

Bloomberg Law News 2024-08-29T20:39:47310769625-04:00

Teleperformance Failed to Dismiss Revised Securities Fraud Suit

By Ufonobong Umanah 2024-08-29T13:39:12000-04:00

- Company allegedly didn't protect staff from child abuse videos
- 6 alleged misstatements sufficient to support securities claim

Teleperformance SE failed to get a securities fraud suit stemming from its practices in the so-called egregious content moderation space dismissed, a federal judge said.

Forbes reported that Teleperformance Tiktok moderators were being trained on sexually exploitative images of children, raising questions over whether the company was complying with applicable laws and regulations, according to the opinion from the US District Court for the Southern District of Florida.

The French company trades American Depositary Receipts over the counter in the US. And, the investors who filed the proposed class action, including municipal employees' retirement systems, said that Teleperformance made a series of statements that collectively suggested that the company took steps to ensure the psychological and emotional well-being of employees.

Media reports contradicted those statements, the investors said, negatively impacting the price of the ADRs.

The investors sufficiently asserted a material misrepresentations and omission claim under Section 10(b) of the Securities Exchange Act and six of the eight provided misstatements sufficiently alleged the elements of that claim, Judge Cecilia M. Altonaga said, denying Teleperformance's motion to dismiss. A second claim under Section 20(a) of the Exchange Act also survived dismissal.

Altonaga previously dismissed the suit in May 2024, ruling in part that some of the statements asserted then were puffery, and therefore nonactionable. "A close read" of the operative complaint showed the investors were focused "on the actionable portions of the alleged misstatements," she said in her Wednesday order.

Specifically, statements 1-4 in the operative complaint identified specific measures—including but not limited to resilience training, counseling, and specialized hiring practices—that represent concrete language, Altonaga said.

The investors sufficiently pleaded falsity as to statements 1-6, the court said. In addition to the media reports, which ran counter to the statements, they alleged that Teleperformance didn't adequately implement the safeguards or training measures they promised to. They sufficiently pleaded the statements were false when made, Altonaga said.

The court already said that as to two individual defendants—founder Daniel Julien and Global President of Trust & Safety Akash Pugalia—the investors sufficiently pleaded knowledge. They sufficiently alleged that content moderation was an important enough part of Teleperformance's portfolio that it could be seen as a core operation, the court said.

Teleperformance argued that the Forbes article wasn't a corrective disclosure, but Altonaga disagreed. The investors said the article contained information from an employee that contradicted statements 1-6, making the article "both a negative and a corrective disclosure," she said.

Two statements, identified as 7 and 8, didn't have a connecting corrective disclosure, Altonaga ruled. The investors had linked those statements to *Time's* reporting, which wasn't sufficient to advance a claim on those statements specifically.

Robbins Geller Rudman & Dowd LLP represents the retirement systems and the proposed class. Latham & Watkins LLP and Lash & Goldberg LLP represent Teleperformance.

The case is [City of Warren Gen. Employees' Ret. Sys. v. Teleperformance SE](#), S.D. Fla., No. 1:23-cv-24580, 8/28/24.

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Teleperformance Failed to Dismiss Revised Securities Fraud Suit

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Drug distributors strike \$300 mln opioid settlement with US health plans

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Nate Raymond



Used blister packets that contained medicines, tablets and pills are seen, in this picture illustration taken June 30, 2018. REUTERS/Russell Boyce/Illustration/File photo Purchase Licensing Rights [↗](#), opens new tab

Aug 30 (Reuters) - The three largest U.S. drug distributors have agreed to pay \$300 million to resolve claims by health insurers and benefit plans that they helped fuel the deadly U.S. opioid epidemic, according to court papers filed on Friday.

The proposed class action settlement with McKesson Corp (MCK.N) [↗](#), opens new tab, Cencora Inc (COR.N) [↗](#), opens new tab and Cardinal Health Inc (CAH.N) [↗](#), opens new tab was disclosed in a filing [↗](#), opens new tab in federal court in Cleveland, Ohio, and requires a judge's approval.

Those companies had previously agreed to pay \$21 billion to resolve claims by state and local governments accusing them of having lax controls that allowed massive amounts of addictive painkillers to be diverted into illegal channels.

Paul Geller, a lawyer for the plaintiffs, said in a statement that Friday's deal covered third-party payers like union funds that "largely paid for the overprescribed and overmarketed pills and for the treatment required when their plan beneficiaries inevitably suffered opioid use disorder."

The distributors did not admit wrongdoing as part of the settlement. The \$300 million will be paid 38.1% by McKesson, 30.9% by Cardinal and 31% by Cencora, which was previously known as AmerisourceBergen.

The case was among thousands that have been filed seeking to hold various drug makers, distributors and pharmacies responsible for a drug addiction epidemic that resulted in hundreds of thousands of overdose deaths nationally over the last two decades.

The litigation has resulted in more than \$50 billion in settlements, largely with states and local government.

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Reporting by Nate Raymond in Boston, Editing by Rosalba O'Brien

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<https://www.law.com/texaslawyer/2024/08/30/class-action-claims-american-airlines-implemented-unsustainable-sales-plan-causing-stock-to-tank/>



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NEWS

Class Action Claims American Airlines Implemented 'Unsustainable' Sales Plan Causing Stock to Tank

This complaint was first surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in state and federal courts.

August 30, 2024 at 11:59 AM

Civil Procedure



Riley Brennan



American Airlines Group and six executives were hit with a securities class action in a Texas federal court this week, accusing the airliner of falsely marketing new sales strategies as profitable and concealing the fact that those strategies were unsustainable.

This complaint was first surfaced by [Law.com Radar](#), ALM's source for immediate alerting on just-filed cases in state and federal courts. [Law.com Radar](#) now offers state court coverage nationwide. [Sign up today](#) and be among the first to know about new suits in your region, practice area or client sector.

The [class action](#), *Thornburg v. American Airlines Group*, was filed Wednesday in the U.S. District Court for the Northern District of Texas by attorneys with [Robbins Geller Rudman & Dowd](#) and Kendall Law Group on behalf of the plaintiff, John A. Thornburg. The complaint alleged that American Airlines and its top leaders, including Robert D. Isom Jr., the president and CEO of the company, and Vasu S. Raja, who oversaw major strategy changes before and after the COVID-19 pandemic drastically impacted travel.

The complaint alleged that the defendants concealed that their newly implemented sales strategies were unsustainable because they failed to attract lucrative corporate clients and "alienated" travel agencies, including dismantling "its corporate sales division in favor of a new distribution capability," where "frequent flyer mileage points would be restricted unless passengers utilized the American Airlines website or all but a few select travel agencies," the complaint said.

New sales strategies allegedly included pushing corporate customers to book through American Airlines' website rather than through the corporate travel agencies that business class customers usually employed. The executive defendants then allegedly made false statements that artificially inflated the prices of the company's stock and caused class members to purchase the stock at inflated prices between July 2023 through May, the complaint said.

"Trying to pay down the debt load the company had amassed during the pandemic, with a new sales strategy plan first announced in December 2022, American Airlines bet that a slowdown in business travel following the pandemic would help it push dramatic changes in its relationships with these corporate customers by eliminating the discounts paid to

corporate travel agents,” the complaint said.

This included slashing the sales staff and removing fares from corporate customers’ channels, “aiming to coax more corporate travelers to book directly on American Airlines’ own website or web app.” The airline also made cuts to the sales team, betting “that the corporate contracts and deals that had long dictated business travel had somehow become less important, and that the company could leverage its vast network and loyalty program to win more direct-book business,” according to the complaint.

“Unbeknownst to investors, by alienating travel agencies and corporate customers who were among the airline’s highest spending customers, these new strategies were driving away lucrative corporate customers and dragging down the company’s revenues and earnings. Internally, defendants immediately knew the intended rollout of the [new distribution capability,] sales strategies in April 2023 were—at best—highly questionable,” the complaint said.

American Airlines allegedly failed to disclose that their strategy was unsustainable, as it “alienated travel agencies and the corporate customers who were among the airline’s highest spending customers, drove away lucrative corporate customers and ultimately diminished the company revenues,” the plaintiff claimed.

The complaint alleged that American Airlines also made allegedly false statements in press releases and during conference calls that the company was returning to its post-pandemic profitability due to the new strategy. In reality, the plaintiff claimed that the strategy “cut out the discount credits previously paid to travel agents and other measures adopted as part of the strategic changes adopted to boost post-pandemic profitability.”

The complaint claimed violations of Section 10(b) of the Exchange Act, Rule 10b-5, and Section 20(a) of the Exchange Act. The plaintiff requests compensatory damages and/or rescission, as well as attorney fees and costs.

Thornburg’s attorney, Joe Kendall of Kendall Law Group in Dallas, did not immediately respond to a request for comment.

Counsel has not yet appeared for the defendants. American Airlines did not immediately respond to a request for comment.

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Binance class action alleges co. allowed hackers, thieves to steal, launder crypto

 topclassactions.com/lawsuit-settlements/money/binance-class-action-alleges-co-allowed-hackers-thieves-to-steal-launder-crypto

August 30, 2024

Binance class action overview:

- **Who:** Three cryptocurrency owners have filed a class action lawsuit against Binance and its founder.
- **Why:** The plaintiffs allege the defendants facilitated the laundering of stolen cryptocurrency on the Binance platform.
- **Where:** The Binance class action was filed in a Washington federal court.

Binance and its founder Changpeng Zhao facilitated the laundering of stolen cryptocurrency on the platform, according to a new class action lawsuit filed by a group of cryptocurrency owners.

The three plaintiffs filed the class action complaint against Binance Holdings Ltd. and Zhao on Aug. 16 in a Washington federal court, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and other federal laws.

The plaintiffs claim that the platform allows criminals to move stolen cryptocurrency without detection.

“Binance.com acted as a depository for millions of dollars of cryptocurrency removed from the digital wallets, accounts or protocols of individuals and entities located in the United States as a result of hacks, malware, theft or ransomware, including Plaintiffs and members of the Class,” the lawsuit says.

Cleaning stolen crypto

The class action alleges that Binance has become a primary channel for criminals looking to transfer stolen funds across the U.S. and internationally.

The lawsuit states that, despite **Binance’s record \$4.3 billion settlement** and guilty plea for violations of the Bank Secrecy Act, and agreement with the U.S. Department of Justice to implement anti-money laundering measures, hackers have continued to exploit the platform to clean stolen cryptocurrency.

In November, Binance admitted to failing to register as a money-transmitting business and to violations of U.S. sanctions. Zhao was sentenced in April to four months in prison for his role in the company's inability to create an effective anti-money laundering system.

As part of the DOJ settlement, Zhao agreed to step down from his leadership position at Binance.

However, the plaintiffs argue that Binance's illegal activity persisted even after these measures were supposed to take effect.

Plaintiffs Philip Martin and Yatin Khanna say they lost significant amounts of cryptocurrency to hackers who used Binance to funnel the stolen assets. Martin alleges that in 2021, tens of thousands of dollars were stolen from his Coinbase account and transferred to Binance. Khanna claims he lost over \$2.4 million in two separate thefts in 2022, with \$1.5 million of that amount sent to Binance.

The complaint alleges that Binance's lax policies allegedly enabled criminals to open anonymous accounts, transfer stolen crypto, and then withdraw the funds without providing personal identification.

The plaintiffs are seeking certification of the class action, damages, fees, costs and a jury trial.

What do you think of the allegations in this Binance lawsuit? Let us know in the comments.

The plaintiffs are represented by Lynn Lincoln Sarko, Derek W. Loeser and Chris N. Ryder of Keller Rohrbach 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.

The **Binance cryptocurrency lawsuit** is *Martin et al. v. Binance Holdings LTD et al.*, Case No. 2:24-cv-01264, in U.S. District Court for the Western District of Washington.

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Alison Frankel

REUTERS/Chris Wattie Purchase Licensing Rights , opens new tab

Aug 29 (Reuters) - The federal appellate court that oversees the lion's share of U.S. investor class actions signaled on Wednesday that it may not be done tinkering with its test for shareholders trying to band together to pursue fraud claims.

The New York-based 2nd U.S. Circuit Court of Appeals issued an order , opens new tab calling for oral arguments on a petition , opens new tab for mid-case review by shareholders of mining company Kirkland Lake Gold (now a subsidiary of Agnico Eagle Mines (AEM.TO) , opens new tab). The shareholders contend that a Manhattan trial judge erred last March when he refused to certify , opens new tab a class to proceed with claims that Kirkland Lake's former CEO misled investors about the company's reluctance to grow through acquiring smaller mining operators.

It's rare for appellate courts to grant petitions for mid-case, or interlocutory appeal, as Kirkland Lake pointed out in its brief , opens new tab opposing shareholders' petition. But interlocutory appeals have been crucial in the development of securities class action precedent.

As you probably recall, the U.S. Supreme Court used an interlocutory appeal by investment bank Goldman Sachs to refine some of the rules for shareholder class certification in 2021. The 2nd Circuit subsequently offered its initial interpretation of the Supreme Court's Goldman Sachs test in a post-remand interlocutory appeal by the bank in 2023.

Now shareholders are trying to turn the tables, hoping to use an interlocutory appeal to blunt the impact of the 2nd Circuit's 2023 Goldman ruling , opens new tab, in which the 2nd Circuit instructed trial judges to use heightened scrutiny when evaluating the price impact of "generic" misstatements that allegedly allowed the company to maintain an inflated share price.

Under the appellate court's "mismatch" theory, when a company's share price falls in response to a specific event, judges should be wary of shareholder claims that the stock drop reflects the impact of anodyne statements that, in hindsight, were allegedly false.

To be clear: The 2nd Circuit has not yet granted the petition by Kirkland Lake shareholders. Wednesday's order instead calls for argument by their shareholders' appellate lawyers from Goldstein, Russell & Woofter and Kirkland Lake's lawyers from Paul, Weiss, Rifkind,

Wharton & Garrison on whether the 2nd Circuit should hear the case. That argument is scheduled for Sept. 10.

But the mere call for oral argument on the petition for interlocutory appeal suggests that shareholders have at least piqued the interest of the 2nd Circuit, since circuit courts hardly ever hear oral arguments on such petitions.

Kirkland Lake investors allege that the company's former CEO made three false statements about Kirkland Lake's willingness to grow through acquiring other mining businesses. In one 2018 statement, the CEO described a demanding "minimum standard" Kirkland Lake maintained for potential merger partners. And in two statements in 2019, the CEO emphasized Kirkland Lake's intention to grow organically rather than through acquisitions.

Shareholders contend that Kirkland Lake's subsequent 2019 acquisition of a "poorly performing" company proved the falsity of the CEO's three statements. They assert that the nearly 18% stock drop when Kirkland Lake announced the 2019 deal showed the company's share price had been artificially inflated by the CEO's reassurances.

U.S. District Judge Paul Oetken of Manhattan rejected those arguments in a March 29 decision denying class certification. Citing the 2nd Circuit's 2023 Goldman ruling, Oetken said there was a mismatch between the CEO's general comments about Kirkland Lake's plan to grow organically and the "corrective disclosure" of the M&A deal. The judge looked at a variety of factors, including consideration of whether Kirkland Lake's share price would have been different if the CEO had made an equally generic statement acknowledging that the company was "considering external growth through M&A." He concluded that Kirkland Lake had rebutted the presumption that the CEO's alleged misrepresentations affected the company's share price.

Oetken reached the same conclusion about the CEO's "minimum standards" statement, despite acknowledging that the statement was not as generic as the CEO's comments about organic growth.

The judge said there was nevertheless a "substantive mismatch" between the CEO's statements and Kirkland Lake's subsequent disclosure of the 2019 deal, pointing to defense arguments that the minimum standards comment was meant to address Kirkland's long-term, forward-looking expectations for acquired companies rather than in-the-moment metrics for merger partners.

In their petition for interlocutory appeal, investors argued that Oetken misconstrued the Goldman test in several ways.

For one, they said, when the judge cited Goldman's "mismatch" test to justify his heightened analysis of the CEO's minimum standards statement, he went too far by concluding that the statement was not false. That's a question for jurors, not judges, according to the petition.

Investors also argued that Oetken wrongly applied heightened scrutiny to the CEO's statements about growing organically instead of seeking M&A deals. Those statements, the petition argued, were not nearly as generic as the anodyne reassurances about Goldman Sachs' ethics in the case that led to the 2nd Circuit's Goldman test.

Oetken was too quick, according to investors, to apply Goldman's "searching price impact analysis" to relatively specific statements that were not a clear mismatch with the market's back-end reaction to the 2019 deal.

"Drawing the right line is important," investors said, because the Goldman mismatch test "puts a heavy thumb on the scale against a finding of price impact."

Kirkland Lake, as you would expect, countered that the petition itself shows the intensely fact-bound nature of Oetken's decision, which, in the company's view, faithfully applied the 2nd Circuit's guidance from the 2023 Goldman decision.

"None of these case-specific objections to the district court's careful opinion require this court's immediate intervention, particularly when petitioner can appeal this ruling after final judgment, and particularly when the district court's careful decision was in any event correct," the Kirkland Lake brief said.

Investors' lawyers at Goldstein Russell and Kirkland Lake's counsel from Paul Weiss declined to comment. Shareholders were represented below by Christian Levis of Lowey Dannenberg, who did not respond to a query. Kirkland Lake's parent, Agnico Eagle, also did not respond.

When the 2nd Circuit issued its 2023 Goldman ruling, it acknowledged that its new test for class certification was "complex," and that "whatever analytical approaches might be warranted in future cases remains to be seen."

Kirkland Lake investors are hoping the appeals court will use their case to clarify when and how trial judges should apply the Goldman mismatch test. But first, they'll have to persuade a panel of judges to take the case during next week's oral argument.

Read more:

Goldman Sachs appellate ruling is boon for securities class action defendants

Kirkland Lake Gold sued in U.S. over Detour purchase

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'Windfall' fees now less likely for lawyers who sued to cut Musk's Tesla pay

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Tom Hals

Elon Musk, CEO of SpaceX and Tesla and owner of X, formerly known as Twitter, attends the Viva Technology conference dedicated to innovation and startups at the Porte de Versailles exhibition centre in Paris, France, June 16, 2023. REUTERS/Gonzalo Fuentes/File Photo Purchase Licensing Rights , opens new tab

- Fee, in Tesla stock, would amount to over \$280,000/hour
- Instead of stock, lawyers would accept \$1 billion cash
- Judge might still decide to restore Musk's pay package

WILMINGTON, Delaware, Aug 29 (Reuters) - The lawyers who sued successfully to void Tesla CEO Elon Musk's \$56 billion pay package are seeking a record \$6 billion in fees, and the judge who will decide the amount got some unsolicited guidance this month from the state's top court: Do not give windfalls.

Chancellor Kathaleen McCormick of Delaware's Court of Chancery is weighing two decisions that will have a multibillion-dollar impact on Tesla and its investors. One issue is the request for the huge fee for voiding Musk's pay. The other is whether a June vote by Tesla shareholders actually restored the pay package, in which case a large fee may not be appropriate.

McCormick got a reminder on Aug. 14 from her bosses on the state's high court in an unrelated case that big legal fees help motivate shareholder attorneys to get great results. In affirming a \$267 million fee, one of the largest ever in shareholder litigation, the justices also cautioned that at some point those type of paydays can "turn into a windfall." Legal experts said the justices likely had the Musk case in mind.

"They are making it clear, to McCormick and anyone else, that certainly an extremely high fee, an eye-popping fee, a 'wow' fee, is appropriate, but there is a line where it's simply past what is necessary to incentivize high-risk cases," said Ann Lipton, a professor at Tulane Law School.

The case over Musk's compensation began in 2018 when shareholder Richard Tornetta sued Tesla's directors for approving Musk's pay package, which granted the billionaire CEO stock options as the electric carmaker hit various goals. Musk did not get a guaranteed salary and the options soared in value as the stock rose 10 fold.

In January, McCormick sided with Tornetta, finding Musk controlled the pay negotiations. She called the \$56 billion compensation "unfathomable" and decided it should be rescinded. The shareholder lawyers at Bernstein Litowitz Berger & Grossmann and Friedman Oster & Tejtzel, both of New York, and Andrews & Springer of Wilmington, Delaware, have worked without pay since they filed the case, with the understanding they would get part of the recovery. The case was brought to benefit Tesla, so the company is going to pay the fee.

The firms asked McCormick in March to approve a "conservative" fee of 11% of the stock that Musk would have gotten if he had won the case. The request works out to 29 million shares, worth almost \$6 billion at Wednesday's closing price of \$205.75. Alternatively, they said they would take a cash fee of \$1 billion.

If the amount of the fee request was unprecedented, Tornetta's attorneys said, it was because they won arguably the largest judgment in U.S. history. They noted that Delaware courts reward higher percentages of a judgment or settlement when attorneys battled deep into a case. They said precedent supported a fee request of as much as 33%.

Delaware judges also look at the time and effort of the lawyers as a way to spot a potential windfall. By this measure, the size of the fee request by Tornetta's lawyers is stunning.

Their fee equals more than \$280,000 an hour for each of the 19,500 hours worked on the case by every attorney, associate and paralegal.

The highest-paid attorneys on the case normally bill \$1,150 an hour while on the low end some contract attorneys and paralegals charge \$250 an hour, according to court filings.

The Delaware Supreme Court has approved huge hourly rates before.

In 2012, the court affirmed the largest fee in its history, around \$304 million to attorneys who obtained a \$2 billion judgment for Southern Copper Corp (SCCO.N) [opens new tab](#). The fee worked out to about \$35,000 an hour.

By comparison, the highest-paid corporate attorneys, who bill by the hour and get paid regardless of outcome, can make around \$2,500 an hour.

The Delaware Supreme Court did not specify when fees become windfalls, but did say \$5,000 an hour was "at the high end."

That would suggest Tesla is on the hook for a fee of around \$100 million, just 10% of the requested cash fee. Lipton noted there are several factors that suggest the Tornetta attorneys should expect more.

For example, they worked unpaid for six years, overcame challenging legal hurdles, risked taking the case to trial and won a complete victory.

However, if McCormick decides that Musk's pay package was restored by the shareholder vote, Tesla should not be on the hook for a large legal fee, John Reed, an attorney for the company, told McCormick at a July hearing.

"You asked if Elon Musk was overpaid," Reed said, referring to McCormick's question at the start of her January ruling. "We want to ask if the plaintiff's lawyers are being overpaid."

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Reporting by Tom Hals in Wilmington, Delaware; Editing by David Gregorio

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Tom Hals
Thomson Reuters

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

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Bloomberg Law News 2024-09-03T12:51:15349112878-04:00

Super Micro Sued Over Stock Losses Following Short-Seller Report

By Martina Barash 2024-09-03T12:27:31000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKETS:** [No. 5:24-cv-06193](#) and [No. 5:24-cv-06149](#)

[Super Micro Computer Inc.](#) misled the market prior to a recent report accusing it of misconduct, investors say in two separate would-be class actions over a shock to the server company's stock price.

Short seller Hindenburg Research said in an Aug. 27 report that Super Micro manipulated its accounting, failed to disclose that two suppliers were owned by the CEO's brother, and evaded sanctions, according to the complaints, both filed Aug. 30 in the US District Court for the Northern District of California.

Super Micro's stock price declined 2.6%, closing at \$547.64 per share that day. And when it [announced](#) on Aug. 28 that it would delay the filing of its financial report for the fiscal year that ended June 30, its stock price tumbled 19.02%, to close at \$443.49.

Investor Michael Spatz's complaint alleges securities fraud related to all three issues in the Hindenburg report, whereas investor Christopher Menditto's lawsuit focuses on alleged accounting and self-dealing misconduct.

The equipment manufacturer has benefited from the artificial intelligence boom, with its shares more than tripling in price in 2023 and was up 92.6% this year through the Aug. 27 close.

Spatz estimates there are hundreds or thousands, and Menditto estimates thousands, of members of the proposed class. Spatz seeks to represent a class of those who acquired Super Micro stock between Feb. 2, 2021 and Aug. 26, 2024, inclusive, while Menditto seeks to represent a class of those who acquired the stock between Aug. 31, 2023 and Aug. 28, 2024, inclusive.

Both seek damages on their securities fraud claims.

Super Micro didn't immediately respond to a voice message.

DiCello Levitt LLP represents Spatz. The Rosen Law Firm PA represents Menditto.

The cases are [Spatz v. Super Micro Computer, Inc.](#) , N.D. Cal., No. 5:24-cv-06193, complaint 8/30/24 and [Menditto v. Super Micro Computer, Inc.](#) , N.D. Cal., No. 5:24-cv-06149, complaint 8/30/24 .

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Aug. 29, 2024, 11:47 AM PDT; Updated: Aug. 30, 2024, 3:48 AM PDT

Starbucks Sued Over Stock Drop on 'Disappointing' Earnings (1)

By Martina Barash

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [No. 2:24-cv-01362](#)

Bloomberg Law News 2024-09-03T10:28:29527614964-04:00

Starbucks Sued Over Stock Drop on 'Disappointing' Earnings (1)

By Martina Barash 2024-08-29T14:47:05000-04:00

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [No. 2:24-cv-01362](#)

Starbucks Corp. earnings for the second quarter of fiscal year 2024 belied earlier positive statements about the company's financial outlook, sending its stock price down 16%, an investor says in a proposed class action.

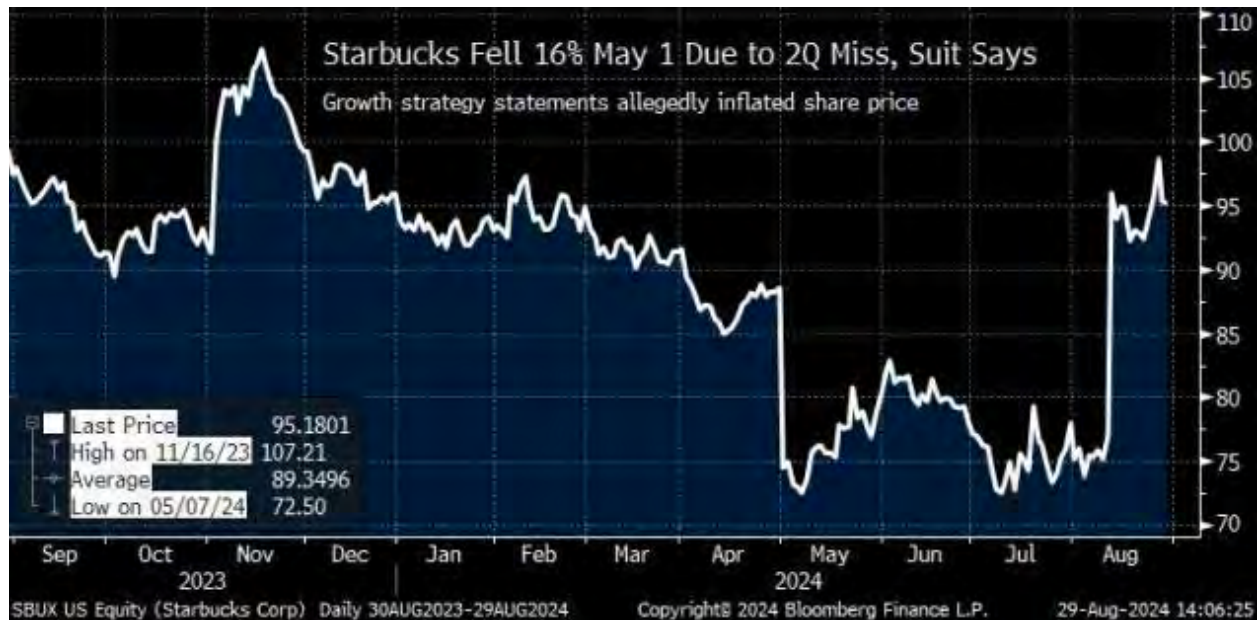
Starbucks and two of its executives "created the false impression that they possessed reliable information pertaining to the Company's projected revenue outlook and anticipated growth," and minimized certain risks, shareholder Charles Garbaccio says. He filed his complaint Wednesday in the US District Court for the Western District of Washington.

The coffeehouse chain's growth-focused "Reinvention" plan "was ill equipped to handle the existing macro uncertainty and competition, particularly in the Chinese market," Garbaccio says.

Starbucks said the allegations are without merit. "Starbucks takes great care in communicating transparently and authentically with its stakeholders, including its investors, partners, customers, and community," it said Thursday in an emailed statement.

The "disappointing" 2Q results, announced after hours on April 30, showed that store sales declined globally 4%, traffic fell 7%, and new revenues of \$8.6 billion represented a 2% decline, he says. "On the back of these results, Starbucks additionally lowered their guidance for FY 2024," he says.

Starbucks' stock fell 16% on May 1, closing at \$74.44 per share. The selloff was the steepest since March 2020, according to data compiled by Bloomberg.



Laxman Narasimhan, who was CEO during the period when the targeted positive statements allegedly inflated the stock price, and chief financial officer Rachel Ruggeri are named as defendants alongside the company.

Starbucks announced Aug. 13 that Narasimhan was stepping down immediately, to be replaced in September by Chipotle Mexican Grill Inc.'s CEO Brian Niccol. Starbucks shares rose 25% that day, closing at \$95.90. Ruggeri is serving as interim CEO, according to the company's website.

The proposed class of those who acquired Starbucks securities between Nov. 2, 2023 and April 30, 2024 consists of hundreds or thousands of members, the complaint estimates.

Garbaccio seeks damages on his securities fraud claims.

Breskin Johnson Townsend PLLC and Levi & Korsinsky LLP represent Garbaccio.

The case is Garbaccio v. Starbucks Corp. , W.D. Wash., No. 2:24-cv-01362, complaint 8/28/24 .

(Updates story originally published Aug. 29 with company comment in fourth paragraph.)

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NOT FOR REPRINT

Starbucks Hit With Securities Suit Claiming 'Reinvention' Plan Was Oversold

A Starbucks shareholder has filed a securities class action in Washington federal court, claiming the coffee company misled investors on the expected success of its "Triple Shot Reinvention" strategy.

August 29, 2024 at 03:50 PM

Securities Litigation



Ellen Bardash



A Starbucks shareholder has filed a securities class action in Washington federal court, claiming the coffee company misled investors on the expected success of its "Triple Shot Reinvention" strategy.

Breskin Johnson & Townsend and Levi & Korsinsky are representing the shareholder plaintiff, who on Aug. 28 filed a [complaint](#) against Starbucks, CEO Laxman Narasimhan and Executive Vice President Rachel Ruggeri in the Western District of Washington.

The complaint proposes a class of investors who owned Starbucks stock between Nov. 2, 2023, when Starbucks publicized highlights from the 2023 fiscal year, and April 30, 2024, when the company announced it would be lowering its guidance for fiscal year 2024 due to declining financial performance in the second quarter. Starbucks' share price fell 15% between April 30 and May 1.

During an earnings call in January, the complaint alleges, Narasimhan and Ruggeri gave investors the impression that the company's diversification and expansion strategies were on their way to generating growth and increased revenue.

The complaint also claims the executives downplayed the issues facing Starbucks in April, when quarterly results showed decreasing sales and revenue. Statements made about financial results for the quarter and the subsequent guidance adjustment reportedly pointed to obstacles Starbucks was facing in China, including competitors.

"In truth, Starbucks' reinvention platform, which the company claimed would prioritize business growth globally, failed to meet Starbucks' stated measures," the complaint states. "Starbucks' plan was ill equipped to handle the existing macro uncertainty and competition, particularly in the Chinese market."

A spokesperson for Starbucks did not immediately respond for comment.

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Sage Therapeutics Misrepresented Drugs' Prospects, Investor Says

By Martina Barash

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-06511](#)

Bloomberg Law News 2024-09-03T10:30:11162851053-04:00

Sage Therapeutics Misrepresented Drugs' Prospects, Investor Says

By Martina Barash 2024-08-29T17:22:50000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-06511](#)

Sage Therapeutics Inc. knew three products under development were less effective in treating brain conditions than it led investors to believe, causing eventual stock drops, an investor alleges.

The company misrepresented the prospects of zuranolone, which it was developing with Biogen Inc. to treat postpartum depression and major depressive disorder, Darren Korver says in his complaint, filed Wednesday in the US District Court for the Southern District of New York.

It also falsely touted dalzanemdor, known as SAGE-718, for the treatment of mild cognitive impairment associated with Parkinson's disease, and SAGE-324, for the treatment of essential tremor, Korver says in his proposed class action.

The FDA's approval of zuranolone only for postpartum depression, with more data needed on major depressive disorder, prompted a stock drop in August 2023; and disappointing study results for the other two drugs caused stock-price tumbles in April and July of this year, he says.

Sage's stock price fell 54% to close at \$16.75 per share on Aug. 7, 2023—its greatest selloff since December 2019, according to data compiled by Bloomberg. It fell 20% to close at \$12.57 on April 17, 2024, and 21% to close at \$10.38 per share on July 24, 2024.



The proposed class consists of hundreds or thousands of members, the complaint estimates.

Korver seeks damages on his security fraud claims.

Sage didn't immediately return an emailed request for comment.

Korver is represented by Pomerantz LLP and Schall Law Firm.

The case is Korver v. Sage Theras., Inc. , S.D.N.Y., No. 1:24-cv-06511, complaint 8/28/24 .

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Outset Medical Sued Over Post-Revelation Stock Drops of 50%, 69%

By Martina Barash

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 5:24-cv-06124](#)

Bloomberg Law News 2024-09-03T10:48:10340255484-04:00

Outset Medical Sued Over Post-Revelation Stock Drops of 50%, 69%

By Martina Barash 2024-08-30T14:42:45000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 5:24-cv-06124](#)

Outset Medical Inc. failed to disclose that its dialysis system was being marketed for a use the FDA hadn't approved, an investor says in a suit citing 50% and 69% stock-price declines.

Both represented the largest percentage drops in the company's stock price up to the dates they occurred—Oct. 13, 2023, and Aug. 8, 2024, respectively—according to data compiled by Bloomberg.

Outset's positive statements about its business were misleading because it didn't disclose enough information about its primary products, a dialysis machine called the Tablo Hemodialysis System and an accessory, the TabloCart, investor Chris Porcelli says.

He filed his proposed class action Thursday in the US District Court for the Northern District of California.

Outset announced after hours on July 7, 2023 that the US Food and Drug Administration had sent it a letter warning against using the Tablo machine for continuous renal replacement therapy and warning it that it would need premarket authorization for the TabloCart, Porcelli says.

Subsequent shocks to the market included Outset's Aug. 2, 2023, announcement of a pause in shipping the Tablo Cart; an Oct. 12, 2023, announcement of third-quarter 2023 financial results showing an impact on revenue growth; and lower 2024 revenue guidance released Aug. 7, 2024, he says.

Outset's stock dropped 50% to close at \$3.39 per share the day after the 3Q 2023 results, and 69% to close at \$1.07 per share the day after the 2024 revenue guidance was shared.



The proposed class consists of hundreds or thousands of members.

Porcelli seeks damages on his securities fraud claims.

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

Glancy, Prongay & Murray LLP and Frank Cruz, who practices in Century City, Calif., represent Porcelli.

The case is Porcelli v. Outset Medical, Inc. , N.D. Cal., No. 5:24-cv-06124, complaint 8/29/24 .

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Teva Investors Can Resume Copaxone Kickback Scheme Class Action

By Daniel Seiden 2024-09-03T11:46:46000-04:00

- Stay was granted in 2022 pending DOJ's false claims lawsuit
- But 'fading memories' risk requires resuming case, judge says

Teva Pharmaceuticals Industries Ltd. shareholders can resume their class action alleging that the pharmaceutical company misled them about a kickback scheme involving multiple sclerosis drug Copaxone, a federal district court said.

The US District Court for the Eastern District of Pennsylvania stayed the suit in 2022 pending the resolution of a related False Claims Act suit against Teva. But the stay is now lifted because the plaintiffs will suffer prejudice from the risk of witnesses' fading memories and lost evidence if it continues, Judge [Karen Spencer Marston](#) said in an Aug. 30 opinion.

The Justice Department sued Teva in August 2020 alleging that it violated the FCA by paying \$300 million to charitable foundations to increase prescriptions of Copaxone. Teva appealed after a Massachusetts federal district court denied the drug company's bid for summary judgment. The case—now before the US Court of Appeals For the First Circuit—is delayed pending settlement negotiations.

Halman Aldubi Provident and Pension Funds Ltd. filed their class action a month later, alleging Teva and its executives violated securities laws by making false and misleading statements about the alleged Copaxone scheme.

Marston [granted](#) Teva's motion to stay the suit, she said in her Aug. 30 ruling, because the company would "face a great burden of juggling two massive discovery processes simultaneously, especially because it would likely spread thin the time of certain key individuals at Teva."

But discovery in the FCA action has concluded, and since there's some overlap in the factual matter in the two cases, it is likely that Teva's discovery burden in the class action would be reduced now, the judge said.

The DOJ action wouldn't likely move forward at the district court level "for many months" if the parties don't reach a settlement, Marston said. The risk of an impending trial, therefore, is "far too attenuated."

Faruqi & Faruqi LLP, Pomerantz LLP and Kaskela Law LLC represent the plaintiffs. Winston & Strawn LLP and Obermayer Rebmann Maxwell & Hoppel LLP represent Teva.

The case is [Halman Aldubi Provident and Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.](#) , E.D. Pa., No. 20-cv-4660, 8/30/24 .

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Aug. 29, 2024, 3:35 PM PDT

Chip Maker MaxLinear Defeats Investor Suit Over Failed Merger

By Martina Barash

Bloomberg Law News 2024-09-03T10:29:40974799849-04:00

Chip Maker MaxLinear Defeats Investor Suit Over Failed Merger

By Martina Barash 2024-08-29T18:35:17000-04:00

Investment funds that purchased shares in a Taiwanese silicon chip manufacturer can't proceed with a suit against MaxLinear Inc. for allegedly misrepresenting its commitment to a merger with that company, a federal court ruled.

A recent appeals court decision compels the conclusion that the funds lack standing to sue MaxLinear for securities fraud because they didn't hold its stock during the period of the alleged misrepresentations, Judge Cathy Ann Bencivengo said Wednesday for the US District Court for the Southern District of California. She dismissed the proposed class action with a chance to re-plead.

- The funds allege that MaxLinear made statements expressing its commitment to merge with Silicon Motion Technology Corp. but intended to exit the deal and, when antitrust authorities approved the deal, accused SIMO of breaching the merger agreement
- The US Court of Appeals for the Ninth Circuit decided a case over another merger, *In re CCIV / Lucid Motors Sec. Litig.*, on Aug. 8
- The investors didn't allege that MaxLinear made misrepresentations about SIMO before the merger, and "the Ninth Circuit has set a bright-line rule that the 'security' at issue must be one about which the alleged misrepresentations were made," Bencivengo said

Saxena White PA and Entwistle & Cappucci LLP were lead counsel for the investors. Morrison & Foerster LLP represented MaxLinear.

The case is *Water Island Event-Driven Fund v. MaxLinear, Inc.*, 2024 BL 301308, S.D. Cal., No. 23-CV-01607, 8/28/24.

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Hemisphere Media Buyout Challenge Case Settles for \$15 Million

By Mike Leonard

- Lawsuit targeted Searchlight Capital, former board members
- Take-private transaction tainted by self-dealing, suit said

Bloomberg Law News 2024-09-03T10:27:03627464897-04:00

Hemisphere Media Buyout Challenge Case Settles for \$15 Million

By Mike Leonard 2024-08-29T15:45:14000-04:00

- Lawsuit targeted Searchlight Capital, former board members
- Take-private transaction tainted by self-dealing, suit said

Hemisphere Media Group Inc. will pay \$15 million to end litigation over its take-private buyout by Searchlight Capital Partners LP and a related side deal with TelevisaUnivision Inc.

The settlement disclosed Thursday would resolve shareholder claims targeting the 2022 transactions, a private equity acquisition that valued the company at \$285 million and the sale of a Spanish-language streaming service for \$125 million. Because the case is a class action, the agreement requires court approval.

Searchlight and Hemisphere's ex-board "deny all allegations of wrongdoing, fault, liability, or damage," according to the settlement stipulation filed in Delaware's Chancery Court. They're settling "solely to avoid the substantial burden, expense, inconvenience, and distraction of continued litigation," the filing says.

The lawsuit, filed in May 2023, alleged that the two related transactions were tainted by self-dealing on the part of Searchlight—which held a 70% stake in Hemisphere—and the media company's former directors. The board members effectively let Searchlight set the buyout's terms, then manipulated a shareholder vote by counting one of their investment vehicles as independent, the suit said.

Vice Chancellor J. Travis Laster narrowed the case in January, but he let certain claims move forward toward trial.

The settlement will be funded by Hemisphere, its insurers, or insurers covering Searchlight and the ex-board, according to the settlement filing. Hemisphere and TelevisaUnivision weren't named as defendants.

The investors leading the litigation are represented by Labaton Keller Sucharow LLP, Block & Leviton LLP, Grant & Eisenhofer PA, Gardy & Notis LLP, and Squitieri & Fearon LLP. Searchlight and certain ex-directors are represented by Richards, Layton & Finger PA and Latham & Watkins LLP. One former board member is represented by Potter Anderson & Corroon LLP and Covington & Burling LLP.

The case is *In re Hemisphere Media Grp. Inc. S'holders Litig.*, Del. Ch., No. 2023-0555, settlement filed 8/29/24.

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Coca-Cola Must Face Suit Over Sustainability After Appeal (1)

By Clara Hudson

Documents

 [DC Appeals Court opinion](#)

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- Lawsuit called out beverage maker's sustainability marketing
 - Companies across industries face similar greenwashing claims

Bloomberg Law News 2024-09-03T10:29:11719209843-04:00

Coca-Cola Must Face Suit Over Sustainability After Appeal (1)

By Clara Hudson 2024-08-29T18:52:31000-04:00

- Lawsuit called out beverage maker's sustainability marketing
- Companies across industries face similar greenwashing claims

The DC appeals court on Thursday sided with activists in a lawsuit alleging that Coca-Cola made misleading claims about its sustainability efforts.

Earth Island Institute's lawsuit against the beverage maker took issue with statements the company made including a tweet that said: "Business and sustainability are not separate stories for The Coca-Cola Company—but different facets of the same story."

The Superior Court for the District of Columbia ruled in November 2022 that the company's statements didn't violate DC's consumer protection act because they were general and aspirational goals—rather than a specific promise to consumers. But the District of Columbia Court of Appeals said in its opinion Wednesday that Earth Island made a "facially plausible misrepresentation claim."

Coca-Cola and Earth Island did not immediately respond to requests for comment.

“Earth Island has plausibly alleged that Coca-Cola’s statements, when viewed in their surrounding context, mislead consumers into believing that it is an environmental steward, when it is in fact an environmental scourge,” the appeals court said. “Whether Earth Island can ultimately substantiate those claims is a different question for another day.”

“We are heartened by the court’s decision,” said Sumona Majumdar, CEO of Earth Island Institute. “We look forward to shining more light on the gulf between Coca-Cola’s environmental claims and their actual actions, which contribute significantly to plastic pollution around the world.”

The case is among a wave of greenwashing lawsuits that businesses across industries have faced in recent years. Consumer suits targeting bold marketing claims like “100% sustainable” have hit companies from Hershey to United Airlines.

More guidance on sustainability claims is expected from regulators. The Federal Trade Commission is working to update guardrails for companies on environmental marketing in its “Green Guides.”

The case is Earth Island Institute v The Coca Cola Company, D.C. Ct. App., No. 22-CV-0895, 8/29/24

(Updated with comment from Earth Island Institute in paragraph six)

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Plaintiffs consider summary judgment motion in California bond fraud case

DJ [dailyjournal.com/articles/380583-plaintiffs-consider-summary-judgment-motion-in-california-bond-fraud-case](https://www.dailyjournal.com/articles/380583-plaintiffs-consider-summary-judgment-motion-in-california-bond-fraud-case)

Aug. 30, 2024

The case accusing some of the nation's largest banks of artificially inflating bond interest rates has been mired in procedural concerns since it was filed in 2014.

The case accusing some of the nation's largest banks of artificially inflating bond interest rates has been mired in procedural concerns since it was filed in 2014.

The plaintiff's counsel in a qui tam action accusing eight of the nation's biggest banks of defrauding state and local governments by artificially inflating bond rates said Thursday they plan to seek summary judgment to bring the decade-long litigation process to an end.

The action comes one week after San Francisco Superior Court Judge Ethan P. Schulman granted summary judgment for the defendants, striking claims relating to bond transactions made prior to 2013 but leaving other claims intact. The plaintiff's initial investigation that they said uncovered the alleged "robo-resetting scheme" ended in 2013.

The case, brought on behalf of the state of California and hundreds of local governments, has been mired in procedural concerns since it was filed in 2014. The plaintiff, Edelweiss Fund LLC, and its sole principal, B. Johan Rosenberg, filed seven amended complaints that were demurred for many procedural reasons. A conclusion to the saga now appears close.

The dispute stems from the state's hiring of the banks to serve as remarketing agents for variable rate bonds known as "VRDOs" whereby the banks would "market and price these bonds at the lowest possible interest rates," the plaintiff's complaint stated.

Allan Steyer of Steyer Lowenthal Boodrookas Alvarez & Smith LLP, one of the plaintiff's lead attorneys, revealed during a discussion about on the case schedule Thursday that his team is considering filing a summary judgment motion similar to the one they filed last month in a parallel New York state lawsuit. *State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Co.*, 100559/2014 (N.Y. Super. Ct., filed 2014).

"In the New York case, we filed affirmative summary judgment motions ourselves," Steyer said. "I don't think the issue has been decided definitively, but it is likely we would do the same thing here, I don't think a decision has been made yet."

The corporate entities and subsidiaries for the following eight banks are the defendants in the action. Barclays, Bank of America, Citigroup, JPMorgan Chase, Morgan Stanley, Piper Jaffray, Royal Bank of Canada, and Wells Fargo. *Edelweiss Fund LLC v. JP Morgan Chase & Co.*, CGC-14-540777 (S.F. Super. Ct. filed July 28, 2014).

The plaintiff's counsel summarized the alleged scheme to inflate the rates paid by the state in the seventh amended complaint.

"Defendants have engaged in this scheme so they can collect millions of dollars per year in remarketing fees without providing any of the remarketing services for which California pays them," they wrote.

"But even more egregiously, Defendants failed to set the rates at the lowest possible interest rates, as their agreements with California required. Instead, Defendants have employed the Robo-Resetting device to collectively impose artificially high interest rates on California VRDOs, the exact opposite of what California hires them to accomplish," they continued.

They said the scheme cost governments in California up to \$641 million in wrongfully paid fees.

In October 2023 the banks agreed to a \$70 million settlement in a similar action filed in Illinois, days before trial was set to begin. The relator plaintiff received \$14 million of the \$48 million dedicated to the state in the case.

Steyer's co-counsel, James Bloom and Sunny S. Sarkis of Schneider Wallace Cottrell Konecky LLP, appeared alongside him Thursday.

Kathleen L. Carlson of Sidley Austin LLP, principal counsel for all defendants, and Matthew J. Silveira of Jones Day, one of the lead attorneys for Wells Fargo bank, also appeared Thursday.

#380583

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Delaware top court will hear drugmakers' appeal to end Zantac lawsuits

 [reuters.com/legal/delaware-top-court-will-hear-drugmakers-appeal-end-zantac-lawsuits-2024-08-27](https://www.reuters.com/legal/delaware-top-court-will-hear-drugmakers-appeal-end-zantac-lawsuits-2024-08-27)

Brendan Pierson

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

Aug 27 (Reuters) - Delaware's highest court said on Tuesday it will hear an appeal by GSK (GSK.L) , opens new tab and other drugmakers seeking to end more than 70,000 lawsuits claiming discontinued heartburn drug Zantac caused cancer.

GSK, Pfizer (PFE.N) , opens new tab, Sanofi (SASY.PA) , opens new tab and Boehringer Ingelheim are asking the court to overturn an order by a lower court judge allowing plaintiffs in the lawsuits to offer expert testimony on the alleged cancer link, which the companies argue is not supported by sound scientific methods. Without that testimony, the lawsuits cannot go forward.

There has been no trial or final judgment in any of the Zantac lawsuits in Delaware. The state's top court hears appeals before final judgment only when it finds that there are exceptional circumstances.

GSK said in a statement that it was "pleased that the Supreme Court is of the view that such circumstances are present here."

Jennifer Moore and Brent Wisner, lawyers for the plaintiffs, said in a joint statement that they were "confident that the (Supreme) Court will reach the same conclusion that the trial court did."

Business groups, including the U.S. Chamber of Commerce, had urged the state Supreme Court to take the case, arguing that the lower court ruling would turn traditionally business-friendly Delaware into a "hotbed" of mass tort litigation if allowed to stand.

First approved by U.S. regulators in 1983, Zantac became the world's best-selling medicine in 1988 and one of the first to top \$1 billion in annual sales. It was sold at different times by the four companies, all of which have faced thousands of lawsuits.

The litigation began after the U.S. Food and Drug Administration in 2020 asked manufacturers to pull the drug off the market over concerns that ranitidine, the active ingredient in Zantac and generic versions of the drug, could degrade into NDMA, a carcinogen, over time or when exposed to heat.

Three Zantac cases so far have gone to trial, all in Illinois, with two ending in verdicts for the defense and one with a hung jury.

The drugmakers won a significant victory in 2022, when a federal judge in Florida rejected the plaintiffs' expert witnesses in about 50,000 cases on the grounds that they did not use reliable scientific methods. While the experts were different from those at issue in Delaware, the legal arguments made by both sides were similar.

Some of the Florida cases are being appealed, and the vast majority of the remaining cases are in Delaware.

Sanofi has agreed to settle about 4,000 cases against it, while Pfizer has reportedly agreed to settle more than 10,000. The companies have also settled some individual cases before trial.

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Reporting By Brendan Pierson in New York; Editing by Alexia Garamfalvi and Jonathan Oatis

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David Thomas

May 22, 2024

- LegalHarvard hires law firm King & Spalding amid US House probe

Mike Scarcella, David Thomas

January 24, 2024

Invisalign maker to settle antitrust claims for \$27.5M

DJ [dailyjournal.com/articles/380590](https://www.dailyjournal.com/articles/380590)

Sep. 3, 2024

"Antitrust cases are inherently risky and, while the plaintiffs believe their claims are sound, recovery is far from certain," Hagens Berman Sobol Shapiro LLP co-founder Steve W. Berman wrote in the settlement motion filed Thursday in federal court.

The maker of Invisalign agreed to pay \$27.5 million to resolve antitrust allegations by consumers who accused the company of conspiring with a rival to corner the clear dental aligner market.

"Antitrust cases are inherently risky and, while the plaintiffs believe their claims are sound, recovery is far from certain," Hagens Berman Sobol Shapiro LLP co-founder Steve W. Berman wrote in the settlement motion filed Thursday in federal court.

The plaintiffs' attorneys seek up to \$6.875 million in attorney fees to end more than three years of litigation. A preliminary approval hearing is set for Sept. 19 before U.S. District Judge Vince G. Chhabria in San Francisco. *Snow v. Align Technology Inc.*, 3:21-cv-03269-VC (N.D. Cal., filed May 3, 2021).

Align Technology, which created Invisalign in the late 1990s, denied any wrongdoing, arguing in court filings that the plaintiffs lacked standing because they had not proved imminent future harm. Today, the Arizona-based company is valued at \$17.6 billion.

According to the complaint, Align Technology began losing its market dominance around 2017 and pursued an anticompetitive scheme to maintain its position. Align Technology unilaterally terminated a longstanding and profitable agreement with its main competitor, 3Shape, so that its proprietary dental scanner could be used to order Invisalign, wrote Hagens Berman partner Rio S. Pierce.

Pierce added that Align Technology entered into exclusive dealing contracts with two major dental service organizations that effectively prevented members from dealing with Align's competitors.

"At approximately the same time, Align entered into a set of interlocking agreements in July 2016 with its strongest potential competitor, SmileDirectClub, that effectively allocated the aligner market between themselves," said Pierce. SmileDirectClub filed for bankruptcy last

year.

Align Technology is defended by several firms, including Manatt Phelps & Phillips LLP and Paul Hastings LLP. The firms did not respond to an inquiry for comment on the settlement.

Arguing in court filings the plaintiffs lack of standing on the issue of future harm, Paul Hasting partner Steven A. Marenberg wrote that each plaintiff already purchased an Invisalign treatment course, "which is a one-off, nonrecurring treatment." Marenberg insisted that Align Technology and SmileDirectClub never agreed to divide markets, pointing to a supply agreement between the two companies that allowed SmileDirectClub to work with third parties to sell its own aligners.

In addition to establishing a \$27.5 million non-reversionary fund, Align Technology offered each class member a \$300 coupon for Invisalign treatment. "Even if only five percent of the settlement class takes advantage of these coupons, they would provide up to \$21.8 million in further relief," Berman wrote in Thursday's filing.

The attorney said the agreement resulted from contentious litigation, extensive discovery, and guidance by "one of the nation's most trusted mediators," Phillips ADR Services neutral Gregory P. Lindstrom.

"The plaintiffs believe their claims are meritorious, but the path forward is not without peril," said Berman.

#380590

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Ex-Volkswagen CEO denies charges in 'dieselgate' trial

 [courthousenews.com/ex-volkswagen-ceo-denies-charges-in-dieselgate-trial](https://www.courthousenews.com/ex-volkswagen-ceo-denies-charges-in-dieselgate-trial)

Martin Winterkorn faces charges including fraud over the use of so-called defeat devices, which made cars appear less polluting in lab tests than they were on the road, and could be jailed for up to 10 years if convicted.

Agence France-Presse / September 3, 2024



Former Volkswagen Group CEO Martin Winterkorn stands in a hall of the Braunschweig Regional Court in Brunswick, Germany, Tuesday, Sept. 3, 2024. (Moritz Frankenberg/dpa via AP)

BRAUNSCHWEIG, Germany (AFP) — Former Volkswagen CEO Martin Winterkorn denied the charges against him as his "dieselgate" trial began, his lawyer said Tuesday, nine years after the scandal first plunged the German auto titan into crisis.

The 77-year-old "rejects the accusations levelled against him," Felix Doerr told reporters at the court in the city of Braunschweig, close to VW's historic Wolfsburg headquarters.

The carmaker admitted in 2015 that it had installed software to rig emissions levels in millions of vehicles worldwide, setting off one of Germany's biggest post-war industrial scandals.

Winterkorn faces charges including fraud over the use of the so-called defeat devices, which made cars appear less polluting in lab tests than they were on the road, and could be jailed for up to 10 years if convicted.

He resigned as head of the VW group — whose brands range from Porsche and Audi to Skoda and Seat — shortly after the crisis began but previous attempts to bring him to trial had failed.

He was supposed to face court in 2021 alongside four other VW executives but proceedings against him were split off and postponed due to his poor health.

Upon arrival at the court in Braunschweig, Winterkorn told reporters he was doing "quite well."

Asked how he looked back on his life's work, Winterkorn replied: "When I see the beautiful cars, very fondly."

He briefly addressed the court at the start of the hearing to confirm his personal details, speaking slowly and leaning on a chair for support.

Questions about Winterkorn's health hang over the proceedings, with reports saying he had to undergo an operation in mid-June.

Some 89 hearings have been scheduled through September 2025.

But his lawyer Doerr said the defense team were confident he would be able to cope with the trial and they do not expect it will take until next year to wrap up the proceedings.

Watch Video At: https://youtu.be/i2kSluI_VDs

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Buyers 'deceived'

Winterkorn faces several charges.

He has been accused of conspiracy to commit fraud, with the allegation based on the claim that buyers of some of the group's vehicles were "deceived about their characteristics" due to the use of defeat devices, according to the court.

The alleged fraud relates to about 9 million vehicles sold in Europe and the United States, with the buyers facing financial losses running into hundreds of millions of euros, it said.

However, Winterkorn has not been accused of involvement in the offense for its entire period, which was from 2006 to 2015. He was VW chief executive from 2007 until 2015.

He has also been accused of giving false testimony to a German parliamentary committee in 2017 when it was investigating the scandal.

He said that he knew of the existence of the defeat devices only in September 2015 but prosecutors claim it was earlier.

Winterkorn further faces a charge of market manipulation.

He is alleged to have "deliberately failed to inform the capital market in good time" after finding out about the emissions-rigging software, in violation of German stock market regulations.

Winterkorn had already agreed a settlement with Volkswagen in 2021, under which he would pay the company 11 million euros (\$12 million) in relation to the controversy.

Ahead of the trial, Volkswagen noted it was not party to the proceedings although it said that it would be monitoring them.

The highest-ranking former executive to have been convicted so far in the scandal is ex-Audi CEO Rupert Stadler.

In June last year, he received a suspended sentence and a fine as part of a deal in exchange for admitting to fraud by negligence.

The fraud has already cost VW more than 30 billion euros in fines, legal costs and compensation to car owners, mainly in the United States.

—

By CLAUDIA HORN Agence France-Presse

Categories / Business, Consumers, International

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3M, Chemours Face PFAS Carpet Coating Deception Class Suit (1)

By Shweta Watwe 2024-08-30T16:48:32000-04:00

- **COURT:** D. Minn.
- **TRACK DOCKET:** [No. 0:24-cv-03497](#)

3M Co., EIDP Inc., and The Chemours Co. were accused in a proposed class action of covering up the harms of PFAS chemicals they sold as carpet stain repellents.

The companies, as well as Daikin America Inc.—which isn't a defendant—"have not paid a dime for the grievous harms caused by carpets in homes and day-care centers infused with PFAS, and none of them has offered to replace any carpets treated with PFAS-infused products," according to the complaint filed Friday in the US District Court for the District of Minnesota.

The plaintiff consumers who say they installed PFAS-containing carpets alleged the companies actively concealed how harmful the treatments were. In addition to a plethora of state-law claims for defect, failure-to-warn, nuisance, product liability, and warranty claims, the consumers also brought racketeering and conspiracy claims.

"As the science and technology of PFAS, societal and regulatory expectations, and our expectations of ourselves have evolved, so has how we manage PFAS," a spokesperson for 3M said in an email. "3M will address PFAS litigation by defending itself in court or through negotiated resolutions, all as appropriate."

PFAS are known as "forever chemicals" because their strong carbon-flourine bonds don't break down easily. The substances have been used in industrial processes and a variety of consumer goods since the mid-20th century because of their heat-resistant and water-repellent properties.

Exposure to the chemicals has been linked to adverse health outcomes including an increased risk of certain cancers and reproductive health problems.

"This isn't the first rodeo for these companies," Steve Berman, an attorney representing the

consumers, [said](#) in a statement Friday. “Many have already been forced to pay monumental amounts related to PFAS contamination, meaning they’ve been on notice in more ways than one.”

Earlier this year a federal court [approved](#) 3M’s offer of at least \$10 billion to settle claims related to PFAS-contaminated water systems.

“Carpets and rugs contribute substantially to the amount of the ubiquitous environmental contamination and exposures,” the complaint said. Additionally, the companies “never disclosed to the carpet manufacturers and retailers—let alone to consumers or anyone else—that PFAS in carpets is extremely dangerous to health, property, and the environment.”

The consumers are accusing the companies of concealing crucial evidence of PFAS bioaccumulation and the negative health and environmental effects from both consumers and government authorities for decades.

The companies also “collaborated to suppress scientific research on the hazards associated with PFAS and mounted a campaign to control the scientific dialogue on the risks of PFAS,” the complaint said.

The named plaintiffs seek to represent a nationwide class of people who bought and installed carpeting before January 2020, limited to those who “still own the building in which the carpeting was installed and have not removed the carpeting.” They are asking for damages.

EIDP and Chemours didn’t immediately respond to requests for comment.

The consumers are represented by Lockridge Grindal Nauen PLLP and Hagens Berman Sobol Shapiro LLP.

The case is [Peterson v. 3M Co.](#) , D. Minn., No. 0:24-cv-03497, complaint filed 8/30/24 .

(Updated to include a comment from 3M in the fourth paragraph.)

To contact the reporter on this story: Shweta Watwe in Washington at swatwe@bloombergindustry.com

3M, Corteva, Chemours hit with class action over 'forever chemicals' in carpet

 [reuters.com/legal/litigation/3m-corteva-chemours-hit-with-class-action-over-forever-chemicals-carpet-2024-08-30](https://www.reuters.com/legal/litigation/3m-corteva-chemours-hit-with-class-action-over-forever-chemicals-carpet-2024-08-30)

Brendan Pierson

The logo of 3M is seen at the 3M Tilloy plant in Tilloy-Lez-Cambrai, France, August 18, 2019. REUTERS/Pascal Rossignol Purchase Licensing Rights , opens new tab

Aug 30 (Reuters) - 3M (MMM.N) , opens new tab, Corteva (CTVA.N) , opens new tab and Chemours (CC.N) , opens new tab were hit with a class action lawsuit on Friday accusing them of covering up the health risks of so-called "forever chemicals" used in carpets and rugs nationwide.

The lawsuit , opens new tab, filed in Minnesota federal court, seeks to represent a class of everyone in the United States who bought and installed carpets before 2020 in buildings they own. It alleges that per- and polyfluoroalkyl substances, or PFAS, made by the defendants, were used in "virtually all" carpets up to that time for stain and water resistance.

The lawsuit is seeking economic damages to remove and replace contaminated carpets, as well as punitive damages, but does not include personal injury claims.

It accuses the companies of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), a federal law originally targeting organized crime that also allows civil claims over alleged conspiracies. It also includes numerous claims under state consumer protection laws, and common law claims of nuisance, failure to warn and design defect.

"As the science and technology of PFAS, societal and regulatory expectations, and our expectations of ourselves have evolved, so has how we manage PFAS," 3M said in a statement. "3M will address PFAS litigation by defending itself in court or through negotiated resolutions, all as appropriate."

Corteva and Chemours, which are both spinoffs of DuPont (DD.N) , opens new tab, did not immediately respond to requests for comment.

PFAS are a family of thousands of chemicals used in consumer and commercial products like firefighting foams, nonstick pans and stain resistant fabrics. They have been linked to cancer and other health concerns and are often called forever chemicals because they do not easily break down in the human body or the environment.

Friday's lawsuit says that DuPont learned as early as the 1950s that PFAS in its Teflon non-stick products were toxic, but kept the knowledge from the public, and that the defendants continued working to cover up the risks. 3M for years secretly paid a toxicology professor to review articles submitted to academic journals and keep research about the dangers of PFAS from being published, it said.

The United States has recently tightened regulation of PFAS, unveiling new standards for contamination in drinking water and requiring some PFAS contamination to be cleaned up under the federal Superfund program for hazardous sites.

Thousands of lawsuits have been filed in recent years against manufacturers of PFAS and the companies that use the chemicals to create a diverse array of products.

DuPont, Corteva and Chemours last year agreed to pay a combined \$1.19 billion to public water systems to resolve claims over PFAS contamination, and 3M agreed to pay \$10.3 billion.

The case is Peterson et al v. 3M et al, U.S. District Court for the District of Minnesota, No. 0:24-cv-03497.

For plaintiffs: Steve Berman of Hagens Berman Sobol Shapiro and others

For defendants: not available

Read more:

US sets first standard to curb 'forever chemicals' from drinking water

US designates PFAS chemicals as Superfund hazardous substances

Chemical makers settle PFAS-related claims for \$1.19 billion

3M reaches tentative \$10.3 billion deal over US 'forever chemicals' claims

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Brendan Pierson
Thomson Reuters

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Sept. 3, 2024, 1:30 AM PDT

E-Discovery's Next Frontier Is Your AI Tool's Output, Prompt Log

- *FTI Technology's Tom Barce discusses "interactions" governance*
- *New discovery rules will be needed for AI-generated data*

Bloomberg Law News 2024-09-03T10:49:21241386358-04:00

E-Discovery's Next Frontier Is Your AI Tool's Output, Prompt Log

By Thomas Barce2024-09-03T04:30:01000-04:00

- *FTI Technology's Tom Barce discusses "interactions" governance*
- *New discovery rules will be needed for AI-generated data*

It's happening. Leading organizations are forming committees, budgeting resources, performing research, conducting pilots, and beginning early implementations for generative artificial intelligence.

Many legal teams are under pressure from leadership to be among the early adopters amid efforts to gain value from these advancements. As new applications enter the market, there's an expectation that teams will quickly onboard tools, and in turn, realize measurable gains.

But there are also concerns about the risks, and legal teams are torn between pursuing innovation and maintaining a strong risk management posture.

Generative AI's entrance into enterprise environments has created a new dimension of company information and potential liability that many organizations aren't quite sure how to handle. Information governance controls are now required for an uncharted category of records—namely "interactions," which are logs of prompts used to query AI tools. New discovery rules and processes must be established for data categories that haven't been discoverable, including interactions and company documents created entirely by a machine.

Legal teams must now address governance and compliance, as well as e-discovery readiness, when implementing generative AI. They also must proactively map out policies for how employees may interact with these tools and where the underlying interactions are stored. This way, they can be properly retained, monitored for compliance purposes, defensibly disposed, and preserved as needed for future legal discovery requirements.

While organizations are working toward generative AI use cases, more risk-oriented controls need to be considered in parallel:

- What happens to generative AI interactions within the organization?
- Where are interactions stored?
- Are they being retained or disposed of?
- Are they being monitored?

Organizations should monitor and manage the use of AI tools in the same way that email, chats, and other established communications require oversight to catch misuse or violation of varying regulatory obligations. Legal teams can:

- Conduct information security and third-party risk management audits to confirm the extent that AI tools comply with company policies and regulatory requirements for other technologies, systems, and providers.
- Establish contractual controls—such as indemnity clauses or stipulating that no client, confidential or sensitive data may be used in large language model training—to provide general protections while teams sort through unknowns within the technology.
- Implement abuse monitoring capabilities to notify compliance teams if employees are making suspicious or inappropriate queries of the AI tool while balancing retention, protection, and access of data that may be monitored—especially including proprietary or personal information.
- Review access controls for company records. Many off-the-shelf AI tools provide users with widespread and unfettered access to query company documents and information. Every application in the system must be checked for access controls to be sure that queries of the AI system won't result in users viewing information they shouldn't be able to access.
- Label policies for documents and information categories that must be treated with varying levels of confidentiality or protection.

Employee interactions with and output from generative AI tools are creating a data set that could come into scope in e-discovery. For example, generative AI tools store artifacts that may introduce e-discovery implications when data related to or from the tools intersects with a dispute or investigation.

When prompts and interactions are stored, they become a potential company document, communication, or record that could be considered as evidence in litigation or a regulatory investigation. The number of tools creating these new or unknown data artifacts, with limited visibility or accessibility, is a potential Pandora's box.

Just like with other forms of emerging data, it will be challenging to preserve these artifacts, defensibly collect them, process them into an e-discovery tool, and render them useful for analysis and review. It also will require technical expertise. Legal teams may also need to irrefutably distinguish between human-generated content and AI-generated content when entering these items into evidence in a legal matter.

Legal arguments about interactions with generative AI, their qualification as communications, and whether they may be subject to discovery will be complicated, if not contentious. Regulators and litigators quickly identified modern forms of communication such as Slack, Zoom, Teams, various mobile messaging apps, and other ephemeral messaging platforms as relevant sources of evidence. It is also plausible that as generative AI becomes more mainstream, data from these systems will likewise be sought to support fact finding throughout the course of discovery.

Many organizations are currently at varying phases of generative AI implementation, with most at either the proof of concept or pilot phase. Functionality and controls change constantly, so organizations need their AI governance and e-discovery readiness programs to be built for adaptability and continual testing.

Until we reach a high degree of certainty with this technology, generative AI tools likely are or will create data that's not being properly controlled. Organizations must activate the appropriate analyses and put the right controls in place. Meanwhile, it's just as probable that some of those controls are yet to be conceived.

Considering the typical 12- to 24-month lag time between the adoption of emerging technology and its appearance in relevant litigation or investigations, the clock is ticking. What seems brand new today may be the linchpin in tomorrow's court case.

Whether an organization currently sanctions the use of generative AI for business, potentially relevant evidence from generative AI has probably already been created.

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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Write for Us: Author Guidelines

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US Judge Tosses Lawsuit Accusing Elon Musk, Tesla of Rigging Dogecoin

“It’s a very good day for Dogecoin,” Musk attorney Alex Spiro of Quinn Emanuel Urquhart & Sullivan said in a statement.

August 30, 2024 at 01:48 PM

Cryptocurrency



Emily Saul



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

A federal judge in Manhattan on Thursday dismissed a lawsuit accusing Elon Musk and Tesla of defrauding investors by hyping cryptocurrency Dogecoin, finding Musk’s statements on social media were “aspirational and puffery.”

“It’s a very good day for Dogecoin,” Musk attorney Alex Spiro of Quinn Emanuel Urquhart & Sullivan said in a statement.

Investors sued Musk and his company Tesla in 2022, claiming he’d used posts on the site formerly known as Twitter – as well an appearance on “Saturday Night Live” – to drive up the value of Dogecoin, trade profitably, and then dump it.

Plaintiffs alleged violations of securities law and insider trading.

But U.S. District Court Judge Alvin Hellerstein threw out the lawsuit with prejudice on Thursday, writing that “no reasonable investor” could rely on Musk’s claims.

Hellerstein’s two-page decision lists those statements, which include tweets by Musk that Dogecoin might be Musk’s “favorite” currency, that Dogecoin could become standard global currency, that it could be used to purchase a Tesla, and that Musk might put a “literal” Dogecoin on the moon – put there by his company SpaceX.

“These statements are aspirational and puffery, not factual and susceptible to being falsified,” Hellerstein wrote.

He found they could not support the securities fraud claims alleged, and “no reasonable investor could rely on them.”

As for plaintiff’s claims of a “pump and dump” scheme by Musk and Tesla, the judge said he could not comprehend the arguments.

“It is not possible to understand the allegations that form the basis of Plaintiffs’ conclusion of market manipulation, a ‘pump and dump’ scheme, a breach of a fiduciary duty amounting to insider trading, or the state law claims,” Hellerstein wrote.

Musk and Tesla were represented by spiro, Sarah Concannon and Brenna Nelinson of Quinn Emanuel.

Plaintiff was represented by Evan Spencer of Evan Spencer Law.

Spencer did not immediately return a message seeking comment.

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Aug. 30, 2024, 5:37 AM PDT

Musk Beats Suit Over Promoting Dogecoin 'Pyramid Scheme' (2)

By Rachel Graf

Bloomberg Law News 2024-09-03T10:26:16695980915-04:00

Musk Beats Suit Over Promoting Dogecoin 'Pyramid Scheme' (2)

By Rachel Graf2024-08-30T08:37:06261-04:00

Elon Musk and Tesla Inc. won dismissal of a lawsuit claiming they pumped up the price of the cryptocurrency Dogecoin into a \$258 billion "pyramid scheme."

Investors who lost tens of thousands of dollars investing in the token faulted Musk for promoting it to his millions of followers on Twitter (now X) with statements like "One word: Doge," causing it to rise. Musk further inflated the price by announcing that Tesla would accept Dogecoin as payment for merchandise, according to the 2022 complaint.

A New York federal judge dismissed the claims on Thursday, finding that Musk's statements were "aspirational" rather than "factual and susceptible to being falsified" and that "no reasonable investor could rely upon them."

When Musk appeared on *Saturday Night Live* in May 2021 after touting Dogecoin for months, he played a financial expert in a newscast trying to explain the cryptocurrency. Pressed, his character in the comical exchange finally agrees that Dogecoin is a "hustle." It lost \$20 billion in market value before the show finished airing, according to the complaint.

The investors also accused Musk and Tesla of participating in a "pump and dump" scheme with Dogecoin, but US District Judge Alvin Hellerstein wrote that it was "not possible to understand" those allegations.

A lawyer for the plaintiffs said his clients are disappointed and plan to appeal.

"Musk's statements and publications were far more than puffery and a class of millions lost billions of dollars" as a result, attorney Evan Spencer said in a statement.



A sticker advertising Dogecoin on a cryptocurrency ATM at a laundromat in Hong Kong.

Photographer: Paul Yeung/Bloomberg

Dogecoin, with its Shiba Inu image, was the original memecoin, a type of cryptocurrency that originated from internet memes, or jokes. Since Musk's early tweets about the token, it has had sharp ups and downs, hitting a peak in March from which it has dropped about 54%.

The case is Johnson v. Musk, 22-cv-05037, US District Court, Southern District of New York (Manhattan).

(Updates with Musk's Saturday Night Live appearance in fourth paragraph and Dogecoin's decline at bottom.)

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Peter Blumberg, Peter Jeffrey

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Shaq's NFT Case Expands Legal Perils for Celebrity Promoters

By Martina Barash

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- Shaquille O'Neal faces NFT owners' claims under recent ruling
 - Court addressed new ways of 'soliciting' sales, new products

Bloomberg Law News 2024-09-03T10:45:12784502184-04:00

Shaq's NFT Case Expands Legal Perils for Celebrity Promoters

By Martina Barash 2024-09-03T05:00:03000-04:00

- Shaquille O'Neal faces NFT owners' claims under recent ruling
- Court addressed new ways of 'soliciting' sales, new products

Celebrities promoting cryptocurrency and other digital asset projects face potentially significant liability under US securities laws, a recent court ruling against Shaquille O'Neal shows.

His failed bid to exit a suit by token holders highlights the risks in a developing area of technology and law, attorneys say. O'Neal and other celebrities—including Tom Brady, Gisele Bundchen, Steph Curry, Naomi Osaka, Shohei Otani, and Larry David—are also facing a reckoning for similar endorsements in a separate suit over the demise of crypto platform FTX.

"At a minimum, it's a big warning sign for those considering promoting the projects," said Oleg Elkhunovich of Susman Godfrey LLP. "You are as responsible as the person issuing the token."

The case stems from the loss in value of Astrals and Galaxy nonfungible tokens in the wake of FTX's collapse in 2022. NFT holders brought a would-be class action against O'Neal in 2023 for the sale of unregistered securities, saying he founded the Astrals Project and heavily promoted its tokens.

The token holders sufficiently alleged that the former NBA star and sports analyst was a “seller” of Astrals and Galaxy NFTs, and that the tokens meet the definition of securities, the US District Court for the Southern District of Florida said Aug. 16.

Read More: The Disastrous Record of Celebrity Crypto Endorsements

O’Neal can be considered a seller because the complaint alleges he solicited the tokens’ purchase, Judge Federico A. Moreno said. He cited a 2022 decision of the US Court of Appeals for the Eleventh Circuit, *Wildes v. BitConnect Int’l PLC*, which held that public communications such as podcasts, social media, and videos—not just previously recognized media like newspaper and radio—could be vehicles for soliciting buyers under the Securities Act. *Wildes* concerned non-celebrity promoters. The Ninth Circuit joined the Eleventh Circuit later that year in a case against a property investment and management company and its principal.

Adam Moskowitz of the Moskowitz Law Firm, who represents the Astrals and Galaxy holders, called Moreno’s opinion “the first extensive ruling on cryptocurrency and celebrity promotions” when it came out. O’Neal’s attorney didn’t respond to a request for comment.

The ruling also fills a gap in a jurisdiction heavy on these types of situations. “The decision is from Miami,” Elkhunovich said. Numerous digital asset projects are based there, and the court hasn’t issued very many opinions in token cases so far, he said.

NFL player Trevor Lawrence was among seven alleged FTX promoters who agreed to settle investor claims in March, and Moskowitz says a global settlement is likely on the horizon. In a separate case, Miami Heat basketball player Jimmy Butler and a YouTube influencer recently agreed to resolve claims that they helped dupe Binance Holdings Ltd. customers into buying unregistered securities. The FTX and Binance cases are both pending in the Southern District of Florida as well.

Valuable Endorsements

Endorsement deals for celebrities can be more valuable than their salaries, sometimes by a multiple of it, Keith Miller of Perkins Coie LLP said. “Endorsement deals represent an important economic incentive for them to promote products,” he said.

Media personality Kim Kardashian and former basketball player Paul Pierce settled with the Securities and Exchange Commission over statements of theirs relating to EMAX tokens. But those settlements were “in a different context that had to do with anti-touting provisions, which require promoters to disclose their compensation when they’re going in trying to promote a project,” said William Kraus of Pierson Ferdinand LLP.

Miller said there’s “regulatory ambiguity” about digital assets. He’s “optimistic that forthcoming legislation and clearly articulated regulations and guidance will provide much-needed direction,” he said.

And civil litigation against celebrities has become more active, using a variety of state and federal claims, said Andrea Surratt of Crowell & Moring LLP. "It's not surprising that the plaintiffs' bar sees celebrities as having deep pockets, especially in an area where the law is still developing," she said.

"If I were a celebrity, I would absolutely seek legal counsel" before promoting crypto assets, she said. "There is room for celebrities to step in it in this arena."

New Media, New Products

The new ruling in O'Neal's case brings a spotlight to the meaning of solicitation. "While we think of a seller as someone transferring title to property, it actually extends under the securities laws to someone who solicits a purchase for the project's benefit," said Kraus. "It really has to be something close to urging or persuading a purchase of the digital asset, but it also doesn't need to be individualized, which I think is an important point—not telling a specific person, 'Hey, William, you should buy this token.'"

"In the past, of course, we would point to a radio advertisement or a newspaper advertisement," Kraus said. Courts are now more willing to point to YouTube videos and other online posts as enough to qualify someone as a seller, he said.

Moreno also said the NFTs could be considered securities, an issue that has prompted varying decisions in the courts.

"These particular NFTs, the Astrals, have indicia of non-securities and indicia of securities," said Elkhunovich, who has a plaintiff-side practice in the crypto area. "The court said the plaintiffs alleged enough that it could be a security," he said.

Kraus pointed to the breadth of opinions about what constitutes a security. "Even where that promotion may not seem at first glance to be saying the price will increase, there really is a broad interpretation of the law as to what might be an issue under the securities laws," he said. Even statements in a blockchain-based case about "the functionality of the network" or "the growth of the ecosystem" can be used to show something is a security, he said.

Because of the uncertainty with cutting-edge products, "you have more of an obligation to think about what you're promoting," Elkhunovich said.

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

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Jessie Balmert

@jbalmert



This was filed last week, but former FirstEnergy executive Mike Dowling no longer needs to wear an ankle monitor while awaiting trial. The judge approved a phone tracking app instead.

clerkweb.summitoh.net/PublicSite/Doc...

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11



The First Amendment Doesn't Create a Right to Bribery

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Recognizing that the First Amendment does not give elected officials the right to accept bribes is at the core of almost any understanding of illegal public corruption. Yet Larry Householder, former speaker of the Ohio House of Representatives, is trying to convince a federal court that bribery is constitutionally protected. This argument, which Householder raised in a bid to overturn his conviction for taking bribes from a public utility company in exchange for a \$1 billion bailout, is likely to lose. But the fact that he raised it at all reflects how deeply the Supreme Court has chipped away at anticorruption protections in favor of a cynical view that corruption is an unavoidable part of politics.

Householder's case has rocked Ohio politics. He was convicted last year for a scheme to pass a billion-dollar taxpayer-subsidized power plant bailout through the Ohio legislature in exchange for more than \$60 million in contributions to a dark money nonprofit group he ran called Generation Now. FirstEnergy Corporation, the Ohio electric utility that received the bailout, admitted that these payments were bribes, and prosecutors at trial showed that Householder used more than \$500,000 for his personal benefit, including to pay his credit card debt, property taxes, and repairs to his Florida vacation home.

Despite these facts, Householder is appealing his conviction to the Sixth Circuit Court of Appeals. Invoking Supreme Court decisions in cases like *Citizens United v. FEC* and *McCutcheon v. FEC* that eviscerated campaign finance rules, Householder argues that the bribes he accepted were constitutionally protected campaign contributions — just politics as usual.

This argument is flatly wrong and unlikely to prevail even with the current Supreme Court. In a brief the Brennan Center filed on Friday alongside the Campaign Legal Center and Environmental Law and Policy Center, we explain just how misguided it is.

It's true that the Supreme Court has struck down several campaign finance laws on First Amendment grounds, reasoning that money spent on political expenditures is a form of speech. But the laws at issue in those cases, including *Citizens United* and *McCutcheon*, were prophylactic — designed to reach *beyond* the prosecution of corruption to prevent it before it occurs. Because the Court wasn't convinced that actual quid pro quos flowed from the types of campaign expenditures those laws prohibited, the Court held that there wasn't a valid justification for the restrictions they placed on speech.

Householder's case is fundamentally different because the corrupt deal already happened. This isn't a case where prosecutors worried that campaign payments *might* lead to corruption. Nor did Householder merely sell the type of "ingratiation and access" the Court

condoned in *McCutcheon*. Instead, he sold a specific act — pushing the power plant bailout through the legislature — in exchange for millions of dollars. This type of dollars-for-official-action exchange is the definition of quid pro quo corruption, which has never been protected under the Constitution.

This should be an easy case for the Sixth Circuit to decide. The judges should unanimously affirm Householder's conviction and reject his warped interpretation of the First Amendment.

But courts have recently botched other cases that should have been just as easy, including the Supreme Court just a few months ago in *Snyder v. United States*. In that case, James Snyder, the former mayor of Portage, Indiana, was convicted for accepting thousands of dollars in kickbacks in exchange for steering a city contract worth \$1 million to a local truck dealership. The federal law he was convicted under had long been understood to criminalize both the knowing acceptance of bribes (payments in exchange for a future decision) and gratuities (payments to reward past actions). Indeed, Snyder's own lawyers conceded that the statute could encompass the gratuity payments he received. But the Court's conservative majority — justices who all claim to adhere to textualism and originalism — jettisoned the plain text of the statute in favor of what Justice Ketanji Brown Jackson's dissent called an "absurd and atextual reading" that the prohibition applies only to bribes, not gratuities.

It's not that the Court is entirely wrong to be wary of prosecutorial overreach in the realm of politics. Criminal anticorruption laws are a heavy hammer, and occasionally, prosecutors have tried to use them to penalize conduct that, while distasteful, was not clearly illegal.

Too often, however, the Court's wariness has tipped over into outright cynicism that questions the basic ideal of public service as a public trust that should not be used for personal self-enrichment. This apparent hostility toward even reasonable efforts to police corruption creates an environment that emboldens bad behavior from public officials. Decisions like *Citizens United* and *Snyder* — not to mention the Court's shocking presidential immunity ruling — send a signal to would-be corrupt officials that they can conduct their schemes with impunity.

Against this backdrop, it is unsurprising to see defendants like Householder raising long-shot arguments that distort precedent and challenge established law. But Householder's appeal represents a radical escalation that seeks to enshrine a right to accept bribes in the First Amendment. No such right has ever existed under U.S. law, and the Sixth Circuit should have no trouble reaffirming the principle at the heart of anticorruption law that taking money in exchange for official acts is illegal.

Triple ETFs Triple Your Fun

Published: Tue Sep 03 14:16:41 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Leveraged single-stock ETF

This is just a neat trick of arithmetic:

The Europe-listed \$11 million GraniteShares 3x Long MicroStrategy Daily ETP (LMI3) is the ultimate example. While MicroStrategy itself is higher by more than 100% this year, LMI3 has dropped nearly 82% — despite offering leveraged long exposure to the stock. That dynamic holds on a one-, three- and six-month basis as well.

LMI3 is an exchange-traded product that offers investors three times the daily return of MicroStrategy Inc.'s stock. If MicroStrategy goes up 3% on Monday, LMI3 goes up 9%. If MicroStrategy goes down 5% on Tuesday, LMI goes down 15%. If MicroStrategy goes up 110% over the first eight months of 2024, LMI3 goes *down* 82%. It's wild!

That's from Money Stuff podcast co-host Katie Greifeld's article "One-Day-Only ETFs Are Jack Bogle's Nightmare Brought to Life," about leveraged single-stock exchange-traded funds. The point of these funds is to give investors two or three times a stock's *daily* returns, and they come with grim health warnings telling you not to hold them for the long term: LMI3 does a good job of giving you three times the daily return of MicroStrategy, but a horrific job of giving you three times the year-to-date return of MicroStrategy. (It gives approximately negative 0.8 times the year-to-date return.) "The funds offer amped-up exposure only to a stock's one-day return," writes Greifeld, "given that the daily rebalance of the options book erodes returns over time."

The intuition is this. A 3x leveraged ETF is designed to give you three times the daily return of a stock, *whenever you buy it*. So on Monday morning, say, the ETF price is \$100 and the stock price is \$100. The ETF gives you exposure to the return of three shares of stock. The stock goes up 10% that day, so the ETF goes up 30%, so that at the end of the day the stock is at \$110 and the ETF is at \$130. On Tuesday, you buy a share of the ETF. You pay \$130, and if the stock goes up 10% again, you want your money to go up 30%. So the ETF now has to give you exposure to *more* than three shares of stock: It has to give you exposure to three times \$130 worth of stock, or about 3.55 shares.

¹ And then if the stock goes up 10% again, the stock will end the day at \$121 (up 10% from \$110)

and the ETF will end the day at \$169 (up 30% from \$130).²

To get this result, the ETF has to *buy more shares* at the end of the day on Monday: It started Monday with each ETF share representing three shares of the underlying stock, but it needs to start Tuesday with each ETF share representing 3.55 shares of the underlying stock. So at the end of Monday it needs to buy 0.55 more shares, to continue to offer three times the return of the underlying stock.³

But what if, instead, the stock goes *down* 9% on Tuesday? Then:

- The stock closes at \$100.10, down 9% (\$9.90) from \$110.
- The ETF closes at \$94.90, down 27% (\$35.10) from \$130.⁴

So the *two-day* return of the stock is +0.1%: up 10% Monday, down 9% Tuesday, so from \$100 to \$110 to \$100.10. The two-day return of the ETF is -5.1%: up 30% on Monday, down 27% on Tuesday, so from \$100 to \$130 to \$94.90. The ETF gives you three times the Monday return, and three times the Tuesday return, but *negative 50 times* the Monday-and-Tuesday return.

Your intuition here could be roughly: “Every time the stock goes up X% and then down Y%, the ETF goes up 3X%, and then down 3Y% *of a bigger number*, so the loss is greater. And every time the stock goes down Y% and then up X%, the ETF goes down 3Y%, and then up 3X% *of a smaller number*, so the gain is smaller.” Or your intuition could be “the ETF is forced to buy shares every time they go up and sell shares every time they go down, which has to be a drag on returns.” Either way, these intuitions work only if the stock is volatile: If the stock goes steadily up (or down), 3x the daily return will end up getting you roughly 3x the long-term return. But if the stock bounces around a lot, tripling the daily returns can get you much worse than 3x — even worse than 0x — the long-term return.

MicroStrategy, needless to say, is very volatile — it moves on average about 7% *per day* — so this more or less happened.⁵ If a stock goes up 8% one day, down 7% the next, then up 8%, down 7%, up 8%, etc., then in the long run it will go up a lot. If it goes up 24% one day, down 21% the next, then up 24%, down 21%, up 24%, etc., then in the long run it will go down a lot.⁶ If the daily returns are mostly positive but very volatile, and you triple them, the long-term returns can be negative.

Anyway the good news is that (1) these products are fun and (2) people seem to understand that they are not buy-and-hold products. Greifeld:

Advocates say these ETFs are meeting a demand in the investment world among a community of highly engaged retail traders. US-listed single-stock funds now command about \$13.4 billion after the first set sail two years ago, according to Bloomberg Intelligence data. ...

Napkin math suggests that traders are following instructions. For example, the \$1.5 billion Direxion Daily TSLA Bull 2X Shares fund (TSLI) has an average trading volume of nearly \$303 million. Dividing that sum by the fund's average market capitalization of about \$1.1 billion produces a turnover rate of 28.2%, meaning it takes about 3.5 days to completely flip its portfolio. That compares to about 185 days for the \$503 billion Vanguard S&P 500 ETF (VOO), which is popular among buy-and-hold investors.

But if your thought process was “I like MicroStrategy, I like 3x MicroStrategy even more, so I’m going to buy and hold the 3x fund,” there’s a good chance you got your face ripped off.

Incidentally. You could imagine an alternative structure:

1. You put \$100 into the ETF on Jan. 2.
2. It borrows some money and buys \$300 worth of the stock.
3. On Dec. 31, it sells the stock, pays back the borrowing, and gives you three times the return on the stock for that year.

That is, it’s not hard to build a fund that *does* give you three times the annual return on the stock. The problem with that fund is: What if you want to buy it on Feb. 1? If the stock is already up 10%, the fund is up 30%, and buying it in February will no longer give you 3x exposure. (If the stock goes up another 10%, for a total of +21%, the fund will close the year up 63%, giving *you* a mere 25% return on your money, not the 30% you wanted. ⁷)

The good and bad thing about exchange-traded funds is that they trade every day. There are some strategies for which that doesn’t matter. An index fund — “we will give you 100% of the return on the S&P 500” — is easy to implement as an ETF: You just buy all the stocks in the index, and if new investors come in, you buy a bit more of those stocks.

Other strategies are harder. We have talked a couple of times about buffer ETFs, whose basic proposition is “we will give you 100% of the return on the S&P 500, but floored at 0% and capped at 10%” or whatever. These products, though, require buying longer-term options, and they *can’t* generally rebalance every day. If that buffer fund launches on Monday when the S&P is at 5,500, and you buy it on Tuesday when the S&P is at 5,800, you don’t get the downside protection from 5,800 (you get it from 5,500). “The S&P 500 return, but it can’t go down” is the rough pitch for the product when it launches, but that pitch decays over time.

Leveraged daily-return ETFs, on the other hand, do rebalance every day, so they do offer the same proposition — “three times the return on the stock” — whenever you buy them. But that comes at a cost.

Astrology pod!

One model for a hedge-fund trade is that there is some robust, predictable, not-quite-economically-rational demand for a thing, and you get into the business of providing it. The index rebalance trade is the classic example: Some new stocks get added to the index, on the rebalance date index funds need to buy those stocks at whatever their current price is, so big multistrategy hedge funds employ teams (or “pods”) whose job is to buy those stocks ahead of the rebalance date and sell them to the index funds. If you can identify price-insensitive flows, or irrational investor behavior, and be on the other side of it, you can make money.

Last month I joked that “there are not so many astrology pods” at big multistrategy hedge funds, but of course this logic suggests that there *could* be. The idea is something like:

1. People irrationally sell all their stocks when Mercury is in retrograde.
2. You have a calendar and can anticipate when Mercury will be in retrograde.
3. You sell stocks just before that happens and buy them back a week later, profiting from the irrational drop caused by Mercury in retrograde.

“Astrology is a subset of mass psychology,” I wrote, “and so is investing, so, you know, there’s gotta be something there.” I’m not sure there’s much, though. I just made up this story about Mercury in retrograde, and I doubt it’s true. The number of astrologically influenced traders is probably small enough that you can’t make any money trading against them in large-cap US stocks.

Still, something to think about, maybe a pattern to be aware of. Here’s a new paper titled “Animal spirits: Superstitious behavior by mutual fund managers,” by Shenglan Chen, Jing Li, P. Raghavendra Rau and Cheng Yan:

Using a unique dataset from China spanning 2005 to 2023, we investigate how superstitious beliefs influence mutual fund managers' risk-taking behavior and how this influence evolves over their careers. We find a significant 6.82% reduction in risk-taking during managers' zodiac years, traditionally considered unlucky in Chinese culture. This effect is particularly pronounced among less experienced managers, those without financial education backgrounds, and those with lower management skills. The impact also intensifies during periods of high market volatility. Our findings challenge the traditional dichotomy between retail and professional investors, showing that even professional fund managers can be influenced by irrational beliefs early in their careers. However, the diminishing effect of superstition with experience and expertise suggests a gradual transition towards more rational decision-making. Our results provide insights into the process by which financial professionals evolve from exhibiting behavior akin to retail

investors to becoming the rational actors often assumed in financial theory.

I don't *quite* know how you'd trade against that, but "fund managers adjust their asset allocation strategies" and "significantly underweight risky stocks during their zodiac year," so I suppose if a lot of fund managers had the same zodiac year you'd want to dump risky stocks just before that year, etc. "The diminishing effect of superstition with experience and expertise suggests a gradual transition towards more rational decision-making," but there's always some irrationality somewhere, and somebody looking to exploit it.

OpenAI

One way to interpret worries about artificial intelligence is that they are mostly *boasting*.⁸ After all, a lot of the people who worry about artificial intelligence killing or enslaving humanity are also the people who are working on artificial intelligence. So when Sam Altman, the chief executive officer of OpenAI, goes around publicly worrying that AI might kill us all, what he is *really* saying is "I am building a technology that is unimaginably powerful and will transform every aspect of human life, so it sure must be worth a lot of money." If he just *said* that, you might be skeptical; it is obviously in his self-interest to talk about how powerful his technology is. But instead he goes around *worrying* about it, which makes him seem more credible: It is *not* obviously in his self-interest to talk about how dangerous his technology is and how carefully he needs to be checked. It's more subtly in his self-interest to do that.

You could take a similar view of OpenAI's "capped-profit" model. If OpenAI just went around saying "we're going to be a \$10 trillion company," you'd be like "yeah, sure, every founder has a pretty grandiose view of their company, this number means nothing." But instead OpenAI goes around fretting about its investors who might lose out if their valuation is capped at \$10 trillion, so you think "hmm this is something they're really worried about." The Financial Times reports:

OpenAI is in discussions about changing its corporate structure to become more investor-friendly, as it pushes ahead with a multibillion-dollar fundraise and seeks to retain its lead over Google and other rivals.

The artificial intelligence start-up has spoken to investors about restructuring itself, according to three people involved in those conversations. Although a final form has not been agreed, it would likely be more attractive to financial backers by seeking to simplify the company's current complex non-profit structure, they added.

The discussions come as OpenAI is in talks to raise new capital at a valuation of more than \$100bn, according to multiple people familiar with the deal, in a fundraising round that is expected to be led by venture capital firm Thrive Capital. Apple and Nvidia are in

talks to participate in the round for the first time alongside existing OpenAI partner Microsoft, according to two of the people. ...

Shifting to a simpler for-profit structure would be welcomed by the start-up's financial partners, according to one investor in OpenAI. "All preferred investors have a profit cap, there's a lot of talk about making it a more traditional investment so we're not capped on our upside," the person said.

"Returns for our first round of investors are capped at 100x their investment," said OpenAI in 2019, when it raised a billion dollars. I guess I am kidding about the \$10 trillion — the caps are individually negotiated, and perhaps the people coming in at a \$100 billion valuation would expect a lower cap — but perhaps not. "We're so sorry," Sam Altman tells them sadly, "but because of our unique corporate structure, once we hit a \$10 trillion valuation we just can't give you any more upside. I know that's a huge problem, though, so we're looking to see if there's any flexibility to fix it." OpenAI has found a way to make "we expect to be a \$10 trillion company" *sound bad*, which somehow makes it *sound credible*.

I'm kidding, probably; the real point of the restructuring would presumably be to get rid of OpenAI's nonprofit governance structure, in which ultimate decisions about OpenAI are made by a nonprofit board of directors who don't have any fiduciary duties to the investors, and who might actually believe the AI-doom stuff and pull the plug on a profitable business. You can't have *that*.

Dogecoin lawsuit

Sometimes, over the past few years, Elon Musk has pumped up the price of Dogecoin. Dogecoin is a meme crypto token, Musk appears to find it funny, and he'll sometimes joke on Twitter or X or *Saturday Night Live* about Dogecoin. Because Dogecoin is a meme token, and Musk is a famous rich online person, his jokes about it generally make it go up. Later, it often goes down again.

This annoys people, for some combination of good and bad reasons. The good reason to be annoyed by this is that it is annoying: It's just sort of immature and stupid, and doesn't Musk have better and worse things to do with his time? The bad reasons to be annoyed by this is that you think it's a *pump-and-dump*. "Elon Musk is fraudulently pumping up the price of Dogecoin for his own nefarious purposes," you think, "and people who buy Dogecoin when he tweets about it are deceived and will lose money." No! For one thing, it seems pretty unlikely that Musk has ever *profited* from pumping Dogecoin⁹: It's not like he bought a bunch of Dogecoin and then sells them after tweeting about it. What he is getting out of his Dogecoin stuff is mostly entertainment, not Dogecoin trading profits.

For another thing, it's not like Musk ever *lied* about Dogecoin in his public statements. Or, rather, he *did*, but he was clearly *kidding*:

On July 17, 2020, Musk tweeted a meme of a photo of a dust storm overtaking an urban area, with the face of the Dogecoin Shiba Inu superimposed on the dust cloud. The cloud was labeled “dogecoin standard.” The urban area about to be overtaken was labelled, “global financial system.” Above this image, Musk superimposed the remark, “It’s inevitable.”

You could read that to mean “in order to pump up the price of Dogecoin, Musk falsely asserted that the global financial system will move to the Dogecoin standard,” but you’d have to be kind of an idiot. It was a joke! You can tell because it featured a picture of a meme Shiba Inu! That’s how Dogecoin works! It’s all a joke.

That quote is from a lawsuit that people *did* file against Musk, accusing him of running a pump-and-dump on Dogecoin. I wrote about it last year, and was skeptical that anyone could have been deceived:

Dogecoin is an online joke, and Elon Musk is a famous person who likes online jokes, and for a time there was a valuable synergy there. The value of Dogecoin as an online joke went up when Elon Musk was making Dogecoin jokes online. If you bought Dogecoin because Elon Musk tweeted about it, you didn’t buy it because you expected it to become the global monetary standard, or because you expected Tesla to start pricing cars in Dogecoin or whatever. You bought it because Elon Musk tweeted about it. That was the whole analysis: “Elon Musk tweeted about this joke dog coin, so I’m gonna buy it.” He really did tweet about it! How could you have been misled?

The lawsuit was dismissed last week. From the judge’s order dismissing the case:

Plaintiffs allege false and misleading statements. ... These paragraphs allege statements by Musk on “Twitter” to the effect that Dogecoin might be his favorite currency and that he had purchased some for his son, that Dogecoin is the people’s crypto and the future currency of Earth, that Dogecoin might become the standard for the global financial system and the currency of the internet, that Musk agreed to become Dogecoin’s CEO, and that Musk might put a “literal” Dogecoin in SpaceX and fly it to the moon and that Dogecoin would pay for the mission, that Tesla vehicles could be bought with Dogecoin, and the like. These statements are aspirational and puffery, not factual and susceptible to being falsified. They cannot be the basis of 10b-5 lawsuit ... and no reasonable investor could rely upon them.

Obviously no reasonable investor has come anywhere near any of this, and the securities laws are built around reasonable investors, not whatever this is.

“Glitch”

One thing that you could do is:

1. Print out some fake checks with a fake name.
2. Make out one of the checks to yourself, for \$20,000.
3. Go to an ATM and deposit the check in your bank account.
4. Take the \$20,000 out of your bank account in cash.
5. Whee!

There are two very large problems with this plan:

1. It is illegal! This is check fraud! Writing a fake check to yourself and stealing the money from the bank! Come on.
2. It might not work? In modern banking, if you deposit a \$20,000 check in an ATM, the bank might not let you take out the money for a couple of days, until the check clears and the money comes in. Here, the money won't come in — the check is fake — so you'll never get the money out.

Point 1 is always true, but Point 2 is, you know, roughly true. Your bank might let you take the money out immediately (if it thinks you're a good credit risk), or it might let you take some of the money out immediately (figuring that's a manageable risk). Or I suppose it might let you take all of the money out by accident? The New York Post reports:

A new TikTok trend has people posting their attempts to exploit a “glitch” in Chase bank ATMs that offers “infinite free money” — but quickly learning that a bank and its money are not so easily parted.

Experts say the “glitch” videos look an awful lot like check fraud — one of the oldest scams in the book.

Videos urging customers at the bank to take advantage of the “glitch” quickly took off online, prompting people to deposit fake checks for large sums of money. The glitch would credit some of the sham deposits to the customers' accounts before the checks cleared.

...

But, Chase quickly fixed the bug, and is now clawing back any money doled out to people who didn't deserve it.

The people who took advantage of the glitch were soon reporting that their accounts were locked and hit with massive negative balances.

Nothing here is legal advice, but also, nothing on TikTok is legal advice, come on. “TikTok told me how to get infinite free money,” oh great, come on. “Now I’d better post it to TikTok too,” come on!

Things happen

Citadel Securities, Jane Street on Track for Record Revenue Haul. Morgan Stanley renews efforts to regain stock trading crown. HSBC’s New CEO Tells Staff to Keep an Eye on Costs in Town Hall. Citadel Securities leads fight over payments for market surveillance system. Europe’s Top Court Rebukes Competition Regulator, Curbing Powers. Americans Are Really, Really Bullish on Stocks. Rule to Curb Judge Shopping in Big Bankruptcies Should Be Delayed, Panel Says. HP to Pursue \$4 Billion Damages After Mike Lynch Yacht Death. New Argentine Currency Launched to Offset Milei’s Shock Therapy. Brazilians flock to Bluesky after court bans Elon Musk’s X. Great Lego Spill.

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1. That is, \$130 per ETF share divided by \$110 per underlying share is 1.1818, times three is 3.5454.
2. That is, the stock is up \$11 per share, and the ETF is up \$39 per share, or \$11 times 3.5454.
3. You can do this with various derivatives strategies but the simplest way to think of it is this. On Monday, the ETF starts with \$100 from investors (the ETF share price) and borrows \$200 to buy a total of \$300 worth (three shares) of the underlying stock. When the stock closes at \$110, the ETF has \$330 worth of stock (three shares), representing \$130 of equity (belonging to ETF investors) and the \$200 of borrowing. It borrows another \$60 to buy 0.55 more shares of stock, bringing its total to 3.55 shares worth \$390. It opens Tuesday with \$130 of investor money (the ETF share price) and \$260 of borrowed money, for a total of \$390 worth (3.55 shares) of stock. Etc.: Each day, the ETF’s exposure to the underlying stock is three times as much as the value of the ETF.
4. Or: The 3.55 shares in the ETF, worth \$390 on Monday evening, lose 9% of their value, leaving

them worth \$100.10 each, or \$354.90 total. There's \$260 of borrowed money in the ETF, so that leaves \$94.90 for the ETF investors. And then the ETF has to sell some stock to get back to a total gross asset value of \$294.70, three times its \$94.90 equity value.

5. When I look at Bloomberg return numbers for MicroStrategy from Dec. 29, 2023, through Aug. 30, 2024, I get a total year-to-date return of 110%, an average daily return of 0.68%, and a standard deviation of daily returns of about 6.94%. So, like, up 7.3% on Monday, down 6.6% on Tuesday, etc. And if I just mechanically triple the daily returns, I get a total year-to-date return of negative 19%. This is not as bad as the actual negative 82% of LMI3, presumably due to fees, interest, trading costs, etc. But even without any of those things — even if you could just triple the daily returns using pure arithmetic — you'd get a negative year-to-date return.
6. If your simple model is that the stock goes up $u\%$ and down $d\%$ on alternating days, then the two-day return is $(1+u)(1-d)$, or $1+u-d-ud$. So if $ud > (u-d)$, then the two-day return is negative. Here, 0.07×0.08 is less than 0.01 , but 0.24×0.21 is greater than 0.03 .
7. That is: The stock and the ETF start the year at \$100. In February, the stock is at \$110, so the ETF is at \$130. The stock ends the year at \$121, up 10% from February and 21% overall. The ETF therefore ends the year up 63% (3 times 21%), at \$163. If you bought the ETF at \$130, you made \$33, or 25.4% of your investment. But the stock went up another 10%, so you “should” have made 30%.
8. I made a version of this case in January, and here is Matt Yglesias last week arguing that “the vast majority of anti-doomers are actually much more skeptical of AI” than AI doomers are: The doomers are the ones who think AI is really powerful.
9. The class action lawsuit against him made a bunch of noise about huge Dogecoin wallets that allegedly belong to him, but those claims never seemed all that credible.

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Matt Levine's Money Stuff: Bill Ackman Has Some More PSUS Ideas

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Bill Ackman Has Some More PSUS Ideas

By Matt Levine 2024-08-29T14:03:35519-04:00

PSUS II

The basic problem with the initial public offering of Bill Ackman's proposed US closed-end fund, Pershing Square USA, was that he couldn't give investors a discount. The fundraising pitch for PSUS was that you'd pay \$50 for a share, and Ackman would invest that \$50 (minus some underwriting fees) for you, in a portfolio of mostly large-cap US stocks but also some derivatives bets. It is entirely possible that \$50 of Bill Ackman investments is worth more than \$50; he has a good track record.

But it is also entirely possible that \$50 of Bill Ackman investments is worth *less* than \$50: Many closed-end funds, including Ackman's own European fund, trade at a discount to net asset value. So when Ackman pitched his new fund to investors, they might reasonably have said: "Yes, sure, I would love to have you invest \$50 for me. But I'd like to pay \$45 for that. And judging by history, I'll be able to pay \$45 for a share a week after the IPO, so I'll just wait and do that." If everyone thinks that, then the IPO can't get done: He needs to sell the shares at \$50 before they can trade down to \$45. And, crucially, *he* can't sell the shares at \$45: The point of the IPO is to raise the \$50 to put in the pot, and selling the shares for less than \$50 doesn't accomplish that.

We talked about all of this a few weeks ago, when Ackman postponed the PSUS IPO, saying that the main question was "Would investors be better served waiting to invest in the aftermarket than in the IPO" and promising "to reevaluate PSUS's structure to make the IPO investment decision a straightforward one."

There are roughly three ways to think about how to restructure the IPO to effectively give the investors a discount to net asset value. The simplest way is: Put some cash in for them. The mechanism is something like:

1. You buy a share for \$45.
- 2. Ackman puts in \$5 of his own money, on your behalf, for free.
- 3. Your share represents \$50 of the pot that he invests: \$45 from you and \$5 from him.

"You can probably spot the objections to this structure," I wrote, but it's actually not crazy. Ackman has a lot of money, so he could afford to do this. And in various ways a successful launch of PSUS would make him more money. (He will eventually charge fees on the PSUS assets, and he has plans to take the Pershing Square management company public; the more money PSUS manages, the better that IPO will go.) Just *donating* a billion dollars of his own money to the PSUS fund *could* be a positive-expected-value trade, for him.

You could play with that structure a bit more: Instead of putting in the \$5 for free, Ackman could put in the \$5 and get back long-term out-of-the-money warrants that pay him, like, \$10 if PSUS does really well over the next two years. You pay \$45 and get *most* of the returns on the \$50, so you get a discount to net asset value, but you give him back some of the returns if he does really well.

Another way to restructure the IPO would be to put something *else* in the pot:

1. You buy a share for \$50.
- 2. Ackman donates some *asset* to the pot.
- 3. Your share represents \$50 of cash that he invests, plus your share of the asset that he donates.

The most obvious asset here is *Pershing Square itself*, that is, the hedge fund and closed-end-fund management company that Ackman runs. Pershing Square recently sold 10% of itself at a \$10.5 billion valuation and plans to go public as soon as next year. Ackman could give investors in PSUS a stake in the management company as an incentive to buy PSUS.

This approach has some advantages over using cash. For one thing, it doesn't require cash; Pershing Square can just issue shares of itself. It arguably aligns incentives nicely: By owning part of the management company, PSUS investors are effectively getting back some of the fees that they pay. Also, this creates some room for differences of opinion about the value of Pershing Square. It turns out that not a lot of people think that \$50 in a pot managed by Ackman is worth \$55, and there is only so much Ackman can do to persuade them otherwise. But some people think that the value of Pershing Square is \$10 billion; putting the management company in the pot gives you something more subjective to market.

A third way to restructure the IPO is just literal *structure*. Like:

1. You buy a share for \$50.
- 2. You also get a free warrant to buy another share for \$50.

- 3. If the value of a share goes up to \$70, you get to buy another one at a discount.

This strikes me as the least compelling option. For one thing, you are not really getting a discount to net asset value; you are just getting some different slicing of the same pot. For another thing, the mechanism of the warrant is something like “if all goes well, PSUS will sell more shares in the future at a discount to net asset value, diluting its shareholders,” which is maybe not what you want to sign up for.

Anyway here's an update from the Financial Times:

Ackman has discussed several options for the new structure, one of which would gift early investors in Pershing Square USA the right to buy extra shares in the vehicle in the future at a fixed price through warrants, two people familiar with the matter said.

However the real prize for investors in Pershing Square USA is likely to be rights to buy into the eventual IPO of his hedge fund, Pershing Square Capital Management, which manages investments for both the proposed US vehicle and his existing European fund. ...

Under the previous plans for the IPO, Ackman had sought to lure investors by waiving management fees for the fund's first year of trading.

However during the marketing process, Ackman met resistance from investors who sought further incentives to invest in the IPO rather than waiting to buy shares after the launch, when such funds often trade at a discount. If warrants were issued alongside the Pershing Square USA stock, the structure might no longer include such a waiver, one of the people said. ...

Separately, two people close to the hedge fund said they expected Ackman to bring the Pershing Square IPO back to the market before the end of this year to keep up perceived momentum.

They seem to be landing on a combination of my second and third approaches: warrants, but perhaps warrants to buy the management company rather than just warrants to buy more shares of PSUS. And if the deal does include a slice of the management company, then the fee waiver is arguably less compelling: After all, the more money Pershing Square makes, the more valuable it is, and PSUS investors would share in that value.

Gas

A basic pattern for a lot of commodities companies is:

1. They mine, drill, produce, refine, etc., some commodity in physical markets, digging it up out of the ground and putting it on boats for customers who pay them for it.
- 2. They *also* trade financial derivatives on the commodity, for instance trading futures contracts on a commodity exchange.

- 3. They do the derivatives trades *first*: They sell a million barrels of oil futures at \$80 to lock in a price today, then they drill the oil and put it on boats and sell it for cash at whatever the market price is when it arrives, and then they close out the futures contracts. If the price of oil when they actually sell it is \$70, they get paid \$70 for the oil and make \$10 on the futures contracts (they sold at \$80 and can buy back at \$70), for a total of \$80. If the price is instead \$90, they get \$90 for the oil but lose \$10 on the futures contracts (they sold at \$80 and buy back at \$90), for a total of \$80.

This can be roughly characterized as “hedging”: The company has locked in the \$80 price for its production, giving up upside (if the price goes up, it doesn’t benefit) to limit its downside (if the price goes down, it doesn’t lose money). But it doesn’t have to be *only* hedging. If the company thinks that oil prices will go down, it can sell more oil futures than it plans to drill. If it thinks that oil prices will go up, it can opportunistically buy oil futures. Its futures traders will have some leeway to make bets that they think are smart, rather than precisely reflecting its drilling plans, and its physical drillers will have some leeway to increase or decrease production for their own reasons, rather than precisely filling the futures position.

This can lead to trouble. We talked a few months ago about a US Commodity Futures Trading Commission enforcement action against Trafigura Group. Trafigura traded physical oil and also oil derivatives. In the ordinary course of things, it (1) bought oil futures to lock in a price, (2) went out and actually bought physical cargoes of oil to deliver and then (3) closed out the futures.

Sometimes, though, it would make bets on oil prices, by buying more oil through derivatives than it planned to actually buy in the physical market. And then it would go out and buy oil in the physical market. But its buying in the physical market *affected* the price of its oil derivatives: Oil futures settle against some benchmark oil price, and that benchmark is set by looking at actual physical oil transactions, and Trafigura was doing a lot of those transactions. And the higher the price that it paid in its physical transactions, the higher the price it would get on its derivatives.

And so there is an incentive to *pay higher prices*. Like, most of the time, a trader will want to buy stuff at the lowest possible price, so she will take steps to buy discreetly and carefully and efficiently. And then sometimes a trader will want to buy stuff at the highest possible price — losing money on the trade, but making more money on a related derivative trade — and so she will take steps to buy sloppily and quickly and push up the price. And that is allegedly what Trafigura did: The CFTC said that its “heavy bidding and buying activity in that short period tended to increase prices paid in the [price setting] window, and ultimately contributed to an increase in the daily Platts USGC HSFO Benchmark value, which benefitted Trafigura’s long derivatives position.”

And the CFTC said that was market manipulation and fined Trafigura \$55 million. But, I wrote, “it’s a funny sort of manipulation”:

Trafigura was buying physical oil, in the quantities it needed, for a real economic purpose (to export it to Singapore). The *buying* was not itself manipulative. And it had those futures positions, in part, to hedge its price risk when it bought the oil. Given that, it *made sense* for Trafigura to buy during the Platts window: Its *hedge* was settled against the Platts window, so it should do its buying in the Platts window, to avoid any slippage between the hedge price and its actual buying price. So buying in the Platts window, to close out your Platts-based hedge, makes sense.

But because the derivatives position was bigger than the physical one, and because Trafigura bought so heavily and pushed the price up, the CFTC thought it was manipulation. But there is no smoking gun. There was no email from one Trafigura trader to another saying “lol let’s push up this benchmark to get paid on our derivatives.” If Trafigura was doing entirely legitimate trading — hedging its price risk in futures, then buying physical oil and closing out its hedges — the trades would have been roughly similar. The CFTC just looked at the trades and decided they were not quite economic, that the size and timing and price impact of the trades were suspicious.

On Tuesday, the CFTC fined TOTSA TotalEnergies Trading SA \$48 million for a similar sort of manipulation, this time in the market for EBOB, “a type of refined gasoline used primarily in automobiles in Europe.” (Here is the CFTC’s order.) TOTSA trades in the physical market, blending and selling EBOB gasoline, and also in the derivatives market, trading EBOB futures on the New York Mercantile Exchange and Intercontinental Exchange. In March 2018, a TOTSA trading desk in Geneva — called “the LIGHTS desk” — “established a large short position in EBOB-linked NYMEX and ICE futures for March”:

These March-settled futures contracts were priced off of the Argus EBOB Benchmark. Because TOTSA’s position in these futures was a short position, meaning that it would increase in value if the price of physical EBOB declined, the LIGHTS desk knew that TOTSA’s futures position would be worth more if the reported Argus price of physical EBOB during the month of March was lower.

The LIGHTS desk established this short position in EBOB-linked futures not just to hedge TOTSA’s physical product, but as part of an effort to make money by speculating on the price of physical EBOB. The short position was large enough that the financial benefit to TOTSA, if the price of EBOB was lower during March, could potentially more than offset any lost revenue a lower physical price might cause TOTSA to incur on sales of physical EBOB. Consequently, TOTSA would likely benefit financially, overall, if EBOB gasoline was sold at lower prices during March. The lower the average Argus reported price of EBOB was during March, the greater would be the potential financial benefit to TOTSA from its short position in futures.

Again: TOTSA planned to physically blend and sell EBOB gasoline, but it *first* sold EBOB through futures. And, says the CFTC, it sold *more* EBOB in the futures market than it planned to sell in the physical market. So it had an incentive to sell the physical gas cheap. And it did:

In March 2018, TOTSA was well-positioned to attempt to depress the price of physical EBOB, and potentially increase its overall trading profits, because TOTSA is one of the largest participants in the EBOB market, and has the capability to blend and sell thousands of metric tonnes of gasoline daily. Throughout March 2018, TOTSA sold more physical EBOB than it had ever previously sold in a single month. The volume of EBOB that TOTSA sold in March constituted more than 60% of the reported volume transacted by all brokered market participants. ...

On multiple days in March, TOTSA traders repeatedly attempted to sell physical EBOB at prices lower than the prices other market participants had indicated they were willing to pay. ...

On March 2, 2018, in chats with EBOB brokers, a TOTSA trader (Trader A) transmitted an indicative offer to sell winter-grade EBOB, and subsequently refused to sell at a higher price, even after another market participant indicated that it was willing to buy at a higher price. A broker specifically told Trader A that another market participant was willing to buy winter-grade EBOB for \$2 more per tonne, and asked if TOTSA would sell at the open for this higher price. Trader A indicated that TOTSA did not want to sell at this higher price, and reiterated TOTSA's previously expressed lower price. ...

On March 12, 2018, in a chat with an EBOB broker, a different TOTSA trader (Trader B) communicated an indicative offer to sell winter-grade EBOB, and was subsequently informed that another market participant was interested in buying winter-grade EBOB for a price that was (depending on specifications relating to delivery) either \$4 or \$9 per tonne higher than the price at which TOTSA was attempting to sell. TOTSA Trader B initially responded by indicating that TOTSA was not interested in selling winter-grade EBOB at either of these higher prices. Trader B also emphasized that TOTSA's offer to sell at a lower price was "valid." ...

On March 16, 2018, in a chat with an EBOB broker, TOTSA Trader B communicated an indicative offer to sell winter-grade EBOB, and was subsequently informed that another market participant wanted to buy winter-grade EBOB for \$3 more per tonne than the price at which TOTSA was seeking to sell. Trader B asked the broker to call him and, shortly thereafter, the broker sent a WhatsApp message to Trader B stating that he had spoken with the other market participant, and that the other market participant was now prepared to buy at TOTSA's lower price.

"Accordingly," concludes the CFTC, "TOTSA on multiple occasions during March, 2018 intentionally or recklessly attempted, through its sales of physical EBOB, to manipulate EBOB-linked futures contracts."

Here again there are no smoking-gun emails saying "let's manipulate the price," though to be fair that is in part because "TOTSA did not timely produce certain WhatsApp communications [the CFTC] requested or adequately preserve these communications." There is just the CFTC's analysis that TOTSA was selling its gasoline too sloppily, getting prices that were too low because that helped its derivatives position. And the somewhat smoking-gun-ish chats where the TOTSA traders *turned down higher prices*: If you are selling gas and someone is like "I'll pay you \$100" and you are like "I'd prefer \$96," that *does* suggest that you're up to something.

Still, CFTC Commissioner Caroline Pham dissented from the enforcement action, writing:

This case is a textbook example of policymakers with no industry experience second-guessing commercial business decisions in a bubble. It is undisputed that there is no evidence of artificial prices in this case. Instead of accepting that, the CFTC has once again brought the immense power of the U.S. government to bear down and obtain a settlement by misapplying the CFTC's broad Dodd-Frank anti-fraud and anti-manipulation authorities. Far from using these new authorities as intended to go after abusive trading practices in the swaps market, the CFTC instead has used them as a blank check to go after commercial producers and merchants in the cash markets. This approach is the opposite of the CFTC's original mandate to promote price discovery and hedging in commodity markets, and will actively discourage commercial end-users from appropriately managing their risks with the use of exchange-traded futures. ...

The direct evidence that was contemporaneous with the alleged manipulative activity does not support the charges, and is consistent with both later expert analysis and the CFTC's own internal analysis regarding physical gasoline market fundamentals underlying supply and demand and Respondent's trading activity.

I mean, I am inclined to agree with the CFTC that *refusing to sell the gas at higher prices* is some "evidence of artificial prices." Still I think Pham has a point. These cases involve physical market participants legitimately buying and selling their products, while also having derivatives hedges that don't quite match up with their physical positions. That *basic pattern* is fine. It's market manipulation only if they are buying and selling the products *uneconomically*, with the *intent* of manipulating the benchmark to make money on their derivatives. Maybe they are! But if they don't *say* that, the essential evidence of manipulation is that the CFTC thinks their trades were sloppy and bad. The CFTC has some expertise here, so I'm not sure it's quite "a textbook example of policymakers with no industry experience second-guessing commercial business decisions in a bubble." But it is a little weird for the CFTC to fine commodity traders for trading badly, and the traders probably do know more about trading than the CFTC does.

Due diligence

A company is a nexus of contracts. If you are an employee or customer or supplier or landlord or creditor of a company, you generally have some sort of contractual relationship with the company. You entered into that relationship for a reason: You met the company's employees and sampled its product and signed up for some sort of deal with the company.

Sometimes companies are acquired in mergers or acquisitions. The buyer of the company is, essentially, buying its contracts. That's what there is; that's what the buyer is buying: The employees, supply chains, buildings, customer relationships, etc., *are* the target company.

This can create problems. A classic one is:

1. You signed a contract with Nice Company A, because it is nice, and because you hate to deal with Giant Company B.
- 2. Giant Company B acquires Nice Company A.

- 3. Now your contract is with Giant Company B.
- 4. That is not what you wanted.

You might try to address this problem in advance, by saying in your contract with Nice Company A “this contract will terminate if you are acquired by someone else.” But this is weirdly difficult. On the one hand, *of course* you want the flexibility to get out of your contracts if your counterparty gets acquired by someone you don’t like. On the other hand, if *everyone* could get out of their contracts on an acquisition, companies could never be acquired: Nice Company A *is* its contracts, and if they all disappeared when it was acquired, then nobody could acquire it.

And so we have talked about a weird dispute involving an oil joint venture between Hess Corp. and Exxon Mobil Corp. Exxon manages the Stabroek block, a giant oil field in Guyana that it co-owns with a few other oil companies, including Hess. There is a contract, a joint venture agreement. Then Hess signed a deal to be acquired by Chevron Corp. Exxon says that Hess is not allowed to transfer its Stabroek stake to Chevron, including in a merger, so Exxon should get to buy it back. Hess and Chevron say, no, of course Chevron is allowed to buy Hess, and if it buys Hess then it gets its stake in the Stabroek field. There seems to be a real dispute about how the contract works. Plausibly Exxon *really thought* that Hess was not allowed to be acquired and keep its Stabroek stake, while Hess *really thought* that was allowed.

Another problem is:

1. Small Company X is up for sale.
- 2. Big Company Y expresses interest in buying it and asks to do due diligence.
- 3. Small Company X puts all of its contracts and other information in an online data room, so that Big Company Y can get a sense of what it is buying.
- 4. Big Company Y takes copious notes on all of Small Company X’s sensitive contracts.
- 5. It does not buy Small Company X.
- 6. It does, however, call up all of Small Company X’s customers and offer them a slightly better deal.

This is not allowed — generally the data room will be subject to a confidentiality agreement — but it could happen anyway. We have talked about a lawsuit brought by Propel Fuels Inc. against Phillips 66 Co., claiming that Phillips 66 considered buying Propel, entered into confidentiality agreements, got access to a data room, learned all about Propel’s business, and then abandoned the deal and decided to compete with Propel instead.

Here’s an even weirder case:

A New York court has ordered Evercore to reveal who had access to a confidential document the investment bank posted in an electronic data room, the secrecy of which Arizona Beverages said was essential to maintaining the 99 cent pricing of its “Big Can” iced tea.

Arizona initiated legal proceedings against Evercore this spring, accusing the boutique firm of wrongfully uploading a secret supply agreement between the upstate New York-based tea maker and its can supplier, Vobev, which Evercore had been hired to sell.

Vobev makes the cheap cans for Arizona, which are apparently crucial to its business. Arizona and Vobev had a supply agreement that was apparently super secret. Vobev considered selling itself, and as part of the due diligence for the sales process, *of course* potential buyers wanted to see its contract with a big customer like Arizona. So it (or rather its bankers at Evercore) put the contract into the online data room, where the buyers could look at it. And the buyers might or might not have included Ball Corp., "Arizona's other major supplier and a previous client of Evercore":

"If AriZona is unable to obtain Big Cans for distribution on the West Coast at the contracted price under its Can Supply Agreement with Vobev, AriZona will suffer millions in damages and Ball will gain enormous leverage over the supply of Big Cans to AriZona, especially if Vobev is sold to Ball," Arizona later wrote in a court action seeking to uncover the parties that had seen the confidential document.

Evercore denied it had shown the agreement to Ball and said its own confidentiality obligations rendered it unable to reveal the unnamed third party "A" that had entered the data room.

I suppose that, from Arizona's perspective, it is bad if Ball sees the Vobev/Arizona supply agreement: That would give Ball some competitive information that might give it more leverage over Arizona. But it's perhaps even worse if Ball buys Vobev and *takes over* the Vobev/Arizona supply agreement.

Nvidia

Yesterday, a few hours before Nvidia Corp. reported its earnings, I asked: "If you worked in Nvidia Corp. investor relations, and you have the earnings a day early, and they are a surprise to the upside, what should you do with that information?" I suggested that (1) buying Nvidia stock or options would be a bad idea (insider trading), while (2) making macro bets on the broad US stock market would be at least an *entertaining* idea. ("Shadow trading," but also a reflection of Nvidia's macroeconomic importance. Not legal advice!) That answer turned out to be weirdly correct. Bloomberg's Carmen Reinicke and Jeran Wittenstein report:

Nvidia Corp.'s earnings report needed to be perfect for a stock that's added nearly \$2 trillion in market value in the past year. In the end, a broad beat still sparked a selloff.

At issue is Nvidia's revenue forecast. While easily exceeding the average analyst estimate, the beat was far narrower than investors have grown to expect over the past five earnings reports. That, and an acknowledgment that the new Blackwell chip hit production snags, was enough to send Nvidia shares tumbling in postmarket trade Wednesday, with declines resuming in premarket Thursday.

Nvidia beat earnings estimates, but if you knew that in advance and bought the stock, you'd have lost money. Meanwhile if you had been like "Nvidia is going to beat estimates, so I'll buy the S&P," you did fine: The broad market was up this morning, even as Nvidia was down. Nvidia turns out not to be a particularly reliable macro indicator, but also, published Nvidia earnings expectations turn out not to be particularly reliable indicators of the market's *actual* expectations.

Things happen

Star Fund Manager's Free Rein at Wamco Backfired for Franklin. OpenAI in Talks for Funding Round Valuing It Above \$100 Billion. Most-Hated Credit Trade Turns Into a Big Winner for Hedge Funds. Goldman Sachs wins challenge to Federal Reserve over stress tests. UK Set to Delay Bank Capital Reforms Until at Least January 2026. SEC Wells notice targets NFTs on OpenSea. The Alleged Kickback Schemes That Inflated Costs for Homebuyers. Palantir is a meme stock. China's international use of renminbi surges to record highs. China Has Another Firm in Its Crosshairs Over Its Epic Property Bust: PwC. Geneva's Oldest Private Bank Slams Inheritance Tax Proposal. Uber Invests in SoftBank-Backed Self-Driving Software Firm Wayve. CrowdStrike Cuts Guidance in Wake of Cyber Outage That Hit Millions. Ukraine agrees debt relief deal worth \$11bn. Cash-Starved Angola Pays Local Suppliers With Treasury Bills. Private Equity Is Coming for Youth Sports. "I've never heard of Mr. Srivastava and I have no connection with the CIA," [Warren] Buffett told the Journal."

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- 1. "If PSUS achieves a sustained premium to NAV which I believe it will achieve," Ackman told investors in July, "it will enable us to access low-cost equity capital when we have good uses for that capital." A warrant means issuing shares at a discount to future NAV. (Or, rather, at a discount to the future *market price*. Maybe PSUS will trade at a premium to NAV, so the warrant will be in-the-money but still accretive to NAV.)

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<https://www.law.com/litigationdaily/2024/08/30/be-likable-tell-the-story-right-mike-lynchautonomy-trial-left-as-much-out-as-was-allowed-in/>



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PODCAST

Be Likable, Tell the Story Right: Mike Lynch/Autonomy Trial Left As Much Out as Was Allowed In

ALM reporter Maria Dinzeo covered the Lynch trial and she speaks with Legal Speak's Patrick Smith about the happenings in the courtroom, how the jury reacted to testimony from witnesses on both sides and how several elements that could have impacted the jury's decision were not allowed to be presented to the jury.

August 30, 2024 at 12:26 PM



Patrick Smith



Cedra Mayfield
Litigation Reporter



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

Legal Speak FOLLOW SHARE  

Be Likable, Tell the Story Right: Mike Lynch/Autonomy Trial Left As Much Out

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Aug 30, 2024

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27:05

In 2011, British software developer Mike Lynch sold his startup Autonomy to U.S. tech giant Hewlett Packard for \$11 billion. However, shortly after the sale, HP said it found irregularities in Autonomy’s bookkeeping that misrepresented the company’s financial health.

That misrepresentation, according to a criminal suit filed against Autonomy in the Northern District of California in the Spring of 2019, saw HP write down close to 80% of the deal value, making it one of the most significant flops in M&A history. Lynch and Autonomy’s vice president of finance, Stephen Chamberlain, were both named as defendants in the criminal fraud trial.

ALM reporter Maria Dinzeo was at the trial and saw how defense counsel managed to craft a narrative that cast Lynch as a “start-up guy” who had little interest in the company’s accounting practices and that HP was simply the victim of its own lack of due diligence. The jury agreed, acquitting both Lynch and Chamberlain of wrongdoing in June. Lynch and

one of his attorneys during the trial, Chris Morvillo, were two of several killed in a boating accident earlier this month. Chamberlain died a few days before after being hit by a car in a separate incident.

Dinzeo said that while several suspicious pieces of business went down at Autonomy, the jury often seemed confused by the dry nature of the prosecution’s material. And while the jury concluded that Lynch and Chamberlain were innocent of the crimes they were charged, they didn’t have access to several pieces of information that, Dinzeo said, could have altered their perception of the events they were being asked to evaluate.

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HP to continue \$4 billion damages case against Mike Lynch

 [reuters.com/technology/hp-continue-4-billion-damages-case-against-mike-lynch-2024-09-02](https://www.reuters.com/technology/hp-continue-4-billion-damages-case-against-mike-lynch-2024-09-02)

Reuters

Technology

By Reuters

September 2, 2024 8:06 AM PDT Updated a day ago

A screen displays the logo for HP Inc. at the New York Stock Exchange (NYSE) in New York, U.S., November 18, 2019. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

Sept 2 (Reuters) - Hewlett Packard (HPE.N) , opens new tab said on Monday it would continue legal proceedings to seek up to \$4 billion in damages from British billionaire Mike Lynch's estate in the UK.

The U.S. company had been seeking compensation over its acquisition of British tech firm Autonomy amid claims of fraud masterminded by its co-founder Mike Lynch to inflate the company's value.

Lynch, who died in August when his yacht sank off the coast of Sicily, had denied any wrongdoings.

"It is HPE's intention to follow the proceedings through to their conclusion," the company said in an emailed statement to Reuters.

HP had bought Autonomy for \$11.1 billion in 2011 in one of the UK's biggest tech deals. But in late 2012 the company said it had discovered a massive accounting scandal at the British tech firm.

In 2022, HP won a civil case against Lynch but a High Court judge said that any damages would be less than the \$5 billion HP had claimed.

A spokesperson for Lynch's family said they did not have any comment to share at this stage.

The company had filed the lawsuit against both Lynch and Autonomy's former chief financial officer, Sushovan Hussain.

Reporting by Sourasis Bose in Bengaluru; Additional reporting by Catarina Demony; Editing by Mark Porter

Technology



No link between mobile phones and brain cancer, WHO-led study says

category · September 3, 2024 · 7:35 AM PDT · 18 min ago

There is no link between mobile phone use and increased brain cancer risk, according to a new World Health Organization-commissioned review of the available published evidence worldwide.

- WorldcategoryUS crypto executives to throw Washington fundraiser for Harris6:22 AM PDT

HP to Pursue \$4 Billion Damages After Mike Lynch Yacht Death (2)

By Jonathan Browning

- HPE to continue to seek \$4 billion damages after Lynch's death
- Mike Lynch and daughter died in yacht tragedy off Sicily coast

Bloomberg Law News 2024-09-03T10:46:43173854251-04:00

HP to Pursue \$4 Billion Damages After Mike Lynch Yacht Death (2)

By Jonathan Browning2024-09-02T12:06:32702-04:00

- HPE to continue to seek \$4 billion damages after Lynch's death
- Mike Lynch and daughter died in yacht tragedy off Sicily coast

Hewlett Packard Enterprise Co. said it intends to pursue the \$4 billion damages claim in London against the estate of the recently deceased British tech tycoon **Mike Lynch**.

Just over a week after the bodies of Lynch and his 18-year-old daughter, Hannah, were recovered from the wreck of his sunken yacht, the US company said it planned to collect any damages that are awarded by a London court. HPE won the British civil case over the collapse of Lynch's Autonomy Corp. and is waiting for a judge to decide how much it is owed.



Mike Lynch with daughter Hannah.
Source: Lynch family spokesperson

"It is HPE's intention to follow the proceedings through to their conclusion," the company said in a statement Monday.

The decision to move forward puts HPE on a reputational tightrope. While a UK civil claim automatically ensures that the case passes to the estate of a defendant in the event of a death, the prospect of pursuing the money from Lynch's family is likely to be deeply unpopular after the tragedy.

"It was likely that they were going to face criticism going ahead with a claim against his grieving widow," said Robin Henry, a partner at law firm Collyer Bristow, who isn't involved in the case. "I think they are trying to mitigate the reputational damage by saying they are under an obligation to protect the interests of HPE's shareholders."

A spokesperson for Lynch's family declined to comment. The Times of London reported on the case earlier.

After one of the longest and most expensive trials in British history, Judge **Robert Hildyard** ruled in 2022 that Lynch had fraudulently boosted the value of the company. "One of the tragedies of the case is clear: an innovative and ground-breaking product, its architect and the company will probably always be associated with fraud," the judge said in the ruling.

In total, HPE was seeking \$4 billion from Lynch and his finance chief, but the judge had cautioned that it was likely to get substantially less than that.

Lynch died after his luxury yacht foundered in severe weather off the coast of Sicily. He was celebrating his acquittal from US criminal charges with a small group of advisers when the storm struck. His wife, Angela Bacares, managed to escape with her life, while Lynch's other daughter wasn't on board at the time.

(Updates with comment from lawyer in fourth paragraph.)

--With assistance from **Mia Dawkins**.

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Psychopathic Traits More Likely Among Crypto Owners, Study Finds

By Teresa Xie

- High levels of 'dark' personality traits seen in crypto fans
- 'Call us whatever you want. We're leading,' says one trader

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Psychopathic Traits More Likely Among Crypto Owners, Study Finds

By Teresa Xie2024-08-30T10:00:00005-04:00

- High levels of 'dark' personality traits seen in crypto fans
- 'Call us whatever you want. We're leading,' says one trader

If you've ever suspected that your crypto-obsessed friend might be a psychopath, you may be on to something.

Digital-asset holders tend to exhibit higher levels of "dark" personality traits such as narcissism, Machiavellianism, psychopathy, and sadism, according to a recent academic paper by researchers at the University of Toronto and the University of Miami published in the journal PLOS One.

"The results presented here suggest that cryptocurrency ownership is associated with several nonnormative and arguably maladaptive characteristics," the report said, adding that "individuals who had purchased crypto were, on average, more likely to believe conspiracy theories, support extremist groups, and share populist sentiments."

The study, which surveyed 2,001 American adults, noted that crypto owners tend to score higher on measures of need for chaos, paranoia, schizotypal attributes, dogmatism, victimhood mentality, and psychological reactance, which is a clinical term for motivations triggered by feelings that personal freedoms have been lost. Just under 30% of survey respondents said they own, or have owned, crypto.

It almost goes without saying that there are plenty of examples of “dark” personality traits in the traditional corporate world as well. While this study is the first of its kind to draw inferences between cryptocurrency holders and psychological traits, others have provided links between psychopathy and abusive corporate leadership. A 2014 paper published in Elsevier found a significant positive relationship between employees’ ratings of psychopathy traits in their supervisors and the workers’ self-reported psychological distress and job satisfaction.

And based on anecdotal evidence at least, humorous self-deprecation is also a common trait of crypto fanatics who have experienced all of the market’s ups and downs, scams and scandals. So some traders are taking the psychopath label in stride.

For example, the study’s conclusions came as no surprise to Chris Wheeler, a 57-year-old crypto trader.

“You literally have to be crazy to be involved in something where your net worth is going up a million and down a million in one day,” Wheeler said. “Nothing is guaranteed.”

In 2021, the price of Bitcoin climbed to almost \$69,000 before sinking below \$16,000 in 2022 and then rocketing back to an all-time peak of almost \$74,000 this year. Over the last few years, the digital asset industry has been whipsawed by everything from leaders getting convicted of fraud to presidential candidate Donald Trump touting a strategic national stockpile of Bitcoin.

The strongest predictors of whether someone owns cryptocurrency include variables such as being male, having a victimhood mindset, or relying on fringe social-media sources for news, the researchers wrote.

To be sure, the sample of participants in the study was relatively limited, and those surveyed were told to report their own characteristics. But its conclusions still resonate.

“Call us whatever you want,” Wheeler said. “We’re leading the way.”

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Michael P. Regan

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Sept. 1, 2024, 5:00 AM PDT

Trump Circle Makes Another Move in Its Ardent Embrace of Crypto

By Olga Kharif

- Trumps are releasing NFTs, own Ether and plan other ventures
- Bannon, Kushner, associates have long histories with crypto

Bloomberg Law News 2024-09-03T10:50:41728420354-04:00

Trump Circle Makes Another Move in Its Ardent Embrace of Crypto

By Olga Kharif2024-09-01T08:00:00001-04:00

- Trumps are releasing NFTs, own Ether and plan other ventures
- Bannon, Kushner, associates have long histories with crypto

With Donald Trump now championing a decentralized finance platform while pledging to make America the “crypto capital” of the world, all eyes are focused on the growing digital-asset efforts of the former president’s family and associates.

In recent weeks, the Republican presidential nominee and two of his sons have been promoting World Liberty Financial, a DeFi project that aims to eliminate intermediaries such as banks through the use of software-driven applications. Trump just put out his fourth collection of nonfungible tokens, which represent unique ownership of assets like images depicting him riding a motorcycle or as a boxer. Melania Trump’s upcoming memoir can be purchased with a digital collectible, according to her website.



Source: collecttrumpcards.com

While five years ago, Trump said he was “not a fan of Bitcoin and other cryptocurrencies,” his family and associates have clearly since whole-heartedly embraced crypto — and already made millions off of it.

For several years now, Donald Trump has been making money by lending his name or likeness to crypto-related products much as he has done throughout his life for everything from real estate to steaks to menswear.

Trump’s CIC Digital LLC, which earned \$7.2 million through licensing his image on NFTs, held a crypto wallet with at least \$1 million in Ether, according to 2024 disclosures. In August, 1,000 Trump-branded “Crypto Sneakers” became available for pre-order for \$499 through CIC Ventures LLC. CIC Ventures is connected to Trump lawyer John Marion IV, according to registration documents in Florida. Marion has represented Trump in Florida, where he argued the former president could live at Mar-a-Lago full time, according to NPR.

Trump is working on the NFT collections with Bill Zanker, a friend of 30 years who co-wrote a book with him, “Think Big and Kick Ass,” published in 2007. Zanker used to book Trump as a speaker through his Leaning Annex business before suggesting to the former president that he should start selling NFTs about two years ago.

Melania Trump had put out several NFT collections, and even sold a gold Mother’s Day necklace with a related NFT on the Solana blockchain. Just how successful the collections have been is unclear: The source of funds for the winning bid in the former first lady’s first NFT auction appeared to be the creators of the project themselves.

Eric and Don Jr., along with their father, began promoting the DeFiant Ones Telegram channel for World Liberty Financial in August.

In an unusual twist, disgraced entrepreneur Martin Shkreli claimed — while offering no evidence — that Barron Trump, the president’s youngest son, was behind the DJT token. The coin debuted in June, and its price has since dropped by more than 97%. The Trump Organization didn’t reply to a request for comment.



Ivanka Trump and Jared Kushner.
Photographer: Al Drago/Bloomberg

Trump son-in-law and former presidential adviser Jared Kushner advocated for a US digital dollar in 2019, according to documents obtained by CoinDesk. Earlier this year, Donald Trump said that he is against creating a central bank digital currency.



Steve Bannon

Photographer: Kent Nishimura/Bloomberg

And then there is Steve Bannon, the chief executive of Trump's 2016 presidential campaign, key adviser and chief strategist at the start of his administration.

Several years ago, Bannon supported Himalaya Coin and a namesake exchange, whose website has since been seized by the FBI. Three people have been charged with soliciting more than \$1 billion in investments using false statements and representations; Bannon wasn't mentioned in the complaint. Bannon had faced a number of federal charges and was pardoned by Trump in 2021. He is currently in prison on a contempt of Congress conviction, related to the 2021 US Capitol attack.



Howard Lutnick

Photographer: Christopher Goodney/Bloomberg

Cantor Fitzgerald LP CEO Howard Lutnick, who is co-chair of Trump's transition team, has been one of most vocal Wall Street supporters of crypto. Cantor Fitzgerald manages reserves for Tether Holdings, known for the \$118 billion USDT stablecoin that is the most traded digital asset.



JD Vance during a campaign event in Atlanta.

Photographer: Dustin Chambers/Bloomberg

Republican vice-presidential nominee JD Vance first got involved in crypto well before joining the campaign. The Ohio senator has disclosed that he owns more than \$250,000 in Bitcoin, according to documents obtained by CNN. He has also emerged as a crypto advocate on Capital Hill, working on a bill to revamp digital-asset regulations, according to Politico.

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Supreme Court Conservatives Are Less Likely to Explain Recusals

By Kimberly Strawbridge Robinson and John Crawley

Eye on the Bench

- Liberal justices often explain decision to step aside in cases
- Court's 6-3 conservative majority eschews the practice

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Supreme Court Conservatives Are Less Likely to Explain Recusals

By Kimberly Strawbridge Robinson and John Crawley 2024-09-03T04:45:03000-04:00

- Liberal justices often explain decision to step aside in cases
- Court's 6-3 conservative majority eschews the practice

US Supreme Court conservatives, unlike their liberal colleagues, routinely decline to explain why they recuse from cases nearly a full term after all of the justices embraced a code of conduct aimed at improving transparency.

Chief Justice John Roberts and the other conservatives in the court's majority opted out of hearing matters more than 60 times since mid-November while liberals cited the code in about 20 instances, an analysis of court data shows. Recusals mostly occurred in petitions denied review and included in public orders.

The liberals' short explanations typically cite the federal recusal law and the ethics code provision. A description of the conflict highlights prior government or judicial service.

Supreme Court's Ethical Di...



WATCH: Supreme Court's Ethical Dilemmas Began Before Clarence Thomas

There's no obvious reason for the ideological divide over providing explanations. But ethics and legal scholars said conservative justices may feel under siege by reports of ethics lapses and calls for recusals, and that providing explanations might be used to fuel strategic behavior from litigants and inflame controversy.

"Conservatives feel like the code of conduct has been weaponized by the left to attack them," said Charles Geyh, a professor and ethics scholar at the Indiana University Maurer School of Law.

Providing Explanations

Following public concern that recusal practices were opaque and overdue for change, the non-binding code of conduct mainly reaffirmed practices followed by the judiciary, including the Supreme Court.

The code of conduct provides a number of instances when the justices should disqualify themselves, including when impartiality "might reasonably be questioned." Recusals are decided by individual justices and explanations are voluntary. The code lists disqualification criteria but disclosing grounds for recusal hasn't historically been the norm.

An account of why justices opt out would help demystify the court's decision-making and build trust with the public on ethics, scholars said.

Democratic-backed legislation would require such explanations. A bipartisan presidential commission appointed by President Joe Biden said recusal explanations "could serve as guidance" and "might also clarify whether the Justices use the same standards for recusal on recurring issues."

And an April 2023 statement by the justices on ethics described the voluntary process now used by liberal members in providing information beyond simply noting they'd recused. But the statement also said explanations can be "ill-advised" in certain instances.

"Examples include circumstances that might encourage strategic behavior by lawyers who may seek to prompt recusals in future cases," the justices said.

Lawyers are always going to be looking for a way to increase the chance of success for their clients, creating concerns over gamesmanship, said Renee Knake Jefferson, the chair of legal ethics at the University of Houston Law Center.

The response should be to create structures that are acceptable to those in both the majority and the minority, not "forgo measures that would enhance accountability, increase public trust, and ensure a fair process for litigants," Jefferson said.

She noted that state supreme courts have different mechanisms for dealing with ethical dilemmas that the US Supreme Court could look to. In Texas, for example, recusal requests can be referred to the full court.

"It would behoove the court to look seriously at how other high courts in the US deal with the recusal question rather than dismiss it out of hand," said Russell Wheeler, a Brookings Institution fellow.

In releasing its code, the court said it would assess whether it needed additional resources to review recusal and other ethics issues. The court didn't respond to a request for comment when asked if it has taken any such step.

Justices' Recusals

The Supreme Court receives roughly 5,000 to 6,000 petitions seeking review annually, and nearly all are denied early on.

Recusals ranged from more than 230 in the 2020 term to nearly 120 in the current one through Aug. 22, according to the analysis of data compiled by Bloomberg Law and watchdog Fix the Court.

Conservative Justices Neil Gorsuch and Amy Coney Barrett each recused roughly a dozen times since the code was adopted, while Justice Samuel Alito's total nearly doubled that. Roberts and Brett Kavanaugh each registered under 10 recusals, while Clarence Thomas had just a handful.

Justices typically recuse for a limited number of reasons, which the court has said "will be obvious" in many instances. This includes prior work as a circuit judge or in the Office of the Solicitor General, a presidential administration's top lawyer at the Supreme Court.

Perhaps obvious to parties, the justices, and other insiders or court watchers, the reasons for recusal aren't apparent to the public without some digging.

For instance, many of Alito's recusals historically are due to stock ownership. Those investments are listed on financial disclosures and can be cross-referenced with the case to determine a potential conflict.

Gorsuch has recused from a death penalty appeal in *Glossip v. Oklahoma*, a rare example a justice stepping away from a granted petition. But the public notice in January 2024 didn't say he'd previously heard an iteration of the case out of Oklahoma while sitting on the US Court of Appeals for the Tenth Circuit, or that he was a former appellate judge, Fix the Court noted.

Like Gorsuch at the Tenth Circuit, recusals involving Kavanaugh and Barrett are commonly tied to their previous work as judges on the DC and Seventh Circuits, respectively. Roberts' was often a party named in a case, Fix the Court showed. While information about lower court roles is public, it can require researching individual cases to determine a likely reason.

The court's liberals are more transparent, especially Justices Elena Kagan and Ketanji Brown Jackson. Kagan was the first to cite the Supreme Court code, doing so nearly a dozen times over potential conflicts stemming from her service as US solicitor general in the Obama administration. She notes prior government employment.

Jackson's recusals also were explained. She cited prior judicial service and another disclosing she or relatives were or had been involved in a case as an attorney. Justice Sonia Sotomayor, Kagan, and Jackson cited the code for being parties to a proceeding in a May 28 order.

Under Attack

Virginia Canter, chief ethics counsel at the watchdog group Citizens for Responsibility and Ethics in Washington, said previous work and financial conflicts make for easy recusal decisions.

The tricky question is whether recusal is required under a "catch-all" provisions that requires a justice to disqualify if their impartiality "might reasonably be questioned," Canter said.

Alito cited that provision when he wrote to members of Congress that he wasn't recusing from Jan. 6 cases based on reports controversial flags had flown at his residences.

Saying the flags were placed by his wife, Alito said he was "confident that a reasonable person who is not motivated by political or ideological considerations or a desire to affect the outcome of Supreme Court cases would conclude that" the events "do not meet the applicable standard for recusal."

John Malcolm of the Heritage Foundation said the calls for conservative justices to recuse and reports of alleged ethical lapses may be one reason why they aren't providing an explanation.

Offering reasons for stepping away can be "dangerous" because it could provide a basis for future attacks if one justice doesn't think a situation requires recusal but another does, he said.

"If I were one of the conservative justices and taken a beating in the press for everything I have done or not done, I suppose my instinct would be: 'I will just make my decision and announce what my decision is,'" Malcolm said. "I don't owe anybody any explanation for why I made that decision."

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Full disclosure? Traps for the unwary in corporate political activity disclosure policies

 [reuters.com/legal/legalindustry/full-disclosure-traps-unwary-corporate-political-activity-disclosure-policies-2024-09-03](https://www.reuters.com/legal/legalindustry/full-disclosure-traps-unwary-corporate-political-activity-disclosure-policies-2024-09-03)

Anita Bandy, Charles Ricciardelli, Olivia Marshall

FILE PHOTO: U.S. currency is seen in this picture illustration taken March 6, 2020.

REUTERS/Mike Segar/Illustration/File Photo - RC28I8A8BCD8 Purchase Licensing Rights

 , opens new tab

September 03, 2024 - Political spending by corporations has been a hot-button issue for decades, with scrutiny often intensifying in the aftermath of significant socio-political events. For example, we have observed such upticks following the North Carolina "Bathroom Bill" controversy in 2016, the Black Lives Matter movement in 2020, and January 6th, 2021.

For public companies, this scrutiny has often come in the form of shareholder proposals that would require greater transparency of, and impose certain restrictions on, their political activity. However, pressure has increasingly been exerted by other stakeholders as well, including employees, customers, and the media.

As the attention and pressure have ratcheted up over the years, many companies have responded with increased transparency. Often in response to shareholder proxy proposals that have been garnering more shareholder support, but also acting on their own initiative to preempt such proposals and respond to concerns of their employee and customer bases, more U.S. public companies now maintain websites publishing data about their political contributions, the criteria used to evaluate recipients, and the process by which they make and exercise oversight over those decisions.

In fact, according to the CPA-Zicklin Index of Corporate Political Disclosure and Accountability, which evaluates and gives scores to major companies based on the transparency and accountability of corporate political spending, the number of S&P 500 companies scoring in the Index's top tier has more than tripled since 2015; and a record high number of companies fully or partially disclosed their political spending or prohibited at least one type of spending in 2023 (78%). (2023 CPA-Zicklin Index of Corporate Political Disclosure and Accountability (Oct. 31, 2023), available here  , opens new tab:

While there have been calls from some quarters for years, particularly by ESG proponents, for the Securities and Exchange Commission to implement a regulatory requirement that companies disclose information about their political activity, the SEC has thus far been unable to implement such a rule. As a result, there is no affirmative legal duty imposed by the SEC to make this type of disclosure by public companies, whose securities are registered with the SEC, in their periodic reporting that is filed with the SEC.

However, if a public company chooses to voluntarily make disclosures relating to its political contributions, it must ensure those statements are accurate and there are sufficient internal disclosure controls in place to ensure as much. Failure in either of these areas risks the SEC taking enforcement action against the company. This is particularly important given the SEC's recent enforcement focus on ESG issues outside the realm of traditional financial reporting and performance accounting or disclosure violations.

For example, the SEC recently settled charges against a Florida-based health insurance company for making false statements to its investors that concealed extensive consumer complaints and gave misleading impressions that the company held its distributors to high compliance standards prohibiting them from making misrepresentations about the company's insurance products.

Among other findings, the SEC found that the company knew certain distributors were misrepresenting the scope of coverage provided by its health insurance products when it made these statements. Indeed, the SEC stated that "[a]ccess to healthcare and consumer satisfaction are increasingly important considerations to investors. It is critical that disclosures are truthful and complete, and we will hold companies and their executives accountable for misleading investors about these factors." Press Release, U.S. Securities and Exchange Commission, SEC Charges Tampa-Based Health Insurance Distributor and its Former CEO with Making False Statements to Investors (July 20, 2022), available here [\[link\]](#) , opens new tab.

If the SEC is willing to pursue cases related to disclosures regarding consumer satisfaction under the theory that investors increasingly care about them, it may not be much of a leap to think that it could be willing to pursue omissions or misstatements in political activity disclosures given demonstrated investor interest in these issues.

Moreover, the SEC has recently demonstrated a willingness to scrutinize statements outside of required SEC filings and other investor-facing statements, including those drafted by company officials who do not have SEC reporting responsibilities or expertise. For example, the SEC recently brought an enforcement action against software company SolarWinds that included a claim that statements on the company's customer-facing website materially misrepresented the strength of its cybersecurity program. SolarWinds argued that the statements were immaterial because the company's risk factor disclosures in an SEC filing specifically warned investors that cybersecurity incidents could occur despite the company's security measures.

While the U.S. District Court for the Southern District of New York recently dismissed the majority of the SEC's claims, it allowed the allegations regarding the website statements to proceed. This further highlights the risk of SEC action regarding political activity disclosures that are not required to be included in SEC filings but are published voluntarily or in agreement with shareholders on a company's website.

Potential sources of SEC enforcement risk in the political activity context

For companies subject to SEC regulation, these enforcement trends underscore the importance of taking steps to mitigate risk when publishing information regarding their political activity. One source of this risk could be from an omission or misstatement of the contributions a company has disclosed (or agreed to disclose) if deemed material. Under the *Basic v. Levinson* test, such an omission or misstatement would need to significantly alter the "total mix" of information available to investors in deciding whether to invest in order to be found material. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988).

While the inadvertent failure to disclose a small number of contributions is unlikely to be material, omitting a significant number or a significant dollar amount of contributions could rise to that level. Since the SEC looks to both qualitative and quantitative factors in assessing an item's materiality, omitting or mischaracterizing a certain category of contributions that the company had agreed to disclose could also be viewed as material, even if the number and value of such contributions were relatively small, if the SEC believes those contributions would be particularly relevant to investors' decisions.

Other qualitative factors could include anything from whether a particular disclosure or category of disclosures is the subject of analyst questions on earnings or investor calls to whether the type of disclosure at issue was the subject of activist proposals.

Additionally, the SEC could bring action against a company that publicly describes a process by which its contributions are evaluated, reviewed, and processed and then fails to strictly follow that process. If the SEC were to pursue a disclosure case against a company for not following its stated process, it would need to show the departure from the process was material.

However, the SEC could also pursue a controls case against a company that failed to follow its internal procedures that are supposed to be reasonably designed to meet its SEC reporting obligations under the theory that the departure represented a failure to maintain adequate controls necessary to comply with its stated policies and/or adequately track its political activity in order to make promised disclosures. Such a controls case does not require the SEC to demonstrate materiality, only that a deviation from procedures occurred.

Good deeds can go unpunished

As noted above, the figurative horse has departed the barn at this point on disclosure of at least some political activity. It would frankly be unrealistic for most companies that have already agreed to disclose their activity to try to walk these policies back. Further, as the Center for Political Accountability (and its aligned shareholders) seek to impact a wider group

of companies — having recently expanded their focus from the S&P 500 to the Russell 1000 — more companies are likely to join their ranks. All of this raises the obvious question: How can companies mitigate the risk created by these agreements to be more transparent?

As a threshold matter, it is essential for a company to carefully consider what information it agrees to disclose and ensure that all of the appropriate internal stakeholders participate in the decision-making process. Practically speaking, this will often mean bringing together the corporate secretary's office, legal and compliance, government relations, and investor relations to make sure they are all comfortable with and can live up to the proposed policies and resulting disclosures. Moreover, once the company decides what will be disclosed, it is important to implement a robust but practical set of procedures to ensure the company meets this obligation.

Finally, companies must resist the temptation to give these policies "fire and forget" treatment — they should be reviewed periodically, as well as any time there is a proposed change to the company's political giving strategy, to make sure they continue to reflect reality.

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Aug. 29, 2024, 11:50 AM PDT

iLearningEngines Shares Tumble as Hindenburg Says It's Short (2)

By Brandon Sapienza and Carmen Reinicke

Bloomberg Law News 2024-09-03T10:32:16375705943-04:00

iLearningEngines Shares Tumble as Hindenburg Says It's Short (2)

By Brandon Sapienza and Carmen Reinicke2024-08-29T14:50:55805-04:00

(Updates to add company response.)

Shares of iLearningEngines sink by as much as 60% to \$1.28 on Thursday, after Hindenburg Research said it was short the stock.

- iLearningEngines, which describes itself as an “Applied AI platform for learning and work automation,” went public in April through a combination with a special purpose acquisition company
- iLearningEngines said in a Thursday press release that it believes the report contains misleading statements

- [Read more: iLearningEngines Believes Report Contains Misleading Statements](#)

--With assistance from **Bre Bradham** and **Dawn McCarty**.

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Andrew Left Case Spooks Short Sellers to Add Research Warnings

By Erik Larson

- New language represents industry reaction to July indictment
- Hindenburg, Kerrisdale revise disclaimers in reports this week

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Andrew Left Case Spooks Short Sellers to Add Research Warnings

By Erik Larson2024-08-30T12:49:58012-04:00

- New language represents industry reaction to July indictment
- Hindenburg, Kerrisdale revise disclaimers in reports this week

Short sellers are beefing up disclaimers in their research reports in the clearest signal yet that last month's criminal charges against **Andrew Left** are reverberating through the industry.

Hindenburg Research and Kerrisdale Capital both upped warnings in reports this week in the wake of the charges against Left, who is accused of misleading investors by making quick trades after issuing his investment recommendations.

The new language shows that short sellers have long-term concerns about the impact of the Left case on an industry that critics say sometimes operates in legal gray areas. US authorities brought the charges against Left as part of a yearslong crackdown against traders who tout their bearish bets and can reap a profit if their predictions are right.

While Hindenburg made a small tweak to language about "derisking" in a legal disclaimer it includes at the bottom of its reports, Kerrisdale took the opportunity to blast the government's case. The firm said the charges had upended its belief that it was enough to issue truthful reports with disclaimers that made it clear they could make money from a stock falling — without a detailed explanation of their trading strategy.

"So in the absence of second-by-second trading updates and so that investors don't feel wronged that we may close out of a lot of a position very quickly after publishing, just assume that that is exactly what we'll do," Kerrisdale said in the fine print of a report Tuesday. "Then, you won't be, er, defrauded. Or something like that."

Kerrisdale and Hindenburg declined to comment on the changes. Neither firm has been accused of any wrongdoing.

Once one of the most active short sellers on Wall Street, Left, the founder of Citron Research, was charged in July with securities fraud and accused of generating about \$20 million in illicit profits. He pleaded not guilty in a federal court in Los Angeles.

Left, 54, allegedly exploited his ability to move stocks in almost two dozen companies, including American Airlines Group Inc. and Tesla Inc. Prosecutors say he misled investors with inflammatory tweets and "extreme" target prices in hopes of nudging a stock up or down just long enough to make his own trades. The US Securities and Exchange Commission filed a parallel civil case.



Andrew Left

Photographer: James Jackman/Bloomberg

Some short sellers say they are concerned that the government appears to have wildly misunderstood how the short-selling industry works. Among Left's key defenses are his own disclaimers.

Left's lawyer, James Spertus, said the charges will undermine traders who provide a valuable service by exposing companies that are overvalued as a result of accounting fraud or other hidden malfeasances.

'Truthful Information'

"The theory of the case is that the people who publish truthful information must also disclose their private trading intentions — that is going to cut off the flow of truthful information to the markets," Spertus said in an interview.

The cases against Left stem from a wide-ranging US effort to examine relationships between hedge funds and skeptical researchers. The probes have rattled the industry for three years as investigators have sought information on dozens of money managers and activists, as well as transactions involving more than 50 stocks.

Read More: Super Micro Tumbles as Hindenburg Takes Aim With Short Report

The case will at least make short sellers more cautious about some issues, including price targets, "because there's an indictment out there," said **Kir Kahlon**, founder and chief investment officer at Scorpion Capital. He doesn't predict a chilling effect from the case, per se, as much of the indictment is specific to Left's alleged conduct and doesn't target short selling itself.

"The indictment makes no allegations about the practice of price targets or short selling," Kahlon said. "They are just going after false statements, that's it."

Ivan Cosovic, the founder of a data firm that tracks activist short sellers' campaigns, said that so far this year, the number of new short reports is on par with last year and it might be too soon to see an effect on the industry.

"The true impact of the Citron-SEC situation on publishing strategy of activist short sellers might only become apparent in the coming months," said Cosovic, founder of Breakout Point, based in Dusseldorf, Germany.

Tweets, Statements

The Left indictment stitches together his tweets and other public statements with confidential electronic communications to show what prosecutors describe as intentional efforts to move stock prices and mislead investors.

Left's trading around price targets is just part of the case. The indictment also alleges he hid Citron's financial relationships with a hedge fund, even fabricating invoices and wiring payments through a third party to conceal his profit.

Spertus said Left posted a disclaimer on his website saying no one should make assumptions about his trading. And, he said, Left's predictions about companies were accurate.

"Prices don't always move toward the target in a linear way and it could take a year or two before the target is reached," Spertus said. "The idea that someone has to hold on until their target price is reached or disclose their own trading intentions — that's just going to stop the flow of information to the market."

--With assistance from **Carmen Reinicke**, **Bailey Lipschultz** and **Hema Parmar**.

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McKesson, Others To Pay Benefit Plans \$300M In Opioid Deal

By **Lauren Berg**

Law360 (August 30, 2024, 10:09 PM EDT) -- McKesson Corp., Cardinal Health Inc. and Cencora Inc. have agreed to pay a group of benefit plans a combined \$300 million to resolve allegations that the drug distributors fanned the flames of the opioid epidemic, according to a filing Friday in Ohio federal court.



A lawsuit over the opioid epidemic has come to a close after McKesson Corp., Cardinal Health Inc. and Cencora Inc. agreed to provide a \$300 million settlement fund meant to compensate the class members for their costs in paying for opioids and the treatment of people with substance use disorder (Press Association via AP Images)

In a **motion** for preliminary approval, the private benefit plans — referred to in the litigation as third-party payor plaintiffs — told the court that the three companies together will provide a \$300 million settlement fund, which will be used to compensate the class members for their costs in paying for opioids and the treatment of people with substance use disorder.

"These cases are the definition of complex; this settlement avoids the clear obstacles present in litigating and trying these cases, and it assures that TPP plaintiffs timely receive compensation only several years after filing," the motion said.

"While TPP plaintiffs believe their case is a strong one, almost all class actions involve a high level of risk, expense and complexity, which is at least in part why judicial policy so strongly favors resolving class actions through settlement," it said.

The parties had been in settlement talks on and off since 2022 and in May filed a motion to sever and stay the TPPs' individual cases in order to get the settlement negotiations down in writing.

Under the settlement, McKesson, Cardinal and Cencora are not admitting liability or wrongdoing, and they will be released from the TPPs' claims that they have spent billions of dollars on their members' opioid prescriptions and resulting medical care.

Per the agreement attached to the motion, McKesson will pay 38.1% of the \$300 million settlement, Cencora will pay 31% and Cardinal 30.9%. The obligations are several and not joint, according to the agreement, meaning each defendant company is liable only for its own financial commitment and not the commitments of the other defendants.

The TPPs' counsel plan to seek no more than 20% of the settlement fund in attorney fees, according to the motion, which noted that the TPP settlement class representatives and their attorneys have "vigorously pursued this litigation since 2017."

"Proposed settlement class counsel have prosecuted this action and its fair resolution with vigor and dedication since filing their clients' complaints and have fought hard to protect the interests of the class," the motion said. "Proposed settlement class counsel undertook significant efforts to uncover the facts to prosecute and refine the class claims."

The TPP plaintiffs' cases are a small part of the multidistrict litigation that originally consisted of thousands of lawsuits filed by cities and counties, Native American tribes and health care providers.

The MDL plaintiffs allege that "opioid manufacturers, distributors and opioid-dispensing pharmacies acted in concert to aggressively market prescription opioids and to flood the country with inordinate quantities of opioids, in order to vastly increase their profits, misleading medical professionals into prescribing ... a massive oversupply of a dangerous controlled substance," the motion said.

The TPPs argued that the settlement's benefits are "impressive given the inherent uncertainties of continued litigation," and that even if they eventually achieved a successful judgment, the years of delay would only further injure the plaintiffs and class members.

"While the human toll on communities and families is incalculable, it was third party payors, like union health and welfare funds, that largely shouldered the economic brunt of the epidemic, paying for overprescribed and overmarketed pills and for treatment that followed when plan beneficiaries suffered opioid use disorder," Paul J. Geller of Robbins Geller Rudman & Dowd LLP, an attorney for the TPP plaintiffs, told Law360 on Friday.

Counsel for the defendants did not immediately respond to requests for comment Friday evening.

In another corner of the MDL, U.S. District Judge Dan Aaron Polster **last week 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.

Last month, **the judge denied several law firms' requests** to amend the share of legal fees they received from the \$2.13 billion pool. Motley Rice LLC was allocated the biggest slice of the pie, at **18.6% or about \$396 million**.

The third party payors are represented by Paul J. Geller and Mark J. Dearman of Robbins Geller Rudman & Dowd LLP, Elizabeth J. Cabraser and Eric B. Fastiff of Lief Cabraser Heimann & Bernstein LLP, Peter H. Weinberger of Spangenberg Shibley & Liber, Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC and Paul T. Farrell Jr. of Farrell & Fuller LLC.

Cardinal is represented by Enu A. Mainigi, Jennifer G. Wicht, Steven Pyser and Ashley Hardin of Williams & Connolly LLP.

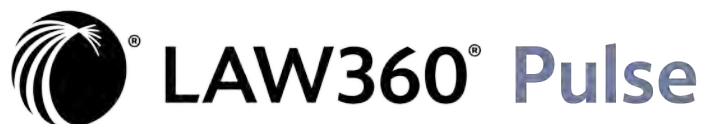
Cencora is represented by Robert A. Nicholas, Shannon E. McClure, Joseph J. Mahady and Anne Rollins Bohnet of Reed Smith LLP.

McKesson is represented by Geoffrey E. Hobart, Timothy C. Hester and Christian J. Pistilli of Covington & Burling LLP.

The case is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Hailey Konnath and Emily Field. Editing by Brian Baresch.

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Memo Ties FirstEnergy's CLO, Ethics Chief To Bribery Scheme

By Sue Reisinger

Law360 (August 29, 2024, 4:48 PM EDT) -- A recently released legal memo states FirstEnergy Corp.'s then-chief legal officer and its then-general counsel and chief ethics officer knew about and failed to disclose a questionable \$4.3 million payment the company later admitted was a bribe to a top Ohio regulator.

The corporate document, prepared by other FirstEnergy executives more than three years ago, is the first public explanation for why Robert Reffner, then the **chief legal officer**, and Ebony L. Yeboah-Amankwah, then general counsel and ethics chief, were "separated from the company [in November 2020] due to inaction and conduct that was influenced by the improper tone at the top, as determined by the independent committee of the board of directors."

The memo, dated Nov. 6, 2020, was released last week, days after FirstEnergy secured a **nonprosecution agreement** with the Ohio attorney general's office on Aug. 12. The agreement stems from an alleged \$1 billion bribery scandal that has sent the former speaker of the Ohio House of Representatives to prison for 20 years.

The two former executives have not been charged with any wrongdoing and apparently were following their supervisor's directions. They have not responded to previous media inquiries and could not be reached for comment Thursday.

Reffner lists himself on LinkedIn as a self-employed legal and management consultant. Yeboah-Amankwah is now vice president for ethics, compliance and enterprise risk management at Signet Jewelers in Ohio, according to her LinkedIn profile.

Ohio brought its action after Akron-based FirstEnergy entered into a deferred prosecution agreement with the U.S. Department of Justice in July 2021, agreeing to pay a **\$230 million fine** to settle criminal charges over its role in the bribery scheme.

Two executives and one regulator also were criminally charged. Cases against former FirstEnergy CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling are ongoing. Ohio Public Utilities Chair Sam Randazzo **died by suicide** in April after being charged in the bribery scheme.

The newly released memo was written by Jason Lisowski, FirstEnergy's current chief accounting officer, and Kevin Burgess, vice president for risk and internal audit. It is marked "attorneys eyes only confidential" and labeled "RE: Tone at the Top Control Deficiency (Material Weakness)"

The purpose of the memo, it states, "is to review the existing FirstEnergy controls that failed to determine the type of control deficiency that occurred, and the severity of the deficiency."

The Ohio Consumers Counsel released the memo with other documents, including depositions, from a



Robert P. Reffner



Ebony L. Yeboah-Amankwah

lawsuit investors filed against FirstEnergy. The company paid **\$180 million** to settle the derivative suit in 2022, according to public documents. Reffner was one of the named plaintiffs.

Documents show Dowling, Reffner and Yeboah-Amankwah met with Lisowski about making the payout to Randazzo, without indicating there was no true legal reason for the payment. According to the indictment, Randazzo used the money and his own influence to induce the Ohio Legislature and the then-speaker of the House to pass a \$1.3 billion rebate bill for FirstEnergy.

The just-released memo specifically lists several items referring to Reffner and Yeboah-Amankwah.

"The SVP, chief legal officer and VP, general counsel and chief ethics officer were responsible for approving certain legal-related reserves in our financial statements," it states. The memo then again discusses the lack of proper tone at the top, especially regarding integrity and ethics.

"As a result, there is a deficiency in the operation of certain entity-level controls such that management or employees in the normal course of performing their assigned functions may not be able to prevent or detect misstatements in a timely basis," it states.

It also notes the invoice submitted to Reffner for approval, processing and payment was divided into three separate payments "in order to keep the amounts under the approved level of signing authority for the executive."

It then singles out Yeboah-Amankwah, saying, "The chief ethics officer did not perform her responsibilities to perform due diligence and raise a questionable payment to a higher level as a result of pressure from above."

The memo then discusses disclosure failures in financial certifications in the second quarter of 2020. "The former SVP, chief legal officer and the former VP, general counsel and chief ethics officer signed [Sarbanes Oxley Act] certifications that did not disclose their awareness of and prior approval of certain payments related to the investigation," it states.

Their lack of disclosure led the company to file its quarterly report with the U.S. Securities and Exchange Commission stating that an internal review "found no evidence of a known violation of law," the memo says.

The memo notes that when the questionable payment was discovered during the third quarter of 2020, three executives, including Jones and Dowling, were dismissed in October, and the two top legal chiefs **were "separated"** in November of that year.

Upon his separation, the company filed securities documents that showed Reffner, who was a named executive officer, lost some stock benefits and saw others reduced to zero, while he did not receive any severance payment, all due to the nature of his separation. There was no information filed about the departure of Yeboah-Amankwah, who was not a named executive officer.

The former executives' conduct "was undetected in a timely manner," the memo states, "in part because of a lack in the tone at the top in setting the appropriate expectations of following company policies as well as abiding to FirstEnergy's code of conduct, which includes acting with integrity and ethics."

--Editing by Lakshna Mehta.



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Chancery Prunes \$2.1M From Atty Fee Bid In Sculptor Merger

By **Jeff Montgomery**

Law360 (August 30, 2024, 10:16 PM EDT) -- Class attorneys who helped secure a 14.4%, or \$80.8 million, improvement in proceeds from Sculptor Capital Management's sale to Rithm Capital Corp. — plus a \$6.5 million common fund — saw their \$5.75 million fee proposal cut to \$3.6 million in Delaware's Court of Chancery Friday.

Vice Chancellor Sam Glasscock III's ciphering wound up a nearly year-long battle over the company sale, which closed in November, marked in part by alleged disclosure failures and tilting of the deal toward Rithm.

Concerns arose early in the process that board members were snubbing a better price from a consortium of hedge fund managers led by Saba Capital Management LP and its founder, Boaz Weinstein.

On Friday, the vice chancellor acknowledged the complexities but discounted compensable class attorney roles in some gains from the litigation. He concluded in part that class counsel should get \$1,939,200 for their work in securing an extra \$1.55 per share for the deal, down from a "not less than" \$4 million request.

"Considering the timing of the efforts of plaintiff, relative to each individual price increase, the market forces at play, and the other parties involved, I conclude that plaintiff's litigation contributed 12% to attaining the transaction price increases," the vice chancellor wrote.

The final value per share for the deal rose from \$11.15 to \$12.70 during the course of the litigation.

Vice Chancellor Glasscock, however, found that more than half the increase occurred before the suit was expedited or documents released, with class attorneys seen as "not substantially" contributing to the first of two price increases.

The second increase followed in part negotiations in October 2023 involving Sculptor founder Daniel S. Och and several of the company's original officers and directors, who collectively held 15.2% of the company's voting stock and filed a second class action.

The founder group suit was eventually consolidated with a suit led by shareholder plaintiff Gilles Beauchemin.

Vice Chancellor Glasscock cited in his decision indications that the founder group negotiated the second part of the settlement.

"That is not to say this litigation and plaintiff's efforts in prosecuting it did not contribute at all to the second transaction price increase," the vice chancellor wrote. "Rather, the record and plaintiff's professed lack of knowledge of these negotiations demonstrate that plaintiff's litigation was not the primary cause" of the second increase.

Counsel for Beauchemin and the class argued that the \$5.6 million request was a reasonable, "indeed conservative," request.

The counsel brief pointed to the substantial benefits gained, "particularly juxtaposed against the

\$5,500,000 payment for legal fees the Founders received from the other defendants (along with other non-ratable benefits) despite their having parachuted into the action late and bailed out early," the class attorney brief said.

Separately, the attorney brief branded Rithm's alternative proposal of a less-than \$270,000 fee for the deal price increase and supplemental disclosures as unreasonable.

Sculptor has been described as "a leading global alternative asset manager and a specialist in opportunistic investing."

Rithm is an asset manager focused on the real estate and financial services industries. Its other operating entities include businesses held through its wholly owned subsidiaries — Newrez LLC, Caliber Home Loans Inc. and Genesis Capital LLC — although it also invests in affiliated businesses that provide residential and commercial real estate related services.

Beauchemin is represented by Ned Weinberger, Michael C. Wagner, Casimir O. Szustak, John Vielandi, Nina Varindani and Joshua M. Glasser of Labaton Sucharow LLP, Jeremy S. Friedman and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC, Joseph L. Christensen, Meghan D. Dougherty and Michael D. Bell of Christensen & Dougherty LLP, D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC and David L. Wales and Adam Warden of Saxena White PA.

Sculptor and directors Bharath Srikrishnan, David Bonanno, James Levin and Wayne Cohen are represented by Brock E. Czeschin, Matthew D. Perri, Kevin M. Kidwell and Mari Boyle of Richards Layton & Finger PA and Michael B. Carlinsky, Jonathan E. Pickhardt, Jesse Bernstein, Brendan T. Carroll, Mario O. Gazzola and Christine J. Chen of Quinn Emanuel Urquhart & Sullivan LLP.

Founder group members Och, Harold Kelly Jr., Richard Lyon, James O'Connor and Zoltan Varga are represented by A. Thompson Baylis, Matthew L. Miller, Christopher F. Cannataro and Florentina D. Field of Abrams & Baylis LLP and Andrew J. Levander, Steven A. Engel, Ryan Strong, Julia Markham-Cameron, Richard S. Horvath, Taylor Jaszewski and Christopher J. Merken of Dechert LLP.

The Sculptor Capital Special Committee is represented by David E. Ross and Roger S. Stronach of Ross Aronstam & Moritz LLP and James E. Brandt, Blair G. Connelly, Thomas J. Giblin and Zachary L. Rowen of Latham & Watkins LLP.

Rithm is represented by Edward B. Micheletti, Scott D. Musoff, Patrick G. Rideout, Arthur R. Bookout, Kamali P. Willett, Matthew P. Majarian and Peyton V. Carper of Skadden Arps Slate Meagher & Flom LLP.

The case is Gilles Beauchemin v. Marcy Engel et al., case number 2023-0921, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Jade Martinez-Pogue, Isaac Monterose and Dorothy Atkins. Editing by Dave Trumbore.



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Starbucks Overpromised On 'Reinvention' Plan, Investor Says

By **Emilie Ruscoe**

Law360 (August 29, 2024, 9:57 PM EDT) -- Coffee chain Starbucks faces a proposed investor class action alleging it misled the markets about prospects for its so-called Triple Shot Reinvention strategy, hurting investors after trading prices for its shares slid when it announced disappointing quarterly results in April 2024.

In a complaint filed Wednesday in Seattle federal court, plaintiff Charles Garbaccio took aim at Starbucks and two of its executives with claims the company overpromised about its "Triple Shot Reinvention with Two Pumps" plan to elevate the brand.

On a November 2023 investor call, Garbaccio claimed, Starbucks brass "touted the company's reinvention [plan] and confidence in the business's overall momentum" while minimizing risks associated with the expansion in markets outside the U.S. that was part of the plan.

Specifically, Garbaccio referenced the company's November expectation that it would see global comparable sales growth in the 5% to 7% range during its 2024 fiscal year.

"As we enter the current year, in the face of macro uncertainty, we remain confident in the momentum throughout our business and headroom globally. We expect sustained momentum throughout the company for years to come," Starbucks CEO Laxman Narasimhan said in November 2023, according to the complaint.

In April, Garbaccio said, Starbucks announced its financial results for the second quarter of its current fiscal year, telling investors that its sales in its stores declined globally by 4%, customer traffic fell by 7% and its revenues fell 2% to \$8.6 billion.

The April announcement also included lowered financial guidance for the rest of the fiscal year, with Starbucks partly attributing the results to its struggles to gain a greater foothold in China's competitive coffee shop market.

Garbaccio said the April news precipitated a 15% decline in trading prices for Starbucks shares from \$88 to \$74.

The proposed class would include those who purchased Starbucks shares between Nov. 2, 2023, and April 30, 2024.

On Thursday, a spokesperson for Starbucks told Law360, "The allegations in the complaint are without merit. Starbucks takes great care in communicating transparently and authentically with its stakeholders, including its investors, partners, customers, and community."

Representatives for Garbaccio did not immediately respond to requests for comment Thursday.

Garbaccio is represented by Adam M. Apton of Levi & Korsinsky LLP and Roger Townsend of Breskin Johnson Townsend PLLC.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Garbaccio v. Starbucks Corp. et al., case number 2:24-cv-01362, in the U.S. District

Court for the Western District of Washington.

--Editing by Jay Jackson Jr.

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Semiconductor Co. Beats Investor Suit Over Failed \$8B Merger

By Sarah Jarvis

Law360 (August 30, 2024, 8:24 PM EDT) -- A California federal judge has dismissed a proposed investor class action filed over semiconductor company MaxLinear Inc.'s decision to cancel a planned \$8 billion merger with Silicon Motion Technology Corp., finding investors' claims against the former can't stand because they held shares in the latter.

U.S. District Judge Cathy Ann Bencivengo **said in an order** Wednesday that during the class period, the proposed class did not hold stock in Carlsbad, California-based MaxLinear, the company about which the alleged misrepresentations were made. Therefore, the judge found, the proposed class does not have standing under the so-called purchaser-seller rule, which hinges statutory standing on whether a security is "sufficiently connected to a misstatement."

That rule was spelled out in the 2022 Second Circuit case [Menora Mivtachim Insurance Ltd. v. Frutarom Industries Ltd.](#) While Judge Bencivengo noted the parties in the current suit had previously agreed that strict satisfaction of the purchaser-seller rule was not a requirement for Ninth Circuit litigants, she pointed to a Ninth Circuit case from August that aligned more with the Second Circuit.

That Ninth Circuit case, [In re: CCIV / Lucid Motors Securities Litigation](#), adopted the rule even though it may prevent some deserving plaintiffs from securing damages, the judge noted.

"Although there appears [to] be a significant connection between the shares of a target and the merger-related statements of its acquirer, the Ninth Circuit has set a bright-line rule that the 'security' at issue must be one about which the alleged misrepresentations were made," Judge Bencivengo said.

Investor Water Island Event-Driven Fund filed suit in August 2023, and later that year, a group of private investment funds — the Westchester Funds, Alpine Funds, Atlas Fund and Kryger Funds — was appointed lead plaintiff.

The investors alleged in their suit that MaxLinear CEO Kishore Seendripu and Chief Financial Officer Steven Litchfield — who are also named as defendants — made, approved or adopted false statements that artificially inflated the share price of Silicon Motion Technology Corp., or SIMO. The lead plaintiffs sought to represent a class of investors who purchased SIMO shares from June 6, 2023, through July 26, 2023.

According to court documents, MaxLinear and SIMO, a Taiwan-based chip manufacturer, announced the terms of their **planned acquisition** in May 2022. The \$3.8 billion acquisition would have given the combined company a value of \$8 billion.

The investors alleged that in June 2023, Seendripu indicated at a conference that MaxLinear was very bullish and that SIMO was a strategic asset for MaxLinear.

Later that month, MaxLinear indicated in a financial filing it had "re-filed" for merger clearance, but the investors alleged the company actually had no intention of completing the merger at that point, due to a downturn in its finances and an increase in the costs of financing.

China's State Administration for Market Regulation granted regulatory approval for the merger on

July 26, 2023, and the same day, MaxLinear announced the deal had been terminated. The following day, SIMO **slammed** MaxLinear's "eleventh-hour" termination, and the chip manufacturer subsequently **issued a letter** to MaxLinear indicating it would hold the latter liable for damages.

In Wednesday's order, Judge Bencivengo said the key issue for standing centered on whether the alleged misrepresentations were made about SIMO.

"The court finds they were not," the judge said. "The identified statements amount to MaxLinear's evaluation of the benefits of the merger and MaxLinear's continued commitment to the merger's success as reflected in MaxLinear's own regulatory filing."

The judge gave the investors until Sept. 18 to file an amended complaint.

Counsel for the parties didn't respond to requests for comment Friday.

MaxLinear is represented by Jordan D. Eth, Christin Hill and Hanna M. Lauritzen of Morrison Foerster LLP.

The lead plaintiffs are represented by David R. Kaplan, Marti L. Worms, Emily R. Bishop, Steven B. Singer, David J. Schwartz, Joshua H. Saltzman, Joseph E. White III, Lester R. Hooker and Jonathan D. Lamet of Saxena White PA, and Andrew J. Entwistle, Vincent R. Cappucci, Robert N. Cappucci, Jonathan H. Beemer and Jessica A. Margulis of Entwistle & Cappucci LLP.

The case is Water Island Event-Driven Fund v. MaxLinear Inc. et al., case number 3:23-cv-01607, in the U.S. District Court for the Southern District of California.

--Additional reporting by Jade Martinez-Pogue. Editing by Lakshna Mehta.



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Tesla, Elon Musk Beat Dogecoin Buyers' Fraud Suit, For Good

By **Lauren Berg**

Law360 (August 29, 2024, 10:59 PM EDT) -- A New York federal judge on Thursday for the final time threw out a contentious lawsuit brought by Dogecoin investors accusing Elon Musk of manipulating the market so that he and Tesla could turn a profit on the meme-themed cryptocurrency.

U.S. District Judge Alvin K. Hellerstein, in a brief **order**, dismissed with prejudice the fourth amended complaint brought by the group of investors, rejecting their contention that Musk's statements on Twitter about the joke cryptocurrency — including that Dogecoin is the "future currency of Earth" and that Tesla vehicles might be bought with Dogecoin — are false and misleading.

"These statements are aspirational and puffery, not factual and susceptible to being falsified," Judge Hellerstein wrote, adding that "no reasonable investor could reply upon them."

What's more, the judge determined that "it is not possible to understand the allegations that form the basis of" the investors' claims of market manipulation, a "pump and dump" scheme or a breach of fiduciary duty amounting to insider trading, according to the order.

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

Dogecoin buyer Keith Johnson **first sued** Musk, Tesla and SpaceX for \$258 billion in June 2022, alleging that they orchestrated a pyramid scheme by hyping the joke cryptocurrency, which then plunged in value.

Johnson alleged that Musk — the self-proclaimed "Dogefather" — and his two companies engaged in an "illegal wire fraud enterprise," an illegal gambling business, common-law fraud and false advertising, among other allegations.

Johnson pointed out that Dogecoin, a digital asset with a Shiba Inu dog as its mascot, is not backed by other assets and isn't tied to a money-making enterprise that would give it value. The token was created as a joke in 2013, but skyrocketed in value in 2021.

The token is "simply a fraud whereby 'greater fools' are deceived into buying the coin at a higher price," the initial complaint alleged.

The complaint was first amended in September 2022 to add other Dogecoin investor plaintiffs, before it was again amended in December 2022 to drop some defendants, including SpaceX, court records show.

At the end of March 2023, Tesla and Musk moved to dismiss the second amended complaint, arguing that it doesn't articulate any allegedly false or misleading statements. The defendants argued no securities laws were broken when Musk posted "**innocuous and often silly tweets**" about Dogecoin.

"The complaint is a fanciful work of fiction that fails to state any actionable claim against defendants Elon Musk and Tesla, and must be dismissed in its entirety with prejudice," the defendants said. "[T]here is nothing unlawful about tweeting words of support for, or funny pictures about, a legitimate cryptocurrency that continues to hold a market cap of nearly \$10 billion."

When the investors filed their **third amended complaint** in June 2023, they added a claim of insider trading against Musk, saying new evidence had come to light that would bolster their claims that Musk's messaging and activity around the crypto amounted to market manipulation.

Not long after, the investors **asked the court to disqualify** Quinn Emanuel Urquhart & Sullivan LLP from representing Tesla and Musk in the case, accusing lead attorney Alex Spiro of leaking "an extraordinary letter" he sent to the investors' attorney to the New York Post.

That letter called the latest version of the complaint frivolous "with zero factual support" and attacked class counsel Evan Spencer's integrity by saying that "no competent attorney could form a reasonable belief that the third amended complaint is well-grounded in fact," according to the filing.

But Quinn Emanuel **threw a counterpunch** in July 2023, saying Spencer should be sanctioned for his disqualification motion — which the firm called a "fanciful work of fiction" in its opposition brief.

A month later, Tesla and Musk **moved to dismiss** the latest iteration of the suit, arguing that the investors still hadn't shown that Musk's "innocuous and often silly tweets" about the meme-themed cryptocurrency were intended to manipulate the market.

Judge Hellerstein in December then **ordered a reset** in the lawsuit, dismissing the suit with instructions to refile it in a way that does not "mix the function of a complaint" and a "press release," and denying both sides' requests to disqualify one another's attorneys.

The investors filed their fourth amended complaint in January and Musk and Tesla filed the current motion to dismiss in March, according to court records.

The investors are represented by Evan Spencer of Evan Spencer Law PLLC.

Musk and Tesla are represented by Alex Spiro, Sarah Heaton Concannon and Brenna Nelinson of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Colby Gorog et al. v. Elon Musk et al., case number 1:22-cv-05037, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Aislinn Keely, Ivan Moreno and Ryan Boysen. Editing by Michael Watanabe.



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Class Attys Seek Chancery Doc Sanctions In Santander Suit

By **Jeff Montgomery**

Law360 (August 29, 2024, 6:41 PM EDT) -- An attorney for Santander Consumer USA Holdings Inc. stockholders urged a Delaware vice chancellor Thursday to exercise the court's "common law" document retention enforcer role during arguments for sanctions against the big auto lender's board, controller and parent for deleting messages before a \$2.5 billion minority squeeze-out merger.

Edward Timlin of Bernstein Litowitz Berger & Grossmann LLP, counsel to a proposed SCUSA stockholder class, told Vice Chancellor Lori W. Will that the company's exclusive reliance on the Signal messaging app — and its optional, thorough auto-delete functions — for top-level communications about the deal warranted an adverse inference regarding alleged spoliation of records sought for a stockholder challenge to the deal and price.

"We intend to show that SCUSA shares were worth significantly more" than the \$41.50 paid in the deal, and "as much as \$45 to \$49 standing alone and into the \$60s with an empirically supported valuation of synergies," Timlin said.

Class investigations, however, were allegedly hampered by the company's acknowledged use of Signal's auto-delete features for top executive communications about the deal.

The class suit accused SCUSA's board of setting up a tender offer that had no minimum requirement for approval, and that was completed with less than 30% of stockholders tendering their shares in favor of the \$41.50 per-share price.

Timlin said top executives with Santander Holdings USA Inc., SCUSA's controlling shareholder, believed that the lender's recent positive performance — buoyed by COVID-related economic circumstances tied to reduced lender defaults and rising prices for used cars — would make any minority buyout through a regular process and arms-length negotiations too costly.

Instead, the class suit accused Holdings of choosing a "coercive" transaction structure that "ensured the deal would close even if every last minority stockholder opposed the acquisition, rendering irrelevant the decision of whether or not to tender."

"What the defendant did was roll the dice on this litigation," Timlin said. "They took a market-based solution and turned it into a problem for the court."

Since the deal closed in January 2022, class attorneys argued in an amended complaint filed in May, controller SHUSA has received \$6.3 billion in distributions, more than half the implied value of the company in the squeeze-out. In the absence of the merger, \$1.23 billion would have gone to minority shareholders.

The record, Timlin said, "suggests a reasonable anticipation of litigation from the moment buyers began to seriously consider a squeeze-out," in a process that "disavowed" a need for review by an independent special committee and approval by a majority of minority, independent shareholders.

Asked by Vice Chancellor Will if a company triggered a duty to preserve records any time it contemplated a squeeze-out without majority of the minority protections, Timlin said the facts and circumstances would determine the response.

"Is that imminent litigation?" the vice chancellor asked.

Timlin said the trigger did not mean litigation in a specific number of days, but added, "It's our position that a reasonable person standing in SHUSA's shoes would have reasonably anticipated litigation" early on.

Ryan A. McCloud of Wachtell Lipton Rosen & Katz, counsel for SCUSA's directors, SHUSA and their parent, Spain-based Banco Santander SA, said the suit failed to show that the message deletions violated a duty to preserve.

"Plaintiff seeks an adverse inference not because any one defendant took steps to actively destroy materials, rather, that some folks followed a company policy" requiring use of Signal, McCloud said. He noted that the controller completed the squeeze-out "at the top of the market, not at the bottom," and said litigation in squeeze-outs is not unusual.

"The truth, whether good or bad, is minority squeeze-outs generally attract litigation," McCloud said, arguing that the suit had not identified "anything specific regarding this transaction that would make litigation imminent or more likely than average" or triggered document retention alarms.

At some point during the long history of the merger plan, which became known as Project Max, McCloud said, BSSA Chair Ana Botin created a policy requiring use of Signal for some communications. He noted that "ephemeral," impermanent messaging apps are more commonly used by company policy in Europe.

"Fiduciaries are unquestionably allowed to speak to one another in unrecorded conversations," McCloud told the vice chancellor. "No company on Earth conducts all of its business merely through verbal communications."

The vice chancellor said she would consider the arguments ahead of a five-day trial now slated to begin on Sept. 16. A pretrial conference is scheduled for Sept. 9.

The shareholders are represented by Gregory V. Varallo, Glenn R. McGillivray, Daniel E. Meyer, Mark Lebovitch, Jeroen van Kwawegen and Edward Timlin of Bernstein Litowitz Berger & Grossmann LLP, Kimberly A. Evans, Jason M. Leviton, Joel A. Fleming and Amanda Crawford of Block & Leviton LLP and Lee D. Rudy, Eric L. Zagar, Kevin E.T. Cunningham Jr. and Karen Kam of Kessler Topaz Meltzer & Check LLP.

Counsel information for the Santander Holdings and Santander Consumer's directors wasn't immediately available.

The consolidated case is In re: Santander Consumer USA Holdings Inc. Stockholders Litigation, case number 2022-0689, in the Court of Chancery of the State of Delaware.

Santander Consumer USA Holdings Inc., its controller and parent are represented by Garret B. Moritz, Thomas C. Mandracchia, and Dylan T. Mockensturm of Ross Aronstam & Moritz LLP and Ryan A. McLeod, Iliria Camaj and Emma S. Stein of Wachtell Lipton Rosen & Katz.

The consolidated case is In re: Santander Consumer USA Holdings Inc. Stockholders Litigation, case number 2022-0689, in the Court of Chancery of the State of Delaware.

--Editing by Marygrace Anderson.



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Door-Maker Demands \$10M In Excess Insurance At 4th Circ.

By **Elizabeth Daley**

Law360 (August 30, 2024, 6:03 PM EDT) -- A door manufacturer pressed the Fourth Circuit to force an insurer to hand over \$10 million in excess coverage in connection with a \$39.5 million shareholder settlement over alleged lies to investors, arguing Friday that the matter was unrelated to other litigation and counts as a separate claim.

In its **brief**, Jeld-Wen Holding Inc. said Travelers Casualty and Surety Co. of America owes it for a securities claim that four other insurers in its \$90 million tower of directors and officers' coverage had already determined was payable. The 2021 settlement along with more than \$10 million in defense costs exceeded \$50 million, exhausting Travelers' fourth-layer \$10 million excess coverage, Jeld-Wen explained.

The manufacturer said its other four prior-layer insurers had each paid \$10 million for the claim, noting that Travelers made itself the "lone outlier" in deciding the securities litigation was excluded from coverage.

Travelers had argued that the securities dispute "should be deemed the same claim as antitrust allegations asserted years earlier" by different classes of people who bought Jeld-Wen's products, the door maker said.

In April 2021, just one day before Jeld-Wen settled the securities dispute, Travelers filed a North Carolina federal complaint seeking a declaration that it owed no coverage for the matter under its policy.

A North Carolina federal court sided with the insurer **in 2022**, agreeing with Travelers' assertions that a preceding-claim exclusion applied since the securities claims relate back to antitrust actions that commenced before the policy's inception.

Jeld-Wen urged the Fourth Circuit to correct the federal court's erroneous finding, calling the securities claims and antitrust claims "nothing alike."

Jeld-Wen and Masonite Corp. were accused in the antitrust class actions of conspiring to restrain trade by fixing prices on interior molded doors. In another action, Steves & Sons Inc., another manufacturer of interior molded doors, claimed Jeld-Wen's 2012 merger with CraftMaster Inc. "substantially lessened competition and economically harmed Steves."

In the securities litigation, shareholders alleged Jeld-Wen and some of its officers and directors "made false and misleading statements on earnings calls and in SEC filings that misrepresented the financial success of the company," the door-maker said.

Jeld-Wen said all of these various claims "involve completely different wrongful acts and are asserted by mutually exclusive categories of claimants." It added that "the alleged wrongful acts occurred at different times" and "involved different alleged injuries" and "different alleged damages redressed by different federal regulatory regimes."

As a result, the door manufacturer argued the various claims "cannot fairly be deemed one and the same claim such that Travelers is absolved of its express promise to cover securities claims." Jeld-Wen also paid the costs of the Steves and Masonite-related litigation itself, according to its brief.

The company offered the court numerous ways to decide in its favor, writing that the Fourth Circuit could find the claims were all clearly unrelated or view the policy's exclusion as ambiguous. The court could even apply a "multifactor test" that Jeld-Wen said other courts had used "to conclude that the exclusionary language does not and cannot apply to the securities claim."

Jeld-Wen said the law is on its side and the district court's ruling was "not supported by the record."

Representatives of the parties did not immediately respond to requests for comments on Friday.

Travelers is represented by Thomas J. Judge Jr. and Jason Christopher Reichlyn of Dykema Gossett PLLC.

Jeld-Wen et al., are represented by R. Steven DeGeorge and Erik R. Zimmerman of Robinson Bradshaw & Hinson PA and by Michael E. Farnell and Benton Parker Jones of Paternoster Farnell & Grein LLP.

The case is Travelers Casualty and Surety Co. v. Jeld-Wen Holding Inc. et al., case number 24-1468, in the Fourth Circuit Court of Appeals.

--Editing by Amy Rowe.

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3M Swept 'Forever Chemicals' Under The Rug, Buyers Say

By **Lauren Berg**

Law360 (August 30, 2024, 10:04 PM EDT) -- 3M Co. and two chemical companies sold stain- and dirt-repellents made with so-called forever chemicals to carpet manufacturers without disclosing the health risks posed by the chemicals, which were then installed in millions of homes and businesses, according to a proposed consumer class action filed Friday in Minnesota federal court.

Per- and polyfluoroalkyl substances, or PFAS, can cause a host of health problems and are referred to as forever chemicals because of their environmental tenacity, but those facts didn't stop 3M, EIDP Inc. — formerly known as E.I. du Pont de Nemours & Co. — and The Chemours Co. from selling the substances to carpet manufacturers, according to the 355-page **complaint** filed by Vicki Peterson and Paul Sadeghi.

The defendants "never disclosed to the carpet manufacturers and retailers — let alone to consumers or anyone else — that PFAS in carpets is extremely dangerous to health, property and the environment," the consumers said. "Instead, those entities collaborated to conceal the truth and such concealment was a common purpose of the PFAS concealment enterprise."

It's obvious the defendants knew about the dangers of PFAS and PFAS-infused products because decades-old safety materials noted that they can cause cancer — based on joint studies done by 3M and DuPont, according to the complaint.

But instead of informing the public, the companies suppressed that information, the consumers said.

Carpet manufacturers and retailers only recently learned that the PFAS-infused products they used to treat carpets are hazardous, but they didn't get that information from the defendants, according to the suit. Instead, they learned from third parties, including the Green Science Policy Institute in 2018.

But even then, the consumers said the defendants "continued to falsely claim that PFAS [are] not harmful." And none of them have offered to replace the millions of carpets infused with PFAS and installed all over the country, the complaint said.

Carpet and rug manufacturers didn't stop using the PFAS-infused products until 2020, the suit said.

Peterson and Sadeghi want to represent a class of potentially tens of thousands of people who bought and installed carpets treated with PFAS before Jan. 1, 2020, according to the complaint.

The suit asserted 127 counts claiming violations of the Racketeer Influenced and Corrupt Organizations Act, conspiracy, nuisance and violations of various states' products liability and consumer protection laws. It seeks damages, including punitive damages and disgorgement, as well as attorney fees and litigation costs, among other relief.

"Consumers in millions of homes across the country would be shocked to learn that under their feet are carpets infused with PFAS, otherwise known as forever chemicals, for their allegedly persistent and widespread harms to human health, especially children," Steve Berman of Hagens Berman Sobol Shapiro LLP said in a statement Friday.

"This isn't the first rodeo for these companies," he added. "Many have already been forced to pay

monumental amounts related to PFAS contamination, meaning they've been on notice in more ways than one, yet have allegedly continued to sweep these chemicals under the rug of unsuspecting home- and business-owners."

3M told Law360 in a statement Friday, "As the science and technology of PFAS, societal and regulatory expectations, and our expectations of ourselves have evolved, so has how we manage PFAS. 3M will address PFAS litigation by defending itself in court or through negotiated resolutions, all as appropriate."

Representatives for Chemours and Corteva Agriscience, which owns EIDP, did not immediately respond to requests for comment Friday.

This is far from the first suit to embroil 3M and other companies over their sale of PFAS-infused products.

Big settlements have recently been reached in **multidistrict litigation** over pollution stemming from firefighting foam containing PFAS, with DuPont, Chemours and Corteva **settling for \$1.2 billion** in February and 3M **settling for \$12.5 billion** in April. In May, BASK Corp. **agreed to pay \$316.5 million** to resolve drinking water claims.

And in June, the South Carolina federal judge overseeing the MDL **gave his blessing** to the **\$750 million settlement** Johnson Controls International PLC subsidiary Tyco Fire Products LP entered to resolve public water systems' pollution claims.

Outside the courtroom, the U.S. Environmental Protection Agency in April **announced the final version** of its first-ever regulatory limits on forever chemicals in drinking water, a move the EPA said will be accompanied by nearly \$1 billion in new funding for implementation.

Late last month, the EPA and the U.S. Army unveiled a **joint national project** to test private drinking water wells near Army installations for PFAS, identifying 235 locations where they will carry out their more in-depth investigation.

Beginning with nine priority installations, the agencies will assess whether PFAS are present in groundwater or drinking water above the new maximum contaminant levels established by EPA. If PFAS are found to be above the acceptable contaminant levels, the Army will then work to assess what actions are needed to mitigate PFAS exposure.

The EPA this year also officially declared two "forever chemicals" to be **hazardous materials** under federal law. The designation means the EPA can investigate and clean up releases of the chemicals and ensure that leaks, spills, and other releases are reported.

Under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, the government and other parties can sue for contributions to cleanups and to recover costs related to those actions.

But the move has attracted **challenges**, including from the U.S. Chamber of Commerce and the state of **New Mexico**.

The carpet consumers are represented by Rebecca A. Peterson of Lockridge Grindal Nauen PLLP and Steve W. Berman, Craig R. Spiegel and Jeannie Evans of Hagens Berman Sobol Shapiro LLP.

Counsel information for the defendants was not immediately available.

The case is Vicki Peterson et al. v. 3M Co. et al., case number 0:24-cv-03497, in the U.S. District Court for the District of Minnesota.

--Additional reporting by Madeline Lyskawa, Emily Field, Mike Curley and Juan-Carlos Rodriguez. Editing by Rich Mills.



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Period Tracker App Users Seek Class Cert. In Data-Selling Suit

By **Jared Foretek**

Law360 (August 30, 2024, 7:01 PM EDT) -- Users of the menstrual cycle tracking app Flo Health Inc. are seeking class certification in their suit against Flo, Google and Meta, telling a California federal judge the proposed class would include millions of users whose personal health information was sold to the ad giants without consent.

In a **heavily redacted motion** filed Thursday, the plaintiffs in the case have proposed nationwide classes for damages and injunctive relief — both with California subclasses — over breach of contract, invasion of privacy and California Confidentiality of Medical Information Act violation claims against Flo.

"Flo repeatedly promised Flo app users that it would only share their personal information in accordance with its privacy policy," the users said in the motion. "Flo never disclosed that it would share users' actual health information and, in fact, repeatedly promised it would not do so."

First filed in 2021, the lawsuit followed a complaint and **settlement agreement** between Flo and the Federal Trade Commission that ended with the latter requiring Flo to gain affirmative consent before sharing personal health information with advertising companies.

The FTC's probe itself came after a 2019 investigation by the Wall Street Journal into the app, which at the time was the most downloaded health and fitness app in Apple's app store, with more than 100 million total users.

According to the proposed class action, Flo illegally shared personal information on users' menstrual cycles and pregnancies with large tech companies for fine-tuning personalized ads and other marketing uses.

"The Flo app promised to be a secure platform for privately tracking the intimate details of one's reproductive health," the users said in their motion for class certification. "In reality, it allowed the ad defendants to intercept billions of data points about the inner workings of women's bodies. Shockingly granular details, including whether an individual was pregnant or ovulating, and the dates and duration of their periods, were transmitted."

The motion proposes classes of all Flo users who entered information on menstruation and/or pregnancy into the app between Nov. 1, 2016, and Feb. 28, 2019, days after the Wall Street Journal's article was published.

According to the plaintiffs, the class would include millions of members, all with claims arising out of common questions of law and fact revolving around the "interception and use" of their health information without their consent.

The case was trimmed slightly by U.S. District Judge James Donato in 2022, when the judge granted Flo's motion to dismiss the plaintiffs' claims of Stored Communications Act violations. He also cut out claims of unjust enrichment against Meta Platforms, Google and ad company Flurry Inc., but Judge Donato denied all other motions to dismiss.

"Plaintiffs, like millions of other women who used the Flo App, were injured when the health information they privately entered was intercepted and used without their consent," the users said

Thursday.

They asked for the court to appoint Carol Villegas of Labaton Keller Sucharow LLP, Christian Levis of Lowey Dannenberg PC and Diana Zinser of Spector Roseman & Kodroff PC as class counsel.

Representatives for Flo could not be reached for comment Friday.

The plaintiffs are represented by James M. Wagstaffe of Adamski Moroski Madden Cumberland & Green LLP, Christian Levis of Lowey Dannenberg PC, Carol C. Villegas of Labaton Keller Sucharow LLP, and Diana J. Zinser of Spector Roseman & Kodroff PC.

Flo Health is represented by Brenda R. Sharton, Benjamin M. Sadun and Theodore E. Yale of Dechert LLP.

Meta Platforms is represented by Michael G. Rhodes and Kristine A. Forderer of Cooley LLP, and Christopher Chorba, Lauren M. Blas, Ashley M. Rogers, Joseph R. Rose and Abigail A. Barrera of Gibson Dunn & Crutcher LLP.

Google is represented by Benedict Y. Hur, Simona A. Agnolucci, Eduardo E. Santacana, Tiffany M. Lin, Yuhua Alice Chi and Argemira Flórez of Willkie Farr & Gallagher LLP.

Flurry is represented by Jason J. Kim, Ann Marie Mortimer, Samuel A. Danon and John J. Delionado of Hunton Andrews Kurth LLP.

The case is Erica Frasco et al. v. Flo Health Inc. et al., case number 3:21-cv-00757, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.

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Schwab's 'Cash Sweep' Paid For TD Ameritrade Buy, Suit Says

By **Sydney Price**

Law360 (August 29, 2024, 7:52 PM EDT) -- The Charles Schwab Corp. has been hit with a proposed class action in California federal court by three customers alleging that the investment bank obtains "outsized benefits" from its cash sweep programs and used a significant amount of the cash to finance its \$26 billion acquisition of TD Ameritrade Holding Corp. several years ago.

Charles Schwab customers Mary Loughran, Rosemary Orlando and Edward Carr said in their suit filed Wednesday that they were enrolled in Schwab's cash sweep program. The firm acts as an agent and fiduciary of its customers by automatically "sweeping" uninvested cash balances from their accounts and depositing that money in accounts at its affiliated bank, the suit said.

However, Charles Schwab concealed that the customers in the program were receiving "unreasonably low interest rates" on their cash while Charles Schwab raked in money from its arrangements with its affiliated banks, the **complaint** said.

The suit alleged that the account agreements and other disclosures provided by Charles Schwab to its cash sweep program customers contained several misrepresentations and omissions. The disclosures did not reveal, for example, that Schwab forgoes compensation in connection with the program to benefit its affiliated banks instead of Charles Schwab customers, the suit alleged.

Additionally, the customers claimed that Schwab breached its fiduciary duties by using a "substantial portion" of its customers' cash to fund its acquisition of TD Ameritrade, a deal announced in 2019 and closed the following year. In 2020, Charles Schwab made an 11-year agreement to direct and maintain a minimum of \$50 billion of cash swept from customers' accounts to TD Ameritrade "in exchange for substantial benefits," the suit alleged.

Charles Schwab did not reveal the agreement to customers until this year in a program agreement disclosure and continued omitting details of the arrangement, the suit alleged.

"[E]ven then [Charles Schwab] failed to disclose to their fiduciary clients the reason for the agreement, the amount of the benefits conferred to TD Bank and TD Bank USA pursuant to the agreement, and the fact that defendants used their fiduciary customers' money for defendants' own benefit," the suit said.

The plaintiffs accused Charles Schwab of breaching its fiduciary duties, negligence, unjust enrichment and violating the California Unfair Competition Law.

In an email to Law360 on Thursday, a spokesperson for Charles Schwab called the case a "legally unsound, copycat lawsuit."

The U.S. Securities and Exchange Commission recently announced that it is looking into similar practices at other financial institutions. In 2023 and 2024, the agency launched investigations into cash sweep programs at Wells Fargo and Morgan Stanley. In an **update** earlier this month, Wells Fargo said it is in "resolution discussions" with the agency.

Wells Fargo and other financial institutions including Ameriprise and LPL Financial have recently been **hit with suits** from customers alleging that their respective cash sweep programs were unfair and unjustly enriched the institutions.

Counsel for the plaintiffs did not immediately respond to requests for comment Thursday.

The customers are represented by Sophia M. Rios, Michael Dell'Angelo and Andrew D. Abramowitz of Berger Montague PC and Alan L. Rosca, Jonathan A. Korte and Paul J. Scarlato of Rosca Scarlato LLC.

Counsel information for Charles Schwab was not immediately available Thursday.

The case is Loughran et al. v. The Charles Schwab Corp. et al. case number 2:24-cv-07344, in the U.S. District Court for the Central District of California.

--Editing by Rich Mills.

Update: This article has been updated with comment from Charles Schwab.

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