incur increased costs in order to address the public health crisis.

In January 2022, the Delaware Supreme Court issued a ruling in **Ace American Insurance Co. v. Rite Aid** , in which a 4-1 majority said the insurer had no defense obligations in suits brought by three Ohio counties over the costs of responding to the opioid epidemic because the actions were not brought "because of" bodily injuries and thus did not trigger Rite Aid's insurers' defense duties.

Less than a month later, Chubb and AIG sued CVS in an attempt to secure a declaration that they had no duty to defend CVS in underlying opioid-related actions. The suits were consolidated, and CVS' additional insureds later joined the action.

In August 2023, Judge Wallace applied the Rite Aid decision to nine representative suits and held that CVS was not owed coverage because the underlying governmental entities didn't allege damages resulting from bodily injury or property damage.

Following that decision, the parties agreed that there was no coverage for over 2,000 opioid-related suits and asked the court to determine whether coverage was available for 218 unresolved actions. Sixty-two of the remaining suits were from governmental entities, including municipalities, and 156 came from nongovernmental entities, including third-party payors and hospitals.

The insurers told the court that the remaining governmental suits are "materially indistinguishable" from the representative suits addressed in the 2023 decision, arguing that the actions "don't seek recovery for individualized injury or property damage, but instead 'seek to recover for budgetary spending in response to the opioid crisis.'"

CVS contended that the governmental suits, which the pharmacy company referred to as the municipal lawsuits, alleged damages in the form of needing repairs to infrastructure, thus meeting the scope of property damage.

"The allegations with regards to property damages are not based on any damage to a specific piece of property," Judge Wallace countered. "Instead, they broadly describe how the opioid crisis strained healthcare systems and eroded the quality of underlying municipal infrastructure such as jails and treatment facilities."

Judge Wallace also pointed to the "generalized" allegations within the nongovernmental suits in siding with the insurers.

The nongovernmental suits alleged that increased prescription purchases and related opioid addiction treatment caused economic harm to members of insurance and health benefit funds, as they had to pay more in health benefits. Hospital systems also alleged that CVS and other distributors caused damages in the form of increased medical care due to opioid misuse.

"As with all the governmental lawsuits, the non-governmental lawsuits do not direct their allegations to 'an individual injury [or damage to individual property] but to a public health crisis,'" Judge Wallace said.

Mike DeAngelis, executive director of corporate communications for CVS, told Law360 on Wednesday that the company was "disappointed" by the court's decision and is considering its options.

"We continue to believe the law obligates the insurers who provide CVS liability coverage to pay for the defense and indemnification of the company in connection with ongoing opioid litigation," DeAngelis said.

Representatives of AIG, Liberty Mutual and AXA XL Insurance declined to comment. Representatives of Chubb and the additional insurers did not immediately respond to requests for comment Wednesday.

CVS is represented by David J. Baldwin, Peter C. McGivney and Zachary J. Schnapp of Berger Harris LLP and Jeffrey L. Schulman of Blank Rome LLP.

The Chubb units are represented by Garrett B. Moritz and R. Garrett Rice of Ross Aronstam & Moritz LLP and Michael S. Shuster, Daniel M. Sullivan, Blair E. Kaminsky and Daniel M. Horowitz of Holwell Shuster & Goldberg LLP.

The AIG units are represented by Christopher J. St. Jeanos of Wilkie Farr & Gallagher LLP and Robert J. Katzenstein and Julie M. O'Dell of Smith Katzenstein & Jenkins LLP.

The additional insurers are represented by attorneys from Bodell Bove LLC, Skarzynski Marick & Black LLP, Chipman Brown Cicero & Cole LLP, BatesCarey LLP, Reger Rizzo & Darnall LLP, Nicolaides Fink Thorpe Michaelides Sullivan LLP, Bellew LLC, Rivkin Radler LLP, Kaufman Dolowich, the Law Offices of Wade A. Adams III, Simpson Thacher & Bartlett LLP, Bayard PA, Ruggeri Parks Weinberg LLP, Marshall Dennehey, Ashby & Geddes PA, Choate Hall & Stewart LLP, Kennedys CMK and Dentons US LLP.

The case is In re: CVS Opioid Insurance Litigation, case number N22C-02-045, in the Superior Court of the State of Delaware.

--Additional reporting by Shane Dilworth. Editing by Emma Brauer.

Correction: A previous version of this story included incorrect counsel information for the additional insurers. The error has been corrected.



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PBMs Can't Yet Duck Municipalities' Claims In Opioid MDL

By **Hailey Konnath**

Law360 (August 22, 2024, 10:32 PM EDT) -- The Ohio federal judge overseeing multidistrict opioid litigation on Thursday refused, for now, to throw out claims against pharmacy benefit managers Express Scripts Inc. and OptumRX Inc., finding that the PBMs' arguments were brought too early and a more robust record is needed.

U.S. District Judge Dan Aaron Polster shot down all the PBMs' arguments for dismissing claims brought by the city of Rochester, New York, and Lincoln County, Missouri, in their bellwether cases, saying that "each of these arguments is not well-taken, at least in the context of a motion to dismiss."

Judge Polster said ESI and OptumRX could potentially make their arguments again at the summary judgment stage, once discovery is complete. But for now, the PBMs haven't proven that the municipalities' claims were brought too late or inadequately pled, the judge said.

Notably, Judge Polster rejected the PBMs' argument that the plaintiffs are merely rehashing decades-old conduct with their Racketeer Influenced and Corrupt Organizations Act claims. Indeed, further down the line, the municipalities will have to demonstrate that the PBM's alleged conduct continued into the four-year limitations period and was separable from acts that took place earlier, the judge said. They'll also have to show that the injuries stemming from these alleged acts constitute "new harms 'over and above' any the plaintiffs sustained prior to the limitations period," according to the opinion.

"Further, under the corollary to the separate accrual rule, plaintiffs will only be able to recover for those injuries that accrued within the statute of limitations," Judge Polster said. "At this juncture, however, plaintiffs' allegations suffice to defeat the PBM's motion to dismiss."

The judge added that the PBMs can raise the issue again at the summary judgment stage "if there is insufficient evidence to support separability of acts or injury."

He also held that he can't yet reject the plaintiffs' argument that their claims are tolled under the fraudulent concealment doctrine. At this stage, they've adequately pled that the PBMs created a false and misleading impression for regulators and others that delayed the municipalities from learning of the alleged misconduct, Judge Polster said.

Again, however, the PBMs could make this argument in a summary judgment motion after discovery "if the facts support it," Judge Polster said.

The sprawling multidistrict litigation also involves cases against pharmacies, drugmakers, doctors, insurers and other healthcare entities over their alleged roles in the opioid epidemic.

The PBMs are accused of wielding influence over the prescribing, dispensing and sales of pharmaceutical drugs because they contract with drug manufacturers, pharmacies and third-party payors. Specifically, the plaintiffs say they colluded with manufacturers to increase the accessibility and sales volume of branded opioid drugs.

ESI and OptumRX have argued that some of the claims were brought too late and others fail because they haven't alleged a direct injury.

Judge Polster on Thursday shot down the PBMs' argument that although the municipalities do generally allege they suffered diminished property values, they've failed to identify specifically any affected real property in their claims.

"The court concludes that, at this stage of the litigation, plaintiffs' allegations of lost property value plead an injury to business or property with particularity sufficient to satisfy [the pleading requirements]," he said.

He added, "Plaintiffs will be required to identify specific properties in discovery and must eventually prove the PBMs' conduct caused the value of those properties to diminish."

Judge Polster also refused to throw out Rochester's claims under New York law, finding that the city has plausibly alleged that the PBMs' conduct continued into the three-year statute of limitations period.

In May, Rochester, Lincoln County and two other municipalities **asked the court** to sanction ESI and OptumRX, arguing that they've refused to comply with an order requiring them to provide complete responses to discovery requests. Judge Polster hasn't yet ruled on that motion, according to the case docket.

Hunter Shkolnik, one of the attorneys representing the plaintiffs, said in a statement Thursday that the PBMs "must now face the consequences of being in bed with companies like Purdue and other manufactures by giving rebates and helping market these dangerous drugs and not putting in place proper controls to prevent the opioid epidemic."

"Now they must pay to clean up this problem," Shkolnik said.

OptumRX and Express Scripts didn't immediately respond to requests for comment late Thursday.

The municipal governments are represented by Hunter J. Shkolnik of Napoli Shkolnik, Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC and Peter H. Weinberger of Spangenberg Shibley & Liber.

The OptumRX defendants are represented by Brian D. Boone, William H. Jordan and Kimberly K. Chemerinsky of Alston & Bird LLP.

The Express Scripts defendants are represented by Mike Lyle, Jonathan G. Cooper and Sage R. Vanden Heuvel of Quinn Emanuel Urquhart & Sullivan LLP.

The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-2804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Mike Curley and Theresa Schliep. Editing by Jay Jackson Jr.



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2nd Circ. Keeps Macquarie Suit Alive After High Court Remand

By **Jessica Corso**

Law360 (August 19, 2024, 7:44 PM EDT) -- The Second Circuit on Monday once again greenlighted an investor lawsuit accusing Macquarie Infrastructure Corp. of hiding the expected impact of a high-sulfur fuel ban on its oil storage business, saying that the U.S. Supreme Court's recent decision in Macquarie's favor had little impact on the circuit court's earlier ruling that the case should move forward.

The nation's highest court **said in April** that Macquarie's failure to speak about the upcoming ban could not be the basis of a lawsuit brought by Moab Partners LP absent any allegations from the lead plaintiff that an affirmative statement from the company rendered that omission misleading.

While broader impact of the high court's ruling on shareholder litigation **remains to be seen**, the Second Circuit said the Supreme Court's ruling has little impact on **its previous decision** allowing the lawsuit against Macquarie to move forward, in part because Moab Partners did allege misleading affirmative statements.

"Having given due consideration to the Supreme Court's decision in Macquarie, and the parties' supplemental briefing, we conclude that the Supreme Court's opinion: (1) required reconsideration of Moab's claims under count one; and (2) did not disturb our previous analysis with respect to counts two, three, four, five, and six," a three-judge panel of the circuit court said in Monday's brief **summary judgment order**.

The panel noted that count one wasn't dismissed entirely, either, but only the portions in which Moab Partners was alleging pure omissions. The court kept intact the allegations in count one relying on so-called "half-truths," in other words those claims alleging that statements made by the company did render its silence on the ban misleading.

Both attorneys for Moab and for Macquarie told Law360 that Monday's decision was expected. The Supreme Court declined to weigh in on the Second Circuit's half-truth analysis, with Moab Partners claiming that Macquarie's leaders spoke positively about the future of their oil storage business despite knowing that the fuel ban would harm the business.

The Second Circuit also noted that the Supreme Court's analysis also didn't touch on claims in the case falling outside Rule 10b-5(b), the U.S. Securities and Exchange Commission rule against making misleading statements.

"The Second Circuit's holding is consistent with our reading of the Supreme Court's decision and it's time for this case to move into discovery," Salvatore Graziano of Bernstein Litowitz Berger & Grossmann LLP, which represents Moab Partners, said in a statement to Law360. "We are looking forward to returning to the district court and finally starting that process in this case."

John Schreiber of Winston & Strawn LLP, which represents Macquarie, also told Law360 that the Second Circuit's ruling was as anticipated.

"It is our understanding that Moab Partners now intends to move for leave to amend its prior complaint, which motion defendants will likely oppose," he said.

The proposed class action dates to 2018 and accuses Macquarie of failing to warn investors that the

company's most profitable segment stood to lose a significant amount of fuel storage business once an international fuel standard known as IMO 2020 went into effect.

The regulation was adopted in 2016, four years before going into effect, but shareholders allege that Macquarie waited two years before publicly announcing a drop-off in customers due to the decline in fuel sales. The announcement of the loss of customers led the stock price to drop 41%, according to suing investors.

Macquarie won dismissal of the case at the district court, which ruled that Moab Partners had not alleged that the company made any actionable half-truths about its reliance on the regulated fuel oil. But Second Circuit revived the lawsuit in 2022, leaving Macquarie to file its Supreme Court appeal.

U.S. Circuit Judges Pierre Leval, Reena Raggi and Myrna Pérez sat on the panel for the Second Circuit.

Moab Partners is represented by Salvatore Graziano, Jesse Jensen, Timothy Fleming and Jasmine Cooper-Little of Bernstein Litowitz Berger & Grossmann LLP and Lori Marks-Esterman, John Moon and Nicholas Hirst of Olshan Frome Wolosky LLP.

Macquarie is represented by John Schreiber, Kerry Donovan, Lauren Gailey and Linda Coberly of Winston & Strawn LLP, as well as by Richard W. Reinthaler.

The case is Moab Partners LP v. Macquarie Infrastructure Corp. et al., case number 21-2524, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Rich Mills.



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Adidas Boots Suit Over Rapper Ye's Allegedly Racist Remarks

By **Katryna Perera**

Law360 (August 19, 2024, 9:02 PM EDT) -- An Oregon federal judge has dismissed, for now, a suit against Adidas AG, accusing the company of failing to disclose the potential damage caused by its partnership with musician Ye, formerly known as Kanye West, following allegations that the artist made antisemitic comments, saying none of the corporate statements challenged as misleading in the suit are actionable.

U.S. District Judge Karin J. Immergut issued an **order** Friday saying the plaintiffs have failed to sufficiently plead facts showing that Adidas misled investors and committed securities fraud.

The investors filed suit in May 2023, alleging that before Adidas ended its partnership with Ye in 2022, it ignored the risk the artist could pose to investors and failed to disclose it had considered ending the partnership as a result of his "overtly antisemitic and other racially offensive remarks."

However, in a February **dismissal motion**, Adidas argued that it was not required to reveal Ye's alleged derogatory behaviors and that its risk disclosures were sufficient. Judge Immergut agreed on Friday but stated that she does not condone the allegations Ye is accused of doing.

According to the order, the investors challenged three categories of statements — Adidas' risk disclosures in its annual reports, its diversity, equity, and inclusion statements, and statements relating to the European Union's Non-Financial Reporting Directive and the Global Reporting Initiative.

First, Judge Immergut said the business partner risk disclosures issued by Adidas were not materially misleading because they never stated nor implied that no celebrity partner of the company was ever engaged in "improper behavior."

"To the contrary, the business partner risk disclosures took such 'improper behavior' as a given, and the warned-of risk in the disclosures was a hypothetical 'negative spill-over effect' on the company," the order states.

The judge also stated that reasonable investors consider the "customs and practices" of relevant industries, and in this case, given Ye's notoriety, a reasonable investor would have understood that "improper behavior" was a given, not a hypothetical. The judge added that the investors "might wish that Adidas had furnished more information about 'improper behavior' ... but that concern is not actionable."

Regarding the company's DEI statements over the years, the investors argued that Adidas' assertion of its "zero-tolerance approach" toward discrimination and harassment was materially misleading because the company failed to disclose Ye's misconduct and the company's awareness and "cover-up of the same."

However, Judge Immergut said that under Ninth Circuit precedent, these statements lack "concrete description and are incapable of objective verification by the reasonable investor," and therefore cannot be materially misleading.

"Adidas's reference to a 'zero-tolerance approach' was not an objectively verifiable statement on which any reasonable investor would have relied," the judge said. "Seen in context, Adidas's 'zero-

tolerance approach' statement was made to signal, as a general goal, how Adidas 'aim[ed] to contribute to creating lasting change.' No reasonable investor would have believed the 'zero-tolerance approach' statement concretely established how Adidas dealt with situations involving misbehaving employees or partners."

Finally, the investors claimed that Adidas' annual reports failed to include non-financial information required by the European Union's Non-Financial Reporting Directive and the Global Reporting Initiative. Such information can include business models, policies, outcomes, risks and key performance indicators related to social and employee issues and human rights.

Specifically, the investors alleged Adidas did not fulfill the GRI's requirements.

"According to plaintiff, 'defendants' omissions concerning [Ye's] repeated misconduct, Adidas's failure to investigate or act on the misconduct, and the risks the misconduct posed to the company also rendered untrue defendants' statements in each of its 2018, 2019, 2020, and 2021 annual reports that the company complied with GRI disclosure standards,'" the order states.

However, Judge Immergut agreed with the company that the GRI's provisions are too "broad and flexible" for a reasonable investor to rely on.

"The GRI's requirements teem with open-ended, indeterminate language and afford investors no concrete idea of what it means to 'fulfill' the GRI," the order states. "Moreover, it seems any investor or corporation can pick and choose which of the non-mandatory guidance and recommendations to prioritize or on which to rely. Thus, Adidas's statements that it 'fulfill[ed]' these standards constitute a 'subjective assessment' by Adidas that cannot be proven or disproven."

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

The investors are represented by Phillip Kim, Laurence M. Rosen and Daniel Tyre-Karp of The Rosen Law Firm PA.

Adidas and the other defendants are represented by Matthew A. Levin, Chad M. Colton and Stanton R. Gallegos of Markowitz Herbold PC and Maeve O'Connor, Elliot Greenfield and Brandon Fetzer of Debevoise & Plimpton LLP.

The case is HRSA-ILA Funds et al. v. Adidas AG et al., case number 3:23-cv-00629, in the U.S. District Court for the District of Oregon.

--Additional reporting by Sydney Price. Editing by Michael Watanabe.



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AMC Shareholder Wants Opt-Out Fight In US High Court

By **Jeff Montgomery**

Law360 (August 20, 2024, 3:31 PM EDT) -- Arguing that stockholder rights to opt out of class-wide monetary settlements should no longer be "dependent on the accident of geography," attorneys for an AMC Entertainment Inc. stockholder asked the U.S. Supreme Court Tuesday to review opt-out denials in a deal that ended a Delaware Court of Chancery suit last year.

Attorneys for Rose Izzo, in a Supreme Court petition for certiorari, pointed to a long-standing split among circuit courts on the issue, including two previous cases — *Adams v. Robertson* in Alabama in 1997 and *Ticor Title Insurance Co. v. Brown* in Arizona in 1994 — focused on opt-outs that had to be dismissed because of unrelated flaws.

The request for review pointed to "the critical nature and number of shareholder class actions that are central to issues of corporate governance and shareholder recovery."

Recently prominent among them: an AMC stockholder challenge last year to a Chancery Court ruling that allowed the theater giant to free up stock for sale through a share conversion and reverse split settlement that ultimately proved disastrous for common investors. Class attorneys argued that the process bypassed dilution-wary common stockholders who twice rejected an increase in the number of authorized shares of AMC, and who invested in AMC at a time when COVID-19 had suppressed theater-going and put ticket sales, company revenues and share prices in a nosedive.

Attorneys for Izzo sought an opt-out from the settlement and argued unsuccessfully in both Chancery and the state Supreme Court that the plan was improperly approved and would clear the way for AMC moves that would dilute retail shareholder equity.

"Although the settlement was purely monetary in nature (i.e., a settlement of claims for freely-tradable stock with no injunctive relief)— it contained no opt out provision. In short, the only option for stockholders who disagreed with the settlement was to oppose approval of the settlement in the Court of Chancery," the petition said.

Delaware's Supreme Court rejected the appeal in a one-page ruling in May. "At least five other circuits, however, permit the certification of substantial damages claims" via mandatory plaintiff classes, including opt-outs, Izzo's attorneys observed.

"Indeed, the Third, Fourth, Sixth, and Eighth Circuits go further than merely permitting such certification — they encourage mandatory class certification even when damages claims are present and opt-out certification is available.

Vice Chancellor Morgan T. Zurn initially rejected, then approved, the theater giant's plan to expand its supply of unsold AMC stock through a preferred-to-common share conversion and 1-for-10 reverse stock split. The reversal followed a class and company agreement to prune the type of shareholder damage claims ruled out under the deal.

AMC CEO Adam Aron proposed the conversion and split plan after the company was twice unable to muster enough shareholder votes to raise cash by simply authorizing more common stock, a move that would directly dilute current shareholders.

"AMC's market capitalization cratered after the settlement was permitted to proceed, falling from

\$4.5 billion to \$1.97 billion immediately after the Delaware Supreme Court denied the stay," the certiorari application said.

The case "presents a substantial question" in which the U.S. Supreme Court "long-ago expressed continuing interest," Izzo's attorneys wrote. "The Court has not had occasion to conclusively resolve" the question but it has "repeatedly hinted at an understanding of the constitutional foundations of the opt-out right."

Izzo's attorneys described the position of Delaware's courts as "entrenched," citing a contrary path followed by the state's jurists in rejecting the right to opt out of class settlements.

In a 1989 decision in *Nottingham Partners v. Dana*, the certiorari motion said, state justices found that a member of a class certified under a rule for mixed claims for monetary awards and an injunction "has Constitutional due process right to notification, but not a right to opt out of the class."

Following *Nottingham*, Izzo's counsel wrote, "the Court of Chancery was emboldened to ignore damages claims and focus on 'the nature of the claims to be released' as regards the director actions."

In analyzing a 2011 U.S. Supreme Court decision in *Wal-Mart Stores v. Dukes*, the cert motion said, Chancery Court later found that nothing in the case "requires shareholders to be given an opt out right even where they have brought a fiduciary duty claim 'potentially entitling the shareholder class to monetary relief.'"

The Delaware Chancery and Supreme Court judgments in AMC Entertainment are final and reflect those courts' "long-entrenched holdings," Izzo's attorneys wrote in arguing for high court review. They observed that Delaware is the corporate home to more than 2 million business entities and more than two-thirds of the nation's Fortune 500 companies.

Counsel for Izzo did not provide additional comment. AMC Entertainment did not immediately respond to a request for comment.

Rose Izzo is represented by Theodore A. Kittila of Halloran Farkas+Kittila LLP, Rafi Melkonian of Wright Close & Barger LLP and Jeffrey T. Green of Green Law Chartered LLC.

Counsel information for the AMC Entertainment in the appeal was not immediately available.

The case is *In re AMC Entertainment Holdings Inc. Stockholder Litigation*, on petition for a writ of certiorari to the Supreme Court of the State of Delaware, no case number yet docketed, in the Supreme Court of the United States.

--Editing by Alex Hubbard.



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Borrowed Claims Revived In CenturyLink Merger Suit

By **Thy Vo**

Law360 (August 22, 2024, 3:59 PM EDT) -- A Colorado Court of Appeals panel said Thursday that attorneys can borrow confidential witness statements from other lawsuits without speaking to the witnesses as long as they take other investigatory steps, reinstating a shareholder suit against CenturyLink.

Dean Houser filed a proposed class action against CenturyLink in 2018 alleging the company failed to disclose illegal practices ahead of a \$34 billion merger with Level 3 Communications Inc., harming himself and other Level 3 stockholders.

A Boulder County District Court dismissed the suit in May 2023, concluding that because Houser's lawyer didn't personally speak with unnamed former employees whose allegations were included in the lawsuit, the lawyer failed to conduct a "reasonable inquiry" into the borrowed allegations.

In a published decision on Thursday, a unanimous three-judge panel cited federal court decisions that upheld borrowed allegations based on confidential witness statements, even when the lawyers drafting the complaints didn't talk to the witnesses.

Like the lawyers in those federal cases, Houser's attorney did his own independent research that included reviewing SEC filings, press releases, earnings calls, media reports, public filings and conferring with counsel in the cases from which the allegations were borrowed, the panel said. That's enough to meet the "reasonable inquiry" requirements of a state civil procedure rule, according to the opinion.

"The shareholder's counsel took a variety of steps to verify the allegations in the In re CenturyLink complaint before filing the amended complaint," Judge Steven Bernard wrote on behalf of the panel, referring to one of the related cases. "He did not solely or exclusively rely on the inquiry of the attorney who had filed the In re CenturyLink complaint."

The state appellate panel also rebuffed concerns raised in a 2013 decision from a federal securities lawsuit against Lehman Brothers Inc. that allowing plaintiffs to borrow unverified confidential witness statements would incentivize attorneys to "misuse or mischaracterize" those statements.

Plaintiffs that file lawsuits with groundless or misrepresented allegations can be sanctioned. The court "need not raise the pleading standard" to avoid behavior that already has a deterrent, Judge Bernard wrote.

The lawsuit stems from a 2017 merger between CenturyLink and Broomfield, Colo.-based Level 3. CenturyLink changed its name to Lumen Technologies Inc. in 2020.

Houser claimed CenturyLink failed to disclose its widespread and illegal use of "cramming," which refers to a practice of placing misleading and deceptive charges on customers' bills. CenturyLink faced other lawsuits and investigations by multiple state attorneys general over the alleged practice, and agreed to nearly \$110 million in settlements, according to Houser's brief.

The putative class action made an earlier trip to the Court of Appeals after a trial court judge dismissed the initial complaint in May 2020 for pleading deficiencies, but the appellate court said the plaintiff should be allowed to amend his complaint and sent it back to the trial court.

In Thursday's opinion, which addresses Houser's second appeal, Judge Bernard rejected

CenturyLink's argument that Houser's lawyer **failed to satisfy** his "nondelegable duty" to personally investigate the veracity of borrowed allegations because he relied on another attorney's work.

The federal cases cited by the company said an attorney "may not rely solely upon the inquiry conducted by another attorney." Houser's counsel satisfied that requirement by conducting other independent research, according to the panel's opinion.

CenturyLink declined to comment on Thursday. Counsel for Houser did not immediately respond to a request for comment.

Judges Stephanie Dunn, Pax L. Moultrie and Steven Bernard sat on the panel for the Colorado Court of Appeals.

Houser is represented by Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc. and Jason P. Kane of Ranson & Kane PC.

CenturyLink is represented by Kathryn A. Reilly and Daniel N. Guisbond of Wheeler Trigg O'Donnell LLP and Sameer Advani of Willkie Farr & Gallagher LLP.

The case is Dean Houser v. CenturyLink Inc. et al., case number 2023CA1214, in the Colorado Court of Appeals.

--Editing by Alex Hubbard.

Update: This story has been updated with a response from CenturyLink.



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Chancery Orders Genworth Suit Funding, Fee Terms Released

By **Jeff Montgomery**

Law360 (August 21, 2024, 7:15 PM EDT) -- Attorneys for Genworth Life Insurance Co. long-term policyholders who sued the company in Delaware's Court of Chancery over the sale of valuable subsidiaries lost a battle on Wednesday to bar the disclosure of litigation funding and fee agreements.

Vice Chancellor Nathan A. Cook cited in part concerns raised by the defense over the potential for case-funding conflicts and in a 16-page opinion wrote that "parties to the litigation funding agreement set forth their collective 'expectation' that the agreement would be disclosed to the court" ahead of class certification.

In addition, the vice chancellor rejected as insufficient a "three-sentence" assertion of work-product protection for the deal, said the effort to shield the fee agreement "rises and falls" with the funding agreement, and ordered delivery of unredacted versions of both the funding and fee pacts to Genworth's counsel.

The suit, which dates to 2018, alleged that Genworth subsidiary Genworth Financial International Holdings LLC had sold its interests in valuable international mortgage subsidiaries to divert assets away from policyholders, among other alleged efforts to "bleed capital from GLIC, a wholly owned insurance subsidiary of Genworth upon which over a million policyholders depend for long-term care insurance benefits in the event that they become disabled."

The company sought a handover of the stockholders' attorney fee agreements in 2023 and, according to the opinion, learned about the funding agreement later the same year during depositions, according to the vice chancellor's ruling. As of the decision, counsel for the class has continued to refuse to release the funding agreement or the identities of the finders themselves.

In April, Genworth's attorneys sought release of the fee agreements, funding agreements and non-privileged communications, citing in part a need to assess conflicts that might prompt counsel to put the interests of those paying the bills above the class.

"I believe there may be legitimate concerns that counsel could face a conflict of interest. There are many instances where a funder's interests might diverge from those of a claim holder," Vice Chancellor Cook wrote.

Class action litigation, the vice chancellor wrote, "seems especially ripe for a third-party funder to exercise improper control over the litigation, at least relative to the heightened degree of oversight that might tend to accompany an ordinary attorney-client relationship."

The vice chancellor's decision pointed to class counsel obligations to fairly and adequately represent the class, as well as concerns that funding terms could "incentivize counsel to prioritize the interests of the funders" over those of the class, risks that the court said could be determined from the agreement.

Reference to the funding agreement in the contingent fee agreement "suggests other potential concerns," Vice Chancellor Cook wrote, pointing in part to questions about disclosure of the funding agreement terms to the stockholder plaintiffs before or after they entered into contingent fee pacts.

Particularly relevant, the opinion said, were direct references to disclosures in the funding agreement itself.

"I have difficulty thinking of a more direct acknowledgment of relevance than the funding agreement's parties stating their 'expectation[s]' that the document or its terms will be disclosed during the course of litigation — at the class certification stage no less," the vice chancellor wrote. "It is as if they foresaw the potential concern over conflicts and tried to get ahead of the issue."

The stockholders are represented by Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC and Edward F. Haber, Michelle H Blauner, Ian J. McLoughlin and Patrick J. Valley of Shapiro Haber & Urmy LLP.

Genworth Financial Inc. and its affiliates are represented by Srinivas M. Raju, Elizabeth J. Freud, Daniel A. Dreisbach, Susan Hannigan Cohen and Kevin M. Gallagher of Richards Layton & Finger PA, Reid L. Ashinoff, Kenneth J. Pfaehler and T. Carter White of Dentons US LLP, and John C. Hueston, Marshall A. Camp, Padraic Foran and Zachary Murray of Hueston Hennigan LLP.

The case is Richard Burkhart et al. v. Genworth Financial Inc. et al., case number 2018-0691, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Ex-Avaya Execs Snag Early Exit From Investor Suits In NC

By Hayley Fowler

Law360 (August 22, 2024, 6:05 PM EDT) -- Three former executives at telecom giant Avaya Inc. have escaped separate lawsuits in the North Carolina Business Court accusing them of painting an inaccurately rosy picture for investors before finances tanked and the company was forced to declare bankruptcy.

Judge Adam M. Conrad in **two orders** Wednesday dismissed investor suits against former Avaya president and CEO James M. Chirico Jr., former vice president and Chief Financial Officer Kieran McGrath, and former Chief Revenue Officer Stephen D. Spears. Judge Conrad specifically determined that Chirico and McGrath can enforce a New York forum selection clause in the investors' contracts with Avaya, and he dismissed the suit for improper venue as a result.

"Every claim is based on statements that Chirico and McGrath made or actions that they took in their capacities as Avaya's officers and agents to induce plaintiffs to invest in the company," the judge wrote. "No allegations or claims arise from actions that either took in a personal capacity. As a result, the forum-selection clauses apply, and North Carolina is not the proper venue for these cases."

As for Spears, Judge Conrad said the investors failed to show that the one-time revenue officer was personally involved in allegedly misleading them or that he was otherwise obligated to make certain disclosures.

"As a result, plaintiffs have not stated a claim for fraudulent omission against him," the judge said.

Avaya is a cloud communications company that was previously headquartered in North Carolina but relocated to New Jersey last year after filing its **second Chapter 11 case** since 2017. According to Wednesday's order, it used to sell hardware and software but transitioned to more cloud-based products in recent years, where it reportedly struggled to adapt after an initial boom in 2020.

Citing one of the complaints, Judge Conrad said Avaya had touted record growth for cloud-based revenue in 2022, and its "regulatory filings were equally upbeat, heralding a rosy outlook for the rest of the year."

The company subsequently sought to raise half a billion dollars in fresh capital. As part of that effort, Avaya secured a \$236 million loan from a group of funds known as the ALCOF III NUBT LP plaintiffs, plus \$125 million and \$25 million in secured notes respectively by two groups of funds known as the Brigade Cavalry Fund Ltd. plaintiffs and the Canyon Distressed Opportunity Master Fund III LP plaintiffs, according to Wednesday's orders.

Judge Conrad said the deals closed in July 2022, but "all the good vibes turned to ashes just two weeks later" after Avaya disclosed "grim" financial results for the third quarter. The company ultimately filed for bankruptcy in February 2023, tanking the plaintiffs' investments.

The ALCOF and Brigade plaintiffs filed back-to-back lawsuits in October 2023 seeking to hold Avaya's executives liable, court documents show. The Canyon plaintiffs intervened in the Brigade case earlier this year.

The suits accused Chirico, McGrath and Spears of falsely touting Avaya's successes to investors even as they knew the business was floundering. They asserted varying claims for negligence, fraudulent

misrepresentations, violations of the North Carolina Securities Act and fraudulent omission as a result.

Starting with Chirico and McGrath, Judge Conrad said the choice-of-forum clause in the investor agreements are valid and mandatory, and that the executives are entitled to enforce them as agents of the company.

"A rule barring agents from enforcing the forum-selection clause would upset the expectations of the agents and signatories alike, undermine the clause's purpose to provide certainty about where contract-related disputes will be litigated, and make it too easy for a plaintiff to evade the clause by suing the agents rather than the corporation," he wrote.

Judge Conrad consequently dismissed the investors' claims against Chirico and McGrath with the "right to refile in an appropriate venue," according to the order.

Spears was only named in the ALCOF plaintiffs' suit, which asserted a single claim for fraudulent omission against him. But Judge Conrad said Wednesday that he didn't play an active role in the communications that induced them to invest, nor did he interact directly with them.

The fact that Spears "knew certain facts and remained silent" does not rise to the level of him having a duty to disclose, the judge said.

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

The ALCOF investors are represented by Melanie Black Dubis and Andrew Tabeling of Parker Poe Adams & Bernstein LLP, and Andrew Glenn, Trevor J. Welch, Marissa E. Miller, Eric J. Carlson and George L. Santiago of Glenn Agre Bergman & Fuentes LLP.

The Brigade investors are represented by Jesse Andrew Schaefer and Raymond M. Bennett of Womble Bond Dickinson, and Erica Weisgerber, Morgan Davis and Maeve O'Connor of Debevoise & Plimpton LLP.

The Canyon investors are represented by Lee M. Whitman and Douglas Scott Hazelgrove of Wyrick Robbins Yates & Ponton LLP, and Adam S. Paris of Sullivan & Cromwell LLP.

Chirico is represented by William D. McClelland, Kenneth Lautenschlager and Austin R. Walsh of Johnston Allison & Hord PA, and Thomas O. Gorman and Stephen Weingold of Dorsey & Whitney LLP.

McGrath is represented by David C. Wright, Adam Doerr and Ethan R. White of Robinson Bradshaw & Hinson PA, and Reid Mason Figel, Minsuk Han and Jordan González of Kellogg Hansen Todd Figel & Frederick PLLC.

Spears is represented by Jennifer M. Houti and Adam L. Ross of James McElroy & Diehl PA.

The cases are ALCOF III NUBT LP v. Chirico, case number 2023CVS31985, and Brigade Cavalry Fund Ltd. v. Chirico, case number 2023CVS31948, in the North Carolina Business Court.

--Additional reporting by Vince Sullivan and Rick Archer. Editing by Adam LoBelia.



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Investors Sue Orthopedics Co., Ousted Execs Over Stock Drop

By **Katryna Perera**

Law360 (August 22, 2024, 6:03 PM EDT) -- Investors of Texas-based Orthofix Medical Inc. have launched a proposed class action against the spine and orthopedics company and current and former executives, claiming the company's stock tumbled more than 30% following Orthofix's merger with medical technology company SeaSpine in 2023 and the unexpected termination and reshuffle of some of the company's C-suite.

Plaintiff Matthew Bernal **filed a complaint** Wednesday against Orthofix, former SeaSpine CEO Keith Valentine, former SeaSpine Chief Financial Officer John Bostjancic, former SeaSpine general counsel Patrick Keran and current executive board chair Jon Serbousek.

According to the complaint, Valentine, Bostjancic and Keran were executives of the combined company after the merger, with Valentine becoming CEO, Bostjancic becoming CFO and Keran becoming chief legal officer. Serbousek was Orthofix's president, CEO and director prior to the merger.

The suit is on behalf of a proposed class of individuals and entities who purchased or acquired Orthofix common stock between Oct. 11, 2022, and Sept. 12, 2023. According to the complaint, Orthofix is a global spine and orthopedics company that offers spinal hardware, bone growth therapies and other specialized orthopedic solutions to healthcare professionals.

In October 2022, Orthofix and SeaSpine, a global medical technology company that focuses on treating spinal disorders, announced they had agreed to an all-stock merger agreement. The merger was completed in January 2023.

Bernal said that throughout the proposed class period, the executives issued false and misleading statements and made omissions about the combined company's management team.

"The statements ... falsely assured the market that Orthofix's management team consisted of individuals committed to conducting business in accordance with the highest ethical and legal standards, and further, that these individuals believed in and fostered a strong performance-based culture focused on integrity, collaboration, innovation, diversity, and corporate responsibility," the shareholder said.

The truth about the management team was later revealed in September 2023 when Orthofix **announced the appointment** of an interim CEO, CFO and chief legal officer, effective following the "unanimous decision by the board's independent directors to terminate for cause Keith Valentine, John Bostjancic and Patrick Keran from those respective roles."

According to the announcement, the trio had engaged in "repeated inappropriate and offensive conduct that violated multiple code of conduct requirements." The company did not share any other specifics about the alleged misconduct when the executives were ousted.

In a press release issued Sept. 12, 2023, Catherine Burzik, then the chair of the Orthofix board, said, "Orthofix's core values are built around fostering, cultivating and preserving a culture that is respectful, and we do not condone harassing or inappropriate conduct or statements of any kind. We require all employees - and especially our leaders - to behave in accordance with the company's values."

"The board did not make these decisions lightly," Burzik added. "We believe they are necessary to ensure our employees, investors, customers, and other stakeholders have confidence in the company's leaders."

On this news, Orthofix's stock price fell \$5.62 per share, or more than 30%, to close at \$13.01 per share on Sept. 13, 2023, according to the complaint.

The suit seeks damages, attorney fees and a jury trial.

In a statement to Law360 on Thursday, Thomas Laughlin of Scott + Scott Attorneys At Law LLP, counsel for Bernal, said, "Defendants deceived investors by concealing that Orthofix's management team was engaged in repeated inappropriate and offensive conduct that violated multiple aspects of the company's code of conduct. When the truth was revealed, the price of Orthofix stock fell sharply and thousands of shareholders suffered significant financial harm."

Representatives for the defendants did not respond to requests for comment on Thursday.

In May, the ousted executives **launched** wrongful termination arbitration claims in California seeking severance payments and damages. According to the petition, Keran and the other former executives sought to pursue claims including breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, false light invasion of privacy, deceit, and violations of the California Labor Code.

Bernal is represented by Thomas L. Laughlin IV, Jonathan M. Zimmerman and Nicholas S. Bruno of Scott + Scott Attorneys At Law LLP, Brian J. Schall of The Schall Law Firm, and Andrea L. Fair of Ward Smith & Hill PLLC.

Counsel information for the defendants was not available Thursday.

The case is Matthew Bernal v. Orthofix Medical Inc. et al., case number 2:24-cv-00690, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Emily Sawicki. Editing by Lakshna Mehta.