

Branson Dumped \$1 Billion in Stock on Space Hype, Suit Says (1)

By Mike Leonard 2024-09-04T07:09:13000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0895](#)

[Richard Branson](#) exploited bogus hype about the capabilities of [Virgin Galactic Holdings Inc.'s](#) spacecraft to make \$1 billion worth of illegal insider stock sales, an unsealed lawsuit says.

A shareholder sued the British industrialist, saying he spent years misleading the public about the readiness of Virgin Galactic's flagship space tourism vessel, the Unity, then dumped "massive portions of his stock" across 2020 and 2021. The sales included \$300 million in August 2021, before the public learned his own trip to space almost ended in disaster, according to the lawsuit, which also targets other board members.

"Despite the near misses, loss of life, and questionable safety record, Branson was determined to be the first billionaire in space" so he could "secure billionaire bragging rights" and try to bail out a travel business empire that lost nearly \$1.9 billion during the Covid-19 pandemic, the suit says.

He was especially keen on beating out Amazon.com Inc. founder [Jeff Bezos](#), who runs the rival space venture [Blue Origin LLC](#), according to the court complaint. Bezos is the world's second-wealthiest person, with a net worth of \$199.7 billion, according to the Bloomberg Billionaires Index. Branson's \$3 billion net worth puts him outside the top 500.

Branson made it into Earth's sub-orbit on July 11, 2021, nine days before Bezos became the first to cross the traditional boundary of outer space. After arguably winning the billionaire space race, "Branson sold every share he could," the lawsuit says.

Virgin Galactic disputed the court claims through a spokesperson Wednesday.

"The allegations are entirely without merit, and we will address them in the appropriate forum," the company said in a statement.

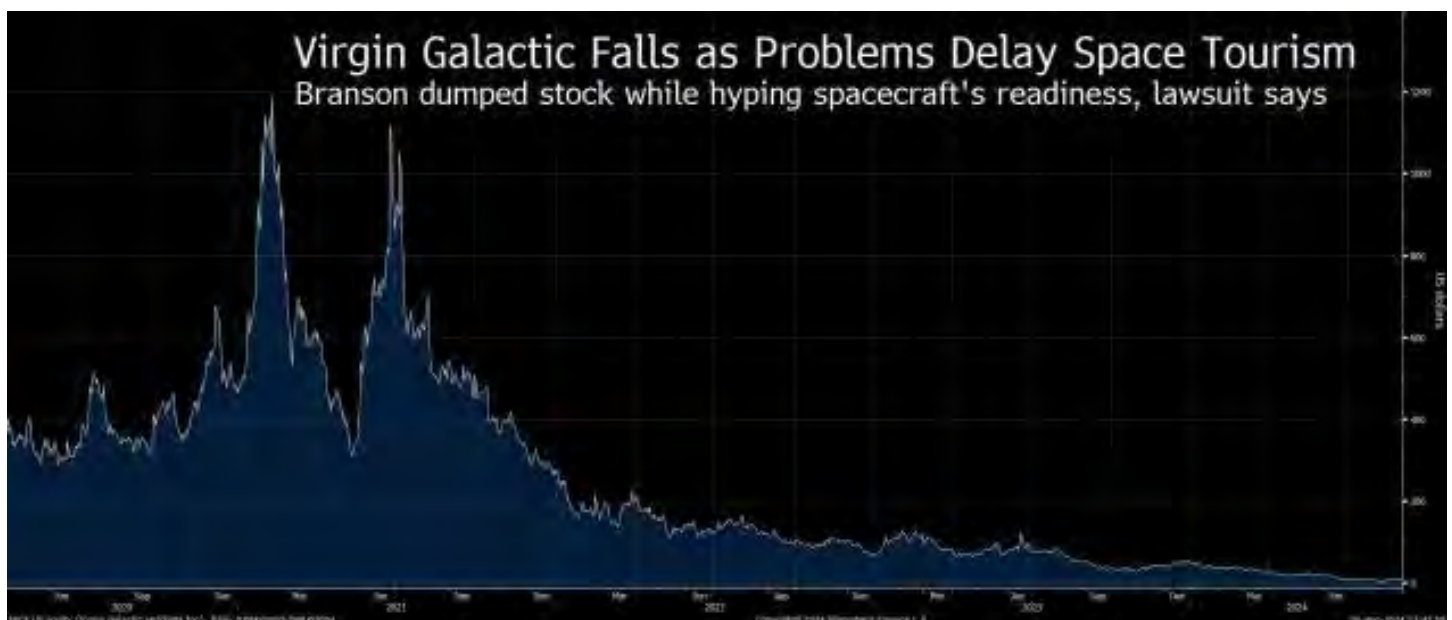
The company is the only one of the three largest commercial space ventures—each founded by a high-profile billionaire—that trades publicly. It’s also the only one that relies on human crews, according to legal filings. The others, Blue Origin and [Elon Musk’s Space Exploration Technologies Corp.](#), are owned by their founders and private investors.

‘Branson Profiteered’

According to the shareholder suit, Branson signaled publicly in mid-2019, a few months after Unity spun out during a test flight, that the company had only minor technical hurdles to overcome before it could take on passengers. Two years later, he publicly described his own trip to space as a wild success.

But he knew both flights and other earlier efforts had suffered “potentially catastrophic” technical failures that nearly led to fatalities, according to the complaint made public Tuesday. Branson allegedly hid that information between May 2020 and August 2021 while selling every Virgin Galactic share he held except for those restricted by stock lockup agreements.

His \$1 billion in insider stock sales made him hundreds of millions in illicit profits before the company’s problems became public, sending its market value tumbling, the lawsuit says. “In stark contrast to Virgin Galactic, Branson profiteered from his wrongdoing,” according to a court filing submitted with the lawsuit.



The case involves shareholder derivative claims, which are technically brought on a corporation's behalf against its leaders or owners. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, its controlling stockholders, or their insurers.

The fiduciary breach allegations echo an ongoing securities fraud suit filed in a federal court in Brooklyn by a different investor. The new lawsuit was originally filed under seal Aug. 27 in Delaware's Chancery Court.

The investors leading the case are represented by Robbins Geller Rudman & Dowd LLP and Robbins LLP. Branson and the other board members haven't yet made court appearances.

The case is [Espinosa v. Branson](#) , Del. Ch., No. 2024-0895, complaint unsealed 9/3/24 .

(Updated with Virgin Galactic statement in sixth and seventh paragraphs.)

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Apollo Defends Board Independence in Leon Black Payout Dispute

By Jennifer Kay 2024-09-04T13:09:00000-04:00

- Email wishing Leon Black a 'happy birthday' cited as conflict
- Judge pushed to see dispute through lens of Epstein scandal

Apollo Global Management Inc. on Wednesday downplayed relationships between a board committee and the private equity firm's three co-founders who received a \$570 million payout collectively in a restructuring that followed CEO Leon Black's ouster.

Apollo wants the Delaware Chancery Court to dismiss litigation challenging the payout to Black, Josh Harris, and Marc Rowan. The co-founders gave up control of Apollo as part of a deal negotiated at arms length by an independent board committee as part of a company restructuring, said Scott Luftglass of Fried Frank, representing the private equity firm.

[Black](#) stepped back from Apollo in 2021 after a tumultuous period that included a report from law firm Dechert that showed he paid convicted sex offender Jeffrey Epstein \$158 million for financial advice. Epstein died in jail in 2019.

Vice Chancellor J. Travis Laster pushed Luftglass to address the scandal that led to Black's exit.

The Anguilla Social Security Board, an offshore pension fund, argues in its lawsuit that "Black already had to leave because of the onrushing scandal, and therefore this was a situation where that part of the deal was done and he didn't have the same type of leverage he would have had in the abstract," Laster said to the firm's attorney. "That's where I need you to focus on."

Any pressure on Black because of his ties to Epstein might have been "the impetus" for the payout discussions, but Rowan and Harris didn't face the same pressures, Luftglass said.

"Something can be the impetus for discussion without meaning that someone has to give away everything," he said. "This wasn't a committee that allowed management to pre-negotiate a deal."

Laster adjourned the hearing without ruling on Apollo's motion to dismiss.

Relationships

The committee in question included former CIA executive director A.B. Krongard and former Apollo operating partner Michael Ducey. Both are named as defendants, along with Black, Rowan, and Harris.

The committee's links to the co-founders are casual, social relationships, such as overlapping service on corporate and philanthropic boards—not the kinds that undermine a director's independence, Luftglass said. These directors also built their careers and wealth long before they developed any affiliation with Apollo.

The pension fund's argument highlighted an email from Krongard and his wife wishing Black a "happy birthday." Krongard's wife is a former Apollo partner, the Krongards and the Blacks belonged to the same golf club, and the Krongards supported the Blacks' charitable endeavors, said Joel Friedlander of Friedlander & Gorris, representing the pension fund.

"You can't just view these things in isolation," he said.

The committee helped whitewash the Epstein scandal "in a way that no one actually believes" and facilitated a way for Black to salvage his reputation, Friedlander said. "There is no suggestion the committee ever questioned the idea that Apollo should pay Black, Harris, and Rowan," he said.

Luftglass called the birthday email "a pleasantry."

"They're asking you do to a lot of work with a one-sentence email," he said.

Apollo and its affiliates also are represented by Potter Anderson & Corroon LLP. The pension fund also is represented by Robbins Geller Rudman & Dowd LLP and Shobe & Shobe LLP.

The case is Anguilla Soc. Sec. Bd. v. Black, Del. Ch., No. 2023-0846, oral argument 9/4/24 .

Robert Henssler is a partner in Robbins Geller Rudman & Dowd LLP's San Diego office, where he focuses his practice on securities fraud and other complex civil litigation. With nearly two decades of experience in securities litigation, Henssler has a distinguished career that began as a deputy federal public defender.

In this role, he defended a broad range of cases, including financial fraud and drug trafficking, driven by his passion for service and representing those who would otherwise go without representation.

"It was a natural progression to join the plaintiffs' bar -- I've always wanted to stand beside the underdog in the courtroom," Henssler said.

Since then, Henssler has achieved significant recoveries for investors in high-profile securities fraud cases. Notable recoveries include \$7.2 billion in the Enron case, \$1.21 billion in the Valeant case, \$434 million in the Under Armour case (pending court approval), and \$215 million in the HCA Holdings case.

As lead trial counsel in the securities fraud class action against Under Armour, Henssler secured a \$434 million recovery for the investor class just three weeks before the trial was set to begin. This case, closely followed worldwide, alleged that Under Armour and its CEO Kevin Plank violated U.S. securities law by making materially false and misleading statements and failing to disclose adverse information about the company's business and operations to investors. In *Re Under Armour Securities Litigation*, 1:17cv-00388-RBD (D. Md., filed Feb. 10, 2017).

"The SEC had brought charges for related conduct by the company and its CEO, and the SEC only recovered a \$9 million penalty, so we were thrilled with the result," Henssler said, adding: " We had an incredible trial team - myself, Mike Dowd, and Sam Sheldon, who until recently was a federal magistrate judge in Houston and whom I've known for over two decades."



Robert R. Henssler Jr.

Robbins Geller Rudman & Dowd
San Diego

The allegations in the Under Armour case centered on a "pull-forward" revenue recognition scheme that masked declining demand for its products. Despite assurances of continued revenue growth, the company's financial results were manipulated to hide the decline through suspect sales practices. In 2017, Under Armour revealed lower than anticipated fourth-quarter revenues and a significant drop in quarterly revenue growth, leading to a 25% fall in the company's share price and the resignation of its CFO after only 13 months on the job. This revelation prompted the investor suit that Henssler successfully resolved.

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https://x.com/jake_zuckerman/status/1831075591459635445



Jake Zuckerman

@jake_zuckerman

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For the (admittedly limited) audience out there wondering what's happening with the securities fraud lawsuit against FirstEnergy re HB6:

The deadline for completion of fact discovery is 6/30/2025.

This is about a bill that passed in 2019

1. Fact Discovery Cutoff

The deadline for completion of fact discovery is June 30, 2025.

The fact discovery cutoff shall be revisited, and an amended scheduling order issued, upon resolution of all issues currently before the United States Court of Appeals for the Sixth Circuit. In the event of a remand from the Sixth Circuit for further class certification proceedings, such order shall include, without limitation, a schedule for such proceedings, including any necessary supplemental expert reports.

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Case: 2:20-cv-03785-ALM-KAJ Doc #: 683 Filed: 09/03/24 Page: 6 of 7 PAGEID #: 14579

Once the stay of expert discovery is lifted, Plaintiffs reserve the right to request that fact and expert discovery occur simultaneously, and Defendants reserve the right to oppose such a request.

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Bloomberg Law News 2024-09-03T21:22:14549431032-04:00

Pharma Distributors Get Nod in \$300 Million Opioid MDL Agreement

By Ufonobong Umanah 2024-09-03T16:27:15000-04:00

- Court granted preliminary approval of settlement Tuesday
- Would resolve claims that quest for profits hurt health plans

Cencora Inc., Cardinal Health Inc., and McKesson Corporation got preliminary approval of a \$300 million settlement with third party payors after the payors alleged the healthcare companies harmed them in their pursuit of opioid profits.

“The proposed Settlement appears to be the product of intensive, thorough, serious, informed, and non-collusive negotiations; has no obvious deficiencies; does not improperly grant preferential treatment to the Settlement Class Representatives or segments of the Class; and appears to be fair, reasonable and adequate,” said Judge Dan Aaron Polster in an [order](#) for the US District Court for the Northern District of Ohio Tuesday.

The settlement comes out of the multidistrict litigation, *In re National Prescription Opiate Litigation*, which originally consisted of thousands of lawsuits filed by cities and counties, Native American tribal governments and entities, health care providers, and TPPs alleging that “opioid manufacturers, distributors, and opioid dispensing pharmacies acted in concert to aggressively market prescription opioids” and to “flood” the county with large quantities of the drugs to increase their profits, a motion for settlement filed in the Ohio district court Aug. 30 said.

The TPPs, comprised of private benefit funds and plans, said that because of the healthcare companies’ disregard for federal and state laws while trying to maximize profits from prescription opioids, they had to pay for those drugs instead of “safer, non-addictive, and lower-cost prescription drugs,” according to the motion for preliminary approval.

Hundreds of thousands of individuals in the US have died from an opioid overdose, the motion said, and TPPs have spent billions of dollars on their members’ opioid prescriptions and resulting medical care.

The TPPs first filed cases in 2017 through 2019, with the majority of them centralized in the MDL, the motion said. The parties initially engaged in preliminary settlement negotiations in 2022, it said.

The class, which includes over 40,000 plans, consists of entities that paid and/or were reimbursed for opioid drugs manufactured, marketed, sold, distributed, or dispensed by the defendants-distributors from January 1996 through the date of entry of the preliminary approval order.

According to the [settlement agreement](#), McKesson would pay about 38% of the settlement fund, with the other companies paying just over 30%. The parties do not admit wrongdoing, according to the motion

Attorneys are expected to receive fees not exceeding 20% of the settlement funds, plus all reimbursable costs and service awards, according to the settlement motion.

The plaintiffs sought \$10,000 service awards for each of the six interim class counsel representatives.

A fairness hearing is scheduled for January 2025, according to the order.

Lawyers from Robbins Geller Rudman & Dowd LLP; Lieff Cabraser Heimann & Bernstein LLP; Spangenberg Shibley & Liber LLP; Simmons Hanly Conroy LLP; Motley Rice LLC; and Farrell & Fuller LLC signed the motion.

The case is [In Re: National Prescription Opiate Litigation](#) , N.D. Ohio, No. 1:17-md-02804, 9/3/24 .

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[CVS, Walmart, Walgreens Reach \\$13 Billion Opioid Settlement \(2\)](#)

[Opioid Distributors Get 'Negotiation Class' Tossed on Appeal \(2\)](#)

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Sept. 3, 2024, 9:27 AM PDT; Updated: Sept. 3, 2024, 10:33 AM PDT

Super Micro Sued Over Stock Losses After Short-Seller Report (1)

By Martina Barash

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

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Super Micro Sued Over Stock Losses After Short-Seller Report (1)

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 doesn't comment on active litigation, the company said in an email Tuesday.

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 .

(Updates story with company response in eighth paragraph.)

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[Securities Law News](#)

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CVS, Officers Sued Over Stock Price, \$764 Million Buyback (1)

By Bernie Pazanowski

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-06595](#)

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CVS, Officers Sued Over Stock Price, \$764 Million Buyback (1)

By Bernie Pazanowski 2024-09-03T13:32:28000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-06595](#)

CVS Health Corp. and its officers committed fraud and breached their fiduciary duties by artificially pumping up the company's stock prices and then buying it back at the inflated prices, which caused the stock to lose about a third of its value, a derivative suit filed in federal court says.

The wrongdoing was committed between May 3, 2023 and April 30, 2024, the complaint filed Aug. 30, by Chaya Sara Kaufmann, says. During the relevant period, CVS's stock prices dropped from \$74.36 to \$56.31 per share and the buyback was worth \$764 million, it says.

CVS computes its pricing for private health insurance plans based on internal forecasts, the complaint says. The profitability of the company's health care benefits segment depends on the accuracy of the the forecasts, it says.

During the time in question, CVS's forecasts were "ineffective at accounting for trends in medical health costs and health care utilization," the complaint filed in the US District Court for the Southern District of New York, says. The defendants concealed that information, "instead touting the profitability of CVS's Health Care Benefits segment through Medicare and Commercial membership growth," pumping up its share value, the complaint says.

“Through press releases, SEC filings, and investor earning calls during the Relevant Period, the Company and the Individual Defendants expressed their expectation that the expansion of the Health Care Benefits segment would continue despite declines due to Medicaid redeterminations,” the complaint says. As the truth dribbled out about the actual decline in the health care benefits segment, the stock prices dropped, it says.

The individual defendants breached their fiduciary duties during that time by “personally making and/or causing the Company to make to the investing public a series of materially false and misleading statements regarding the Company’s business, operations, and prospects,” the complaint says. They also breached their fiduciary duties by causing the company to not “maintain adequate internal controls,” and “to repurchase its own stock at prices that were artificially inflated due to the foregoing misrepresentations,” it says.

Kaufmann seeks damages and pre- and post-judgment interest, an order requiring the individual defendants to strengthen the company’s internal procedures, restitution, costs, and fees.

A CVS spokesperson said that the “allegations in this complaint are inaccurate and we will vigorously defend ourselves.”

The Brown Law Firm PC represents Kaufmann.

The case is Kaufmann v. Lynch , S.D.N.Y., No. 1:24-cv-06595, complaint filed 8/30/24 .

(Story updated to add comment from CVS.)

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2nd Circuit Tosses Securities Suit Against Ericsson Over Statements on Alleged Iraq Corruption

“Ericsson’s Anti-Corruption Statements contained no such specificity that would transform any of those generalized statements from mere puffery to an actionable material misrepresentation,” the appeals court wrote.

September 04, 2024 at 04:11 PM

Securities Litigation



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The U.S. Court of Appeals for the Second Circuit on Tuesday upheld the dismissal of a securities lawsuit against Ericsson that accused the Swedish telecommunications firm of making misleading statements about its anticorruption practices to address allegedly corrupt business activities in Iraq.

In a summary order, the New York-based federal appeals court said that Ericsson’s statements were not misleading to investors because they were general and didn’t promise “perfect compliance.”

“Ericsson’s Anti-Corruption Statements contained no such specificity that would transform any of those generalized statements from mere puffery to an actionable material misrepresentation,” the court wrote.

“We find [the plaintiffs’ arguments] unpersuasive,” the summary order continued. “Indeed, in making these statements, Ericsson expressly cautioned that ‘[w]e may fail to comply with our corporate governance standards’ and ‘we cannot assure that violations [of laws and regulations] do not occur.’”

The lawsuit was filed in March 2022 after Ericsson announced that the federal government had told the company it breached a 2019 deferred prosecution agreement with the U.S. Department of Justice by not sharing information about alleged misconduct in Iraq. Ericsson had agreed to report to the DOJ any allegation of conduct that may constitute a violation of certain Foreign Corrupt Practices Act provisions.

Ericsson agreed to plead guilty to FCPA violations and pay a \$206 million fine for breaking the 2019 deal.

One day later, the Boston Retirement System accused Ericsson of making false or misleading statements about the strength of its anticorruption compliance programs between 2016 and 2018, as well as by not disclosing a company internal investigation that identified “corruption-related misconduct” in Iraq.

U.S. District Judge William F. Kuntz II of the Eastern District of New York dismissed the lawsuit, prompting the BRS to appeal.

The Second Circuit affirmed, saying that Ericsson’s nondisclosure of its own investigation did not violate securities law and that the company did disclose the government’s investigation.

The plaintiffs had pointed to a statement by Ericsson’s former chief legal officer during a 2019 earnings call where he said that he was unaware of “any follow-on investigations.” But the court said that statement related only to the government’s investigations into alleged FCPA violations, not the company’s internal investigation.

“[The former CFO’s] statement was made in response to the analyst’s question, which asked for an update on regulators’ investigations and Ericsson’s accounting in its financial statements of the costs of resolving those investigations,” the Second Circuit wrote, noting that Ericsson also gave investors warnings that the company might fail to comply with regulations in the future.

Sullivan & Cromwell co-chair Robert Giuffra Jr. argued for Ericsson. Michael P. Canty, a Labaton Keller Sucharow partner, argued for the BRS.

Judges Barrington D. Parker Jr., Denny Chin and Joseph F. Bianco were on the panel that considered the appeal.

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Investors Lack Recourse Over Company Sale, Appeals Court Says

By Martina Barash 2024-09-04T12:17:31000-04:00

- Shareholders alleged trust merger left them with nothing
- Argument probed holders' rights, meaning of 'liquidation'

[Cedar Realty Trust Inc.](#) preferred stock owners failed to state viable claims against the company and its directors who allegedly froze them out when setting up a merger, the Fourth Circuit said Wednesday.

The lower court properly dismissed the proposed class action, the appeals court said in a unanimous affirmance. Claims against the acquiring company, another real estate trust, are also unsound, the panel said.

"All of us have wished that we could turn back the clock and not make a purchase we've come to regret," Judge Julius N. Richardson said for the court.

The investors don't adequately allege that Cedar Realty or the company that acquired it "violated any legal right or duty—they only allege that they regret the terms they bargained for," he said.

'Convoluteds' Transactions

The case arose from a series of transactions by the Cedar Realty board. The real estate investment trust owned and managed 52 properties, particularly grocery-anchored shopping centers, according to the preferred shareholders.

Julia Kim and several other preferred stockholders [told](#) the US Court of Appeals for the Fourth Circuit that the directors, who owned common stock, "orchestrated a convoluted series" of transactions to avoid sharing the proceeds of the company's sale with owners of preferred stock.

The transactions included a cash sale of the most valuable properties; cash-generating mortgages on

the other properties; delisting Cedar's common stock; and transferring ownership of Cedar's common stock to Wheeler Real Estate Investment Trust, "a financially distressed REIT," they said in a brief. The directors received a "bonanza" while the preferred stockholders "remain trapped inside Cedar—a shell of its former self now fully controlled by Wheeler," they said.

The US District Court for the District of Maryland dismissed the suit in 2023.

The preferred stockholders appealed, saying the directors breached their stock-related contract because the transactions triggered their right to convert their preferred shares to common stock. Their claims for breaches of contractual and fiduciary duties were also valid, they said in an appellate filing.

But the merger didn't violate any contractual provisions, according to the defendants—the directors, two Cedar entities, and Wheeler. "Preferred stockholders' rights were set out in black and white in the relevant corporate document, the Articles Supplementary," the defendants [said](#). And no duties were breached, they said.

Liquidation Meaning

At [oral argument](#), Judge Paul V. Niemeyer focused on a contractual provision related to Cedar's potential liquidation, which would prompt a payout to the preferred stockholders. "They alleged there was a liquidation," he said. "How can the district court reject that without a trial?"

Yet at the hearing, the definition of "liquidation" proved thorny for the judges and attorneys alike.

The panel's decision resolved the quandary. Under the Articles Supplementary, where the preferred stockholders' rights are laid out, a merger or asset sale isn't a liquidation, Richardson said.

But a central issue is whether a "change of control" occurred, triggering the investors' right to convert common stock into preferred stock, the judge said. And under the Articles' language, there was no change of control, he said.

The investors' claim for breach of the implied duty of good faith and fair dealing also fails, he said. They can't use the duty "to shoehorn in rights to be represented in transaction negotiations, to be

treated equally as common shareholders, to have certain financial assurances, or any other desirable outcome,” he said. “They got exactly what they agreed to receive.”

And the complaint doesn’t “allege a fiduciary duty that the Board could have breached,” Richardson said.

Claims against Wheeler rely on an underlying breach by Cedar Realty or its board, and therefore also fail, he said.

Niemeyer and Chief Judge Albert Diaz joined the opinion.

Heffner Hurst, Berger Montague PC, Levi & Korsinsky LLP, and Wohl & Fruchter LLP represented the preferred stockholders. Goodwin Procter LLP represented the director defendants. Gordon Feinblatt LLC represented the Cedar entities and Wheeler.

The case is [Kim v. Cedar Realty Trust, Inc.](#) , 4th Cir., No. 23-01905, 9/4/24 .

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Investor Clears Hurdle in Securities Fraud Suit Against Verrica

By Sam Skolnik 2024-09-04T15:27:37000-04:00

- CEO knowledge of challenges to FDA approval sufficiently pleaded
- “Strong inference” CEO knew statements may have misled investors

A proposed class action investor suit adequately pleaded that Verrica Pharmaceuticals Inc. and its chief executive acted with knowledge that they were misleading investors, a federal judge said.

Verrica and CEO Ted White had their motion to dismiss denied after investors alleged they were defrauded when the company and its leaders concealed obstacles the company faced in obtaining FDA approval of its lead product.

Judge Mitchell S. Goldberg, of the US District Court for the Eastern District of Pennsylvania, also dismissed with prejudice the claims against Verrica’s chief financial officer, P. Terence Kohler Jr.

Kranthi Gorlamari alleged that from May 2021 to May 2022, Verrica and White made false public statements to conceal quality problems at Sterling Pharmaceutical Services LLC, a manufacturer Verrica used to produce the product.

The FDA denied approval of VP-102—a drug-device combination for treating the skin disease molluscum—in 2021 and 2022, leading Gorlamari to assert he and other investors were misled about the prospects VP-102 would succeed.

Goldberg had earlier [dismissed](#) some of the claims against Verrica in January.

After having previously ruled that Gorlamari failed to adequately plead knowledge as to some of the statements at issue in the suit, Goldberg said that the second amended complaint had remedied that earlier defect.

The revised complaint offered new allegations regarding knowledge of Sterling’s quality-control problems, Goldberg said. Sterling sent White and other Verrica senior managers daily updates, including the FDA’s conclusion that quality problems similar to those found earlier remained,

according to an anonymous former Verrica employee cited by Gorlamari in the revised complaint. “White allegedly ‘grilled’ Sterling about its earlier promises to fix those problems,” Goldberg said.

The allegations raise a “strong inference” that White understood it was misleading to tell investors that Sterling’s problems had been addressed through a “successful resolution,” Goldberg said.

Though Kohler was alleged to have been among the Verrica executives receiving daily updates on the February 2022 inspection at Sterling, Gorlamari’s allegations were “too sparse” to raise a strong inference either that Kohler acted with the necessary knowledge or intent or that he knowingly participated in a fraud, Goldberg said.

“There is no allegation that Kohler had any responsibilities related to” statements in the company’s press releases, “or to FDA approval or Sterling more generally,” Goldberg wrote. And, unlike White, “there is no allegation that Kohler reacted in any way or was made aware of the significance of the February 2022 inspection for Verrica’s prospects.”

Glancy Prongay & Murray LLP represents Gorlamari and the proposed class. Cooley LLP and Morgan, Lewis & Bockius LLP represent Verrica and White.

The case is [Gorlamari v. Verrica Pharms. Inc.](#) , 2024 BL 307105, E.D. Pa., No. 22-2226, 9/3/24

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Ericsson Remains Free of Stock Suit Over Alleged Iraq Corruption

By Martina Barash

- Investors faulted corruption risk disclosures as misleading
- Ericsson argued suit didn't state securities fraud claims

Bloomberg Law News 2024-09-04T10:29:47675219871-04:00

Ericsson Remains Free of Stock Suit Over Alleged Iraq Corruption

By Martina Barash 2024-09-03T17:46:57000-04:00

- Investors faulted corruption risk disclosures as misleading
- Ericsson argued suit didn't state securities fraud claims

Telefonaktiebolaget LM Ericsson won a federal appeals court decision Tuesday affirming rejection of a lawsuit accusing the company of misleading investors about its anticorruption program and other issues related to alleged bribery in Iraq.

The trial court properly dismissed the shareholders' suit, the US Court of Appeals for the Second Circuit said.

Anti-corruption statements targeted by investors "consisted of generalized statements about ethics and compliance, such that no reasonable investor would rely upon them," the panel said in an unsigned, unpublished opinion.

And company statements that US government investigations into possible Foreign Corrupt Practices Act violations had ended weren't misleading, the court said. They were "sufficiently limited to the scope of the FCPA investigations *by the government* that had already occurred and conveyed nothing about any internal investigations," Judges Barrington D. Parker Jr., Denny Chin, and Joseph F. Bianco said.

The lawsuit was filed after reports based on the leak of an internal company investigation emerged in February 2022 that Ericsson might have been involved in making payments to terrorist organization ISIS to facilitate the sales of its goods in Iraq. The SEC opened an investigation into that issue in June 2022.

Three years earlier, the Swedish telecom company's equipment manufacturing subsidiary Ericsson AB entered into a deferred prosecution agreement with US prosecutors over alleged bribes in Djibouti, China, Vietnam, Indonesia and Kuwait between 2000 and 2016. Ericsson agreed to pay a \$520 million penalty and consent to an independent compliance monitor. It also paid more than \$500 million to the US Securities and Exchange Commission.

Its payments in the Department of Justice case expanded by nearly \$207 million when it pleaded guilty in March 2023 to breaching the agreement by withholding evidence. Ericsson completed the four-year compliance monitoring program in June 2024.

In the wake of the Iraq report, investors sued Ericsson in March 2022 in the US District Court for the Eastern District of New York, updating their complaint in September of that year.

Allegations Fall Short

The company touted its anti-corruption programs and its sales growth in the Middle East while failing to disclose that it "was only able to successfully operate in Iraq's challenging macroeconomic environment because of the Company's illegal and corrupt practices," the investors alleged. The February 2022 reports caused the company's stock price to fall sharply, they said.

Judge William F. Kuntz II dismissed the suit in May 2023, concluding the investors failed to adequately allege material misstatements by Ericsson and also didn't adequately support their allegations of intent.

The investors appealed to the Second Circuit. Ericsson and its leaders "deceived the market by treating the prospect of corruption in its operations as a mere future possibility, when they knew"—including from the company's internal report—"that corruption was an established fact of life in its Iraqi business at the time the statements were made," they said in a brief.

Ericsson responded that it operates globally, including in war zones. Corruption is a risk that comes with such operations, it said. "Ericsson has long disclosed those corruption risks to investors," it said.

The lead investor "tries to turn Ericsson's warnings about its corruption risks on their head and to turn the Company's non-disclosure of an internal investigation into federal securities fraud," the company told the appeals court in its brief.

Oral argument took place March 22.

The district court properly dismissed the claims with finality because "any further amendments would have been futile given the inability to cure the legal defects in the claims," the Second Circuit said.

Labaton Keller Sucharow LLP represented the investors. Sullivan & Cromwell LLP represented Ericsson.

The case is *Boston Ret. Sys. v. Telefonaktiebolaget LM Ericsson*, 2d Cir., No. 23-00940, unpublished 9/3/24.

.

AMC Holder Takes Meme Stock Conversion Case to Supreme Court (1)

By Mike Leonard 2024-09-04T09:26:45000-04:00

- Appeal comes after AMC converted APE units to recapitalize
- Shareholders should have been able to opt out, petition says

An AMC Entertainment Holdings Inc. shareholder is asking the US Supreme Court to overturn a series of rulings that let the theater chain recapitalize, a move opposed by its boisterous base of meme stock investors.

The petition comes a year after AMC converted the AMC Preferred Equity units, or APEs, into common stock following an unusually fierce fight over its settlement with a pension fund that initially challenged the maneuver. The Supreme Court appeal was filed by Rose Izzo, whose objections to the accord previously delayed the stock conversion by several weeks.

The filing opens a new chapter in the [sprawling legal battle](#) over the APEs, which AMC created in 2022 to get around a share limit it couldn't raise without the approval of its retail investors. Some stockholders opposed the conversion plan over equity dilution concerns, while others believed the company could survive without additional financing.

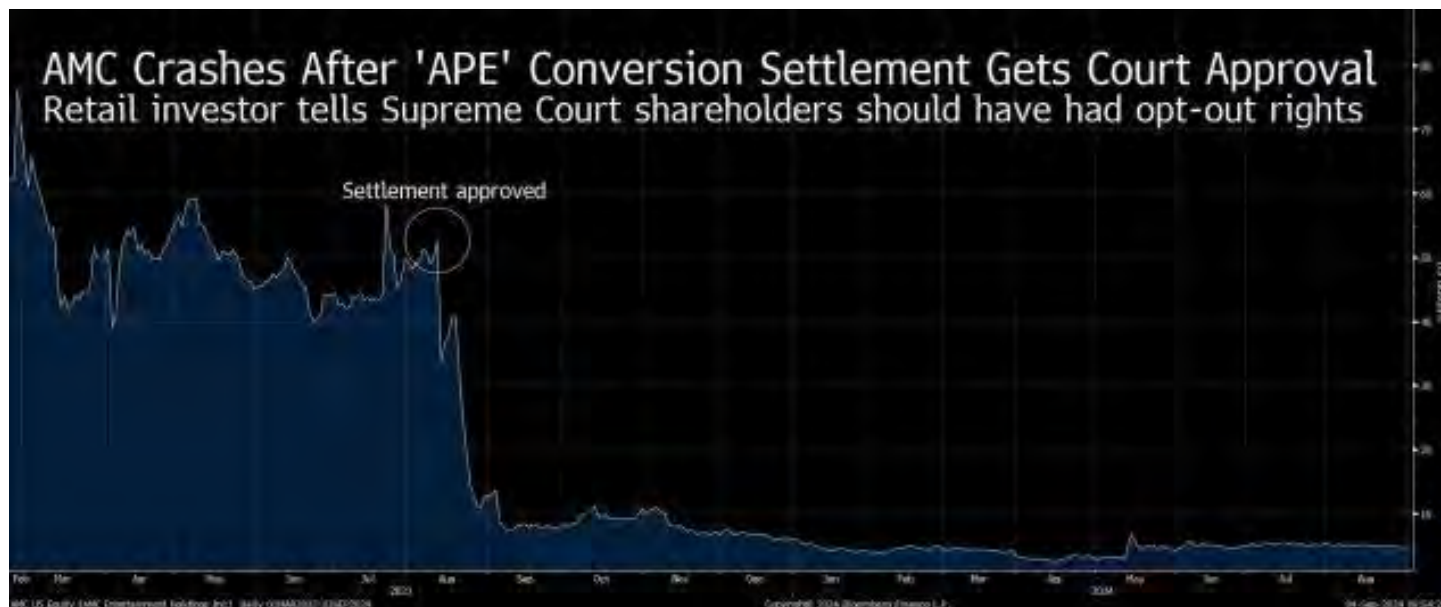
Izzo was one of [nearly 3,000 investors](#) who wrote to a Delaware judge last year urging her to reject the settlement, an unorthodox influx of correspondence from the traders behind the rally that spared AMC a pandemic-era bankruptcy. She was the only one with a lawyer—an attorney who [now represents Donald Trump](#) in his own Delaware meme stock case—and they [initially prevailed](#), sending stunned arbitragers scrambling to unwind costly bets in favor of the conversion.

Spotlight on Delaware

The judge ultimately [approved a revised version](#) of the settlement, which reduced the dilution of AMC's common stock by handing out an extra share for every 7.5 held. The move paved the way for the conversion to take place in August 2023. The state's top court [upheld the ruling](#)—which would

have been virtually impossible to unwind—in May.

AMC's shares crashed after the settlement got the green light, [plunging 85%](#) in about a month. The stock closed at \$4.63 on Tuesday, down from \$52.60 the day the accord received court approval.



The proceedings cast a spotlight on Delaware's Chancery Court, the [leading US forum for high-stakes corporate litigation](#), foreshadowing [high-profile attacks](#) on the elite legal forum this year by [Elon Musk](#). Musk moved Tesla Inc. from Delaware [to Texas](#) after its chief judge [struck down](#) his \$56 billion pay package.

The presiding judge in the AMC case [fashioned bespoke procedures](#) to handle the unusual involvement of the company's retail investors, whose letters often reflected conspiracy theories spreading online. But many of them still felt mistreated by CEO [Adam Aron](#), the pension fund that negotiated the settlement, and the legal rules that dragged them into the deal.

'Important and Recurring'

Izzo's new appeal takes aim at those rules. Class action procedures that force investors to participate in settlements, without any way to opt out, violate constitutional due process, according to her petition. The justices have twice tried to weigh in on that issue—which has divided the federal appeals courts—but they were stymied when they ended up having to reject those cases on other grounds, the filing says.

“The question is both important and recurring,” according to the Aug. 20 petition, which was filed to the Delaware case docket Tuesday.

The pension fund that led the litigation, the Allegheny County Employees’ Retirement System, waived its right to respond.

Izzo is represented by Green Law Chartered LLC, Wright Close & Barger LLP, and Halloran Farkas & Kittila LLP. The pension fund was represented in the lower courts by Bernstein Litowitz Berger & Grossmann LLP, Grant & Eisenhofer PA, Fields Kupka & Shukurov LLP, and Saxena White PA. AMC was represented by Richards, Layton & Finger PA and Weil, Gotshal & Manges LLP.

The case is [In re AMC Ent. Holdings Inc. S’holder Litig.](#) , U.S., No. 24-197, petition filed 8/20/24 .

(Updates with additional reporting in paragraphs 10 and 11 and attorney information in paragraph 12.)

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Phone Maker OSOM Sued for Records Over Crypto Looting Claims

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0894](#)

Bloomberg Law News 2024-09-04T10:26:09603253754-04:00

Phone Maker OSOM Sued for Records Over Crypto Looting Claims

By Mike Leonard 2024-09-03T13:18:42000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0894](#)

An OSOM Products Inc. founder may have looted millions from the smartphone maker, spent it on his auto racing career, and bailed himself out through a self-dealing transaction with cryptocurrency platform Solana Labs Inc., an unsealed lawsuit says.

A former executive is suing the company for internal files, seeking to investigate concerns that CEO Jason Keats used OSOM as a “personal piggybank” to fund his lavish lifestyle, including the mortgage on his home, an American Express card, two Lamborghinis, and a bogus salary for his partner on the Super Trofeo sports car racing circuit.

The misconduct allegedly sowed behind-the-scenes turmoil that led Solana founder Anatoly Yakovenko to resign from the OSOM board, which he joined in connection with a 2022 Series A investment. It’s likely Yakovenko and his replacement uncovered the extensive wrongdoing and—rather than address it directly—exploited their knowledge to leverage an exit on beneficial terms for Solana, the suit says.

Keats, meanwhile, appears to have “decided to pay Solana off” by engineering a transaction that would “cover up his pilfering,” according to the court complaint made public Aug. 30.

‘Outlandish Allegations’

The case doesn’t personally target Keats, whose racing team includes Charlie Martin, a transgender lead driver who finished second at a major event in June.

OSOM said in a statement Tuesday that “we’re aware of the outlandish allegations by a former employee, and look forward to disproving them in court.” Solana, which isn’t named as a defendant, didn’t immediately respond to a request for comment.

The lawsuit in Delaware’s Chancery Court seeks documents under a state law giving investors broad access to corporate records if they have credible but preliminary suspicions of wrongdoing. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

The suit was originally filed under seal Aug. 27 by Mary Ross, OSOM’s former chief privacy officer. According to her shareholder complaint, a company director and members of the executive team grew suspicious when Keats began touting the need for another financing despite crypto holdings of Solana that should have grown fourfold in value since the 2022 funding round.

‘Something Went Badly Wrong’

They allegedly uncovered indications Keats had “staked” the crypto—an arrangement that involves committing it to an exchange for payments akin to interest—to cover personal expenses. The company’s apparent financial ill health means “something went badly wrong here,” the lawsuit says. “The Solana tokens appear to have disappeared, with a former director pointing the finger at Keats.”

Keats allegedly cited an abrupt pivot as the reason OSOM suddenly needed a cash infusion, saying the company would abandon smartphones—“its entire business model”—and shift to cameras powered by artificial intelligence. Around the same time, he told other executives he expected litigation from Solana, which was “trying to screw the company,” according to the complaint.

He then began laying off employees with severance agreements conditioned on claims releases, but Ross “refused to sign,” the suit says.

Ross is represented by Dailey LLP. OSOM is represented by Fox Rothschild LLP.

The case is Ross v. OSOM Prods. Inc. , Del. Ch., No. 2024-0894, complaint filed 8/30/24 .

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Alphabet Wins Dismissal of Shareholder Suit Over Google Ad Tech

By Matthew Bultman 2024-09-04T12:48:00000-04:00

- Google facing antitrust trial over online advertising technology
- Judge said various statements by Google were puffery

A federal judge dismissed a lawsuit alleging Alphabet Inc. misled shareholders about Google's online advertising technology and user privacy.

Investors haven't plausibly alleged that Google, which is defending itself against Justice Department claims of a monopoly in online advertising technology, knew statements it made to Congress were false, Judge Rita Lin of the US District Court for the Northern District of California said.

Other statements touting how Google's ad tech products help advertisers and publishers, as well as its commitment to user privacy, are puffery and can't support a securities fraud claim, Lin said.

"These general statements 'are vague, highly subjective claims as opposed to specific, detailed factual assertions' capable of objective verification," the judge said in a Tuesday [order](#).

Lin dismissed the case but gave investors a chance to amend the complaint.

The proposed class action was filed in March 2023, two months after the DOJ sued Google alleging it monopolized the market for advertising technology used to buy, sell, and serve video and display ads online. The government's [case](#) is scheduled for a bench trial next week in the Eastern District of Virginia.

Google has also faced scrutiny from state [attorneys general](#) and the [European Commission](#) over its ad tech practices.

Investors pointed to various statements alleged to be false or misleading, including written responses Google provided to US lawmakers after CEO Sundar Pichai's 2020 testimony. Among other things,

Google said publishers weren't required to use its ad tech products.

But the plaintiffs didn't do enough to show such statements were false, the judge said. "Even assuming Google employed anticompetitive methods to make it difficult for publishers to choose rival ad tech products, that does not mean Google 'required' the publishers to use its services," Lin said.

Pomerantz LLP is counsel for the proposed class. Freshfields Bruckhaus Deringer LLP represents Google.

The case is [AMI - Government Employees Provident Fund Management Company Ltd. v. Alphabet Inc.](#), N.D. Cal., No. 23-cv-01186, 9/3/24 .

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TD Ameritrade customers can't sue as a class over 'order flow,' US appeals court says

 [reuters.com/legal/government/column-td-ameritrade-customers-cant-sue-class-over-order-flow-us-appeals-court-2024-09-04](https://www.reuters.com/legal/government/column-td-ameritrade-customers-cant-sue-class-over-order-flow-us-appeals-court-2024-09-04)

Alison Frankel

A TD Ameritrade sign is seen outside a branch in the financial district in New York February 29, 2016. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights [↗](#), opens new tab

Sept 4 (Reuters) - You have to give credit to plaintiffs' lawyers from Levi & Korsinsky: After a U.S. appeals court roundly rejected their original theory in a securities class action against TD Ameritrade in 2021, Levi & Korsinsky came up with a completely different theory to allow customers to band together.

The case originally alleged that TD Ameritrade customers paid higher trading prices than they should have because instead of seeking the best possible price for its customers, the brokerage routed orders to exchanges and market makers that had paid TD Ameritrade to execute its customers' trades. (That practice is known as payment for order flow.)

The 8th U.S. Circuit Court of Appeals trashed the original theory in a 2021 decision [↗](#), opens new tab decertifying a class of TD Ameritrade customers who traded through the brokerage between 2011 and 2014.

Securities fraud claims, the 8th Circuit said, require proof that plaintiffs lost money as a result of the alleged fraud. Levi & Korsinsky argued that its expert economist had created an algorithm to provide that proof across a class of TD Ameritrade customers. But the 8th Circuit said it would be impossible to establish that TD Ameritrade customers paid higher prices than they should have without examining the particulars of every trade. Those individual inquiries, the appeals court said, would defeat the whole purpose of the proposed class action.

On remand to the trial court in Omaha, Levi & Korsinsky offered an alternative justification to certify the class. TD Ameritrade didn't tell customers about its payment-for-order-flow deals with certain exchanges and market makers, the firm alleged. So, according to this new theory, when customers paid commissions ranging from \$9.99 to \$49.99 for their trades, they weren't getting what they paid for.

All of those customers, Levi & Korsinsky argued, experienced the same loss, paying commissions based on TD Ameritrade's alleged fraud.

I should pause here to note that TD Ameritrade, now part of Charles Schwab (SCHW.N) [↗](#), opens new tab, has insisted [↗](#), opens new tab throughout the 10-year case that it did not

deceive its customers and has always sought the best execution of their orders. The brokerage has also argued that it routinely discloses its receipt of payments for order flow in filings to the U.S. Securities and Exchange Commission.

"TD Ameritrade vigorously disputes the merits of plaintiff's fraud claim and each liability element," the company has said in briefs.

Levi & Korsinsky's rejiggered argument about fraudulent commissions – a novel theory in payment-for-order-flow litigation against retail brokerages – was good enough for the trial judge, who certified [the class](#), opens new tab a retooled TD Ameritrade customer class in 2022. But the new theory didn't pass muster at the 8th Circuit. On Monday, the appeals court once again decertified [the class](#), opens new tab the class.

Judges Steven Colloton, Ralph Erickson and Jonathan Kobes held that Levi & Korsinsky's new theory, like its previous attempt, failed to establish classwide economic losses as the 8th Circuit defines the term.

Economic loss, Colloton wrote, means just that: "the difference between the price at which customers' trades were executed and a better price available elsewhere." The payment of a flat-rate commission, the appeals court said, does not prove that any TD Ameritrade customer would have fared better with any particular trade if they had relied upon a different broker.

The new theory, like the old one, would still require assessment of individual trades, the 8th Circuit said. That's fatal for class certification.

The ruling seems to foreclose any additional attempt to certify a class of TD Ameritrade customers. The 8th Circuit said it would not allow an injunctive class, partly because TD Ameritrade no longer charges commissions, and would not countenance an issue class to determine whether the brokerage breached its duty of best execution because the case would still face too many individualized issues.

TD Ameritrade was represented throughout the case by Sidley Austin. A Schwab spokesperson said via email that the company hopes the 8th Circuit's new decision will finally end the litigation. "As we have said before, high-quality trade executions and transparency are a cornerstone of our commitment to putting clients first," the statement said.

Eduard Korsinsky of Levi & Korsinsky said his firm thought the case merited class treatment. "We are considering other options," he told me.

One possibility might be arbitration before the Financial Industry Regulatory Authority, or FINRA. The lead plaintiff in the prospective class action, Roderick Ford, alleged that he placed more than 3,500 trades through TD Ameritrade between 2011 and 2014, so he

presumably has a claim worth pursuing, especially because Levi & Korsinsky has said its expert has devised an algorithm to calculate his alleged losses from trades routed to TD Ameritrade's favored market-makers.

And if Ford's claims go to arbitration, why not those of other TD Ameritrade customers? As you know, many plaintiffs' firms have become adept at rounding up consumers and employees to assert arbitration demands en masse. Levi & Korsinsky has already sunk 10 years of time and money into the TD Ameritrade litigation, so the firm has good reason to try one last strategy to salvage its investment.

I'm not aware of any FINRA mass arbitration campaign against a brokerage firm, but there's a first time for everything.

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

Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

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TD Ameritrade Clients' Class Status Rejected Again on Appeal

By Martina Barash

- Customers faulted commissions rather than trading outcomes
- TD Ameritrade appealed class status based on reframed loss

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TD Ameritrade Clients' Class Status Rejected Again on Appeal

By Martina Barash 2024-09-03T15:08:09000-04:00

- Customers faulted commissions rather than trading outcomes
- TD Ameritrade appealed class status based on reframed loss

TD Ameritrade Holding Corp. persuaded the Eighth Circuit Tuesday to undo its brokerage clients' ability to proceed as a class for the second time in litigation over trade execution.

The customers' new theory of economic loss, based on commissions rather than trading outcomes, doesn't fit their claims, Chief Judge Steven M. Colloton said for the unanimous appellate panel.

The ruling reverses the US District Court for the District of Nebraska's grant of class certification after a previous trip to the US Court of Appeals for the Eighth Circuit. The appellate court sided in 2021 with TD Ameritrade on the same question, the predominance of common issues.

Roderick Ford and another client alleged TD Ameritrade violated its duty of "best execution" by using an algorithm to send orders to trading companies that paid it the most, rather than to companies that provided the best outcome for customers. Ford, who had training in trading methods, placed 3,556 trades and allegedly noticed delays and other indicators of low-quality execution.

The pair initially obtained certification for a class of clients who were "damaged" when they "placed orders that did not receive best execution" because of the routing practices involving liquidity rebates or payments. But the Eighth Circuit knocked down that class definition, in part because of the individualized evidence required to show a price differential.

The plaintiffs redefined the class to consist of customers who paid commissions for trades that TD Ameritrade allegedly routed to companies that made rebates or payments to it. The district court judge, Joseph F. Bataillon, again certified the class. The reframing avoided examining the circumstances of each trade, he said.

TD Ameritrade appealed again.

The Eighth Circuit reversed, rejecting the commission-based definition. "A commission is a flat rate that says nothing about the best price reasonably available under the circumstances at the time of a trade," Colloton said, joined by Judges Ralph R. Erickson and Jonathan A. Kobes. "Showing that a customer paid a commission to TD Ameritrade does not establish that the customer is worse off than if the customer had used a different broker."

The court rejected the clients' argument that customers didn't receive the full value of the commission they paid, suffering a loss.

"In a best-execution case, the claim is that the broker's misconduct resulted in a sub-optimal result on the trades themselves, regardless of the commissions," Colloton said. "The alleged misconduct does not affect the amount of commissions paid."

If there are instances where it did, the inquiry is individualized, not class-wide, he said.

The appeals court also rebuffed the investors' alternative requests for a class seeking injunctive relief and a class only for purposes of certain issues.

Attorneys for the investors included Levi & Korsinsky LLP. Sidley Austin LLP and Kutak Rock LLP represented TD Ameritrade.

The case is *Ford v. TD Ameritrade Holding Corp.*, 8th Cir., No. 22-03232, 9/3/24.

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NOT FOR REPRINT

Critical Mass With Law.com's Amanda Bronstad: Delaware's Highest Court Takes Up Zantac Expert Appeal, Will Convicted Tom Girardi Go to Prison?

The Delaware Supreme Court has agreed to take up an appeal of a May 31 ruling that allowed 10 plaintiffs' experts into thousands of Zantac lawsuits.

September 04, 2024 at 10:16 AM

Critical Mass



Amanda Bronstad
staff reporter



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: The Delaware Supreme Court has agreed to take up an appeal of a May 31 ruling that allowed 10 plaintiffs' experts into thousands of Zantac lawsuits. Tom Girardi, 85, could face sentencing guidelines of nine to 14 years after being convicted of wire fraud. Find out who stepped in for Fifth Third Bank in lawsuits brought over allegedly fraudulent loans to finance solar panel installations.

I'm Amanda Bronstad. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on [LinkedIn](#) or X: [@abronstadlaw](#).

'Substantial Issues Regarding the Daubert Standard'

The Delaware Supreme Court has agreed to take up an interlocutory appeal of a trial judge's May 31 order allowing 10 plaintiffs' experts on general causation in thousands of cases filed over the recalled heartburn medication Zantac.

Delaware Superior Court Judge Vivian Medinilla refused to dismiss expert opinions linking Zantac to 10 types of cancer. She later wouldn't certify her decision for the defendants, which include GlaxoSmithKline and Boehringer Ingelheim, [to file an interlocutory appeal](#), but the Delaware Supreme Court, on Aug. 27, disagreed, holding that:

"A ruling on the issues regarding the plaintiffs' general causation experts could be dispositive for some or all of the almost 75,000 claims filed in Delaware; the defendants agree that discovery and litigation regarding the second track of the case management order may continue while the interlocutory appeal is pending; and, most importantly, the Superior Court's decision raises substantial issues regarding the Daubert standard generally and mass tort litigation specifically, including whether (i) experts may base their causation opinions on studies regarding the cancer-causing agent or must focus on the product at issue in the litigation, and (ii) Delaware law requires experts to identify a threshold dose for purposes of establishing general causation."

GlaxoSmithKline said in a statement: “The scientific consensus remains that there is no consistent or reliable evidence that ranitidine increases the risk of any cancer. Since 2019, there are 16 epidemiological studies looking at human data regarding the use of ranitidine, including outcomes for more than 1 million patients using ranitidine, supporting this consensus.”

The opening brief is due Oct. 1.

[Jennifer Moore](#) (**Moore Law Group**) and [R. Brent Wisner](#) (**Wisner Baum**), who are co-lead counsel in the Zantac cases in Delaware, said in a joint statement: “The court wants to review two discrete questions involving close to 75,000 cancer victims. We all know that NDMA causes cancer—it’s why the FDA recalled Zantac from the market over four years ago. We are confident that the court will reach the same conclusion that the trial court did after three full days of hearings and a 102-page order.”

‘This Is What This Guy Deserved’

Tom Girardi, the former mass torts plaintiffs attorney now convicted of wire fraud, faces a potential maximum prison sentence of 80 years. But how much could he really get?

[Here’s my report](#) on the likelihood that Girardi, 85, could end up behind bars. [Julian André](#) (**McDermott Will & Emery**), a former federal prosecutor in Los Angeles, said Girardi likely faces sentencing guidelines of between nine to 14 years in prison, and his age and medical care needs could reduce that even further.

After the jury’s verdict on Aug. 27, **U.S. Attorney E. Martin Estrada**, of the **Central District of California**, which prosecuted the case, said Girardi’s age won’t stop his office from pushing for a prison sentence. He vowed that ex-clients would get to speak at the sentencing hearing, which is scheduled for Dec. 6.

Clients aren’t the only ones impacted by Girardi’s fraud, which prosecutors called a Ponzi scheme that lasted a decade. **Law Finance Group**, a litigation lender that gave Girardi a \$12 million loan, sued him after he failed to pay it back. LFG founder **Alan Zimmerman** testified during Girardi’s trial that he first suspected wrongdoing after another Girardi Keese partner, **Bob Finnerty**, asked him during a St. Patrick’s Day party if Girardi had paid him yet.

[Leslie D. Corwin](#) (**Duane Morris**), the lawyer who brought the 2019 suit for LFG, told **Law.com** that Girardi, who at the time [called his client “a miserable, rotten, despicable company,”](#) was “arrogant” and “pathetic.” He called Girardi’s conviction “probably one of the most significant white-collar cases ever brought regarding the legal profession.”

Corwin told me:

“What happened in that courtroom to me was final justice, and this is what this guy deserved. I love this profession, love the people in it. He is what gives this profession a bad reputation. He always took this attitude that he was above it all, and he was smarter than you were, more connected than you were, and how dare you question his integrity.”

Who Got the Work?

[Enu A. Mainigi](#) (**Williams & Connolly**) appeared last month for **Fifth Third Bank** and its related companies sued over allegedly fraudulent loans tied to the installation of solar panels by a company called **Vision Solar**. Plaintiffs in five lawsuits have moved to coordinate the cases as multidistrict litigation in the **District of New Jersey**, but Fifth Third Bank, in an Aug. 23 response before the **U.S. Judicial Panel on Multidistrict Litigation** noted it faced 15 additional lawsuits, plus a case filed by the Minnesota Attorney General’s Office and a class action in Florida. Mainigi argued that the cases should be in the **Southern District of Ohio** or the **District of Connecticut**.

Here’s what else is happening:

Roundup Windup: Another Roundup verdict in the **Philadelphia Court of Common Pleas** is likely around the corner, with the city’s most recent trial entering its third week. Philadelphia’s fifth Roundup trial, in a case captioned *Young v. Monsanto*, began Aug. 19 with [Kim Loutey](#) (**Kirkendall Dwyer**) representing the plaintiff. [Jennifer Saulino](#) (**Sidley Austin**) and [Michelle Ramirez](#) (**Sidley Austin**) represent Roundup manufacturer **Monsanto**, now owned by **Bayer**, which plans to begin its defense case on Sept. 4.

CrowdStrike Suit: The first consumer class action [has been filed](#) against cybersecurity firm **CrowdStrike** over its July 19 global outage. Two customers of **Delta Air Lines**, which canceled thousands of flights due to the computer crash, filed the suit in the **Western District of Texas** before U.S. District Judge Robert Pitman. [Warren Burns](#) (**Burns Charest**) represents plaintiffs Christopher Harlan and Sara Harlan, who were stranded in Atlanta during a return trip from the Dominican Republic. Pitman also is overseeing a July 30 securities class action filed by the **Plymouth County Retirement Association** against CrowdStrike, and Delta was hit with a consumer class action last month over the outage.

Photo Finish: Ancestry.com [won a rare victory](#) in a class action alleging right-to-publicity violations over old yearbook photos. On Aug. 27, U.S. District Judge Edmund Sargus, of the **Northern District of Ohio**, granted summary judgment after concluding that Ancestry.com had not used plaintiff John Wilson’s photos for a commercial purpose. The case is one of several similar right-to-publicity class actions, including those against **PeopleConnect’s Classmates.com**, **ZoomInfo Technologies** and **Whitepages**.

Thanks for reading Critical Mass! I’ll be back next week.

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Walgreens hit with lawsuit claiming generic cold medicine has cancer-causing chemical

 [reuters.com/legal/litigation/walgreens-hit-with-lawsuit-claiming-generic-cold-medicine-has-cancer-causing-2024-09-04](https://www.reuters.com/legal/litigation/walgreens-hit-with-lawsuit-claiming-generic-cold-medicine-has-cancer-causing-2024-09-04)

Diana Jones

People walk by a Walgreens, owned by the Walgreens Boots Alliance, Inc., in Manhattan, New York City, U.S., November 26, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

Sept 4 (Reuters) - Walgreens is facing a proposed class action lawsuit brought on Wednesday by customers who say they weren't warned that the pharmacy chain's generic version of cold medicine Mucinex contains a cancer-causing chemical.

The lawsuit, filed in Chicago federal court, claims Walgreens did not label the products or otherwise warn customers that they contained benzene, a known carcinogen. A Reuters review of court records shows the lawsuit appears to be the first filed after news articles – first published by Bloomberg last month – claimed generic versions of Mucinex sold at stores including Walgreens contain benzene.

Walgreens customers Miriam Birdsong and Cheryl Mikel, both South Carolina residents, say they would not have purchased the products or would have paid less for them had they known they contained benzene, and are seeking damages and restitution. They are seeking court approval of a nationwide class of Walgreens customers who purchased the products, as well as separate classes of Illinois and South Carolina customers.

The lawsuit names Walgreens Inc as the defendant, although Walgreens Boots Alliance is the parent of Walgreens Co.

Walgreens representatives did not immediately respond to requests for comment. In response to questions about whether its products contain benzene, the company told Bloomberg it works with its suppliers to follow U.S. Food and Drug Administration regulations.

Attorneys for Birdsong and Mikel did not immediately respond to requests for comment.

The FDA has said drugmakers should not use benzene in the manufacture of their products and has urged pharmaceutical companies with products on the market that contain more than 2 parts per million of benzene to initiate recalls.

Walgreens is facing at least three other lawsuits filed this year in federal courts in Chicago and California over benzene in products. The lawsuits allege it sells acne treatment products that contain benzoyl peroxide, which can degrade into benzene.

Walgreens argues that the claims are preempted by the Federal Food, Drug, and Cosmetic Act, which sets the guidelines for product labeling.

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Reporting by Diana Jones

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Diana Novak Jones

Thomson Reuters

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

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Sept. 4, 2024, 2:00 AM PDT

Big Law Grows Litigation Finance to Cut Risk, Please Clients

By Emily R. Siegel

Deep Dive

- Top firms active in spurring \$15 billion industry
- IP, arbitration, antitrust are popular areas

Bloomberg Law News 2024-09-04T10:30:38335973877-04:00

Big Law Grows Litigation Finance to Cut Risk, Please Clients

By Emily R. Siegel 2024-09-04T05:00:03000-04:00

- Top firms active in spurring \$15 billion industry
- IP, arbitration, antitrust are popular areas

Mayer Brown defense partner Michael E. Lackey said litigation finance “was just anathema” to him about a decade ago.

“Anything that makes it easier for people to sue my clients is something I don’t want,” Lackey said in an interview. Now, “virtually every large law firm that does litigation probably has a funded case somewhere”—including his.

The biggest US law firms have grown comfortable with the practice of using investments from third parties to pay the cost of lawsuits. In return, the investors get a piece of any successful court awards or settlements and benefit from returns uncorrelated to equity markets.

Making Millions Off Other ...

WATCH: Making millions off others’ lawsuits: How litigation finance works

Big Law has helped build litigation finance into a \$15.2 billion industry, up from \$9.5 billion five years ago, according to Westfleet Advisors. The 200 largest US law firms by revenue accounted for more than a third of total capital commitments in two of the past three years, Westfleet found.

Quinn Emanuel Urquhart & Sullivan in April announced a \$40 million deal with Longford Capital to finance lawsuits for private equity firms and their portfolio companies. Saul Ewing has about four funded matters and does due diligence for multiple litigation funders—a change from years ago when the firm and others in Big Law cast a suspicious eye at the practice.

“My firm was somewhat reluctant to embrace litigation funding,” said Casey Grabenstein, a Saul Ewing partner for commercial litigation and co-chair of the firm’s litigation funding group. “Now they’re fully on board. You have a wave of newer partners who are open to creative solutions like litigation funding that are really pushing it within their firms.”

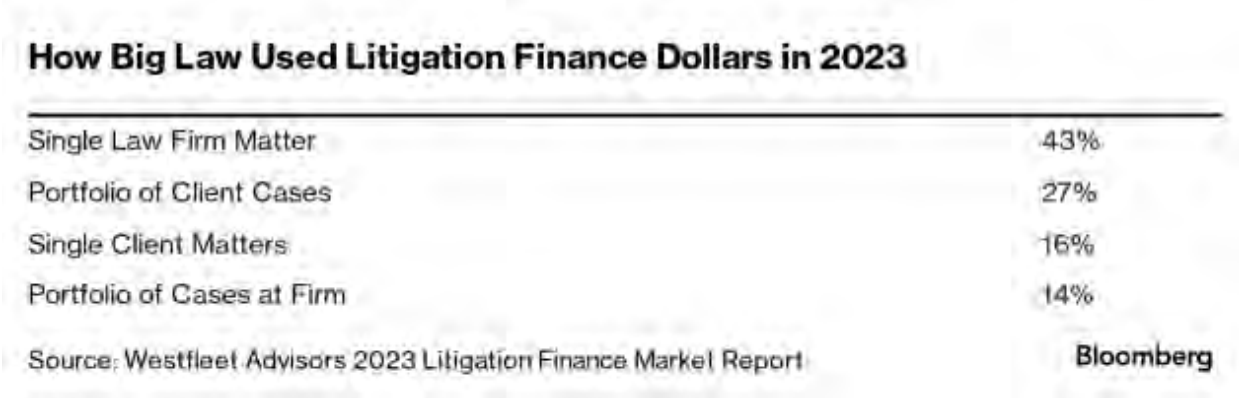
Lowering Risk

The large firms’ comfort has stemmed from a better understanding of the industry and a desire to take on more contingency cases without assuming the risk if the lawsuits are losers. Patent litigation accounted for 19% of new capital commitments last year, Westfleet found. Firms said antitrust and international arbitration were also popular areas for litigation finance.

The funding is useful in expensive, long-duration international arbitrations, said Martin Gusy, a partner at Bracewell who handles such cases.

“It’s client driven,” Gusy said. The customers sometimes lack the capital to pursue matters or in other cases simply want to avoid the high costs of arbitration, he said.

“Clients are becoming more sophisticated and they’re demanding better deals,” said Michael Bowe, co-chair of the litigation and dispute resolution practice at Brown Rudnick. “There’s pressure on bigger firms to compete.”



Cadwalader uses the funding for all contingency cases, said Phil Iovieno, co-chair of the firm's antitrust litigation group, who typically handles cases with \$10 to \$20 million budgets. The firm has several contingency cases with funding and he only works with a select group of funders who are comfortable with large budgets, despite getting solicitations for funding nearly every week, he said.

"We're not turning a contingency case into a billable case, we are sharing the risk with the funder," Iovieno said. "You pick your funders carefully—you just have better outcomes."

Best Practices

Westfleet over the past year and a half has seen an increase in inquiries from Big Law firms about navigating litigation finance, said Charles Agee, the firm's chief executive.

"There are many benefits of funding, but there are also some real downsides—some ethical issues, conflict issues," he said describing the content of the inquiries he receives. "We see the need to institutionalize some best practices around it."

Saul Ewing's Grabenstein said it's best that funders be "hands off" on case strategy. "You can run into problems with funders who want to control the terms of settlement," he said.

Shawn Blackburn, a Susman Godfrey partner who has litigation funding behind at least half of his intellectual property cases, said the investor's return shouldn't take too much from the patent owner. Otherwise clients may say "I'm not going to get any of this money" and press for an unnecessary trial rather than take a settlement, he said.

Blackburn said he refers clients to multiple funders because he doesn't want to be in a position of funneling people to just one. He said he also doesn't get involved in negotiations between the client and funder.

"You want to make sure that it is their choice and that they are themselves going out and getting the best deal," he said.

Brown Rudnick's Bowe said firms that use litigation finance must be prepared for the large amount of time it takes to get funding—at times several months—with a low probability of being approved. "That's a really big cost and it can be off-putting to a client," he said.

Bowe said he's increasingly interested in using the insurance industry to fund cases because it is less cumbersome and expensive than litigation finance.

"Over time this industry is going to continue to become more and more efficient and have more and more products and be much more sort of consumer friendly to law firms," he said. "That's very exciting."

Lackey of Mayer Brown said funders' claim that they even the playing field is true.

"It does present opportunities for our clients to bring case that they otherwise couldn't bring," he said.
"When used in that form, I find it to be a very useful tool."

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Daily Journal

DJ [dailyjournal.com/articles/380731](https://www.dailyjournal.com/articles/380731)



Richard M. Heimann
Lieff Cabraser Heimann & Bernstein
San Francisco

Richard Heimann describes himself as the primary trial attorney at Lieff Cabraser. That means he gets involved in "all sorts of different cases," ranging from securities class actions to employment and consumer cases, "any case that is in a posture that's heading towards trial."

Most of his cases deal with securities and consumer matters, he said. But he does take any nearing trial. One prominent example is leading the Walgreen's portion of the trial in San Francisco's lawsuit over opioids in 2022. Soon after that case, the company announced a \$5.7 billion national settlement. *The City and County of San Francisco v. Purdue Pharma*, 3:18-cv-07591 (N.D. Cal., Dec. 18, 2018).

A new case keeping him busy targets a real estate investment business that he suspects was basically a Ponzi scheme. The suit alleges the two defendants used "a complex web of corporate entities" to trick people across the country into investing into what turned out to be dilapidated properties in Sonoma County. *Claridge v. LeFever*, 3:24-cv-04093 (N.D. Cal., filed July 8, 2024).

Heimann and attorneys from Cotchett, Pitre & McCarthy, LLP and CaseyGerry are working the case intently because they fear the defendants may sell the properties "and abscond with the money," he said. "We may very well go in for either a temporary restraining order or the appointment of a receiver."

He recently filed a derivative action against Elon Musk. It alleges that Musk and the directors of Tesla acted improperly by making statements to drive down the price of Twitter stock and simultaneously drive up the price of Tesla stock "so that he could sell Tesla stock to provide himself with the funds that he needed in order to acquire Twitter," Heimann said. *Employees' Retirement System of Rhode Island v. Musk*, 2024-0631 (Del Chancery Ct., filed June 10, 2024).

Heimann is also suing Fox Corp. officers and directors in a derivative suit based on the \$787 million libel settlement it agreed to pay to Dominion Voting Systems last year over the 2020 election. He is readying to oppose the motion to dismiss. "In the derivative case, that's an important juncture because the question always is ... whether we can establish the demand on the board to take action would've been futile." *In Re Fox Corporation Derivative Litigation*, 2023-0418 (Del. Chancery Ct., filed Sep. 15, 2023).

He's at about the same point in another derivative suit against Discover Bank over its stock's steep price drop when it appeared it wasn't able to comply appropriately with federal rules and regulations. *KBC Asset Management NV v. Discover Financial Services*, 1:23-cv-06788 (N.D. Ill., filed Sept. 1, 2023).

Heimann said a big insider-trading case is on hold pending an appeal of the certification of a related class action. The defendant is a company accused of paying tens of millions of dollars to Ohio state lawmakers, including the now-imprisoned speaker of the state house, to gain favorable legislation. *MFS Series Trust I v. FirstEnergy Corp.*, 2:21-cv-05839 (S.D. Oh., filed Dec. 17, 2022).

#380731

Daily Journal

DJ [dailyjournal.com/articles/380674](https://www.dailyjournal.com/articles/380674)



Elizabeth J. Cabraser
Lieff Cabraser Heimann & Bernstein
San Francisco

Elizabeth Cabraser has been leading large class action and mass tort litigation for more than 40 years. She has sued over tobacco, dangerous and overpriced medications, wildfires, defective cars and car parts, oil spills and price fixing.

For the last year, she has been deep into a case she compares to Marine Corps basic training. "It's a grind," she said.

Cabraser is co-lead counsel representing people sickened from exposure to contaminated water at the Marines' Camp Lejeune from August 1953 through the end of 1987. Camp Lejeune Water Litigation v. U.S., 7:23-cv-00897, (E.D. N.C., filed April 25, 2023).

The case is "moving right along," she said. Expert discovery is beginning, and bellwether trials could begin next year.

The litigation was authorized by the Camp Lejeune Justice Act of 2022, and more than 300,000 people filed claims with the Navy by the Aug. 10 deadline. "We anticipate that we'll be dealing with several hundred thousand cases that will either be tried or hopefully the subject of a global resolution," Cabraser said. She added that the court has appointed two settlement masters, "but we may well need trial verdicts and damages awards to provide some data for the parties to use."

Under the act, liability is not at issue. But causation and damages for each claimant are. "We're dealing with diseases and deaths that are occurring now, based on exposures that happened some years ago," she said.

Lief Cabraser represents 500 to 600 claimants, which she said was all the firm felt it could handle responsibly. Unlike typical mass tort cases, these present historical challenges, Cabraser said. "There's a lot of reconstructive work that has to go on" to determine when clients were at the camp and to trace their decades-old medical histories.

Cabraser also continues to be a leader in opioid litigation, serving on the plaintiffs' executive committee in the national MDL and also representing cities, counties, Native American tribes and health organizations.

"The good news is that collectively over \$50 billion has been obtained for the various plaintiffs and is in the process of distribution," she said. "But we've got a ways to go before we're done."

The litigation grew more complicated in June, when the U.S. Supreme Court rejected the Purdue Pharma bankruptcy plan that would have shielded the company's owners, the Sackler family, from lawsuits.

Now, "there are highly confidential mediation efforts underway, which cannot be talked about," she said. Either those efforts will resolve the many claims against the family, or "we've got a new wave of opioid litigation."

Beyond those two massive litigations, Cabraser said she works with her younger partners "who are on upward trajectories of their careers."

"If I were applying for a job at Lieff Cabraser today, I don't think I'd get it because our young lawyers are a lot more qualified," she said. "And I think that's great."

#380674

<https://x.com/AnnMLipton/status/1831412585973063763>



@annmlipton@esq.social

@AnnMLipton

...

this quote will be added to complaints against tesla for commingling business interests, mark my words

Starlink's entanglement in a dispute originally about X is a stark illustration of how some government officials around the world may draw few distinctions between enterprises that Musk runs. Starlink could be especially affected by this because the satellite-communications business must secure approval to offer internet service from regulators in each country where it wants to operate around the world.



@ProfEricTalley@lor.sh



The seeds of a good veil-piercing exam question? SpaceX has moved to relocate employees from Brazil in a sign of how Elon Musk's battle with Brazil's highest court over his social-media company X is spilling over to some of his other businesses [wsj.com/business/telecom](https://www.wsj.com/business/telecom)... via @WSJ

12:22 PM · Sep 4, 2024 · 74 Views



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EXCLUSIVE TELECOM

SpaceX Pulls Employees From Brazil, Discourages Travel There, as Musk Battles Court Over X

The moves show how Musk's legal dispute about X is affecting SpaceX and its Starlink satellite-internet service

By [Becky Peterson](#) [Follow](#) and [Micah Maidenberg](#) [Follow](#)

Updated Sept. 4, 2024 2:15 pm ET



Elon Musk's social-media platform X has been at odds with Brazil's Supreme Court over accounts that the court says are spreading hate speech and misinformation. PHOTO: DAVID SWANSON/REUTERS

SpaceX has moved to evacuate employees from Brazil and warned others against traveling to the country, a sign of how Elon Musk's ongoing battle against Brazil's highest court over his social-media company X is spilling out to affect some of his other businesses.

In an email late last week, SpaceX President Gwynne Shotwell advised employees not to travel to Brazil for work or pleasure, according to people familiar with the email. The space company also last week took steps to relocate

from the country its small group of non-Brazilian employees there, one of the people said.

For months, Musk has been battling with Brazilian Supreme Court Justice Alexandre de Moraes, who ordered X to remove a number of accounts that the court said are spreading hate speech and misinformation on the social-media platform. In August, X closed operations in Brazil, citing the need to protect the safety of its staff.



Brazilian Supreme Court Justice Alexandre de Moraes PHOTO: TON MOLINA/ZUMA PRESS

The court then last week banned X, saying it would only lift the block when the platform complied with legal requirements, such as paying its fines and appointing a legal director in the country.

The court also took action against SpaceX's Starlink, ordering its finances in the country frozen and preventing it from conducting any further financial transactions, the satellite provider said Thursday. The order was based on the court's determination that Starlink, a SpaceX business that uses satellites to provide high-speed internet access, should be held responsible for fines levied against X, according to Starlink.

Foreign investors putting money into Brazil have recoiled at the move. Arthur Lira, the powerful leader of Brazil's lower house of Congress, warned over the weekend that the decision threatened to heighten legal uncertainties in the country and scare off other businesses.

On Tuesday, Starlink said in a post on X that it was doing everything it could to keep Brazilian customers connected. It said it began legal proceedings before the Brazilian Supreme Court, calling the order against it illegal. At the same time, Starlink said it would comply with a ruling requiring it to block access to X.

SpaceX didn't respond to requests for comment.

Starlink's entanglement in a dispute originally about X is a stark illustration of how some government officials around the world may draw few distinctions between enterprises that Musk runs. Starlink could be especially affected by this because the satellite-communications business must secure approval to offer internet service from regulators in each country where it wants to operate around the world.

As of the end of last month, Starlink had won those rights from 105 different countries, according to one of its recent posts on X.

Starlink has grown quickly in recent years in Brazil, with the satellite business reporting around 250,000 customers across the South American country. The business has gained ground in the country's agricultural heartland and in the Amazon rainforest, regions where traditional internet service may be unavailable or spotty.

Brazil is an important market for Starlink, given its large population and remote areas underserved by terrestrial telecom infrastructure, analysts said. Executives at SpaceX have said Starlink is best suited serving customers in areas outside of dense cities.



A Starlink terminal provides satellite internet service to the Yawanawa indigenous community near Tarauaca, Brazil. PHOTO: VICTOR MORIYAMA/BLOOMBERG NEWS

“When you talk about squeezing usage and squeezing revenue out of the southern hemisphere, there’s two countries that stand out: Brazil and Australia,” said Chris Quilty, president of consulting firm Quilty Space. For any satellite network like Starlink, “Brazil is one of the crown jewels.”

Starlink currently charges consumers around \$33 a month for service in the country, and around \$177 in upfront costs for hardware, according to its website.

SpaceX is also pursuing deals to connect businesses with Starlink in Brazil. Earlier this year, agriculture-equipment manufacturer Deere struck an agreement with Starlink to connect its machines in the field with that service expected to debut this year in parts of the U.S. and Brazil. It couldn’t be determined if the Brazilian court’s ruling against Starlink would affect those plans. Deere didn’t respond to a request for comment.

It is unclear what impact, if any, the events have had on Musk’s electric-vehicle company Tesla, which doesn’t sell its cars in Brazil. Musk met with the former president of Brazil Jair Bolsonaro in 2020. Before the meeting, Bolsonaro said on Twitter that he would try to convince Musk to bring Tesla to Brazil, though the plans never came to fruition.

Members of the Bolsonaro government made deeper inroads with SpaceX, the space technology company led by Musk. In late 2021, Fábio Faria, then serving as communications minister in Bolsonaro’s government, said in a video with Musk posted to X that he was excited about beginning a partnership with Starlink and SpaceX in Brazil.

Faria has said he personally fast-tracked regulatory approval Starlink needed to enter the Brazilian market, the Journal has reported.

—*Samantha Pearson contributed to this article.*

Write to Becky Peterson at becky.peterson@wsj.com and Micah Maidenbergl at micah.maidenberg@wsj.com

Videos

Bloomberg Law News 2024-09-04T16:58:11857392002-04:00

Matt Levine's Money Stuff: Hedge Funds Help Companies Hedge

By Matt Levine 2024-09-04T14:34:30300-04:00

Deal-contingent hedges

This [is cool](#):

A growing number of hedge funds are helping banks recycle the risks stemming from deal contingent trades, a risky type of derivative that banks sell to corporates and private equity firms looking to hedge financial market moves ahead of the completion of major mergers and acquisitions.

At least four hedge funds are active in helping banks offset deal contingent risks, according to industry experts, compared with just one a few years ago. That is helping create a secondary market for the risks stemming from these complex trades and enabling banks to underwrite more – and larger – deal contingent transactions than ever before.

“We are regularly facing a lot larger [deal contingent hedging] opportunities than in the past,” said the global head of foreign exchange structuring at a major dealer. “The fact that banks’ appetite [for deal contingent risk] has increased is linked to the fact that there’s now an ability to distribute that risk in the market to hedge funds, allowing us to take on larger deals through risk recycling.”

The idea of a deal-contingent hedge is that, if a company signs a deal to acquire another company, that deal won’t close for a few months, and when it does, the buyer will need to come up with the money. This might involve borrowing the money and/or converting it from the buyer’s currency into the target’s. This creates risk: Between signing and closing, the exchange rate might move against the buyer, or interest rates might go up. The buyer might want to hedge this risk by locking in an interest rate or an exchange rate at the time of signing.

That’s generally pretty simple to do: You buy a bunch of foreign currency today (or do a forward) to lock in your exchange rate, or you borrow a bunch of money today (or do an interest rate swap) to lock in your interest rate. But there is another risk: The deal might not close. (Regulators might block

it, the target's shareholders might vote no, another bidder might emerge, etc.) And if *that* happens, the buyer will not want to be stuck with a bunch of foreign currency and/or borrowed money that it doesn't need.

And so there is a market for the buyer's banks to say "we'll do a trade where you lock in an exchange rate and/or interest rate today, and you get that rate when the deal closes, but if the deal doesn't close we'll tear it up, never mind." That's a good product for the buyer, a good hedge to its actual risks. (And so the buyer will pay the bank a premium for it.)

It's a tough product for the bank to manufacture, though, because it puts the risk of deal closing on the bank. The bank needs to correctly estimate the likelihood of the deal closing to hedge the derivative, and if it gets it wrong it could lose a lot of money.

In an earlier era you'd say "yes, the job of an investment bank is to use its balance sheet to facilitate risk management trades for clients, and to be smart and good about managing the risks of those trades." In 2024 that is not quite right. In 2024 it is the job of a *big hedge fund* to use its balance sheet to facilitate risk management trades; it is the job of an investment bank to *bring the hedge funds those trades*. The investment bank has the client relationship; the hedge fund takes the risk:

Hedge funds are comfortable holding these chunky exposures because they don't face the same regulatory and risk constraints as banks. It can also be a lucrative business as banks are often willing to pay handsomely to offload deal contingents on public transactions that can involve billions of dollars of risk.

It's these riskier, public M&A deals that hedge funds are most interested in taking off banks' hands, in part because there's often a higher chance of failure, meaning the hedge will be more expensive. There also tends to be more information around the proposed transaction to scrutinise.

This relates to two stories that I write about from time to time around here. One is about the retreat of *banks* (and investment banks) from many sorts of balance-sheet risk, and the rise of other firms — hedge funds, proprietary trading firms, private credit firms, etc. — to replace them. Banks have risky funding models and a lot of regulation, so it is tougher than it used to be for them to take big proprietary risks on mergers closing. But hedge funds are less regulated and happy to take over that business, for a price.

The other is about the economic function of hedge funds. You can sort of tell two stories about what it

is that a hedge fund *does*:

- 1. One story is “a hedge fund is full of smart people who have some advantage at predicting financial asset prices, so they buy things that will go up.” Hedge funds find uncorrelated sources of returns and then bet on them. They are essentially making bets in a casino, and they are smart bettors.
- 2. The other story is “a hedge fund is a financial intermediary that provides a set of services to long-term fundamental investors and other participants in the real economy, though it usually provides those services indirectly: It is on the other side of some trade that people want to do for fundamental reasons, and it gets paid, in expectation, for that service.” So we have talked about the basis trade, which is arguably “hedge funds bet that Treasury bond prices will converge with Treasury futures prices” — a pure smart-betting story — but which is more sensibly described as “pension funds want to get their duration via Treasury futures, and Treasury wants to sell bonds, so hedge funds intermediate that trade by buying the bonds, using them to manufacture futures, and collecting a spread.” Or yesterday I mentioned the index arbitrage trade, which is “index funds want to buy stocks the day they are included in the index, so hedge funds buy them up ahead of time to deliver to the index funds, and collect a spread for their trouble.”

Here, you can tell both stories. The hedge funds have smart people who can analyze whether a merger will close — they have a merger arbitrage desk, for instance, that bets directly on whether deals will close — and they have smart people who can price foreign-exchange and interest-rate derivatives, so they think they can do a good job of pricing deal-contingent derivative risk, and they can get paid for being right.

On the other hand, they are also obviously providing a service to real companies, mitigating risks and making it easier for mergers to happen in the real economy. They are providing, essentially, a *banking* service. They get paid for being right, and lose money if they're wrong, but in expectation they should mostly get paid, because they are doing something useful.

T+1

In May, the US stock market transitioned to T+1 settlement. Before the transition, if you bought stock on a Monday, the trade settled — you got the stock and delivered the money — on Wednesday (T+2). After the transition, if you bought stock on a Monday, it settled on Tuesday. Ahead of the

transition, people were worried, and I suggested that there were three ways it could go:

- 1. Smoothly,
- 2. Disastrously, or
- 3. Smoothly enough that the US stock market would not crash, no big financial institutions would be bankrupted, and I wouldn't have to think about it much anymore, but disastrously enough that stock settlement professionals would moan about how many problems it caused.

That was a few months ago, and I am now pretty sure that the T+1 transition was not a visible-to-the-naked-eye disaster. But are settlement professionals moaning about it? Yes:

This year's seemingly smooth transition to a faster settlement regime for US stocks turns out to have been far from plain sailing for many industry players, according to Citigroup Inc.

From overhauling arcane funding processes to relocating traders across oceans, the late-May switch to the system known as T+1 proved tougher than expected, the bank found in a survey of market participants.

The scale of the changes required — which affected multiple divisions including funding, FX and securities lending — caught out many in the industry, the poll shows. Meanwhile, the impacts of the switch appear to have been felt unevenly, with the likes of asset managers hit with higher funding costs as banks and other intermediaries see expenses drop.

“Every area appears to have been more impacted than originally anticipated, from funding to headcounts, securities lending and fail rates,” the Wall Street bank's securities services arm said in a report released Wednesday. “Investment budgets have been diverted, non-critical projects delayed and essential resources borrowed.”

The basic intuition here is that if settlement takes two days, then brokers take two days of risk that their customers will not deliver securities or cash and the trade will fail. This risk is expressed in things like clearinghouse margin, where the broker posts some cash to a clearinghouse to cover the risk of client failures. If settlement takes one day, that risk is substantially reduced, so the broker doesn't need to post as much cash.

Meanwhile, if settlement takes two days, then the customer can do a trade and take two days to line up funding for the trade. If settlement takes one day, the customer has less time to line up funding. In fact, because of various mismatches (you might be in a different time zone, foreign exchange markets might be quiet, your bank might be closed, etc.), the customer might have to line up funding *before* agreeing to the trade, keeping cash lying around in the US to be able to trade stocks. And so T+1 settlement reduces systemic risk and broker costs, while increasing customers' funding costs and headaches:

The single biggest impact for brokers and custodians has been a roughly 30% reduction in clearing margin, with some 80% of the sellside calling the development strongly impactful to their business.

In contrast, 46% of buy-side respondents say they're having to cover significant funding gaps during the settlement process as they navigate between T+1 and T+2 regimes (the latter is still standard in Europe and in the global currency market).

This does seem mostly like T+1 working as intended.

Too Uber to fail

Here's a business model:

- 1. Write insurance on some essential part of the economy.
- 2. Underprice the insurance: Charge \$60 for insurance that will predictably pay out \$100 in a few years.
- 3. Win a lot of market share: Your insurance is cheaper than everyone else's, so customers will prefer you.
- 4. Invest the float and pay yourself nice bonuses.
- 5. Eventually, you will get insurance claims, you won't have enough money to pay them, and you'll be insolvent.
- 6. Oops! It's fine, though. The thing you are insuring is so essential that the government will probably bail you out.

This is ... you know, this is such an obviously good business model that it's kind of the whole point of

insurance regulation to prevent it? *Of course* if you could undercharge for insurance, keep the money, and not pay out claims, that would be a good business, so insurance regulation is designed to make sure that insurance companies actually keep enough money to pay their claims. It's not perfect though:

American Transit, also known as ATIC, insures roughly 60% of New York City's more than 117,000 commercial taxis, livery cabs, black cars and rideshare vehicles.

It's also insolvent.

Run by Ralph Bisceglia, ATIC has for decades been the dominant player in New York City's commercial car insurance market, the largest in the country, offering cabbies premiums far lower than other insurers. In the second quarter, it posted more than \$700 million in net losses, according to a filing with the National Association of Insurance Commissioners. ...

"There is a perception that they are too big to fail," said Andrew Don, chief operating officer of Research Underwriters, a transportation insurance broker. If that happened, "there would be a large void in the ability to get a taxi or an Uber or a Lyft or a limo in New York as all of these vehicles would suddenly be without insurance." ...

"[The New York Department of Financial Services] has to step in and do something," said Matthew Daus, a partner at law firm Windels Marx and the former chairman and commissioner of New York City's Taxi and Limousine Commission. The company's latest financial filing paints a picture so dire that it's "creating unrest in the industry," said Daus, who founded Windels Marx's Transportation Practice Group.

ATIC has been underpricing insurance for decades, snapping up business from competitors, Daus and other transit and insurance industry officials told Bloomberg.

"The premiums that they were charging were not commensurate with the risk they were taking on," Research Underwriters's Don said.

Apparently. I like that, in New York, the too-big-to-fail industry is taxis and Ubers.

This story is a little reminiscent of an amazing working paper titled "[When Insurers Exit: Climate](#)

[Losses, Fragile Insurers, and Mortgage Markets](#),” by Parinitha Sastry, Ishita Sen and Ana-Maria Tenekedjieva, about the Florida home insurance market. (Bloomberg’s Leslie Kaufman wrote about it in April.) The basic story is that there are a lot of parts of Florida where it is very risky to insure a home, and in response to that fact (1) traditional insurers don’t insure homes there, (2) new, riskier insurers step in to sell underpriced insurance and (3) this is all allowed because the new insurers get somewhat dubious credit ratings:

Using Florida as a case study, we show that traditional insurers are exiting high risk areas, and new lower quality insurers are entering and filling the gap. These new insurers service the riskiest areas, are less diversified, hold less capital, and 20 percent of them become insolvent. We trace their growth to a lax insurance regulatory environment. Yet, despite their low quality, these insurers secure high financial stability ratings, not from traditional rating agencies, but from emerging rating agencies.

Sort of a traditional bad story: underpriced insurance, risky insurers and regulatory gaps. But there’s a second part to the story:

Importantly, these ratings are high enough to meet the minimum rating requirements set by government-sponsored enterprises (GSEs). We find that these new insurers would not meet GSE eligibility thresholds if subjected to traditional rating agencies’ methodologies. We then examine the implications of these dynamics for mortgage markets. We show that lenders respond to the decline in insurance quality by selling a large portion of exposed loans to the GSEs.

If you are a mortgage lender in Florida, you care about homeowner’s insurance: If the home gets washed away in a hurricane, the insurance had better pay out, or else you’re not getting paid back on your mortgage. If you suspect that some insurers will *also* get washed away in a hurricane, you won’t want to hold mortgages against houses that they insure. Fortunately (for you), there is a profit-maximizing solution: You make the mortgage, but then you sell it to Fannie Mae or Freddie Mac, so that the credit risk is their problem. (And Fannie and Freddie are insensitive to this risk.) Instead of the government having to bail out the insurers after the fact, it can do it in advance using the GSEs.

Cell phones

One person with a fascinating job is whoever runs the US Securities and Exchange Commission’s Task Force for Fining Everyone for Texting About Work on Personal Cell Phones. In the beginning, that was a creative, risky job. When you first went to the chair of the SEC and said “I want to start

fining everyone for texting about work on their personal cell phones,” there was a possibility that he would say “what, no, it’s not illegal to text about work on your personal cell phone.” Maybe that was not that big a risk — the SEC chair is Gary Gensler — but maybe *other* people would say that. Maybe you’d go to the big banks and say “we think you have employees who text about work on their personal phones” and the banks would say “yeah probably” and you’d say “okay we’re fining you a billion dollars for that” and they’d say “what, no, that’s not illegal, we’ll see you in court,” and you’d go to court and a judge would conclude that it’s not illegal to text about work on your personal cell phone. And then the whole Task Force for Fining Everyone for Texting About Work on Personal Cell Phones would shut down ignominiously without extracting any fines.

But that is in fact not what happened: The SEC extracted a \$200 million cell phone settlement from JPMorgan Chase & Co. in 2021, and that got the ball rolling for a couple of billion dollars of bank fines, and at that point the task force was off to the races.

And then the job probably got more boring. Coming up with the theory — that texting about work on your personal cell phone violates a 1948 SEC regulation requiring every broker to keep “originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to its business as such” — and persuading banks that it was correct was an impressive creative leap, but after that it’s all pretty cookie-cutter. You come into work each day and ask yourself “what other sorts of financial services firms could we fine for texting about business on their cell phones,” and you go down the list. You started with the biggest banks and extracted the biggest fines, but three years into the program you’re rounding up the cats and dogs. For instance, you might eventually get around to the awkward fact that SEC employees, like everyone else, also sometimes discuss work on their personal cell phones.

On the other hand eventually someone might push back — none of these cases have been *litigated*; they all settle — and that might be exciting.

Anyway, [ratings agencies](#):

The Securities and Exchange Commission [yesterday] announced charges against six nationally recognized statistical rating organizations, or NRSROs, for significant failures by the firms and their personnel to maintain and preserve electronic communications. The firms admitted the facts set forth in their respective SEC orders; acknowledged that their conduct violated recordkeeping provisions of the federal securities laws; agreed to pay combined civil penalties of more than \$49 million, as detailed below; and have begun implementing improvements to their compliance policies and

procedures to address these violations.

Okay. Here's the one against [Moody's Investor Service Inc.](#), which is paying \$20 million:

Moody's Ratings employees, including those at senior levels, have communicated using personal mobile devices by text message and other messaging platforms, such as WhatsApp, since at least January 2020 ("off-channel communications"). The messages included discussions of initiating, determining, maintaining, monitoring, changing, or withdrawing a credit rating ("Credit Rating Activities").

Probably. You can't do that, apparently.

Triple ETFs

We talked yesterday about the problems with triple-leveraged exchange-traded funds. Basically: Those ETFs try to match three times the *daily returns* of some stock (or index, etc.). If that's what you want, you get it (minus fees). But if you want three times the *long-term* return of the stock — or even, like, three times the *monthly* return — you might be disappointed. If the underlying stock is volatile, tripling its daily returns will not get you triple its long-term returns. In particular, we talked about a 3x levered single-stock ETF on MicroStrategy Inc.: MicroStrategy was up about 110% year-to-date, with a ton of volatility; the ETF was down about 80%. If a stock is up 8% one day, down 7% the next, etc., it will go up a lot over the long term, but if it is up 24% one day and down 21% the next, it will go down over the long term. (Here is a 2010 article titled "[Leveraged ETFs: All You Wanted to Know but Were Afraid to Ask](#)," which goes through the math for how far a leveraged ETF will deviate from its underlying, given the volatility of returns.)

I pointed out that this is not an *inherent* feature of leveraged ETFs. You could imagine an ETF that is like "we give you 3x the annual returns on Stock XYZ." The problem is that ETFs trade every day, and they advertise some experience ("3x the returns on a stock"), and people want that experience whenever they trade. A triple-annual-return ETF would work perfectly for someone who bought it on the launch day, but after that, if the stock is up or down and you buy the ETF, you will not get exactly three times the returns on the stock *from the point at which you buy it*. The daily rebalancing is a requirement to make the ETF work every day.

But you could just give up that goal and get an arguably more sensible longer-term product.

Coincidentally, also yesterday, [someone launched that](#):

Tradr ETFs, a provider of ETFs designed for sophisticated investors and professional traders, [yesterday] announced the launch of eight leveraged ETFs as part of its new series of “Calendar Reset Leveraged ETFs.” Tradr’s new products reset their performance target on a calendar week or calendar month, providing an alternative to the daily resets offered by today’s leveraged ETFs. The launch represents a profound advancement in the world of leveraged trading that will significantly expand the possible uses of leverage for a variety of investment purposes.

The six new ETFs below seek 200% exposure to the weekly or monthly performance of the SPY ETF and the Invesco QQQ ETF for broad U.S. equity exposure, and to the SOXX ETF for semiconductor industry exposure. ...

Weekly ETFs reset performance each calendar week on the last trading day of the week, while monthly ETFs reset on the last trading day of the calendar month. Tradr also plans to launch several ETFs with calendar quarter resets on October 1. ...

Calendar Reset Leveraged ETFs provide a practical alternative to daily leveraged ETFs, which are specifically designed to generate an amplified return for one day only and are best suited for day traders. Years of data show that many investors hold dailies for several days, weeks or even months, leading to several challenges. The first is the erosion of returns, or “volatility drag,” caused by day-to-day price movements in the underlying security, which in turn compounds over time making it difficult to achieve the targeted leverage multiple. In addition, use of daily ETFs usually requires frequent position monitoring and rebalancing, which is time consuming and potentially generates unnecessary trading costs.

If you buy the calendar month ETF on the 10th of the month, you will not get exactly 200% of the index’s performance for the rest of the month. But if you buy it on the first of the month and hold it until the end of the month, you will, which is nice.

One other clarification of yesterday’s column. In writing about the problem of volatility — if you triple the returns of a volatile stock that goes up a lot over the long term, your tripled product might go *down* over the long term — I wrote that it was only a problem of volatility, and that “if the stock goes steadily up (or down), 3x the daily return will end up getting you roughly 3x the long-term return.” That’s approximately true if by “steadily up” you mean “with limited volatility.” But if you mean it literally, I mean, if the stock goes up 1% per day for a month, then at the end of the month it will be up about

23% ; if it goes up 3% per day, it will be up 86%, which is more than triple.

This is an arithmetic point but it is also a practical one. If you buy a triple-levered ETF thinking “this stock is going to go up every day for the next week,” and you’re right, then it’s great, *better* than getting triple the weekly returns. You just have to know what bet you’re making.

Don’t call bribes “chickens”

This is a long-running piece of advice (though not legal advice) around here, so I feel like I have to point out the [duck bribes](#). Here’s a [US Department of Justice case](#) against Linda Sun, a former New York government official, for allegedly working as an agent of the Chinese government:

Acting at the request of PRC government officials and the CCP representatives, Sun engaged in numerous political activities in the interests of the PRC and the CCP, including blocking representatives of the Taiwanese government from having access to high-level New York State officers; changing high-level New York State officers’ messaging regarding issues of importance to the PRC and the CCP; obtaining official New York State proclamations for PRC government representatives without proper authorization; attempting to facilitate a trip to the PRC by a high-level New York State politician; and arranging meetings for visiting delegations from the PRC government with New York State government officials. ...

In return for these and other actions, Sun received substantial economic and other benefits from representatives of the PRC government and the CCP, including the facilitation of millions of dollars in transactions for the PRC-based business activities of Hu; travel benefits; tickets to events; promotion of a close family friend’s business; employment for Sun’s cousin in the PRC; and Nanjing-style salted ducks prepared by a PRC government official’s personal chef that were delivered to the residence of Sun’s parents.

She allegedly got a lot of other, more obviously monetarily valuable stuff, but I kind of respect a person who would work as a spy and get paid in salted ducks. I bet the ducks were really good?

Things happen

Nvidia Gets DOJ Subpoena in Escalating Antitrust Probe. Nordstrom Family Offers to Take Chain Private for \$3.8 Billion. Companies Approved \$107 Billion in Buybacks Ahead of Latest Rout. SPACs are back. Rise of the [Pint-Size Startup](#) Is Reshaping the U.S. Economy. High Rates Expose Global Banking's Multi-Trillion-Dollar Weak Spot. Russia built [covert trade channel with India](#), leaks reveal. Uber Kicks Off Its First Bond Sale as Investment-Grade Company. [Trump Media](#) stock keeps sinking as Donald Trump's share dump nears. Elon Musk's [Starlink agrees to block X](#) in Brazil. America Must Free Itself from the Tyranny of the [Penny](#).

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- 1. Or make a lot of money, depending on which way the underlying exchange rate or interest rate moves. If the derivative moves **against** the bank, and its hedge moves **in favor** of the bank, and then the deal doesn't close and the derivative goes poof, it's left only with the profitable hedge. But also vice versa.
- 2. Assuming 21 trading days in a month, $(1.01)^{21}$.

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Nvidia Says It Has 'Not Been Subpoenaed' by Justice Department

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By and Leah Nysten

(Bloomberg) --

Nvidia Corp. said it has not been subpoenaed by the US Department of Justice in response to a report by Bloomberg News Tuesday that the federal agency has sent it and other companies subpoenas as part of an inquiry into whether the chipmaker violated antitrust laws.

The DOJ often sends requests for information in the form of what's known as a civil investigative demand, which is often referred to as a subpoena. The Department of Justice has sent such a request seeking information about Nvidia's acquisition of RunAI and aspects of its chip business, according to one person with direct knowledge of the matter.

"Nvidia wins on merit, as reflected in our benchmark results and value to customers, and customers can choose whatever solution is best for them," Nvidia said in a statement, adding, "We have inquired with the US Department of Justice and have not been subpoenaed. Nonetheless, we are happy to answer any questions regulators may have about our business."

Antitrust officials are concerned that Nvidia is making it harder to switch to other suppliers and penalizes buyers that don't exclusively use its artificial intelligence chips, according to people familiar with the matter, who asked not to be identified because the discussions are private.

To contact the reporters on this story:

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Death of Autonomy CEO Mike Lynch Cuts Short His Tech Legacy

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By Amy Thomson

(Bloomberg) --



Mike Lynch

Photographer: Simon Dawson/Bloomberg

Hewlett-Packard's acquisition of the British software company Autonomy has been the source of a yearslong legal dispute—and the death of Autonomy's former CEO, Mike Lynch, in a yacht sinking doesn't seem to have stopped its path in the courts. Bloomberg's Amy Thomson takes a look at what happens now. Plus: The extreme cost of cutting emissions to save the planet and Elon Musk's troubles in Brazil.

If this email was forwarded to you, click here to sign up.

When UK tech entrepreneur Mike Lynch in June beat criminal charges that he'd defrauded one of Silicon Valley's biggest tech companies, I asked his team for an interview. His people put me off until September. After months stuck away from home in California, he wanted to celebrate the court victory with a family trip.

That vacation, of course, ended in tragedy when Lynch and six others died as his yacht sank in a storm off the coast of Italy. It was one of those rare moments that can shock a newsroom. We had to repurpose a planned magazine article about Lynch's fresh start into an obituary. He was 59.

I covered Lynch off and on for more than a decade as his \$11 billion sale of Autonomy to Hewlett-Packard—the crux of the case against him—roughly coincided with my move to London from New York. The son of a nurse and a firefighter, he made his way to Cambridge via a scholarship to the private Bancroft's School when he was 11. He advised prime ministers, was part of a very small club of UK tech entrepreneurs to get megarich and in 2006 was knighted.



Mike Lynch in 2013.

Photographer: Simon Dawson/Bloomberg

Lynch was one of those rare CEOs who'd call a reporter directly to explain a point or go out to lunch without any PR minders. As a boss, he was hard-driving and relentless, and, according to court testimony, he once threatened an employee by saying, "I swear if I could squeeze down a telephone line to California you would get to know directly how the f--- I feel about this."

Even so, Lynch valued loyalty, and he inspired it in others. It was rare to hear of anyone leaving his inner circle, and even those who moved on tended to remain close to him personally. After he sold Autonomy to HP in 2011, he worked at the combined company for a short while. When he decamped, a number of former Autonomy employees came with him. He installed them at his new investment firm, Invoke Capital, or at startups founded under its umbrella.

Invoke's first IPO—AI-based cybersecurity company Darktrace—made millions of pounds for former Autonomy employees. Those include Sushovan Hussain, Autonomy's former chief financial officer, who served jail time on charges similar to those that Lynch beat.

While Darktrace thrived, Hewlett-Packard's fraud accusations haunted the final decade of Lynch's life, tainting his reputation and those of his ventures. It forced him to step back from the businesses, and short sellers seeking to cast doubt on Darktrace's accounting pointed to Autonomy. (Darktrace had consistently denied the short-seller accusations. While a 2023 auditor review it commissioned found some errors and inconsistencies, the company found no reason to adjust its financial reports.)

Before Lynch overcame the criminal charges in the US, a separate UK civil trial found that he and Hussain had committed fraud. Lynch had planned to appeal the ruling, though his legal troubles will go on posthumously, with Hewlett Packard Enterprise confirming this week it will see the case, where it's seeking up to \$4 billion in damages, to the end.

All this is to say that there isn't a neat way to sum up the legacy of someone like Lynch. What's been all too clear in the past few weeks, from talking to the people who'd written about and worked with him, is that his story wasn't finished. We all wanted to know what would happen next.

In Brief

- Volvo abandoned a target to sell only fully electric cars by 2030.
- Netflix is trying to shrink its shows' carbon footprint, but the company's overall emissions reduction progress has been marginal.
- The Justice Department is escalating its antitrust probe of Nvidia.

Cutting Emissions Is Possible, But Costly

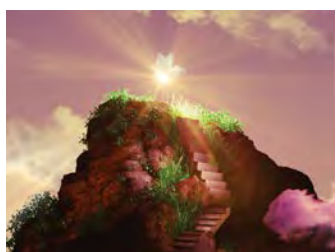


Illustration: Rad Mora

Last year, at the 28th annual United Nations Climate Change Conference, almost 200 countries pledged to help reach “net zero”—the point at which human civilization no longer emits greenhouse gases or else removes from the atmosphere the small amount we still do—by 2050. More than half the world's largest corporations have made comparable commitments. If we pull it off, we might limit the planet's heating to not much more than 1.5C, which would already be costly and damaging.

The necessity of reaching net zero has been extraordinarily difficult for humankind to accept. It was only during last year's UN meeting that world leaders acknowledged for the first time in writing that a livable Earth requires “transitioning away from fossil fuels.” Now we face a second mental leap that's just as hard: accepting the staggering scale and urgency of the net-zero transition. Only then will there be any chance of achieving it.

The timeline to hit net zero is agonizingly brief—just 26 years. There are many potential paths, but none is remotely easy. Beyond the technological challenges, the transition involves staggering amounts of money. It's important to recognize, however, that this enormous expenditure is not simply a cost. It's an extraordinary investment in a new energy system, heralding profitable industries, a surplus of jobs and lower energy costs for consumers from goods like EVs and heat pumps.

SEC's WhatsApp Probe Expands as Moody's, S&P Hit With Fines (2)

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- Moody's, S&P Global, Fitch to pay combined \$48 million
- Penalties add to billions that banks have agreed to pay SEC

Moody's Corp., S&P Global Inc. and Fitch Ratings Inc. will pay a combined \$48 million over allegations that the credit-rating companies failed to keep proper electronic communications — the latest fallout from US regulators' so-called WhatsApp investigations.

The Securities and Exchange Commission said Tuesday that Moody's and S&P will each pay \$20 million to settle the cases, while Fitch will pay \$8 million. The firms acknowledged violating the agency's recordkeeping rules and will retain a compliance consultant, the SEC said in a statement.

The fines add to the billions of dollars that big banks previously agreed to pay the Wall Street regulator to settle similar investigations into the use of messages on personal phones and WhatsApp. Financial firms are required to monitor and save communications involving their business to head off potential misconduct.

"We have seen repeatedly that failures to maintain and preserve required records can hinder the staff's ability to ensure that firms are complying with their obligations and the commission's ability to hold accountable those that fall short of those obligations, often at the expense of investors," said Sanjay Wadhwa, deputy director of the SEC's enforcement unit.

In a statement, Moody's said it is "fully committed" to upholding its record-keeping obligations and is pleased to put the issue behind it.

"S&P Global Ratings remains committed to compliance with its regulatory obligations," the company said in a statement. It noted that the regulator acknowledged the firm's remedial actions and cooperation.

Fitch didn't immediately respond to emailed requests for comment.

The agency also settled with HR Ratings de México for \$250,000, A.M. Best Rating Services Inc. for \$1 million and Demotech Inc. for \$100,000.

“HR Ratings has significantly strengthened its electronic recordkeeping policies and procedures,” the company said in a statement. “The settlement with the SEC underscores our firm commitment to upholding regulatory standards in every jurisdiction where we operate.”

A.M. Best said it's pleased that the SEC recognized the firm's “historical efforts to comply with recordkeeping requirements,” that the agency decided a compliance consultant isn't necessary and that the matter is resolved. A representative for Demotech didn't immediately respond to a request for comment.

(Updates with companies' comments in the last two paragraphs.)

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Grenfell Tower fire: UK inquiry blames avoidable deaths on incompetence and greed

 [reuters.com/world/uk/grenfell-tower-report-detail-what-led-deadly-2017-london-blaze-2024-09-03](https://www.reuters.com/world/uk/grenfell-tower-report-detail-what-led-deadly-2017-london-blaze-2024-09-03)

Michael Holden, Catarina Demony

Inquiry into Grenfell tower tragedy finds deaths were 'avoidable'

- Government, construction industry, firms all responsible
- All the deaths were avoidable, inquiry chair says
- Deadliest residential building fire in UK since World War Two
- Victims have voiced concern inquiry has delayed justice

LONDON, Sept 4 (Reuters) - A public inquiry into the devastating 2017 London Grenfell Tower blaze that killed 72 people blamed the disaster on failings by the government, construction industry and, most of all, the firms involved in fitting the exterior with flammable cladding.

The fire ripped through the 23-storey social housing block in one of London's richest areas during the early hours of June 14, 2017. It was Britain's deadliest blaze in a residential building since World War Two.

"The simple truth is that the deaths that occurred were all avoidable," said inquiry chair Martin Moore-Bick.

In its long-awaited final report, the inquiry laid most responsibility for the disaster on the companies involved in the maintenance and refit of the apartment tower, failings by local and national authorities as well as companies which had dishonestly marketed combustible cladding materials as safe.

"Not all of them bear the same degree of responsibility for the eventual disaster, but as our reports show, all contributed to it in one way or another, in most cases, through incompetence, but in some cases, through dishonesty and greed," Moore-Bick said.

The inquiry report, which ran to almost 1,700 pages, said the inferno was the culmination of "decades of failure", with profits put before people.

"The duty of government should be to safeguard life, whilst protecting us from corporate greed," said Grenfell United, a group representing some survivors and bereaved families.

"But for too long, they have aided corporations, facilitating them to profit and dictate regulation."

While British police have said 58 people and 19 firms and organisations are under investigation, prosecutions - including for corporate manslaughter and fraud - remain years away because of the complexity and need to consider the inquiry's report.

Prime Minister Keir Starmer apologised to the relatives of victims and survivors on behalf of the British state, saying they had been failed for years.

"It should never have happened. The country failed to discharge its most fundamental duty, to protect you and your loved ones," he said in parliament where some bereaved relatives watched on. "Today is a long awaited day of truth, but it must now lead to a day of justice."

FRIDGE FIRE



Item 1 of 9 The Grenfell Tower residential building is seen on fire in London, Britain, June 14, 2017. REUTERS/Toby Melville/File Photo

[1/9]The Grenfell Tower residential building is seen on fire in London, Britain, June 14, 2017. REUTERS/Toby Melville/File Photo [Purchase Licensing Rights](#)  , opens new tab

An earlier report by the inquiry team in 2019, which focused on the events of the night, found an electrical fault in a refrigerator in a fourth floor apartment started the fire.

Flames then spread uncontrollably, mainly because the tower had been covered during a 2016 refurbishment with cladding - exterior panels designed to improve appearance and add insulation - made of flammable aluminium composite material that acted as a source of fuel.

The harrowing accounts, including recordings from those who perished while awaiting rescuers and having followed official guidance to stay put, prompted fury and national soul-searching over building standards and the treatment of low-income communities.

The inquiry, headed by retired judge Martin Moore-Bick, found a litany of failings; lessons had not been learned from past high-rise tower blazes and testing systems were inadequate.

The most overt blame was laid at the feet of those involved in the refurbishment of the tower with the flammable cladding. The inquiry said architect Studio E, principal contractor Rydon, and cladding sub-contractor Harley all bore considerable responsibility for disaster.

Fire safety inspectors Exova were also blamed for the building being left "in a dangerous condition on completion of the refurbishment".

Both Kensington and Chelsea council and the Tenant Management Organisation (TMO), which managed the local authority's housing stock, were also heavily criticised.

They had shown indifference to fire safety regulations in the years before the blaze and the TMO, whose difficult relationship with some residents was said to have created a "toxic atmosphere", had been unduly focused on cutting costs.

While the local community and voluntary groups were praised for providing support, the council was also criticised for its slow, muddled and "wholly inadequate" response to the incident.

There was also condemnation of those firms which made and sold the cladding or its foam insulation - Celotex, Kingspan, and Arconic Architectural Products, the French subsidiary of U.S. company Arconic. The inquiry concluded there had been "systematic dishonesty" on their part.

"They engaged in deliberate and sustained strategies to manipulate the testing processes, misrepresent tested data and mislead the market," the report said.

Arconic said it rejected any claim it had sold an unsafe product or tried to conceal information about tests of its materials. Kingspan said it had "long acknowledged the wholly unacceptable historical failings" but said these did not cause the tragedy.

The issue of exterior cladding has raised concerns across Europe where there have been similar blazes in apartment blocks such as in the Spanish city of Valencia in February, and in Italy in 2021.

In Britain, government figures from July showed 3,280 buildings standing at 11 metres or higher still had unsafe cladding, with remediation work yet to start on more than two-thirds of them.

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Reporting by Michael Holden and Catarina Demony; editing by Elizabeth Piper and Alexandra Hudson

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Catarina Demony
Thomson Reuters

Catarina is a UK-based breaking news correspondent. She previously worked as a multimedia journalist in Portugal and Spain, where she covered everything from elections to natural disasters. Catarina has previous experience in TV and local journalism, co-founded a project telling the stories of Portuguese-speakers living in London, edited a youth-led news site and worked for several NGOs. She recently produced a documentary about transatlantic slavery and its legacies in today's society.

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Barratt Developments PLC

Cladding issues will take up to 5 years to fix, says Barratt

Developer says lack of qualified fire engineers contributing to slow pace of remediation as it reports annual results



The makeshift memorial wall with Grenfell Tower in the background. Cladding across the UK is in the process of being remediated © AFP via Getty Images

Joshua Oliver in London 9 HOURS AGO



Fixing the fire safety issues identified after the Grenfell blaze will take another three to five years, according to the chief executive of one of the UK's largest housebuilders.

[Barratt](#), like other major developers, has said it will remediate faults in its buildings but its chief executive David Thomas said the pace of work was constrained by practical issues, such as the number of qualified fire engineers.

“We recognise that this will take another three to five years to work through to resolution,” Thomas said. “There are resource constraints, an example would be fire engineers.”

His comments, speaking as the company reported full-year results, come ahead of the publication of the final report of the Grenfell Tower Inquiry on Wednesday and underscore the huge scale of the work still required to make UK buildings safe, seven years after the fire.

People suffering the anxiety of living in blocks with dangerous cladding also often face [huge insurance bills and problems selling or borrowing](#) against their properties. Residents have clashed with developers over the scope and speed of remediation work.

The risk of these buildings was highlighted again by a fire at a block in Dagenham last week, where work was under way to remove cladding.

Following the 2017 [Grenfell fire](#) in Kensington, London, that killed 72 people, thousands of buildings with fire safety problems were identified across the country.

Work has yet to start on more than half of the buildings that big developers have agreed to remediate, according to government statistics. Campaigners and residents say the companies are moving too slowly, and sometimes try to minimise the scope of the work.

Industry groups have pointed to the complex and lengthy legal process around building safety, as well as logjams at government bodies like the Building Safety Regulator — on top of supply chain constraints and shortages of qualified workers.

Within its building portfolio, Barratt said it had identified another 26 buildings that might need remediation in the year to June, while 42 buildings were either successfully remediated or found not to require work.

The company took a £126mn charge for fire safety during the year, with its total provision reaching £628mn. It also took a £57mn provision after identifying “structural issues” related to reinforced concrete at two more developments.

Developers and landlords have been dealing with issues from reinforced autoclaved aerated concrete (Raac) after fears about the building material led to the closure of more than a hundred schools last year.

Barratt also reported an 18.6 per cent decline in [new home completions](#), in line with expectations. Its profits before tax dropped to £170.5mn in the year to June, from £705mn a year before, as it warned new home completions would not recover in the coming financial year.

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Teva Investors Get Go-Ahead To Resume Kickbacks Class Suit

By **Emilie Ruscoe**

Law360 (September 3, 2024, 10:57 PM EDT) -- A shareholder's certified class action against pharmaceutical company Teva can resume after being paused for two years, as the company says it is working towards a settlement with the U.S. Department of Justice over related claims it used kickbacks to raise the price of its multiple sclerosis drug Copaxone, a Philadelphia federal judge has decided.

In Friday filings, U.S. District Judge Karen S. Marston lifted a stay on investor Gerald Forsythe's securities fraud claims against Teva and seven of its executives, finding, among other things, that as the company worked toward resolution of the government's separate False Claims Act allegations, it would serve the public interest for the securities case to proceed.

Citing her earlier finding that the securities case should be put on hold so that it wouldn't be a "distraction" as the Justice Department case went forward, Judge Marston noted Friday that with the timeline of the Justice Department case up in the air, "there is no real 'distraction' to trial proceedings" in the False Claims Act case at this time.

In the current version of the securities claims, Forsythe claimed trading prices for Teva shares saw a corrective disclosure after the U.S. Attorney's Office for the District of Massachusetts accused the drug company of forcing "American taxpayers to shoulder the high prices that Teva set" for its Copaxone, which is used in the treatment of multiple sclerosis.

Specifically, the government claimed that Teva violated the law by purportedly making donations to charitable patient assistance programs the Chronic Disease Fund and the Assistance Fund, which cover copays for certain patients.

According to the government, Teva wanted its donations to be used only to cover copays for Copaxone. The government said charitable organizations are required to use donation funds generally for all beneficiaries.

The Justice Department claims are currently in abeyance, as the parties to that case have said they're working on an agreement to end those claims. However, before the abeyance, the matter was before the First Circuit, which is poised to weigh Teva's interlocutory appeal of a 2023 partial summary judgment finding in favor of the government.

On Friday, Judge Marston noted that when she first stayed the investor claims in 2022, the False Claims Act case was slated for a September 2023 trial. But the trial date was scratched when the court allowed Teva to file the summary judgment appeal, and between the abeyance amid settlement talks and the appeal, it will likely be some time before any future trial date might be scheduled.

In the meantime, Judge Marston noted, the class had been certified in the proposed securities class action. And if the securities claims proceeded to discovery, the judge said, "there is no prospect of parallel discovery since discovery in the DOJ action concluded in March 2023."

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

The class is represented by Timothy Peter, James Wilson and Robert Killorin of Faruqi & Faruqi LLP.

Teva is represented by Linda Coberly, Daniel Blouin, James Smith and Kerry Donovan of Winston & Strawn LLP and Mathieu Shapiro and Melissa Blanco of Obermayer Rebmann Maxwell & Hippel LLP.

The case is Halman Aldubi Provident and Pension Funds Ltd. v. Teva Pharmaceuticals Industries Ltd. et al., case number 2:20-cv-04660, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Lauren Berg, Jessica Corso, Craig Clough and Hailey Konnath. Editing by Jay Jackson Jr.

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2nd Circ. Backs Toss Of Ericsson Investors' ISIS Bribes Suit

By **Katryna Perera**

Law360 (September 3, 2024, 10:01 PM EDT) -- The Second Circuit on Tuesday upheld a New York federal judge's decision to toss an investor class action against telecom giant Ericsson and several members of its top brass over claims that they hid knowledge of possible bribes to the Islamic State from U.S. investors and committed other violations of federal securities laws.

A three-judge panel for the Second Circuit issued an **order** stating that the lower court was correct in finding that generic statements about Telefonaktiebolaget LM Ericsson's growth in the Middle East did not require further disclosure, among other things.

According to the order, the suit's plaintiff, the Boston Retirement System, sought to lead a class of those holding American depository shares in the company. The March 2022 lawsuit **was filed** one day after the **telecom giant acknowledged** that the U.S. Department of Justice found that it breached its obligations under a 2019 deferred prosecution agreement by failing to disclose evidence from an internal investigation into alleged employee misconduct in Iraq from 2011 to 2019.

That internal investigation revealed possible payments to terrorists, according to a copy of the report obtained by the International Consortium of Investigative Journalists.

According to Tuesday's order, the retirement system challenged the district court's **dismissal** of statements made by the company between 2016 and 2018 related to its policies on compliance, ethics and other anti-corruption measures that it was allegedly working to improve.

The district court held those statements were inactionable because of their "generality" and because Ericsson "never promised perfect compliance."

The Second Circuit panel said it had repeatedly held that "general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are too general to cause a reasonable investor to rely upon them."

According to the order, the retirement system acknowledged that the challenged anti-corruption statements did not guarantee "perfect compliance" but argued that they were still false and misleading because Ericsson "downplayed the risk of [Foreign Corrupt Practices Act] violations when defendants knew those risks had already materialized."

The panel said it found that argument unpersuasive because, in making the statements, Ericsson "expressly cautioned" that it may fail to comply with its corporate governance standards and cannot ensure that violations of laws and regulations would not occur.

"To be sure, we recognize that 'a company's specific statements that emphasize its reputation for integrity or ethical conduct as central to its financial condition or that are clearly designed to distinguish the company from other specified companies in the same industry' can, 'in some circumstances, violate the securities laws,'" the panel said. "However, Ericsson's anti-corruption statements contained no such specificity that would transform any of those generalized statements from mere puffery to an actionable material misrepresentation."

The retirement system also challenged the district court's dismissal of statements made by Ericsson related to the government's Foreign Corrupt Practices Act investigations and the risk of future

enforcement actions.

According to the order, the lower court found that the company's statements about its entry into a deferred prosecution agreement with the DOJ and the "seeming finality" of government investigations were not misleading, given the accompanying "stream of warnings to investors."

The retirement system argued on appeal that Ericsson "made a series of misrepresentations ... that emphasized the finality of the DPA" and that those "statements conveyed that the DPA resolved all then existing corruption," according to the order.

However, the panel once again said it was unpersuaded by this argument since the statements regarding the deferred prosecution agreement were "sufficiently limited to the scope of the FCPA investigations by the government that had already occurred and conveyed nothing about" internal investigations that would be revealed many years later.

The retirement system also argued that the district court erred in dismissing the amended complaint with prejudice and said that because Ericsson entered into a plea agreement with the DOJ after the amended complaint was filed, new information revealed about Ericsson's conduct in Iraq would have allowed it to plead fraud with greater specificity.

However, the panel said Tuesday that "nothing in that plea agreement would cure the non-actionable nature of the allegedly misleading statements for the reasons articulated by the district court."

As part of its 2019 deferred prosecution agreement, Ericsson agreed to pay criminal and civil penalties totaling more than \$1 billion to U.S. authorities over bribery and slush fund schemes in Asia, Africa and the Middle East that dated back to 2000.

Regulators say the company also agreed that it would alert the government to any further allegations of FCPA violations of which it became aware. Ericsson said last year that the DOJ was giving it a chance to explain the nature and circumstances of the failure to report the Iraq bribery allegations, as well as the efforts the company was making to remediate the situation.

U.S. Circuit Judges Barrington D. Parker Jr., Denny Chin and Joseph F. Bianco sat on the panel for the Second Circuit.

The investors are represented by Michael Canty, James Christie and Danielle Izzo of Labaton Sucharow LLP.

Ericsson is represented by Robert Giuffra and David Rein of Sullivan & Cromwell LLP.

The case is *In re Telefonaktiebolaget LM Ericsson Securities Litigation*, case number 23-940, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Rich Mills.



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8th Circ. Again Scraps Class Cert. For TD Ameritrade Clients

By **Dorothy Atkins**

Law360 (September 3, 2024, 11:00 PM EDT) -- The Eighth Circuit reversed Tuesday a lower court's ruling certifying a class of TD Ameritrade clients for the second time in a lawsuit alleging the stockbroker routed orders to trading venues that didn't always provide the best execution, rejecting the named plaintiff's new class-wide damages theory based on commissions.

In an 8-page opinion written by U.S. Circuit Court Judge Steven M. Colloton, a unanimous three-judge panel held once again that U.S. District Judge Joseph F. Bataillon abused his discretion when he certified a class of TD Ameritrade clients who challenge TD Ameritrade's trade-execution practices.

The panel noted that the Eighth Circuit **previously rejected** named plaintiff Roderick Ford's class damages theory, and since then, on remand, Ford has changed his damages theory.

Ford's prior damages theory was based on losses calculated from the difference between the price at which customers' trades were executed and the "better" price allegedly available from an alternative trading source, according to the opinion. But he now bases his loss theory on the flat-rate commissions that each proposed class member paid to TD Ameritrade in exchange for brokerage services that were allegedly not provided, the opinion says.

However, the panel rejected Ford's new damages theory, noting that the commissions weren't impacted by the alleged trade-execution misconduct.

"Showing that a customer paid a commission to TD Ameritrade does not establish that the customer is worse off than if the customer had used a different broker," the opinion says.

The panel added that even if commissions could be used to determine a class member's losses, individualized questions would still predominate, because the court would have to answer questions about the existence of alternative brokers, the commission fees of other brokers and the prices that other brokers could have obtained for each trade.

In light of the panel's reasoning, the appellate court reversed the district court's order certifying the class and remanded the case for further proceedings.

The trip to the Eighth Circuit is the latest chapter in a hotly contested lawsuit that Ford initially filed against TD Ameritrade, its parent company and its then-CEO Fredric J. Tomczyk in 2014, alleging that TD Ameritrade's order routing practices violated U.S. Securities and Exchange Commission regulations and the company's "duty of best execution" by systematically sending customer orders to trading venues that pay the company the most money, rather than to those that provide the best outcome for investors.

Ford claimed that the stockbroker, which was acquired by Charles Schwab Corp. in a \$26 billion 2020 deal, caused customers to suffer economic loss by leaving orders unfilled, filling orders at a suboptimal price and filling orders in a way that "adversely affected performance after execution" between 2011 and 2014.

Ford initially moved for class certification in 2017, and a magistrate judge recommended denying certification, reasoning that an order-by-order inquiry would be necessary to determine whether each customer suffered economic loss because of TD Ameritrade's routing practices.

But the district court later determined that an algorithm created by Ford's expert could make automatic loss determinations for each customer and the judge certified the class.

TD Ameritrade appealed, and in 2021, a prior three-judge Eighth Circuit panel reversed the class certification ruling, with Judge Colloton writing in that published opinion that an algorithm couldn't be used to calculate class-wide damages and individual evidence is required for each class member.

On remand, Ford renewed his request to certify a class of TD Ameritrade clients who, between Sept. 15, 2011, and Sept. 15, 2014, placed orders that were electronically routed by TD Ameritrade without manual review, which TD Ameritrade received either liquidity rebates or payment for order flow, and who paid a commission to TD Ameritrade to execute the order.

The district judge again agreed to certify the class, but the Eighth Circuit on Tuesday, again, reversed it.

Charles Schwab said in a statement Tuesday that the Eighth Circuit rejected Ford's "latest attempt in a decade-long effort to invent economic loss to try to obtain class certification."

"We hope this decision finally brings this matter to a close," the statement says. "As we have said before, high-quality trade executions and transparency are a cornerstone of our commitment to putting clients first."

Counsel for Ford didn't immediately respond to requests for comment Tuesday.

U.S. Circuit Court Judges Steven M. Colloton, Ralph R. Erickson and Jonathan A. Kobes sat on the panel.

Roderick Ford is represented by Nicholas I. Porritt of Levi & Korsinsky LLP.

TD Ameritrade, TD Ameritrade Holding Corporation and Fredric J. Tomczyk are represented by Robert N. Hochman of Sidley Austin LLP.

The case is Roderick Ford v. TD Ameritrade Holding Corp., case number 22-3232, in the U.S. Court of Appeals for the Eighth Circuit.

—Additional reporting by Sarah Jarvis. Editing by Emily Kokoll.

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\$2.2M Bowling Co. Investor Settlement Gets Initial Green Light

By **Sydney Price**

Law360 (September 3, 2024, 2:34 PM EDT) -- A Maryland federal judge has preliminarily approved a nearly \$2.2 million settlement ending a class action that alleged Bowl America's board of directors acted in bad faith when approving a merger with Bowlero Corp.

According to U.S. District Judge Stephanie A. Gallagher's **order** issued Friday, a fairness hearing is scheduled for Oct. 31.

The settlement, which was submitted for approval last Tuesday, came more than three years after Bowlero Corp. announced it would acquire Bowl America.

Bowlero acquired all of Bowl America's outstanding stock for \$44 million, not including a 60 cents-per-share special dividend that was paid to stockholders when the merger closed, which ended up being \$8.53 a share, according to court records. The Bowlero investors allege details of the deal were concealed from the public.

The plaintiffs called Bowlero's offer "wholly inadequate" and said the deal liquidated their shares for less than what they could have gotten on the open market.

In addition, the deal failed to factor in the real estate owned by Bowl America, which had a value in excess of \$50 million prior to the COVID-19 pandemic, according to tax records, the lawsuit said.

The plaintiffs are represented by Daniel Sommers and Richard Speirs of Cohen Milstein Sellers & Toll PLLC and Brett Krantz of Kohrman Jackson & Krantz LLP.

The defendants are represented by John Tucker, Jarren Ginsburg and Jonathan Friedman of Foley & Lardner LLP and Benjamin Schuman, Meagan Pace and Alexa Ain of DLA Piper.

The case is *Fine et al. v. Bowl America Inc. et al.*, case number 1:21-cv-01967, in the U.S. District Court for the District of Maryland.

--Editing by Daniel King.

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Super Micro Faces Investor Suits Over Short Seller Report

By **Sydney Price**

Law360 (September 3, 2024, 9:55 PM EDT) -- Artificial intelligence server manufacturer Super Micro Computer Inc. has been hit with at least three investor lawsuits in California federal court over claims its shares fell by about 20% after a short seller report accused it of violating its previous settlement with the U.S. Securities and Exchange Commission over accounting improprieties.

According to the complaints filed Friday by investors Joseph Averza, Michael Spatz and Christopher Menditto, Super Micro sells its hardware to technology companies for use as servers for websites, data storage and artificial intelligence applications. All three investors seek damages following the publication of a Hindenburg Research report last week that allegedly revealed Super Micro's ongoing financial misconduct.

The report allegedly uncovered, among other things, that Super Micro failed to make meaningful changes to its policies following its **2020 settlement** with the SEC over alleged accounting manipulation, including inflating revenues by prematurely reporting the sales of goods.

Super Micro CEO Charles Liang and Chief Financial Officer David E. Weigand are individual defendants in the suits.

Averza's suit — which has the longest class period of the three — says Super Micro's relevant misconduct began no later than Aug. 10, 2021, the day Super Micro issued financial results for the fourth quarter and full fiscal 2021. In that filing, and in many others over the next several years, Super Micro "created the false impression" that it had information to reliably project revenue outlook and anticipated growth while also minimizing risk from seasonality and macroeconomic fluctuations, the suit claims.

The suit asserts that Super Micro told investors during the class period that it had paused sales to Russia, Belarus and areas in Ukraine due to the war affecting the region. However, according to Averza, the Hindenburg Report would later reveal the company's continued exports to Russia.

Hindenburg Research said its report published Aug. 27 was the result of a three-month investigation into Super Micro's accounting, governance and compliance procedures.

The report claimed Super Micro rehired some of the executives fired following the previous accounting scandal and that the company continued recognizing incomplete sales as revenue, making it a "serial recidivist."

The Hindenburg Research report also revealed, according to Averza, that Super Micro's exports to Russia rose to \$126.6 million in 2023 and made up about 5% of the company's total worldwide sales, excluding the United States.

From a closing market price of \$562.51 on Aug. 26, Super Micro shares fell \$119.02, or about 21%, to close at \$443.49 per share on Aug. 28., Averza says.

The suits claim Super Micro and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act.

Counsel for the plaintiffs and representatives of Super Micro did not immediately respond to requests

for comment Tuesday.

Averza is represented by Adam M. Apton of Levi & Korsinsky LLP.

Spatz is represented by Brian O. O'Mara, Steven M. Jodlowski, Hani Y. Farah, Ruben Peña and Adam J. Levitt of DiCello Levitt LLP.

Menditto is represented by Laurence M. Rosen of The Rosen Law Firm PA.

The cases are Averza v. Super Micro Computer Inc. et al., case number 5:24-cv-06147, Spatz v. Super Micro Computer Inc. et al., case number 5:24-cv-06193, and Menditto v. Super Micro Computer Inc. et al., case number 3:24-cv-06149, all in the U.S. District Court for the Northern District of California.

--Editing by Kristen Becker.

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\$15M Class Atty Fee Sought In Microsoft-Activision Suit

By **Jeff Montgomery**

Law360 (September 3, 2024, 4:25 PM EDT) -- Attorneys for Sweden's state pension fund manager have proposed a \$15 million attorney fee for their investigation and intervention in a suit seeking Delaware Court of Chancery fixes for defects in some terms of Activision Blizzard Inc.'s \$68.7 billion acquisition by Microsoft Corp. last year.

The proposed fee, made public in a half-page **filing** with scant detail Friday, would cover only part of the total stockholder attorney bill potentially arising from a wider, 329-page third amended class complaint now pending before Chancellor Kathaleen St. J. McCormick in a case that was first filed in November 2022.

Chancellor McCormick approved some retroactive fixes for the Microsoft-Activision tie-up on July 9, under Section 205 of Delaware's General Corporation Law, which allows correction of legal or technical errors or technical mistakes to corporate acts. The decision came two months after Microsoft and Activision sued for a court cleanup of flaws involving some provisions of Section 251 governing mergers of domestic corporations.

"The fee request only relates to the Section 251 claims. The rest of the case is going forward," said Michael Hanrahan, a director of Prickett Jones & Elliott PA, which — along with Kessler Topaz Meltzer & Check LLP — represents AP-7 in the litigation.

Hanrahan noted that the fee request covers work by attorneys for AP-7 on a books and records suit focused on the deal as well as the full case and a motion to intervene filed after Microsoft and Activision sought dismissal of part of the suit under Section 205.

Chancellor McCormick's Section 205 ruling "only resolved the Section 251 claims and there was time spent in all three actions" on those claims, Hanrahan said in an email.

Counsel for Microsoft and Activision did not immediately respond to a request for comment.

Prickett Jones sought \$4,272,770 of the \$15 million for its work on the case, which involved 14 attorneys and staffers. Kessler Topaz proposed a \$948,702 fee for 20 partners, associates, paralegals and investigators.

AP-7's original complaint, filed on Nov. 3, 2022, alleged in part that Activision hastily arranged a bargain merger with Microsoft to protect its CEO from a series of discrimination and harassment scandals at the video game company.

Included in the now-amended complaint were allegations that Activision's handling of the agreement and disclosures kept stockholders from knowing early on that the company's directors had secured increased liability protection as part of the deal.

The wider complaint named Microsoft, Activision, Activision CEO Robert Kotick and several other company directors, alleging a scheme to shortchange Activision shareholders. Activision makes popular games like Call of Duty and World of Warcraft.

Before the announcement of the merger, CEO Robert Kotick's job was allegedly on the line, with employees staging walkouts to protest his alleged conduct, according to the suit. A firing would have

cost Kotick millions, the suit alleged, but the merger with Microsoft was described as potentially allowing him to walk away with a \$400 million payout.

Chancellor McCormick said in a ruling on the Section 205 motion to rehabilitate part of the deal on July 9 that her findings applied only to the Section 251 merger detail objections. Excluded were claims for quasi-appraisal, or the monetary value of the equity that stockholders would have received in the absence of fiduciary breaches; and damages for loss or conversion of shares.

The stockholder suit alleged, among other claims, that Activision paid dividends during the time period at issue amounting to a fraction of the billions in extra cash its operations produced.

The latest amended class complaint seeks a declaration that Kotick and directors named in the suit "breached their duties of loyalty and care and engaged in bad faith and intentional misconduct and knowing violations of law." Microsoft was accused of aiding, abetting and conspiring in the same duty breaches.

More than 98% of Activision's voting stockholders approved the incomplete version put before them, the companies' Thursday application for the order said, after a lengthy regulatory process. The deal closed on Oct. 12, 2023, with Activision stockholders being paid \$95 per share in cash, a 45% premium over the unaffected, pre-deal announcement price.

Sjunde AP-Fonden is represented by Michael Hanrahan, Corinne Elise Amato, Kevin H. Davenport, Stacey A. Greenspan, Christine N. Chappellear and Kirsten M. Valania of Prickett Jones & Elliott PA and Lee D. Rudy, Eric L. Zagar, J. Daniel Albert and Lauren Lummus of Kessler Topaz Meltzer & Check LLP.

Microsoft and Activision Blizzard Inc. are represented by Stephen P. Blake, Laura Lin and Eric C. McCaffree of Simpson Thacher & Bartlett LLP and Elena C. Norman, Daniel M. Kirshenbaum and Y. Carson Zhou of Young Conaway Stargatt & Taylor LLP.

Activision Blizzard is additionally represented by Edward B. Micheletti, Lauren N. Rosenello, Michelle L. Davis, Peyton V. Carper and Claire K. Atwood of Skadden Arps Slate Meagher & Flom LLP.

The case In re: Activision Blizzard Inc., case number 2024-0466, in the Court of Chancery of the State of Delaware. The plenary action is Sjunde AP-Fonden v. Activision Blizzard et al., case number 2022-1001, in the Court of Chancery of the State of Delaware.

--Editing by Rich Mills.



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Alphabet Beats Investor Suit Over Antitrust Issues, For Now

By **Rae Ann Varona**

Law360 (September 3, 2024, 10:00 PM EDT) -- A California federal judge on Tuesday tossed a proposed securities fraud class action against Google and its parent company Alphabet Inc., saying investors failed to adequately allege that Google intended to deceive them when responding to a congressional query on concerns of anti-competitive ad tech practices.

In granting Alphabet's motion to dismiss the suit, U.S. District Judge Rita F. Lin ruled that plaintiff investors did sufficiently allege falsity as to Google's written response stating that the channel through which a bid for an online publisher's ad inventory is received doesn't affect the determination of the winning bidder.

Google's response was to former Democratic Rep. David Cicillene's question on what percentage of the time Google won bids on its own ad exchange called AdX, an intermediary between publishers and advertisers. Judge Rita said that the plaintiff investors plausibly pled that Google's demand-side marketing platform, Display & Video 360, through an effort called "Project Poirot," submitted higher bids to Google's AdX, than to rival ad exchanges.

But Google's response "cannot form the basis of a Section 10(b) or Rule 10b-5 claim because plaintiffs failed to adequately plead that it was made with scienter," Judge Lin wrote.

She said that while the investors, for instance, alleged that Google's product leadership recommended weakening a publisher practice known as "header bidding" to Google CEO Sundar Pichai, "the [first amended complaint] lacks particularized facts that compel a strong inference that Pichai had knowledge that attempts to eliminate header bidding included Project Poirot's DV360 bid reduction to rival advertising exchanges."

Judge Lin, however, allowed the investors to file another amended complaint within 21 days, saying that "the court cannot conclude at this juncture that amendment would be futile."

Alphabet had **moved to toss** the August 2023 amended complaint in the suit **led** by Menora Mivtachim Insurance Ltd. and its subsidiaries Menora Mivtachim Pensions and Gemel Ltd. The investors accused Alphabet, Google and members of its brass including Pichai of committing securities fraud through various public statements that described Google's ad tech products as being helpful to customers, characterized the ad tech market as being highly competitive, claimed that Google supported and protected user privacy, and represented how its ad tech products operated.

The suit, initially launched in March of that year, followed an antitrust lawsuit the U.S. Department of Justice and eight states **filed** against Alphabet in late January 2023, accusing Google of having pursued a "systematic campaign to seize control of the wide swath of high-tech tools used by publishers, advertisers, and brokers, to facilitate digital advertising."

Much of the DOJ's complaint centered on "header bidding," a technique it said publishers developed to make sure that multiple advertising exchanges, not just Google's AdX, could bid on their ad inventory, thus increasing their chances of finding a best match.

Google, according to the DOJ, is accused of devising ways to tackle header bidding, including by developing an initiative called Project Poirot, which the department asserted aimed to shift transactions away from ad exchanges that used header bidding and to Google's AdX by "artificially

manipulating bids sent to rival ad exchanges so that AdX could win those transactions more often."

The investors said in their complaint that following news of the DOJ's suit, Alphabet's Class A shares fell from \$149.84 per share on Nov. 18, 2021, to \$95.22 per share on Jan. 25, 2023. They said that its Class C shares fell from \$150.71 to \$96.73 during the same period. They said that Alphabet "lost hundreds of billions of dollars in market capitalization."

Alphabet moved to dismiss the investors' suit in September 2023, arguing, among other things, that many of the challenged statements were "expressions of opinions."

In granting Alphabet's dismissal bid, Judge Lin ruled that general statements about how Google's ad tech products help advertisers and publishers, as well as the company's commitment to user privacy, were "puffery."

So, too, were statements regarding the competitive nature of the ad tech market, Judge Lin wrote, adding that those statements were "at best opinion statements."

Judge Lin wrote that the investors also failed to adequately plead that the opinion statements were misleading for not disclosing Google's allegedly anticompetitive practices like Project Poiriot.

When it came to written statements Google made on Sept. 14, 2020, concerning how its ad tech products worked, Judge Lin wrote that aside from the written response to Cicilline's question, the investors failed to sufficiently plead falsity for other responses.

For example, when it came to former Republican Rep. Ken Buck's question if Google runs the auctions to determine which ad can fill a specific ad box, the investors alleged that Google gave a false response when it said publishers use multiple platforms to sell ads and are not required to use Google.

But the investors' amended complaint didn't contain specific factual allegations showing that publishers were "required" to use Google, Judge Lin wrote.

"Even assuming Google employed anticompetitive methods to make it difficult for publishers to choose rival ad tech products, that does not mean Google 'required' the publishers to use its services," she wrote.

Counsel for the investors did not immediately respond to a request for comment Tuesday. Counsel for Alphabet declined comment.

Alphabet is represented by Boris Feldman, J. Mia Tsui, Doru Gavril, Elise Lopez and Jon Fougner of Freshfields Bruckhaus Deringer LLP.

The investors are represented by Jeremy A. Lieberman, Emma Gilmore, Villi Shteyn, Orly Guy, Eitan Lavie, Jennifer Pafiti and Dolgora Dorzhieva of Pomerantz LLP, and Robert D. Klausner of Klausner Kaufman Jensen & Levinson.

The case is AMI - Government Employees Provident Fund Management Co. Ltd. v. Alphabet Inc. et al., case number 3:23-cv-01186, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig and Katryna Perera. Editing by Michael Watanabe.



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Dave's Killer Bread Judge Rips Attys For 'Flooding' Docket

By **Dorothy Atkins**

Law360 (September 3, 2024, 11:30 PM EDT) -- A California federal judge admonished attorneys for both parties in a proposed class action alleging Dave's Killer "Good Seed" bread deceptively advertises the loafs as containing 5 grams of protein, slamming counsel for "flooding" the docket with "entirely unnecessary" motions and warning she'll sanction them if their conduct continues.

U.S. District Judge Yvonne Gonzalez Rogers' comments came during a hearing in Oakland, California, on multiple motions — including a motion to dismiss, a motion for class certification, multiple motions to strike and a motion to intervene, as well as numerous objections — in a consumer proposed class action that Oakland resident David Swartz first launched in 2021.

Swartz accuses the Milwaukie, Oregon-based bread marketer Dave's Killer Bread Inc. and Georgia-based bread producer Flowers Foods Inc. of deceptively marketing their Dave's Killer Bread products by labeling their "Good Seed" and 21 Whole Grain bread packages with a prominent "5g PROTEIN" per serving advertisement on the front, even though not all protein in the bread in each serving is fully digestible in the human gut.

Judge Gonzalez Rogers kicked off the hearing on the motions Tuesday telling Swartz's counsel, Matt McCrary of Gutride Safier LLP, and defense counsel, Quyen L. Ta of King & Spalding LLP, that she was going begin the hearing with "an admonishment."

"In my view, you all should know better than to file as many administrative motions as you did in this case," the judge told counsel. "It is inappropriate. It is burdensome. I have been in [another] trial since June, and I do not appreciate when lawyers ... file a motion without meeting and conferring. But for some reason you all cannot agree on what is proper and what is not. I certainly did not appreciate the flooding of this docket with motions that are entirely unnecessary."

Judge Gonzalez Rogers then went chronologically through the docket, recounting the flurry of administrative motions, opposition briefs and objections that began in February with the defense's first motion to strike the plaintiff's expert declaration and the plaintiff's subsequent administrative motion to strike the defense's motion to strike.

The plaintiff then filed an administrative motion to consolidate hearings on the motions, which the defense opposed, as well as an administrative motion to seal and another declaration by its expert, which prompted the defense to file an objection. In response, the plaintiff filed an administrative motion to strike the defense's objection and another motion to strike the defendants' opposition to the plaintiff's request to strike the defendant expert's declaration, which spurred an opposition brief from the defense, and more administrative filings.

As the judge listed off the various motions and objections, she mostly denied them, finding that they were unnecessary and could have been better resolved by the parties in a meet and confer proceeding, or addressed in a so-called Daubert motion, which challenges the legitimacy of an expert's qualifications and testimony. The judge noted that some of the motions stemmed from a disagreement over extending certain briefing deadlines, which could have also been negotiated.

"All of that's denied, all of these are just denied," the judge said, eventually asking, "Why do I have to deal with this? Why can't you agree on extensions?"

In response to the admonition, counsel for both parties quickly apologized, and agreed that there is "no excuse" for their extensive administrative motions practice.

"We should have done a better job at meeting and conferring," McCrary said, noting that he was apologizing both on behalf of himself and his firm.

Defense counsel echoed McCrary's comments.

"There's no excuse, we have to do better," Ta told the judge.

Judge Gonzalez Rogers appeared to accept the apologies, but she reiterated that their conduct is "just really frustrating — it is entirely inappropriate."

"Don't do it again. All of you are on notice," she said. "And I don't mean just this case. If I see you in this courtroom, and you've done this, I'll sanction you all."

Judge Gonzalez Rogers added that the court dockets in the Northern District of California are overloaded, and judges are overburdened, with each judge managing hundreds of active civil and criminal cases.

"We expect better. And if your clients don't like it, tell them 'too bad,'" the judge warned. "You're going to get sanctioned."

Following her admonition, Judge Gonzalez Rogers heard arguments on the motion to dismiss and Swartz's motion for class certification.

Swartz seeks to certify a class of California consumers who have purchased the relevant bread products since Dec. 29, 2018, and the class seeks to pursue claims under the Golden State's Unfair Competition Law, according to the motion, which is heavily redacted.

Meanwhile, Dave's Killer Bread and Flowers Foods argued in their motion to dismiss that Swartz lacks standing to sue and hasn't been harmed since he continues to buy the company's bread loafs. The companies argued that since the lawsuit was filed, Swartz has made a number of admissions, including that he doesn't know how the daily value of protein is calculated on nutrition labels, which make his claims non-viable and defeated by the court's reasoning in an earlier order trimming some claims.

The judge didn't rule from the bench on either motion, but she told counsel that the lawsuit is the kind of consumer case that "routinely" gets certified, and she doesn't find most of the defense's arguments against certification persuasive.

As for the motion to dismiss, Judge Gonzalez Rogers said she has to "go back and look" to see if Swartz is trying to pursue a claim based on a legal theory she already rejected.

"This to me is the core issue," she said.

The judge added that if Swartz pleads a viable claim, she'll likely grant the motion for class certification, and if he doesn't, the motion for certification will likely be denied.

At the end of the hearing, she took the arguments under consideration.

Swartz and the proposed class of consumers are represented by Matt McCrary and Seth Adam Safier of Gutride Safier LLP.

Dave's Killer Bread Inc. and Flowers Foods Inc. are represented by Quyen Le Ta, Michael Langer Resch and Livia M. Kiser of King & Spalding LLP.

The case is David Swartz v. Dave's Killer Bread Inc. et al., case number 4:21-cv-10053, in the U.S. District Court for the Northern District of California.

--Editing by Michael Watanabe.