

# ZoomInfo Shareholder Sues Over Customer Churn After Pandemic (1)

By Matthew Bultman

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [3:24-cv-05739](#)

Bloomberg Law News 2024-09-06T10:06:26761744295-04:00

ZoomInfo Shareholder Sues Over Customer Churn After Pandemic (1)

By Matthew Bultman 2024-09-05T14:07:07000-04:00

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [3:24-cv-05739](#)

ZoomInfo Technologies Inc. was sued by a shareholder who alleges the software provider misled investors about its revenue and hid customer churn.

ZoomInfo reported record financial results during the Covid-19 pandemic, as businesses emphasized digital sales and marketing, the lawsuit said. But after the initial wave of demand abated, numerous customers attempted to reduce their use or, in some cases, abandon the product, the suit said.

The investor accused ZoomInfo of using “manipulative and coercive” auto-renewal policies, as well as litigation threats, to stem the flow of its exits. That created a hidden demand cliff for future contract renewals, said the suit, filed Wednesday in the US District Court for the Western District of Washington.

“The tactics also burned ZoomInfo’s reputational capital, eroded the Company’s customer franchise, and placed the Company at a competitive disadvantage as compared to new market entrants,” the proposed class action said.

ZoomInfo’s share price has been on a downward trend since climbing over \$77 per share in November 2021, according to Bloomberg data.

It bottomed out around \$8 last month after ZoomInfo said, among other things, it was incurring a \$33 million charge related to nonpayments by its customers and that its chief financial officer, Cameron Hyzer, would be leaving the company, the suit said.

The lawsuit said the decline has cost shareholders billions. Meanwhile, company insiders, including Hyzer and CEO Henry Schuck, were able to dump “ZoomInfo stock at artificially inflated prices before the truth was revealed,” the suit said.

ZoomInfo declined to comment.

Robbins Geller Rudman & Dowd LLP, AsherKelly, and Keller Rohrbach represent the investor.

The case is City of Pontiac Police and Fire Retirement System v. ZoomInfo Technologies Inc , W.D. Wash., No. 24-cv-05739, 9/4/24 .

(Updates with ZoomInfo declining to comment in eighth paragraph.)

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

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# Michigan Pension Fund Files Complaint Against ZoomInfo

**CIO** [ai-cio.com/news/michigan-pension-fund-files-complaint-against-zoominfo](https://www.ai-cio.com/news/michigan-pension-fund-files-complaint-against-zoominfo)

**Pensions** September 5, 2024

*The City of Pontiac Police and Fire Retirement System alleges the software and data company made misleading statements about its revenue.*

By Matt Toledo



The City of Pontiac Police and Fire Retirement System, a Pontiac, Michigan-based pension fund, has filed a lawsuit against Vancouver, Washington-based software company ZoomInfo Technologies Inc., alleging the company made misleading statements. ZoomInfo is unrelated to Zoom Video Communications Inc.

Purchasers of ZoomInfo Class A common stock between November 5, 2020, and August 5, 2024, have until November 4 to seek appointment as lead plaintiff in the complaint, which is seeking class-action status.

The case, *City of Pontiac Police and Fire Retirement System v. ZoomInfo Technologies Inc.*, was filed in U.S. District Court for the Western District of Washington. The pension fund is represented by Robbins Geller Rudman & Dowd LLP.

TA Associates Management, the Carlyle Group and DO Holdings were also named as defendants in the case; the three companies combined to control approximately 80% of the voting power of ZoomInfo shareholders following a secondary registered public offering in August 2021, according to the complaint.

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ZoomInfo CEO Henry Schuck and chief financial officer Cameron Hyzer were also named as defendants.

The complaint alleges that the defendants made materially false and misleading statements and omissions about the company's customer retention and financial position. It alleges that ZoomInfo's financial and operational results were boosted by the effects of the pandemic, pulling forward demand for the company's software and artificially inflating the price of the company's stock.

ZoomInfo stock had rallied nearly 100% from its initial public offering in June 2020, when the stock was \$21 per share, and peaked in November 2021 at \$77.35 a share. Shares have declined nearly 90% since then. Shares closed September 5 at \$9.94.

The fund had purchased shares of ZoomInfo during the class period.

The complaint alleges that ZoomInfo used coercive tactics, including threats of litigation and manipulative auto-renewal policies, to retain customers. The plaintiffs argue that in a November 2022 earnings call, Hyzer pointed to increased "scrutiny" from customers during the contract renewal process. The company reported a decline in net revenue retention, resulting in a 29% decline in share price the next day.

"ZoomInfo's coercive customer retention tactics had materially damaged the Company's customer relationships, client franchise, and competitive advantages, and created a hidden demand cliff for customer contract renewals in future periods; and that as a result of above, ZoomInfo's reported revenues, operating income, and customer and retention metrics were materially overstated," the complaint states.

Pontiac PFRS had \$219 million in assets under management at the end of 2021 and a funded ratio of 88.9%. The fund reported annualized one-, three-, five- and 10-year returns of 16.26%, 14.82%, 10.57% and 9.80%, respectively, as of December 31, 2021.

A spokesperson for ZoomInfo declined to comment on any pending litigation.

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PSERS, Aon Settle Lawsuit for \$7M

Atlanta Pension Settles Price-Fixing Lawsuit Against Taro Pharmaceuticals

NYC, Oregon Pension Funds Named Lead Plaintiffs in Fox Lawsuit

Tags: City of Pontiac Police and Fire Retirement System, Lawsuit, Michigan, ZoomInfo



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## Investor Claims Virgin Galactic Put Billionaire Space Race Over Safety, Netting Branson \$1B

The lawsuit alleges that Branson made over \$1.1 billion by selling shares of California-based Virgin Galactic at a price artificially inflated by safety issues not being publicly known.

September 04, 2024 at 05:43 PM

Corporate Governance

By Ellen Bardash | September 04, 2024 at 05:43 PM



The original version of this story was published on [Delaware Business Court Insider](#)

A Virgin Galactic Holdings Inc. shareholder has claimed in the Court of Chancery that founder Richard Branson and the company’s board breached their fiduciary duties by failing to prioritize and keep investors informed about safety issues on space flights.

Robbins Geller Rudman & Dowd and Robbins LLP are representing the plaintiff, Kimberley Espinosa, and filed a public version of her derivative [complaint](#) on Tuesday, alleging that Branson made over \$1.1 billion by selling Virgin Galactic shares at a price artificially inflated by safety issues not being publicly known.

Virgin Galactic flights had previously either had or narrowly avoided several accidents, the complaint stated, with the company’s test program killing four people. In July 2021, Branson, two pilots and three crew members were onboard another flight that allegedly experienced complications. The complaint states Branson publicly said the flight had gone “flawlessly” and the company had never experienced any significant safety issues.

“Despite the near misses, loss of life, and questionable safety record, Branson was determined to be the first billionaire in space,” the complaint stated. “He was particularly intent on beating rival Jeff Bezos and Bezos’ company Blue Origin into space. In addition to securing billionaire bragging rights by doing so, Branson would be able to monetize his substantial holdings in the company’s stock by engaging in massive sales at inflated prices.”

The complaint alleges Branson was further financially motivated by the roughly \$1.88 billion his travel companies incurred in losses during the pandemic. The California-based space tourism company Branson founded in 2004 went public in 2019 through a de-SPAC transaction.

Those incidents, the plaintiff claims, can be attributed to Virgin Galactic using aircraft prototypes built by Northrop Grumman subsidiary Scaled Composites for commercial purposes, using aircraft designed to last for a few flights for multiple years.

Shortly after the 2021 flight, the FAA began investigating Virgin Galactic, and Branson allegedly dumped stock before the public learned of the investigation.

Virgin Galactic is also the subject of a securities class action over artificially inflated shares which an Eastern District of New York judge denied dismissal of in August 2023.

The shareholder plaintiff is pursuing breach of fiduciary duty claims against Branson as well as against Virgin Galactic’s board for not taking legal action against Branson after being served a demand letter.

“The allegations are entirely without merit, and we will address them in the appropriate forum,” Virgin Galactic and Virgin Group spokespersons said on behalf of Branson.

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# McKesson, Cardinal, Cencora to pay \$300M settlement over role in opioid epidemic

[topclassactions.com/lawsuit-settlements/prescription/mckesson-cardinal-cencora-to-pay-300m-settlement-over-role-in-opioid-epidemic](https://topclassactions.com/lawsuit-settlements/prescription/mckesson-cardinal-cencora-to-pay-300m-settlement-over-role-in-opioid-epidemic)

September 6, 2024



(Photo Credit: MOLEQL/Shutterstock)

## McKesson opioid settlement overview:

- **Who:** McKesson Corp., Cencora Inc. and Cardinal Health have reached a \$300 million class action settlement.
- **Why:** The McKesson settlement will resolve claims from health insurers and benefit plans over the drug distributors' alleged role in the opioid crisis.
- **Where:** The opioid class action lawsuit was filed in Ohio federal court.

Three of the country's largest drug distributors have reached a \$300 million class action settlement over allegations they contributed to the opioid crisis, **Reuters reports**.

McKesson Corp., Cencora Inc. and Cardinal Health deny any wrongdoing but agreed to settle the McKesson opioid class action lawsuit to escape claims from health insurance companies and benefit plans over the drug companies' alleged failure to regulate the amount of opioid painkillers to be sold through illegal channels.

Paul Geller, one of the plaintiffs' lawyers, said the McKesson settlement covered third-party payers that "largely paid for the overprescribed and overmarketed pills and for the treatment required when their plan beneficiaries inevitably suffered opioid use disorder."

The proposed settlement class includes insurance companies and benefit plans that paid for or were reimbursed for prescription opioid drugs manufactured or distributed by the defendants and/or that incurred costs for treatment related to misuse, addiction and/or overdose of opioid drugs since Jan. 1, 1996.

McKesson will pay approximately 38% of the \$300 million McKesson settlement amount, while Cardinal and Cencora will pay about 31%.

The plaintiffs have asked an Ohio federal judge to preliminarily approve the McKesson opioid settlement.

## McKesson settlement part of effort to seek accountability for opioid crisis

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Thousands of opioid lawsuits have been filed with the goal of holding drug manufacturers, distributors and pharmacies accountable for fueling the opioid crisis and hundreds of thousands of opioid overdoses in the United States over the last two decades.

More than \$50 billion in settlements have been reached to date. Most of the opioid settlements have been reached with states and local governments.

Hikma Pharmaceuticals recently **agreed to pay \$150 million** to escape allegations it failed to report suspicious opioid orders made by potentially illegal distributors. A California federal judge also recently **approved a \$78 million settlement** over allegations McKinsey and Co. deceptively advertised its opioid prescription drugs.

***What do you think about the McKesson settlement agreement? Join the discussion in the comments.***

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

The **McKesson opioid settlement** is *In re: National Prescription Opiate Litigation*, Case No. 1:17-md-02804-DAP, in the U.S. District Court for the Northern District of Ohio, Eastern Division.

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# GitLab Hyped AI as Fueling Demand, Investor Says in Stock Suit

By Martina Barash

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-06244](#)

Bloomberg Law News 2024-09-06T10:07:06465818825-04:00

GitLab Hyped AI as Fueling Demand, Investor Says in Stock Suit

By Martina Barash 2024-09-05T07:41:42000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-06244](#)

GitLab Inc. misled investors about its ability to create AI features that would increase market demand for its software development platform, causing a 21% decline in its stock price, an investor alleges.

GitLab and two top executives “created the false impression that they possessed reliable information pertaining to the Company’s ability to develop and incorporate AI throughout the software development cycle in order to optimize code generation,” Arlie Dolly says in a proposed class action. He filed the complaint Wednesday in the US District Court for the Northern District of California.

The company claimed that would make software development more affordable, increasing its market share, Dolly says. “In truth, there was weak market demand for Gitlab’s touted AI features,” as other expenses mounted, he says.

GitLab released a disappointing financial report on March 4, he says. GitLab’s stock price fell 21% to \$58.84 per share the following day.



Dolly seeks to represent a class of those who acquired GitLab securities between June 6, 2023 and March 4, 2024, inclusive. The proposed class consists of hundreds or thousands of members, the complaint estimates.

Dolly seeks damages on his securities fraud claims.

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

Levi & Korsinsky LLP represents Dolly.

The case is Dolly v. GitLab Inc. , N.D. Cal., No. 3:24-cv-06244, complaint 9/4/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

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So this is interesting. Court refuses to dismiss 10b claims against Coinbase for concealing the risk that customers' assets would be treated as part of the estate in the event of bankruptcy



law360.com

Coinbase, Execs Can't Beat Investor Suit Over Business Risk  
A New Jersey federal judge on Thursday declined to dismiss a consolidated investor class action against Coinbase and...

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The reason this is interesting is at no time was Coinbase in danger of bankruptcy, and in a general sense SHs don't care what happens after bankruptcy. But this was material bc it might make the platform less attractive to customers - which then would reduce Coinbase's profits



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Except plaintiffs don't allege that Coinbase suffered any reduced profits as a result of this risk, afaiak; they only allege that once the market became aware of the risk, Coinbase's stock price fell.



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Which the court holds is sufficient to show both materiality and loss causation.

I think as a theoretical matter that's correct. SHs priced Coinbase based on a certain risk profile, when they discovered that the company was riskier, they repriced, and that's a loss.



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But courts have been hostile to that concept of loss causation, which is very theoretically muddled. See eg Jill Fisch's Cause for Concern:



[scholarship.law.upenn.edu](https://scholarship.law.upenn.edu)

Cause for Concern: Causation and Federal Securities

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Bloomberg Law News 2024-09-06T13:21:47043453209-04:00

# Coinbase Must Defend Investors' Suit Over SEC, Other Risks (1)

By Martina Barash 2024-09-06T08:07:48000-04:00

- Company allegedly denied crypto assets were securities
- Alleged nondisclosure of bankruptcy risk also actionable

Coinbase Global Inc. investors adequately alleged the cryptocurrency platform company misled them about the risk of SEC action against it for operating an unregistered securities exchange, a federal court ruled.

Some of the investors' claims about allegedly undisclosed risks associated with bankruptcy are also sound, Judge Brian R. Martinotti said Thursday for the US District Court for the District of New Jersey.

The court trimmed away some of the proposed class action's allegations of misrepresentations about bankruptcy risks and proprietary trading by Coinbase.

A key feature of the case is its focus on regulatory risks. The investors, led by institutional investor Sjunde AP-Fonden, allege that Coinbase knew that crypto assets listed on its platform from 2019 through 2021 were likely securities in light of Securities and Exchange Commission guidelines and enforcement actions. But the company denied that digital assets on its platform were securities and downplayed the risk of an SEC enforcement action against it, even after the commission began investigating it and as such an action loomed, the investors say.

News of SEC steps against Coinbase caused a series of stock drops culminating in one immediately after the commission filed suit against it in June 2023, the investors say.

The SEC's case against Coinbase, which could reshape the industry, [withstood](#) a dismissal attempt in March in the Southern District of New York. The SEC adequately alleged that Coinbase engaged in the "unregistered sale and offer of securities" and illegally operated as an exchange, a broker, and a clearing agency, that court said.

Meanwhile, the SEC on Dec. 15 [denied](#) Coinbase's request for rules clarifying standards for determining whether digital assets are securities. The company then [asked](#) the US Court of Appeals for the Third Circuit to force the agency to do so. The case will be argued Sept. 23.

Martinotti rejected Coinbase's argument in the investor suit that it lacked a duty to disclose its alleged understanding of what the SEC would do. The investors adequately alleged that Coinbase and its leaders "misleadingly described a favorable picture of the improbability that the SEC would file an enforcement action by repeatedly emphasizing that the crypto assets they listed were not securities," the judge said. As alleged, the statements Coinbase did make were misleading, so the investors adequately alleged it had "a duty to disclose material facts related to the likelihood that the crypto assets listed were securities and, as a result, the likelihood that the SEC would file an enforcement action," he said.

Coinbase had also [argued](#) the allegations didn't suggest "that the purportedly omitted bankruptcy risk even existed (and indeed, it does not)."

But Martinotti said the investors' claim was that the company and its executives "failed to disclose that, in the event of a bankruptcy—a common experience among crypto peers—Coinbase's customers were at risk of losing their assets." Coinbase discussed those risks in an SEC form, effectively acknowledging that the risk's omission was material, he said.

The investors sufficiently alleged the necessary level of intent for securities fraud and the causal connection between the statements and their losses, he said.

Kessler Topaz Meltzer & Check LLP is lead counsel for the investors. Latham & Watkins LLP represents Coinbase and the individual defendants.

The case is [In re Coinbase Glob., Inc. Sec. Litig.](#) , D.N.J., No. 2:22-cv-04915, 9/5/24 .

(Updates with additional reporting starting in fourth paragraph.)

To contact the reporter on this story: Martina Barash in Washington at [mbarash@bloomberglaw.com](mailto:mbarash@bloomberglaw.com)

To contact the editors responsible for this story: Carmen Castro-Pagán at [ccastro-pagan@bloomberglaw.com](mailto:ccastro-pagan@bloomberglaw.com); Brian Flood at [bflood@bloombergindustry.com](mailto:bflood@bloombergindustry.com)

# Coinbase must face shareholder lawsuit over SEC risks

 [reuters.com/legal/coinbase-must-face-shareholder-lawsuit-over-sec-risks-2024-09-06](https://www.reuters.com/legal/coinbase-must-face-shareholder-lawsuit-over-sec-risks-2024-09-06)

Jonathan Stempel

Smartphone with displayed Coinbase logo and representation of cryptocurrencies are placed on a keyboard in this illustration taken, June 8, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Sept 6 (Reuters) - A federal judge rejected Coinbase's (COIN.O) , opens new tab bid to dismiss a proposed class action by shareholders who accused the operator of the largest U.S. cryptocurrency exchange of downplaying the likelihood it would be sued by the U.S. Securities and Exchange Commission.

U.S. District Judge Brian Martinotti in Newark, New Jersey, ruled on Thursday, 15 months after the SEC's June 6, 2023 civil lawsuit accusing Coinbase of operating an unregistered securities exchange. Coinbase's share price fell 12% that day.

Martinotti said shareholders adequately alleged that Coinbase and top executives defrauded them by describing "a favorable picture of the improbability that the SEC would file an enforcement action by repeatedly emphasizing that the crypto assets they listed were not securities."

In his 50-page decision, Martinotti said shareholders could also pursue some claims that Coinbase misrepresented the risk that customers might lose assets stored with the company in the event the company filed for bankruptcy.

Coinbase's share price fell more than 26% on May 11, 2022, the day after it added disclosures and reported a larger-than-expected decline in quarterly revenue. The judge dismissed claims that Coinbase falsely denied it engaged in proprietary trading. Coinbase Chief Executive Brian Armstrong and several other executives are also defendants.

Coinbase said in a statement on Friday: "We remain confident that we are right on the facts and the law, and we look forward to proving the rest of our case."

Lawyers for the shareholders did not immediately respond to requests for comment.

In March, a federal judge in Manhattan rejected Coinbase's bid to dismiss the SEC lawsuit. The proposed class action led by Swedish pension fund Sjunde AP-Fonden covers Coinbase shareholders from April 14, 2021, to June 5, 2023.

The case is In re Coinbase Global Inc Securities Litigation, U.S. District Court, District of New Jersey, No. 22-04915.

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Reporting by Jonathan Stempel in New York; editing by Jonathan Oatis

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NEWS

## International Crypto Bank Faces New York Securities Fraud Class Action Lawsuit

“It was a cutting-edge bank and should have been a great success, but the CEO misrepresented the financials and allegedly stole the money,” said Jeffrey W. Gutchess, a partner at AXS Law Group.

September 05, 2024 at 04:51 PM



Michael A. Mora



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

### What You Need to Know

- Migom Global Corp., its subsidiary and others are facing a securities fraud class action lawsuit in New York.
- Migom Bank Ltd. is one of the few licensed cryptocurrency banks worldwide and was once the rising star of the Dominica-based fintech sector.
- The stock, once valued at over \$100 per share, has become worthless, investors alleged in the lawsuit.

An international cryptocurrency bank has been hit with a securities fraud class action lawsuit in a federal district court in New York after the CEO of its parent company allegedly siphoned customer deposits and misled investors, leading to hundreds of millions of dollars in investor losses.

Jeffrey W. Gutchess, a partner at [AXS Law Group](#) in its Miami and Los Angeles offices, is the lead attorney for the plaintiff, AMJ Global Entertainment LLC. The defendants include Migom Global Corp., a U.S. publicly traded company; Migom Bank Ltd., its subsidiary; and Thomas Schaetti, its largest shareholder and CEO.

“Migom is one of the very few licensed crypto banks in the world,” Gutchess said. “You deposit your money and it invests in crypto for you. It was a cutting-edge bank and should have been a great success, but the CEO misrepresented the financials and allegedly stole the money. This happens more and more, especially with these types of startup companies that prey on the over-the-counter markets.”

The defendants did not respond to a request for comment.

Now, the case is pending before U.S. District Judge Vernon S. Broderick of the Southern District of New York.

### \$100 to ‘Worthless’

Migom Bank was established and licensed as an offshore bank in the Commonwealth of Dominica in August 2019 and Schaetti has been the sole director and majority shareholder since then. The bank serves international clients in the fintech, gaming and crypto industries and underwent a reverse merger within months of its founding through the acquisition of Migom Global, a U.S. publicly traded company whose stock is traded on the OTC pink markets.

In early 2020, Migom Global’s shares traded for \$3.10 under the trading symbol “MGOM.” Schaetti then devised a scheme to steal Migom’s funds and artificially inflate the value of the stock, according to the lawsuit.

First, Schaetti lied to the SEC by reporting fraudulent financials that showed the company was “solid and growing,” per the lawsuit. Second, Schaetti omitted from the financials adverse information, which, when revealed, “caused a precipitous decline in the market value of Migom Global, resulting in millions of dollars in losses and damages to plaintiff and the class.” And third, Schaetti stole tens of millions of dollars of client deposits for his personal use.

Those actions, the plaintiffs alleged, resulted in the stock price climbing to \$100 in 2021 and plummeting to \$10 in early 2023. The stock is now “worthless” after an international criminal investigation uncovered Schaetti’s wrongful actions, according to the lawsuit. In total, Migom lost around \$750 million in investor capital.

The plaintiffs sued (i) all the defendants for violations of Sec. 10(b) of the Exchange Act and Rule 10b-5, (ii) Schaetti under Sec. 20(a) of the Exchange Act and for breach of fiduciary duties and (iii) all other individual defendants for aiding and abetting breach of fiduciary duties.

In doing so, the plaintiffs filed the action individually and on behalf of other similarly situated victims who were damaged by the defendants’ “fraudulent misrepresentations that their banking business was profitable and growing when, in reality, they were lying to auditors, investors, and U.S. regulatory agencies to conceal the fact that the bank deposits were being diverted and stolen.”

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# Wells Fargo, Ocwen Meet Friendly 2d Cir. in ERISA Mortgage Suit

By Jacklyn Wille

- Pension fund appealing loss over mortgage-backed securities
- Agency definition of 'plan assets' under ERISA at issue

Bloomberg Law News 2024-09-06T10:04:3047462147-04:00

Wells Fargo, Ocwen Meet Friendly 2d Cir. in ERISA Mortgage Suit

By Jacklyn Wille 2024-09-05T11:58:11000-04:00

- Pension fund appealing loss over mortgage-backed securities
- Agency definition of 'plan assets' under ERISA at issue

Wells Fargo Bank NA and Ocwen Financial Corp. appeared poised to defeat an ERISA lawsuit over mortgage-backed securities, when a panel of Second Circuit judges expressed doubt over a pension fund's attempt to characterize the securities as equity rather than debt.

The oral arguments, held Thursday in New York, centered on whether mortgage-backed securities held by the United Food & Commercial Workers Unions & Employers Midwest Pension Fund are more like debt or equity. The judges seemed inclined to treat the securities as debt, which would be fatal to the pension fund's claims under the Employee Retirement Income Security Act.

Judge Richard J. Sullivan pointed out that the securities provided fixed payments at regular intervals and were characterized as debt by the pension fund itself on multiple occasions.

"It sure seems to walk, talk, and squawk like debt," he said in an exchange with pension fund attorney R. Bradley Miller of Alexandria, Va.

Judge Susan L. Carney seemed to agree, asking Miller whether the securities had typical equity features like "variability and upside." Rather than reflecting those features, the securities appeared to provide regular interest payments and a fixed maturity date, which she said looks "just like a regular loan."

## Novel Theory

The trustees' lawsuit appears to be the first-ever attempt to argue that mortgage-servicing misconduct can violate ERISA if pension funds invest in mortgage-backed securities.

Wells Fargo and Ocwen want the US Court of Appeals for the Second Circuit to affirm a lower court's 2023 ruling that the securities don't qualify as plan assets under ERISA—and thus there's no valid claim under the statute—because they're more like debt than equity.

That decision turned on a close reading of the Labor Department's regulation defining plan assets under ERISA. The district judge said mortgage-backed securities won't qualify as plan assets if they're treated as debt under local law and have no substantial equity features.

## 'Fiduciary by Surprise'

Judge Denny Chin focused his questions on the purportedly tenuous relationship between Ocwen and the pension fund. He questioned how the company can be treated as a fiduciary under ERISA if it allegedly didn't know that one of its investors was an ERISA-covered pension plan.

Anton Metlitsky, the O'Melveny & Myers LLP attorney who argued on behalf of Ocwen, focused on this issue as well.

"There's no such thing as a fiduciary by surprise under ERISA," he said. It "makes no sense to say you're a fiduciary to a stranger."

But according to Miller, Ocwen knew some of its investors were ERISA plans, even if it didn't know specifically which ones.

Wells Fargo's attorney, Yaakov M. Roth of Jones Day, emphasized that pension plans have the same rights as any other investors in the securities, but they don't have "special rights" simply by virtue of being ERISA plans.

The pension fund's legal theory is "simply a misfit," he said.

The case is *Powell v. Ocwen Fin. Corp.*, 2d Cir., No. 23-999, argued 9/5/24 .

To contact the reporter on this story: Jacklyn Wille in Washington at [jwille@bloomberglaw.com](mailto:jwille@bloomberglaw.com)

To contact the editor responsible for this story: Kiera Geraghty at [kgeraghty@bloombergindustry.com](mailto:kgeraghty@bloombergindustry.com)

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Bloomberg Law News 2024-09-06T13:25:37234525917-04:00

## ZoomInfo Sued Again for Use of Personal Info to Promote Services

By Christopher Brown 2024-09-05T19:42:14000-04:00

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [No. 3:24-cv-05745](#)

[ZoomInfo Technologies LLC](#) is facing a proposed class action alleging it misappropriated the personal information of consumers to sell its services in violation of the Washington Personality Rights Act.

Plaintiff Memary LaRock [alleged](#) that ZoomInfo used her name and personal information to advertise and promote its products and services without her consent despite the fact that she never interacted with the company.

The lawsuit comes [two months after](#) the company agreed to pay \$30 million to settle a similar lawsuit from residents of California, Illinois, Indiana, and Nevada, [Ramos v. ZoomInfo Techs. LLC](#).

ZoomInfo maintains profile pages for millions of Americans whose information appears in its database of publicly available information, and uses the profile pages to sell subscriptions to its services, the complaint said.

The WPRA prohibits companies from using a person's "name, voice, signature, photograph, or likeness" for purposes of "advertising products, merchandise, goods, or services," without having first obtained the person's consent, the complaint said.

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

LaRock seeks to represent a class of people in the US, but not in the states encompassed by the settlement in *Ramos v. ZoomInfo Techs. LLC*, who had a free-preview profile page on zoominfo.com without having subscribed to the site.

The complaint brings two claims of violations of the WPRA.

LaRock is seeking actual, compensatory, punitive, and statutory damages; injunctive relief; attorneys' fees and costs; and pre- and post-judgment interest.

Hedin LLP and Nicolas Major of Seattle, Wash., represent LaRock and the proposed class.

The case is [LaRock v. ZoomInfo Techs. LLC](#) , W.D. Wash., No. 3:24-cv-05745, complaint filed 9/5/24

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To contact the reporter on this story: Christopher Brown in St. Louis at [ChrisBrown@bloombergindustry.com](mailto:ChrisBrown@bloombergindustry.com)

To contact the editor responsible for this story: Amy Lee Rosen at [arosen@bloombergindustry.com](mailto:arosen@bloombergindustry.com)

## Lawyers Lose \$34 Million Fee Bid in Spirit-JetBlue Merger Case

By Sam Skolnik 2024-09-06T10:04:08000-04:00

- Plaintiffs in no sense a “prevailing party,” judge says
- Merger was blocked in separate case earlier this year

Lawyers representing consumers who sought to block a \$3.8 billion merger between JetBlue Airways Corp. and Spirit Airlines Inc. lost their \$34 million fee request in federal court.

“The plaintiff’s motion is denied because in no sense were any of the plaintiffs a ‘prevailing party’ in this action,” said Judge William G. Young of the US District Court for the District of Massachusetts, rejecting the requested fees, costs, and expenses in an electronic docket order entered Thursday.

The ruling is the latest outcome in a consumer lawsuit [filed](#) in 2022 to block the merger they said would eliminate JetBlue’s main competitor, Spirit, and lead to higher airfare prices. The Department of Justice also sued to block the merger over similar concerns.

The proposed merger was abandoned by the airlines in March, after Young in a separate case earlier this year sided with DOJ regulators that it would hurt consumers by [limiting](#) competition.

Plaintiffs lawyers on July 12 argued that they in fact “prevailed in their action against Defendants” because the merger proposal by then had ended—with their help.

“Plaintiffs lawsuit substantially contributed to the DOJ’s victory, including as it related to the evidence of direct harm that the public would suffer following the merger,” the lawyers argued.

The fee request was “amply supported” by detailed time records, accounting entries, and third-party invoices that showed they incurred \$724,000 in litigation costs.

The lodestar amount of fees incurred by counsel “at normal and reasonable standard rates” was \$6.8 million, they asserted. But that figure should have been multiplied between three and five times, they

said, given the hours expended, the “significant risk” of representing plaintiffs on a contingency fee basis, and the filing of the suit without assurance of government intervention.

Alioto Law Firm, Larson LLP, and several other firms represent the consumers. Cooley LLP represents JetBlue. Paul, Weiss, Rifkind, Wharton & Garrison LLP represents Spirit.

The case is Garavanian v. JetBlue Airways Corp., D. Mass., No. 23-10678, docket entry 9/5/24

To contact the reporter on this story: Sam Skolnik in Washington at [sskolnik@bloomberglaw.com](mailto:sskolnik@bloomberglaw.com)

To contact the editor responsible for this story: Carmen Castro-Pagán at [ccastro-pagan@bloomberglaw.com](mailto:ccastro-pagan@bloomberglaw.com)

# \$2.8B NCAA settlement not enough, some athletes say

DJ [dailyjournal.com/articles/380852-2-8b-ncaa-settlement-not-enough-some-athletes-say](https://www.dailyjournal.com/articles/380852-2-8b-ncaa-settlement-not-enough-some-athletes-say)

Entertainment & Sports,

Antitrust & Trade Reg.

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Sep. 6, 2024

Even if the lead plaintiffs' counsel amended their complaint to appoint a class representative, the settlement framework still does not grant adequate relief to athletes on a partial scholarship, Korein Tillery LLC partner Garrett R. Broshuis told Senior U.S. District Judge Claudia A. Wilken in Oakland. Representatives of women athletes also objected.

The attorney representing five current and former college athletes reiterated his opposition to a groundbreaking \$2.8 billion name, image, and likeness settlement against the NCAA, insisting during a preliminary approval hearing on Thursday that the agreement shorted players who are on partial scholarships.

Even if the lead plaintiffs' counsel amended their complaint to appoint a class representative, the settlement framework still does not grant adequate relief to athletes on a partial scholarship, Korein Tillery LLC partner Garrett R. Broshuis told Senior U.S. District Judge Claudia A. Wilken in Oakland.

"These are viable claims. These claims have never been litigated," Broshuis said, pushing back on the NCAA's representation that hundreds of millions of dollars would be allotted for partial scholarship athletes.

If approved by Wilken, the agreement will devote \$600 million to an "additional compensation" fund, excluding \$2.58 billion in a name, image and likeness (NIL) fund. Broshuis wrote in court filings that \$600 million was "pennies on the dollar," adding that an independent economist valued the claims at over \$24 billion.

"I'm a former All-American baseball player on a partial scholarship. This is a rampant problem in baseball and every head baseball coach out there has complained about this for years," Broshuis said during the hearing.

Wilkinson Stekloff LLP partner Rakesh Kilaru said the \$600 million fund sufficiently addressed partial scholarship class members' concerns. "The history of those claims is quite clear. They have failed every single time they have been litigated. They failed at the motion to dismiss stage. ... They failed at the class certification stage ... and there's really no reason to think the claims would be any different here," Kilaru told the judge.

Under the settlement, eligible college athletes would receive up to 22% of the Power Five schools' average athletic revenue each year, estimated by plaintiffs' counsel to be worth more than \$20 million for the current school year. The prospective relief, paid out over the next 10 years, does not include existing scholarships and other benefits permitted by NCAA rules, including third-party NIL payments.

Although the settlement would be the largest antitrust payout for student-athletes, allowing them to share in the financial windfall generated by college sports, several plaintiffs' attorneys voiced their concern that the deal was too small for a multimillion-dollar organization like the NCAA. *In re: College Athlete NIL Litigation*, 4:20-cv-03919-CW (N.D. Cal., filed Jun. 15, 2020).

Among these objectors are female college athletes, whose attorneys said the proposed agreement unfairly favored football and men's basketball players.

The NCAA's NIL rules adversely impacted female athletes more than their male counterparts, MoloLamkenLLP partner Steven F. Molo said during the hearing. "Our concern is that this anticompetitive conduct which had an overly powerful effect on women ... isn't fairly compensated in the settlement," the attorney continued.

The NCAA did not promote women's sports programs like it promoted men's sports programs and female athletes would have generated more revenue under different circumstances, Molo said.

Winston & Strawn LLP Jeffrey L. Kessler, one of the lead plaintiffs' counsel, responded that he was sympathetic to potential sex discrimination claims but contended that Molo's clients would have to litigate them separately.

"It's not an antitrust violation to engage in sex discrimination that may violate Title IX or some other discrimination law, none of which are released [in the settlement], and so if there are damages claims for that, they should be asserted by someone in some other forum," said Kessler.

The reality is that most of the NCAA's revenue is generated by men's sports, Kessler said, adding that the plaintiffs had to "follow the money" in an antitrust case. "I can't be a social policy advocate and rejigger the damages to right a sex discrimination wrong."

Bloomberg Law News 2024-09-06T13:42:11578726306-04:00

## Judge Questions Damages, Fund Distribution in NCAA's Settlement

By Katie Arcieri 2024-09-05T20:58:01000-04:00

- Settlement would open door to paying student-athletes
- Judge asked about Title XI concerns, partial scholarships

A California federal judge sought clarity on how the NCAA's \$2.8 billion settlement designed to resolve antitrust claims would be distributed, along with consideration of scholarship limit claims, as she questioned attorneys for about three hours Thursday.

Athlete plaintiffs in July [filed](#) for preliminary approval of the landmark deal with the NCAA and its Power Five conferences, proposing back pay for hundreds of thousands of athletes in other sports across Division I including revenue-generating football and basketball players.

At a hearing on the plaintiffs' motion for preliminary approval Thursday, Judge Claudia Wilken of the US District Court for the Northern District of California said the proposed deal needed a better explanation of damages and a clearer understanding of how much money each class member could expect to gain. Wilken last year [granted](#) class status to at least 184,000 college athletes in various categories.

Wilken said she wanted the settlement to provide a "realistic notion" of how much they could get. "Not everybody is going to get a million dollars," she said.

Under the deal, NCAA Division I schools can provide their student-athletes with direct payments and benefits worth up to 22% of the Power Five schools' average athletic revenue each year. That payment pool would be more than \$20 million per school in the 2025-26 academic year and grow from there.

The settlement was quickly criticized by women's advocates, who say the settlement favors male athletes, and scholarship athletes, who allege the NCAA [capped](#) scholarship amounts at artificially low levels.

Wilken said she was concerned there was no class representative making a claim for scholarship limits. "My question is do we need such a class rep? If we do, do we have one?" Wilken said.

The scholarship claims remain viable, said Garrett Broshuis, an attorney in St. Louis for Korein Tillery LLC, which represents athlete plaintiffs in the Colorado [cases](#) over scholarship limits. "This is a problem that is rampant in baseball, he said, adding that baseball coaches have complained about the issue for years.

Women athletes are being denied fair compensation due to the way the deal is structured, said Steven Molo, an attorney who represents a group of women student athletes who object to the settlement. Under the deal, a football or men's basketball player would get roughly \$135,000, while the average recovery for a women's basketball player would be approximately \$35,000.

Jeffrey Kessler, attorney with Winston & Strawn LLP who represents athlete plaintiffs, countered that notion, saying the antitrust claims are based on the compensation athletes would have gotten on past performance.

"We have to follow the money, and that's what our experts did," said Kessler.

Plaintiffs are represented by Winston & Strawn LLP and Hagens Berman Sobol Shapiro LLP.

The case is In re College Athlete NIL Litig., N.D. Cal., No. 4:20-cv-03919, motion hearing 9/5/24 .

To contact the reporter on this story: Katie Arcieri in Washington at [karcieri@bloombergindustry.com](mailto:karcieri@bloombergindustry.com)

To contact the editors responsible for this story: Rob Tricchinelli at [rttricchinelli@bloombergindustry.com](mailto:rttricchinelli@bloombergindustry.com); Stephanie Gleason at [sgleason@bloombergindustry.com](mailto:sgleason@bloombergindustry.com)

# Objections cloud path to proposed \$2.8 billion NCAA antitrust settlement

 [courthousenews.com/objections-cloud-path-to-proposed-2-8-billion-ncaa-antitrust-settlement](https://www.courthousenews.com/objections-cloud-path-to-proposed-2-8-billion-ncaa-antitrust-settlement)

Hillel Aron

(CN) — A federal judge questioned on Thursday the National Collegiate Athletics Association and a collection of student athletes over a proposed \$2.8 billion antitrust settlement that would revolutionize how student athletes are rewarded for playing sports in college.

The agreement, if approved, would resolve three different antitrust lawsuits that challenged the NCAA's current rules about student athletes receiving money from third parties, including from endorsement deals and likeness rights for video games.

The deal calls for \$2.576 million in damages to be paid to athletes who were denied making money from such deals, going back to 2016. The deal also sets up a new revenue-sharing agreement that would allocate money to student athletes, starting as early as next season, and lasting for the next 10 years.

NCAA Division I schools would also be able to pay their athletes — something that was previously banned — "up to 22% of the Power Five schools' average athletic revenues each year," according to the agreement an amount that would start at more than \$20 million, and rise to nearly \$33 million by the mid-2030s.

Two groups of plaintiffs have objected to the deal, including a number of female athletes who say the agreement is unfairly biased against women.

On Thursday, lawyers for the other plaintiffs and the NCAA tried to defend the proposed settlement, but U.S. District Judge Claudia Wilken had a laundry list of questions, and appeared skeptical over certain aspects of the agreement.

"Do you see a problem with the settlement favoring athletes who played in higher revenue sports?" Wilken asked the plaintiffs' attorneys.

"We don't believe [the settlement] favors that," plaintiffs' attorney Jeffrey Kessler said. "It traces what would be paid to the athletes."

Steven Molo, a lawyer for the women objectors, pointed out that the NCAA had been hurting the revenue of women's sports for years — for example, by failing to market the women's NCAA basketball tournament in the same way as the men's. The settlement, he said, failed to take that into account.

"Throughout the history of college athletics, women have been treated as second class citizens," the two groups of objecting plaintiffs wrote in their objection to the proposed settlement. The settlement, they wrote, "is more of the same," in that it "vastly favors male athletes (especially football and basketball players)."

"A male football player may receive hundreds of thousands of dollars, while a female swimmer might receive \$125 or less," the objectors wrote.

They also echoed other objections that the deal merely substitutes one "illegal price-fixing cartel" with another one.

Kessler said that the damages were what they were.

"I can't rejigger the damages to write sex discrimination law," he said.

Under the terms of the settlement, thousands of former men's college football and basketball players would receive an average \$131,000. Certain players would be eligible for up to \$800,000 for "lost opportunity" payments.

The deal, the plaintiffs wrote in the motion to approve the proposed settlement, filed last month, would "have a profoundly positive impact on the tens of thousands of college athletes at the hundreds of colleges and universities that play Division I sports each year."

The National College Players Association, an athlete advocacy group, has objected to a clause in the proposed settlement that would eliminate so-called NIL collectives — groups set up by alumni and fans to pool donations and distribute that money to certain students, a heavily regulated system that has only existed for a few years.

Wilken said she shared those concerns, saying, "I've found that taking things away from people is not too popular."

NCAA attorney Rakesh Kilaru defended the clause, saying that it was meant to distinguish legitimate compensate for name, image and likeness rights — or NIL — from "pay-to-play" schemes, in which boosters pay athletes to play for their alma mater.

"Our position is that pay-for-play is prohibited," Kilaru said, adding that the clause, the product of a compromise, set up an arbitration process if an NIL collective is believed to running afoul of the rules — a more fair process than before.

"For us, it's an essential part of the deal," Kilaru said.

"We do not expect third-party payments from collectives to be reduced," Kessler responded. "If anything, we expect them to increase."

But Wilken said failed to understand the distinctions being made between booster groups and businesses like Nike, seeking to endorse athletes. The definition of booster, she said, was far too murky.

"What if Mr. Fan loves his team and wants to give them all a truck, or a \$1million to their favorite player," Wilken asked. "Is he a booster? I don't know ... How would this ever be interpreted?"

Both sets of lawyers defended the clause as an improvement over the old system. Kilaru pointed out that the payments that athletes currently get via NIL collectives could be stopped by enforcement at any time. But Wilken wasn't swayed.

"I think we have problems with this," she said. "I'm going to have to throw it back to you all to come up with something better."

The parties agreed to work an addendum to the proposed settlement. The plaintiffs said the rewrites wouldn't be a problem. Kilaru sounded less optimistic.

"Based on the comments, we have to talk about whether or not we have a deal," he said.

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NEWS

# Judge Denies Mobile Gaming Company's Motion to Compel Arbitration in Class Action

U.S. District Judge Edward Chen ruled that “the agreement to arbitrate is unconscionable and thus not enforceable.”

September 06, 2024 at 10:48 AM

Class Actions



Kat Black



## What You Need to Know

- A judge in a California federal court has rejected mobile gaming company AviaGames' motion to compel arbitration in a class action, ruling in a Wednesday order that 'the agreement to arbitrate is unconscionable and thus not enforceable.'
- The original class action, filed in November 2023, accused AviaGames of manipulating gameplay by surreptitiously using bots to compete with users instead of matching them with other humans.
- AviaGames has been involved in previous patent infringement litigation brought by a rival company, which alleged similar claims.

A California federal court judge has rejected mobile gaming company AviaGames’ motion to compel arbitration in a class action that accuses it of defrauding users into believing they are playing skill-based games against “live human opponents” instead of computer bots.

U.S. District Judge Edward Chen on Wednesday ruled in an [order](#) that “the agreement to arbitrate is unconscionable and thus not enforceable” and rescheduled motions to dismiss filed by Avia, its co-founders, and co-defendants ACME and Galaxy Digital Capital Management for Nov. 6.

The original complaint, filed on Nov. 17, 2023 by Edelson and Burns Charest in the California Northern District Court, alleged violations of the California Business & Professions Code, the California Consumer Legal Remedies Act and the federal Racketeer Influenced and Corrupt Organizations Act. Defendants include Avia, its co-founders Vickie Yuanjuan Chen and Ping Wang, and two companies that have invested in Avia, ACME and Galaxy Digital Capital Management.

Avia, which was founded in 2017 and is headquartered in Mountain View, California, provides a platform where users can play online games such as “Solitaire” or “Bingo Cash” to win money. According to the plaintiffs’ claim, Avia falsely represents to its customers on its website and in app stores that they are competing against other (human) players of

comparable skill levels, when in reality the company pits players against bots (that is, “historical playthroughs which can include a video recording of a match played previously by another player”) that it can use to manipulate the outcomes of matches. This, claims the lawsuit, results in fewer cash prizes for Avia users.

Matthew S. Tripolitsiotis, an attorney at Burns Charest representing the class members, said that some of his clients have lost up to “six figures,” believing that they could recoup their losses if they continued to improve their gameplay. “These people were duped,” he said.

Burns Charest is also currently litigating a similar class action against esports company Papaya Gaming in the Southern District of New York, which alleges violations of the New York Deceptive Practices Act and the New York False Advertising Act.

In February, rival esports company Skillz scored a \$42.9 million verdict against AviaGames in a patent infringement lawsuit, which also advanced claims that AviaGames used bots to rig its online games for its own enrichment. Tripolitsiotis noted that the class action filed against AviaGames in the California Northern District Court focuses on consumer protection and seeks to hold the company “accountable” for the devastating financial losses it has allegedly inflicted on users.

AviaGames and its counsel at Keker, Van Nest & Peters and Kwun Bhansali Lazarus did not immediately respond to requests for comment.

Tripolitsiotis said he expects the judge’s order to result in a trial as early as 2025.

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NEWS

# Did Johnson & Johnson's Proposed \$8B Talc Bankruptcy Plan Just Jump to \$9.1B?

More than a decade after taking on Johnson & Johnson with the first trial linking baby powder to ovarian cancer, attorney Allen Smith on Wednesday signed off on a proposed bankruptcy plan after negotiating for an additional \$1 billion.

September 05, 2024 at 05:32 PM

Mass Torts



Amanda Bronstad  
staff reporter



## What You Need to Know

- Plaintiffs attorney Allen Smith said he would recommend the bankruptcy plan to his 12,000 talc clients after negotiating for another \$1 billion.
- Beasley Allen, which has partnered with Smith on talc cases, continues to oppose J&J's bankruptcy plan.
- The move comes about a week after J&J paused its timeline for certification of the vote on its proposed bankruptcy plan, which needs the support of 75% of talc claimants.

More than a decade after taking on Johnson & Johnson with the first trial linking baby powder to ovarian cancer, attorney Allen Smith has signed off on a proposed bankruptcy plan after negotiating for an additional \$1 billion.

Smith, of the Smith Law Firm in Ridgeland, Mississippi, said he would recommend the plan to his 12,000 talc clients. Despite opposing J&J's prior bankruptcies, both of which were dismissed, Smith said he negotiated adding another \$500,000 to an initial \$6.48 billion for current talc claimants. And J&J also increased the plan's total value, when including future talc claimants, to \$9.1 billion from \$8 billion, Smith said.

"I fought against bankruptcy there based on the terms on the table, and, after my negotiations with Johnson & Johnson over the past month regarding the potential bankruptcy refiling, when they put the additional money in to compensate my clients, I agreed," he said.

"Is this settlement perfect? No. No settlement is perfect," he added. "Does this settlement offer fair and reasonable compensation to my clients in a timely manner? 100%."

Smith, however, has partnered with Beasley Allen in representing all 12,000 talc claimants. And Beasley Allen, in Montgomery, Alabama, continues to oppose J&J's proposed bankruptcy plan.

“I’m going to recommend it to my clients,” Smith explained when asked about his and Beasley Allen’s contrasting positions. “What I’ve always been about, and continue to be, is the best interest of my client. I have no other motivations.”

Beasley Allen, in a Wednesday statement, said it would “continue to represent the collective best interests of our clients in seeking an agreement with J&J that provides fair and timely compensation to the victims of the company’s products.”

“While we respect his lengthy history in this litigation, we disagree with his decision to join J&J’s bankruptcy efforts,” Beasley Allen principal Andy Birchfield said about Smith. “Mr. Smith has no authority to alter the previous vote of our mutual clients, in which they overwhelmingly rejected J&J’s bad-faith bankruptcy plan. Those individuals are not required or expected to accept any recommendation that he may make as to the proposed settlement of their claims.”

**‘Icing on the Cake’**

The move by Smith comes about a week after J&J paused its timeline for certification of the vote on its proposed bankruptcy plan, which needs the support of 75% of talc claimants.

J&J said it would make the “new terms” public when the vote is certified, which could be completed later this month.

“Plaintiffs’ attorneys who have opposed the plan reached out to engage in negotiations with the company,” Erik Haas, J&J’s worldwide vice president of litigation, said in an Aug. 23 statement.

“These lawyers, who attest that they represent the majority of claimants who oppose the plan, requested that the claims administrator pause the plan’s certification,” he continued. “This will allow these plaintiffs’ attorneys time to speak to their claimants to now consider supporting the plan. We have agreed to a short extension of the certification timeline to accommodate this request.”

Smith said he and Beasley Allen “have by far the most talc claims of anybody opposing the bankruptcies.”

J&J, in a statement, said Smith’s support, if followed by his clients, would put the bankruptcy vote “well above” the 75% threshold.

Smith joins 18 other plaintiffs firms that have lined up behind J&J’s bankruptcy plan. Smith’s joining is “icing on the cake,” said Jim Onder, of OnderLaw in St. Louis, Missouri.

Onder said, “I have worked closely with Allen Smith since the inception of this litigation and appreciate his efforts to address concerns and reach an enhanced and meaningful resolution, as he joins the ranks of ad hoc supporting counsel.”

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# Snap sued by New Mexico over failure to protect children from sexual exploitation

 [reuters.com/legal/snap-sued-by-new-mexico-over-failure-protect-children-sexual-exploitation-2024-09-05](https://www.reuters.com/legal/snap-sued-by-new-mexico-over-failure-protect-children-sexual-exploitation-2024-09-05)

Sheila Dang

A man takes a photograph of the front of the New York Stock Exchange (NYSE) with a Snap Inc. logo hung on the front of it in New York, U.S., March 2, 2017. REUTERS/Lucas Jackson/File Photo Purchase Licensing Rights , opens new tab

Sept 5 (Reuters) - New Mexico said on Thursday it filed a lawsuit against Snapchat owner Snap Inc (SNAP.N) , opens new tab alleging that the messaging app's policies and design features facilitate the sharing of child sexual exploitation material.

The lawsuit brought by New Mexico Attorney General Raul Torrez said a months-long investigation found that Snapchat was a primary platform for sextortion, in which a predator coerces a minor into sending explicit photos or videos and threatens to distribute the content unless more sexual content or money is paid.

A Snap spokesperson said the company was reviewing the complaint and would respond in court.

Snap has invested hundreds of millions of dollars into its trust and safety teams and would continue to work in collaboration with law enforcement, online safety experts and other groups, the spokesperson said.

Snapchat, which is wildly popular with teens and young users, is known for messages that disappear in 24 hours.

"Snap has misled users into believing that photos and videos sent on their platform will disappear, but predators can permanently capture this content and they have created a virtual yearbook of child sexual images that are traded, sold, and stored indefinitely," Torrez said in a statement.

As part of its investigation, the state's Department of Justice opened a decoy Snapchat account for a 14-year-old named Heather, which exchanged messages with an account called "child.rape" and others with explicit names.

Investigators also found 10,000 records related to Snap and child sexual abuse content on dark websites, saying that Snapchat was "by far the largest source of images and videos among the dark web sites investigated."

New Mexico sued Meta Platforms (META.O) , opens new tab in December on similar allegations of failing to protect children from sexual abuse and predation.

# Utah top court skeptical of reviving youth-led climate change case

 [reuters.com/legal/government/utah-top-court-skeptical-reviving-youth-led-climate-change-case-2024-09-04](https://www.reuters.com/legal/government/utah-top-court-skeptical-reviving-youth-led-climate-change-case-2024-09-04)

Nate Raymond

Oil pumpjacks are seen near Aneth, Utah, U.S., October 29, 2017. REUTERS/Andrew Cullen Purchase Licensing Rights , opens new tab

Sept 4 (Reuters) - Utah's highest court on Wednesday appeared reluctant to revive a lawsuit by young people alleging the state was violating their right to life under the state's constitution by adopting laws that contribute to climate change by promoting fossil fuel development.

Justices on the Utah Supreme Court questioned a lawyer for youth activists suing the state about whether striking down certain laws governing the permitting of oil, gas and coal mining projects would do anything to remedy the climate harms they are alleging given that new fossil fuel projects could still be approved.

"If we can't say that granting the relief you seek would change even a single decision, then there wouldn't be any impact on fossil fuel emissions," Justice Diana Hagen asked the lawyer, Andrew Welle of the non-profit law firm Our Children's Trust.

Hagen said even if the laws were stuck down, state regulators would still retain discretion to authorize future projects, which the plaintiffs have not sought an injunction to block.

Hagen and other members of the five-judge court suggested that was one of the many potentially fatal flaws of the young activists' lawsuit that would warrant upholding a lower court judge's 2022 decision to toss the case.

That judge, Robert Faust, had concluded the case raised a political question and that nothing in the state's constitution would authorize a judicial remedy to address global climate change.

The lawsuit is one of several climate change cases youth activists have filed nationwide. The youth activists broadly accuse state and federal governments of exacerbating climate change by adopting policies that encourage or allow the extraction and burning of fossil fuels in violation of their rights.

While some of those cases have faltered, a Montana judge last year in a landmark ruling held that the state was violating the rights of young people by barring regulators from considering how new fossil fuel projects could affect climate change.

Hawaii in June agreed to a first-in-the-nation settlement with young people to take action to decarbonize its transportation system by 2045. The Hawaii and Montana cases like the Utah one were pursued by Our Children's Trust.

In the Utah case, a group of young people alleged they were experiencing serious harms to their health, safety and longevity due to the development and use of fossil fuels in the state, resulting in hazardous air quality and dangerous climate conditions caused by greenhouse gas emissions.

Welle said the statutes in question violate the state's constitution by directing state agencies to promote and authorize fossil fuel development to the maximum extent possible, a policy carried out on a system-wide basis.

"When the citizens who ratified Utah's constitution enshrined its explicit right to life, they understood that it provides fundamental protections, restricting the government from causing serious harm to people's health and safety," Welle said.

His argument faced pushback from a bench comprised entirely of appointees of Republican governors.

Judge Ryan Harris, an appeals court judge sitting in place of a recused justice, noted only one of the laws even used the word "maximized" in its text and appeared designed to ensure oil and gas fields that were authorized were operated "efficiently."

Assistant Solicitor General Erin Middleton said the youth plaintiffs were entitled to disagree with Utah lawmakers' determination that oil, gas and coal development were necessary to ensure its citizens have affordable, reliable energy.

"But they cannot use a generalized declaratory relief action to move the debate about those choices from the elected branches into the court," Middleton said.

The case is *Natalie R. v. State of Utah*, Utah Supreme Court, No. 20230022-SC.

For the youth plaintiffs: Andrew Welle of Our Children's Trust

For Utah: Erin Middleton of the Utah Attorney General's Office

Read more:

Hawaii agrees to 'groundbreaking' settlement of youth climate change case

Montana urges state top court to overturn landmark climate ruling

Nate Raymond

Thomson Reuters

Bloomberg Law News 2024-09-06T13:48:23298421929-04:00

## Investors Craft Counterattacks After Influencer's Anti-DEI Blitz

By David Hood 2024-09-06T05:00:01000-04:00

- Shareholders weigh options for restarting diversity programs
- Influencer Robby Starbuck pledges to continue online campaign

Shareholder groups are considering options from proxy proposals to litigation to reinstate diversity, equity, and inclusion commitments at John Deere, Lowe's, and other companies that dropped such initiatives following pressure from conservative social media influencer [Robby Starbuck](#).

Activist investors are weighing how to push back on at least [seven public companies](#) that have cut diversity programs targeted by Starbuck, who initiated an online campaign earlier this summer seeking to prove DEI has no place in business operations.

The campaign is part of a broader conservative backlash to corporate America's push to grow more diverse and inclusive in the wake of George Floyd's police murder in 2020. The Supreme Court's June 2023 decision striking down affirmative action in university admissions had a further dampening effect on corporate DEI programs, though recent polls have shown the majority of businesses [remain committed to diversity](#) but have changed the way they talk about it.

Andy Behar, CEO of shareholder advocacy group As You Sow, said his organization is considering responses to Starbuck ranging from helping investors write and file proxy ballot proposals to launching campaigns to replace board members at companies that reversed course on DEI.

"We, as shareholders, tend to work in the world of data, as opposed to Robby Starbuck, who works in the world of radical white supremacist politics," Behar said.

Litigation is also a threat if companies don't justify their altered DEI commitments delicately, New York City Comptroller Brad Lander said. Last year already saw a [rise in shareholder lawsuits](#) alleging companies made misleading statements about their diversity goals after Floyd's murder or have fallen short of meeting their promises.

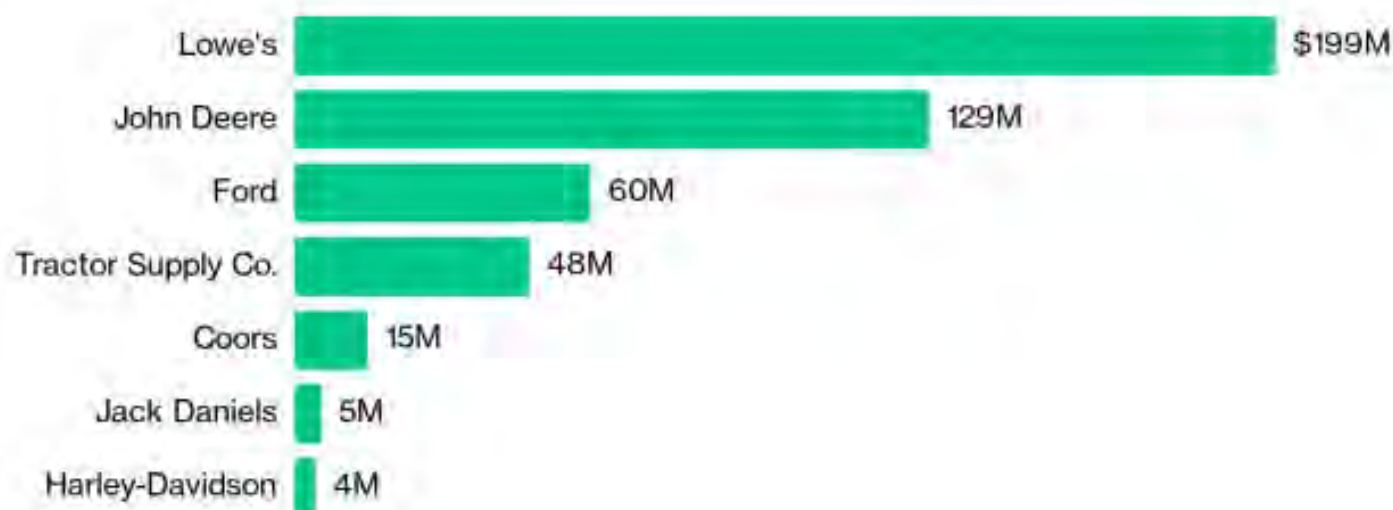
Lander said he's regrouping after Starbuck's initial successes, but companies that caved to his demands should be "on notice." The comptroller manages funds across five city employee retirement

systems that hold shares in the seven companies targeted by Starbuck totaling almost \$500 million.

“We’re not going to stand by as folks with no track record in investing try to roll back proven strategies for advancing diversity of companies across the economy in effective ways,” Lander said.

### New York City Comptroller's Influence

City retirement systems hold nearly \$500 million in companies targeted by anti-DEI activist



Source: New York City Comptroller  
Note: Values as of June 30

Bloomberg Law

## Hit List

Starbuck began his campaign by getting concessions from Tractor Supply Co. in June; fellow farm equipment supplier Deere & Co. followed three weeks later. He then extracted major concessions from Jack Daniels whiskey parent company Brown-Forman Corp., Molson Coors Beverage Co., Harley-Davidson Inc., and American automaker Ford Motor Co., in addition to Lowe’s Companies Inc.

Among Starbuck’s wins were promises—announced publicly or in company-wide memos from Tractor Supply, Brown-Forman, Harley-Davidson, Lowe’s, Ford and Coors—to withdraw from a “Best Places to Work” index organized by the LGBTQ advocacy organization Human Rights Campaign. Lowe’s

said it would merge employee resource groups under one umbrella and allow workers to join any affinity group they like regardless of whether they identify with that group. Tractor Supply said it would scrap all DEI programs and related jobs. Coors announced it would stop linking executive compensation to employee diversity.

Brown-Forman started its work on diversity and inclusion nearly 20 years ago, and launched its official strategy in 2019, spokesperson Elizabeth Conway said.

Since then, the world has “evolved, our business has changed, and the legal and external landscape has shifted dramatically, particularly in the United States,” Conway said. “Brown-Forman adjusted its work to ensure it continues to drive our business results while appropriately recognizing the current environment.”

A spokesperson for Ford said the company’s memo “speaks for itself,” and did not elaborate.

Spokespeople for the other five companies did not respond to a request for comment.

“If you have conservative consumers you’re depending on to walk through your doors, I think it’s a really dangerous thing to align yourselves with the political ideology, because DEI is essentially a Trojan horse for left-wing policy,” Starbuck said in an interview, noting he isn’t finished.

His strategy, he told Bloomberg Law, is to target companies that operate in areas of the country or have customers whose demographics indicate they are more likely to be sympathetic to his ideas.

Starbuck declined to name his next targets, but noted he has an eye on multinational companies with greater reach, revenues, and employee numbers.

“Before you know it, you know, if you have some dedication to this, the norm will become companies staying out of these issues, and the weird companies will be the ones who get involved,” Starbuck said.

“I think, you know, in a weird way, DEI actually encourages a certain kind of racism,” Starbuck, who’s Latino, added. “I prefer to judge people based on sort of their actions, who they are, their character, the merit they show in their work.”

## Shareholder Proposals

Lowe's was a bold target for Starbuck: just two years ago, its investors passed with nearly 60% of the vote a proposal from Arjuna Capital that asked the company to issue reports detailing racial and gender pay gaps. It's rare for such bids to pass; this past proxy season [just three](#) environmental, social, governance-related shareholder bids gained majority support, and those were on climate goals and political spending.

The home improvement giant issued a [report](#) in December 2022 that showed female associates' median pay in 2021 was about 97% of male associates' median pay, while minority associates' median pay was approximately 99% of non-minority associates' median pay. It also disclosed that women and minorities earn equal pay of comparable male and non-minority associates' pay, statistically adjusted for role and tenure.

Natasha Lamb, managing partner and co-founder of Arjuna Capital, said she was disappointed that Lowe's was swayed by Starbuck, but doesn't have any plans yet to file another similar proposal.

"It's critical that companies don't ignore the investor voice," she said. "If a majority, or even a significant portion of a company's investors are pressing for best practice and improvement in companies, they should be listening, should be consistent and uphold those goals and objectives."

Companies need to explain their actions, said Meredith Benton, founder of Whistle Stop Capital, a consulting firm that helps companies with DEI initiatives—especially those that affect a specific demographic.

Withdrawal from the Human Rights Campaign Corporate Equality Index and workplace rankings for employees who identify as LGBTQ, for instance, could spark outrage, Benton said.

Such withdrawals indicate "they no longer view that as an important community—either within their employees or their consumer base," she said. "This is not the sort of thing that a company can expect to do without repercussions for their brand and growth, and that's our concern."

To contact the reporter on this story: David Hood in Washington at [dhood@bloombergindustry.com](mailto:dhood@bloombergindustry.com)

Tesla Inc

## Elon Musk's China dream stalls as hybrids rush past Tesla

Consumers shift to plug-in models from local  
rivals such as BYD

Edward White in Shanghai YESTERDAY



Chinese car buyers are shunning Tesla as rival manufacturers flood the world's largest car market with more advanced electric vehicle models.

The US company's share of Chinese EV sales, including battery and plug-in hybrids, slipped to 6.5 per cent in the first seven months of the year from almost 9 per cent a year earlier, according to data from Shanghai consultancy Automobility.

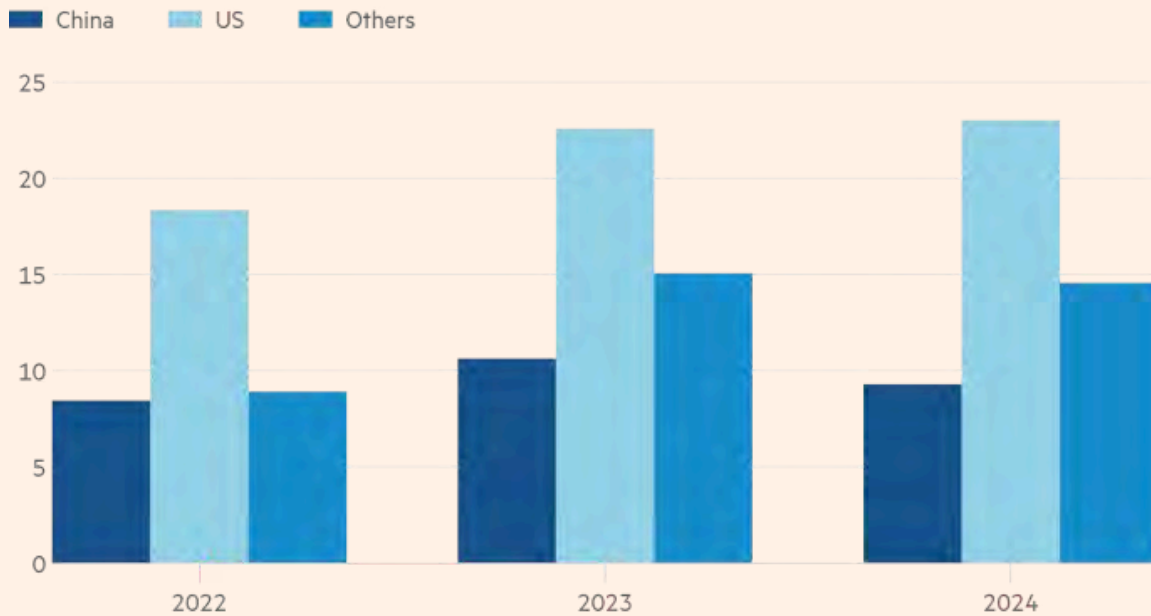
Elon Musk's company, whose first-half Chinese sales of \$9.2bn were down from \$10.6bn in 2023, has not released a new EV in China since 2019, while other carmakers are launching more than 100 new models in the country this year alone.

"It is going to be very challenging — about impossible — for Tesla to take sales from any competitor without any new products," said Tu Le, founder of consultancy Sino Auto Insights.

Tesla's troubles come as China's [EV](#) sales have grown more than 30 per cent so far this year, buoyed by a near-90 per cent jump in sales of plug-in hybrids, according to Automobility. The technology combines a smaller battery with a back-up fuel-powered engine. Tesla did not respond to a request for comment.

## Tesla's sales growth in China has stagnated

First-half revenues based on sales location (\$bn)



Source: company reports

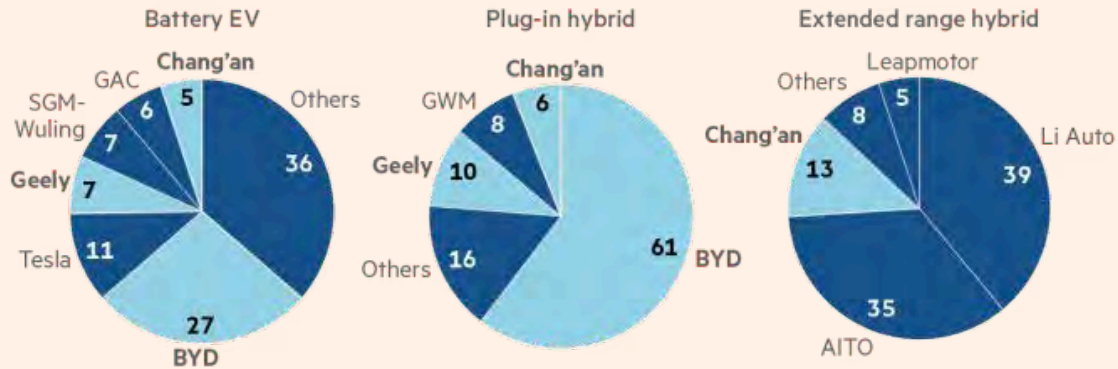
As Tesla's sales fall, Chinese rivals including Warren Buffett-backed BYD are capitalising on the rush for hybrids. The models were initially conceived as a transition technology, but in China, they also benefit from generous EV subsidies and their popularity has forced companies focusing solely on battery-only cars to reconsider their line-ups.

Tina Hou, who leads China auto research for Goldman Sachs, said EV sales growth was increasingly coming from outside the so-called first-tier cities of Beijing, Shanghai, Guangzhou and Shenzhen. "More and more incremental sales will come from the lower-tier cities. Their charging infrastructure is not as strong, so people will have more range anxiety," she said.

Bill Russo, the former head of Chrysler in China and founder of Automobility, said Chinese carmakers have quickly met the growing, post-pandemic demand for family cars with a longer driving range. Low-cost, bigger plug-in cars have proved popular for vacation and weekend trips, he said: "Access to charging stations weighs heavily into purchase consideration."

## BYD dominates China's EV market

Market share by sub-segment (%)



Battery EV is solely battery powered, plug-in hybrid runs on electric power until the battery is depleted and then it switches over to combustion engine, and extended range hybrid is battery powered with a combustion engine charging the battery

Source: Automobility  
© FT

Shenzhen-based BYD, which controls the biggest share of the plug-in market, has released two hybrid models this year with a mileage of 2,100km from a single charge and one tank of petrol — more than three times the range of Tesla's Model S.

In August, Volkswagen-backed Xpeng, which has focused solely on batteries, conceded it was “closely studying” new hybrid technologies, while Geely's Zeekr EV unit said it would release its first hybrid next year.



Tesla last unveiled a new EV, the Model Y, in the world's largest car market in 2019 © Wu Hao/EPA-EFE

The growth of low-cost hybrid EVs in China is exacerbating the demise of foreign auto groups, which have been slow to pivot from internal combustion engines. Chinese brands' share of domestic car sales has risen to a record high of above 60 per cent this year, said experts.

Still, Lei Xing, the founder of Chinese consultancy AutoXing, said Tesla's decision to offer interest-free loans in China this year has helped limit the fallout. "Maintaining flat growth is a win in the current bloodbath," he said.

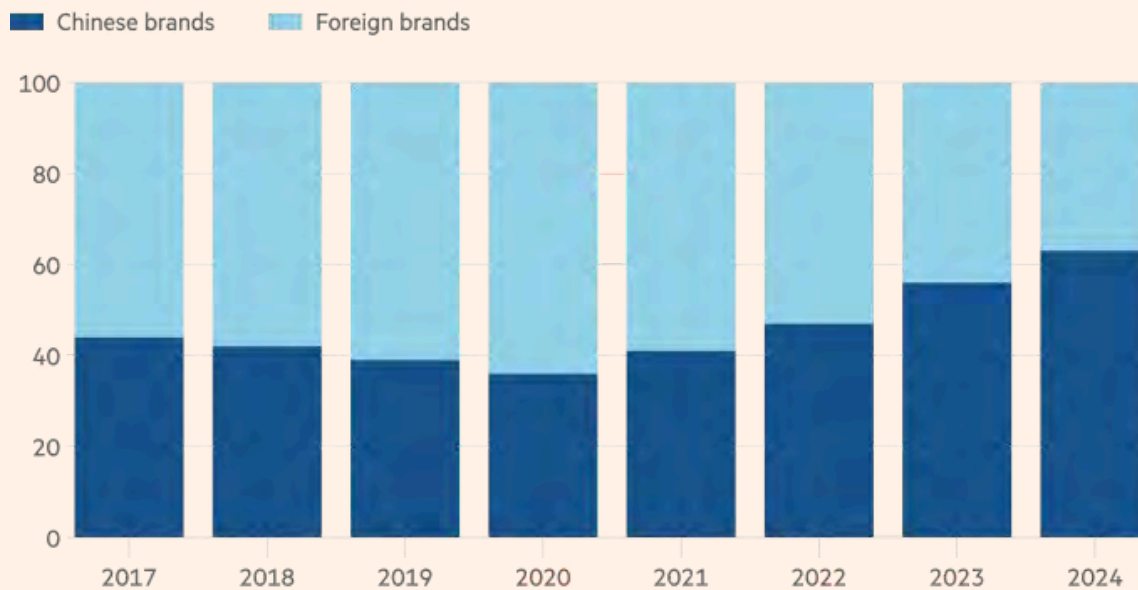
Against this backdrop, analysts said that Musk was under increasing pressure to convince Chinese regulators to give the green light to Tesla's semi-autonomous driving software — dubbed FSD, or "full self-driving", a potentially lucrative new revenue stream for the company.

Musk, whose business empire also includes SpaceX and social media platform X, believes deploying the technology is central to future success, including in the nascent robotaxi market. He has prioritised its development above releasing a long-delayed, low-cost EV, known unofficially as the Model 2.

In late April, the billionaire flew to Beijing and met Li Qiang, President Xi Jinping's number two. The trip appeared to help Tesla ease Beijing's regulatory concerns over data security compliance and pave the way for access to Chinese mapping and navigation systems. Experts said it signalled Beijing's approval of Musk and his technology plans.

## Chinese companies dethrone foreign brands

Market share in China (%)



2024 data up to Jun

Source: Automobility

Yuqian Ding, a Beijing-based analyst with HSBC, said there have been positive signs from Tesla's local partners that the carmaker's self-driving platform is moving closer to release. The software would be available to more than 1.6mn Tesla cars in China.

How much of the company's platform will be available in China remains "heavily debated", said Ding, adding that most of Tesla's Chinese rivals are working on similar technologies.

Analysts note that exports from Tesla's Shanghai factory, which account for about 20-30 per cent of production, are helpful as a buffer against any Chinese slowdown.

However, Tu Le of Sino Auto Insights said it was difficult to see Tesla building "any momentum" in China without new products to compete with the growing menu of Chinese battery EVs and plug-ins, or a sudden change of heart from Beijing over self-driving regulation.

"I think there is some wishful thinking from Elon. I wouldn't be surprised if before the end of the year he comes over again and tries to massage the FSD launch into China," he said.

**Volkswagen AG**

## Former VW boss Herbert Diess rejects union criticism of hybrid car strategy

Works council chair claims ex-CEO left company 'empty-handed' when it came to dual-fuel vehicles



Herbert Diess said lower-than-expected sales of electric vehicles in Germany could also be attributed to the technology not having been wholeheartedly endorsed by Berlin © Sean Gallup/Getty Images

**Patricia Nilsson** in Munich and **Kana Inagaki** in London 28 MINUTES AGO



Former Volkswagen chief Herbert Diess has pushed back against criticism over his strategy on hybrid vehicles during his tenure at Europe's largest carmaker, arguing that public backing for the technology was too weak in Germany.

Daniela Cavallo, chair of VW's works council, on Monday accused the former CEO, who departed in 2022, of having [left the company "largely . . . empty-handed"](#) when it came to hybrids — a technology that has grown in popularity as enthusiasm for electric cars has slowed.

"That's not true," Diess told the Financial Times, adding that the ailing group had an "excellent portfolio" of plug-in hybrids, including models of the Tiguan, Passat and Golf.

Of the 4mn-plus cars sold by VW Group in the first half of this year, 3 per cent were plug-in hybrids, a figure that the company said had grown by nearly a fifth from the same period last year.

Among the various hybrid technologies, carmakers are increasing investment in plug-ins, which can run for dozens of miles on electric power alone and can be charged at home.

But these vehicles remain relatively expensive since they rely on a large battery, and sales remain bigger for full hybrids — which run on a smaller battery and are cheaper. Volkswagen sells mainly plug-in hybrids.

Plug-ins accounted for only 1 per cent of the 5mn vehicles sold by Toyota, the pioneer in hybrid technology, during the first six months of the year. But when combined with full hybrids, the segment accounted for 41 per cent for the world's largest carmaker.

Diess said further investment would not have been possible under his tenure as the dual-power technology had at the time been “discredited in Germany by public discussion in the media and [by] some politicians”.

But he backed hybrid technology, calling it a “missed opportunity” and said it was a “better alternative than EVs both economically and ecologically”, as the extra battery capacity needed for longer-range electric vehicles was more costly and carried a larger product carbon footprint.

The former car executive, who has since become the chair of Munich-based chipmaker Infineon, said that lower-than-expected sales of electric vehicles in Germany could also be attributed to the technology not having been wholeheartedly endorsed by Berlin.

“The mixed messages around EVs really are confusing German customers,” he said, adding that the German government's [demand](#) in 2023 that EU plans to ban combustion engines by 2035 include an exemption for “green” fuels produced using electricity from renewable hydrogen and other gases, had only served to dent demand for EVs.

Diess also criticised Berlin's sudden withdrawal of EV subsidies at the end of last year, as well as patchy progress on the buildout of a charging network, adding that cash support and infrastructure investment had been “on and off”.

Cavallo's remarks marked the onset of a battle at VW after Diess's successor, Oliver Blume, this week endorsed plans to lay off workers — reneging on a three-decade old job security guarantee — and raised the [unprecedented prospect of closing some German plants](#).

Diess found himself ousted within months of making a similar suggestion three years ago, following clashes with Cavallo. The VW's works council controls half the seats on the company's supervisory board and often relies on the backing of the state government of Lower Saxony — which holds 20 per cent of the voting rights in the carmaker and is a strong advocate for employment in the region.

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# Law Firms Appeal Atty Fee Denial In Opioid Settlements

By **Jonathan Capriel**

Law360 (September 5, 2024, 8:54 PM EDT) -- Two law firms, Goldstein & Russell PC and Kelley & Ferraro LLP, have claimed in an appeal to the Sixth Circuit that they were improperly shut out of the \$2.13 billion attorney fee pool created by recent national opioid settlements with major pharmaceutical companies and pharmacy chains.

The firms — which represented six cities in Ohio — sought .08% of the fund, or about 3.5 times their lodestar, according to their **appeal** filed Wednesday. Instead, U.S. District Judge Dan Aaron Polster, overseeing the MDL, denied them any portion. This refusal came after oral arguments, but Judge Polster offered "no explanation" as to why they deserved nothing, according to their bid.

This is not the first time counsel for the six cities have sought review by the Sixth Circuit on a ruling made by the court. The firms note that they had to appeal the federal court's prior order, which attempted to force their clients to either accept or reject the settlement, worth \$26 billion, without giving them a chance to know the settlement amount, according to the bid.

The fees come from deals struck with Janssen, AmerisourceBergen Corp., McKesson Corp., Cardinal Health Inc., Teva Pharmaceuticals, Allergan, CVS, Walgreens and Walmart. The companies were accused of feeding the epidemic by downplaying the risk of addiction while touting the benefits of the drugs. At the same time, drug distributors allegedly ignored suspiciously large orders of opioids shipped around the country.

Judge Polster **capped** attorney fees at 15%, saying it was necessary to make sure more money goes to the plaintiffs. According to the **fee panel's recommendation**, the firms Motley Rice LLC, Simmons Hanly Conroy LLC and Napoli Shkolnik PLLC were deserving of the largest shares.

A number of firms **contested** the fee allocations. Ultimately, Judge Polster accepted the panel's recommendation and denied all but one firm's appeal, that of Spangenberg Shibley & Liber. He awarded it 3% of the multibillion-dollar pool and specifically noted that the firm's co-liaison attorney Peter H. Weinberger's contributions to the litigation were "**invaluable**" and significantly raised the settlement amount.

The two firms are represented by James L. Ferraro of Kelley & Ferraro LLP.

The appeal is In Re: Nat'l Prescription Opiate Litigation, case number 24-3739, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Rich Mills.

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# CrowdStrike Brass Face Investor Suit Over Global Outage

By **Sydney Price**

Law360 (September 5, 2024, 6:00 PM EDT) -- Executives and directors of global cybersecurity company CrowdStrike have been hit with a shareholder derivative suit alleging that they overstated the capabilities of the company's technology that eventually caused a massive disruption over the summer when its system crashed.

Shareholder Jordon Routh said in **a complaint filed Wednesday** in Texas federal court that CrowdStrike "failed to adequately develop, test and deploy" updates to its Falcon software program, which purportedly uses artificial intelligence and machine learning technology to prevent security breach threats.

In addition to nominal defendant CrowdStrike, the suit lists 10 individual defendants, including CEO George Kurtz, Chief Financial Officer Burt W. Podbere and eight company directors.

The suit's relevant period begins Nov. 29, the day CrowdStrike hosted its third quarter earnings call. During the call, CrowdStrike executives touted the capabilities and successes of Falcon.

According to the complaint, CrowdStrike's brass continued to overstate Falcon's utility over the next several months in its announcements and filings with the U.S. Securities and Exchange Commission, but on July 19, a flawed content update for Falcon caused severe worldwide technology outages for millions of devices using Microsoft Windows.

"Due to the outage, airlines were forced to ground numerous flights, and emergency 911 hotlines were inoperable, among other consequences," the suit said. "In addition, the company warned the public that bad actors were attempting to exploit the CrowdStrike outage as a means of hacking company customers."

On that news, CrowdStrike's share price declined \$38.09, or 11%, to close at \$304.96 a share on July 19, according to the complaint.

On July 22, news emerged that Congress had contacted Kurtz to testify regarding the outage, resulting in some prominent analysts to downgrade CrowdStrike's stock rating and causing CrowdStrike's share price to decline again by \$41.05, or 13.5%, to close at \$263.91 a share, the complaint said.

A week later, on July 29, news broke that Delta Air Lines had hired prominent attorney David Boies to seek damages from CrowdStrike following the outage and shares of CrowdStrike fell \$25.16, or 10%, to close at \$233.65 a share on July 30, the suit said.

The suit said that in the weeks following the outage, CrowdStrike continued to face reputational and financial damages, including those that will result from a securities suit filed against the company **in July** and two consumer class actions.

The complaint also said several of the suit's individual defendants made improper insider trades before the alleged fraud was exposed, netting proceeds of more than \$195.5 million.

Routh accuses the individual defendants of violating the Exchange Act, breaching fiduciary duties, unjust enrichment, abuse of control and gross mismanagement.

Counsel for Routh and a representative for CrowdStrike did not immediately respond to requests for comment Thursday.

Routh is represented by Saadia Hashmi of The Brown Law Firm PC.

Counsel information for CrowdStrike was not immediately available Thursday.

The case is Routh et al. v. Kurtz et al., case number 1:24-cv-01031, in the U.S. District Court for the Western District of Texas.

--Additional reporting by Katryna Perera. Editing by Stephen Berg.

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# GitLab's AI Hype Was Too Optimistic, Investor Suit Says

By **Emilie Ruscoe**

Law360 (September 5, 2024, 9:46 PM EDT) -- Software development collaboration platform GitLab is the latest company to face claims that it misguided investors about how artificial intelligence might bolster its fortunes as it faced other headwinds, including mounting costs for a China-based joint venture, that caused its share price to sink.

In a Wednesday complaint in California federal court, GitLab investor Arlie Dolly claimed that as the company provided shareholders with company news undergirding its revenue expectations for its 2025 fiscal year, it focused on its incorporation of AI throughout its development, security and operations platform, highlighting that it aimed to make software development more efficient with its added AI offerings.

According to Dolly, the company stated to investors that by increasing code generation efficiency, the implementation of its AI tools would make software development more affordable, which in turn would allow the company to properly monetize its AI features via monthly subscription offerings, among other things.

But according to Dolly, the company's statements gave investors the "false impression that [it] possessed reliable information pertaining to the company's ability to develop and incorporate AI" into its software development cycle, and it generally overpromised in telling investors that AI could be deployed to optimize code generation for its users, Dolly said.

The investor claimed that as the company made its AI statements, it knew or should have known that "in truth, there was weak market demand for Gitlab's touted AI features," and that the company was seeing mounting expenses involving JiHu, its Chinese joint venture.

"Defendants misled investors by continually highlighting its AI-driven innovations," Dolly claimed.

In March, Dolly said, when GitLab shared quarterly earnings for the start of its 2024 fiscal year, it said it had seen a strong quarter, but then lowered its full-year guidance for 2025, citing its expectation that it would take longer to build its marketing pipeline than it had previously assumed.

The company also said in March that for the first quarter of its 2025 fiscal year, it expected to see an operating loss of as much as \$13 million, with full-year 2025 operating revenue of \$10 million at most.

Dolly alleged that the March announcement sent trading prices for GitLab shares tumbling by about 21% over a trading day from over \$74 to just under \$59.

The proposed class would include those who purchased GitLab shares between June 6, 2023, and the March announcement.

On Thursday, counsel for Dolly declined to comment and representatives for GitLab did not immediately respond to requests for comment.

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

Counsel information for the defendants wasn't immediately available Thursday.

The case is Dolly v. GitLab Inc et al., case number 5:24-cv-06244, in the U.S. District Court for the Northern District of California.

--Editing by Kelly Duncan.

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# Class Attys Vie To Lead Drug Co. Insider Trading Suit In Del.

By **Jeff Montgomery**

Law360 (September 5, 2024, 8:51 PM EDT) -- A courtroom face-off over lead stockholder counsel duties in a Delaware Chancery Court case accusing a biopharmaceutical company's directors of insider trading and fiduciary duty breaches got edgy Thursday, after one of the plaintiff-side legal teams contended that the other's case was irreparably hobbled by conflicts of interest.

The conflict allegation stood out during a hearing before Vice Chancellor J. Travis Laster on competing proposals for class claims against Taysha Gene Therapies Inc., its directors and private investors who participated in a \$150 million public investment in private equity, or PIPE, deal just before the company announced promising news about a potential treatment for a genetic disorder.

Shareholder Denny Young alleged in a complaint brought in April that on Aug. 14, 2023, the directors and others who bought into the PIPE deal were aware of Taysha's positive preliminary clinical study data and **knew the stock price would jump** when the results were publicized that same day.

Taysha's stock price rose 188% to \$2.13 a share that day, according to the consolidated lawsuit. As a result, the company saw an immediate \$205 million spike in the value of its stock and warrants issued in the PIPE deal, the investors said.

Early in the hearing held Thursday, Steven J. Purcell of Purcell & Lefkowitz, who is representing another stockholder, Fredric Elliott, said Grant & Eisenhofer PA initially filed a suit for Young that named dozens of PIPE deal investors, only to dismiss that action and refile it to jettison six overseas affiliates of Fidelity Investments that purportedly had dealt with Grant & Eisenhofer.

"The other side has shown us that they have a conflict, and their attempts to explain it were not persuasive and, in fact, added to our concern," Purcell said.

Grant & Eisenhofer's Christine M. Mackintosh explained that her firm dismissed Young's original suit to remove the potential conflicts as defendants after the law firm's chief operating officer noted that Grant & Eisenhofer had some dealings with overseas Fidelity interests. That concern was later found to be baseless, and the case was refiled to restore the original lineup, Mackintosh said.

"The suggestion that phone calls were made and that's why we dropped them is categorically false," she told Vice Chancellor Laster, noting an affidavit had declared the firm has never represented the funds in question. "I'm having a hard time not getting angry about it."

Mackintosh argued that Grant & Eisenhofer had assembled a superior and more comprehensive complaint. She said the firm dismissed and refiled the litigation because it didn't want to "burn an amendment."

Purcell, however, maintained that "the Fidelity conflict is disqualifying," and asserted that his team "is the better choice when considering that conflict."

Vice Chancellor Laster told the parties that a part of the issue involved the wording of an earlier email regarding the Fidelity matter and Grant & Eisenhofer's decision to drop the funds as defendants.

In a "cold read" of the email, the judge said, "it sounds like a relationship" existed.

Purcell said during the argument that his team, which includes Bleichmar Fonti & Auld and Farnan LLP, strategically chose to focus their initial complaint on Taysha's directors, rather than the sweep of third-party investors that was included in Grant & Eisenhofer's version of the litigation.

Mackintosh argued that her team, which includes counsel from the Reeves Law Firm and Bronstein Gewirtz & Grossman, pressed forward with document demands under Section 220 of Delaware's General Corporation law before filing the Young action well after Elliott's complaint.

The team led by Purcell & Lefkowitz filed Elliott's initial complaint on Jan. 30, 2024. The Grant & Eisenhofer-led team filed its first version of the Young action on April 15.

Vice Chancellor Laster said he would take the arguments under advisement.

Young is represented by Christine M. Mackintosh and Vivek Upadhy of Grant & Eisenhofer PA, Jeffrey Reeves of the Reeves Law Firm LLC, and Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC.

Elliott is represented by Derrick B. Farrell, Matthew L. Miller and Robert B. Lackey of Bleichmar Fonti & Auld LLP, Brian E. Farnan and Michael J. Farnan of Farnan LLP, and Steven J. Purcell, Robert H. Lefkowitz, Stephen C. Childs and Omer Kremer of Purcell & Lefkowitz LLP.

The individual defendants and Taysha Gene Therapies are represented by Raymond J. DiCamillo, Kevin M. Gallagher and Cassandra L. Thompson of Richards Layton & Finger PA and Aric Wu, Brian French and Bingxin Wu of Cooley LLP.

The consolidated case is In re: Taysha Gene Therapies Inc. Stockholder Litigation, case number 2024-0073, in the Court of Chancery of the State of Delaware.

--Editing by Covey Son.

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# Coinbase, Execs Can't Beat Investor Suit Over Business Risks

By **Aislinn Keely**

Law360 (September 5, 2024, 10:14 PM EDT) -- A New Jersey federal judge on Thursday declined to dismiss a consolidated investor class action against Coinbase and its executives over disclosures the cryptocurrency exchange made about certain business risks it faced, although he trimmed certain allegations deemed to be, among other things, corporate puffery.

U.S. District Judge Brian R. Martinotti **delivered an order** Thursday that found a putative class of Coinbase common stock buyers can bring most of their allegations that the crypto exchange misrepresented or concealed parts of its business to the detriment of certain stockholders. These included certain risks of how assets might be treated in the event of a bankruptcy and the possibility that the U.S. Securities and Exchange Commission would bring an enforcement action against it over its cryptocurrency business.

With respect to this last allegation, the investors claimed Coinbase listed assets that its own review process showed had high likelihoods of being deemed securities and concealed indications as early as 2022 that the SEC believed the platform supported securities.

"The court finds plaintiffs have adequately alleged that defendants misleadingly described a favorable picture of the improbability that the SEC would file an enforcement action by repeatedly emphasizing that the crypto assets they listed were not securities," said the order.

The SEC eventually did file suit against Coinbase, accusing it in June 2023 of operating an unregistered securities exchange. The suit is still being **contested**.

The investors had also argued that Coinbase concealed the risk that certain customer assets could be treated as part of its estate in the event of a bankruptcy. Although Coinbase argued the risks associated with bankruptcy weren't material to stockholders, Judge Martinotti found that a 2022 disclosure to the SEC appeared to contradict that position, with Coinbase disclosing that customers may find custody services less attractive given the risk of asset treatment during bankruptcy.

"In this admission, the company effectively acknowledged the 'substantial likelihood' that the omission of the bankruptcy risk was material to investors," said the order.

The firm also had a duty to disclose the bankruptcy treatment as a risk to customer assets under custody, said the order. While Coinbase told customers of the risks of hacks and lost keys, the investors met the bar to allege it also "concealed their knowledge of potential bankruptcy risks," according to the order.

"The court finds that the subject statements here, to the extent they highlight Coinbase's alleged ability to safely store customers' assets, are actionable as they contain 'embedded' falsities and concern a central part of Coinbase's business," said the order.

However, statements that touted customers' trust in Coinbase were found to be non-actionable puffery and opinion, and tossed from the case.

In addition, Judge Martinotti found the investors hadn't adequately shown that Coinbase concealed an alleged proprietary trading business, since most of those allegations were based on a Wall Street Journal article that cited only anonymous sources.

The article "does not provide the sufficient level of detail required by the heightened pleading standard and does not indicate an independent investigative effort" to bring the claims under Section 10 of the Securities Exchange Act, the judge said.

In a statement to Law360, Coinbase highlighted that the court agreed with portions of its bid to dismiss the case, and that the case hasn't yet reached a fact-finding stage.

"It's important to note that the remaining pieces are allowed to move forward because of the way this motion to dismiss works: the court draws inferences based on the plaintiff's allegations rather than the reality of what happened," said a Coinbase spokesperson. "We remain confident that we are right on the facts and the law, and we look forward to proving the rest of our case."

Counsel for the investors did not immediately respond to a request for comment Thursday.

U.S. Magistrate Judge Leda Dunn Wettre **consolidated** two actions in December 2022 to form the resulting securities class action, and tapped Sjunde AP-Fonden as lead plaintiff. The institutional investor allegedly sustained the largest financial loss at \$10 million.

The putative class is represented by Matthew L. Mustokoff, Stacey M. Kaplan, Joshua A Materese, Margaret E. Mazzeo, Austin W. Manning and Dylan J. Isenberg of Kessler Topaz Meltzer & Check LLP.

Coinbase and the individual defendants are represented by Kevin M. McDonough, Andrew B. Clubok and Susan E. Engel of Latham & Watkins LLP.

The case is Patel v. Coinbase Global Inc. et al., case number 2:22-cv-04915, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Katryna Perera. Editing by Michael Watanabe.

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# Pharma Co. Verrica Fails To Shed Investor Suit Over FDA OK

By **Katryna Perera**

Law360 (September 5, 2024, 6:29 PM EDT) -- A Pennsylvania federal judge has partially denied Verrica Pharmaceuticals Inc.'s second request to throw out a proposed class action filed by investors who claim the company defrauded them by hiding obstacles it faced in obtaining approval from the U.S. Food and Drug Administration for its lead product.

U.S. District Judge Mitchell S. Goldberg issued a **memorandum opinion** Tuesday dismissing the suit's claims against Verrica Chief Financial Officer Terence Kohler but retaining the rest.

According to the opinion, investors asserted scienter — or knowledge of wrongdoing — claims against Kohler. Judge Goldberg said he previously found that the investors did not adequately state a claim against Kohler in their first amended complaint and that, in the latest version of the suit, the allegations are "still too sparse to raise a 'strong' inference either that Kohler personally acted with scienter or that he knowingly participated in a fraud."

Judge Goldberg said Tuesday that the only connection between Kohler and the alleged false statements is that, in his role as CFO, Kohler signed certain mandatory financial reports repeating statements Verrica made in a press release about its contract manufacturer, Sterling Pharmaceutical Services LLC.

"There is no allegation that Kohler had any responsibilities related to these statements, or to FDA approval or Sterling more generally," the opinion states.

Judge Goldberg retained the rest of the suit's claims. According to the opinion, the second amended complaint heavily relies on statements from anonymous former Verrica employees to demonstrate the defendants' knowledge of ongoing problems. In their dismissal bid, the defendants rely on declarations purportedly made by those same people, who now deny the accuracy of statements attributed to them.

But Judge Goldberg said he was not persuaded by any of the defendants' arguments that he must consider attached witness declarations on a motion to dismiss.

"A motion to dismiss is normally confined to the pleadings," he said. "There are limited exceptions for intrinsic or judicially noticeable documents, but witness declarations do not fall into those categories."

Considering only the complaint's pleadings, Judge Goldberg found that the investors adequately pled scienter in the second amended complaint regarding Verrica and CEO Ted White allegedly making misleading statements that concealed quality problems at Sterling.

Judge Goldberg said the second amended complaint offers new allegations about White and Verrica's knowledge of Sterling's quality problems during the proposed class period, based on an account from an anonymous former Verrica employee who claims to have traveled to Sterling's site during a February 2022 FDA inspection.

"Sterling sent Verrica's senior management, including White, daily updates on the inspection, including the FDA's conclusion that quality problems similar to those found in May 2021 remained. White allegedly 'grilled' Sterling about its earlier promises to fix those problems," the opinion states. "These allegations raise a 'strong inference' that White understood it was misleading to tell investors

at subsequent conferences and in public filings that the problems at Sterling had been addressed through a 'successful resolution.'"

Judge Goldberg also found that the investors adequately pled "control person" claims against White, using that term to mean the person responsible for the alleged false statements.

The suit is on behalf of a proposed class of individuals and entities that purchased or acquired Verrica securities between May 19, 2021, and May 24, 2022. According to the operative complaint, Verrica is a dermatology therapeutics company that develops medications for skin diseases.

Its lead product, VP-102 or YCANTH, is a "drug device combination of Verrica's topical solution, cantharidin, administered through a single-use precision applicator, developed for the treatment of molluscum contagiosum, an infection most common in children that is caused by a poxvirus that results in a skin disease with lesions, external genital warts, and common warts."

During the class period, Verrica was trying to obtain FDA approval for VP-102, but investors say the defendants made false and misleading statements and omissions about hurdles the company faced. The hurdles cited include a 2021 FDA investigation of Verrica's Sterling manufacturing site that identified unresolved compliance deficiencies that had to be addressed for the FDA to grant approval, and a second investigation that occurred a year later identifying the same unresolved issues.

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

Investors are represented by Lee Albert and Leanne H. Solish of Glancy Prongay & Murray LLP, and by Frank R. Cruz of The Law Offices of Frank R. Cruz.

Verrica Pharmaceuticals, White and Kohler are represented by Sarah M. Lightdale, Aric H. Wu, Christopher L. Martin Jr., Luke T. Cadigan and Zachary Sisko of Cooley LLP, and Michael L. Kichline and Emily S. Kimmelman of Morgan Lewis & Bockius LLP.

The case is *Gorlamari v. Verrica Pharmaceuticals Inc. et al*, case number 2:22-cv-02226, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Amy French.



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## 2nd Circ. Chilly To Mortgage-Backed Securities ERISA Suit

By **Kellie Mejdrich**

Law360 (September 5, 2024, 4:53 PM EDT) -- The Second Circuit appeared unlikely Thursday to revive a union pension fund's suit looking to hold Wells Fargo and Ocwen Financial Corp. liable for losses on mortgage-backed securities, with two judges signaling the risky loans the fund sued over might not be covered by federal benefits law.

At oral arguments, a three-judge panel zeroed in on whether trustees of the United Food & Commercial Workers Union & Employers Midwest Pension Fund could hold Ocwen and Wells Fargo liable under the Employee Retirement Income Security Act for misconduct related to the subprime mortgages underlying the pension fund's investment. The pension fund invested in mortgage-backed securities through trusts created by American Home Mortgage Investment Corp., which issued securities composed of investment contracts tied to mortgages issued and serviced by Ocwen and Wells Fargo.

The panel's judges appeared inclined to agree with U.S. District Judge Vernon S. Broderick's **2023 ruling** that under U.S. Department of Labor regulations defining what constitutes a plan asset, which hinges on determining whether an investment is debt or equity, the mortgage-backed securities looked more like debt. Judge Broderick ruled that because the union fund hadn't showed any equity features to the underlying assets, those mortgage backed-securities weren't plan assets subject to ERISA, and Ocwen and Wells Fargo therefore weren't fiduciaries to the union plan.

"Seems to sort of walk, talk and squawk like debt. I mean, it's fixed payments at regular intervals. I mean, this is not the way equity typically works," said U.S. Circuit Judge Richard J. Sullivan in an exchange with Bradley Miller, the attorney for the UFCW benefit plan trustees.

Earlier in the exchange with Miller, Judge Sullivan appeared to reject the union fund's argument that the pension fund's own characterization of the investments in mortgage-backed securities as debt on its Form 5500 annual filing with the DOL didn't bear on the plan asset interpretation.

"Seems like you want to sort of take the benefits of it being a debt instrument for tax purposes and for other things, but when it comes to basically having a claim under ERISA, you want to call it, you know, equity. And I mean, there does seem to be a problem with that," Judge Sullivan said.

Under DOL regulations defining plan assets subject to ERISA, an ERISA plan's assets include its investments, but the underlying assets of that investment generally aren't themselves considered a plan asset subject to ERISA's fiduciary duties. But the DOL's so-called plan asset rule also outlines an exemption that explains when assets underlying investments can be considered plan assets for purposes of ERISA, if the underlying asset has substantial equity features and isn't treated as indebtedness under applicable local law.

In his order granting summary judgment to Wells Fargo and Ocwen in 2023, Judge Broderick concluded that the pension fund hadn't offered up any evidence of equity features that would support the argument that the mortgage-backed securities were ERISA plan assets under the DOL's regulations.

U.S. Circuit Judge Denny Chin also grilled Miller on how the servicing companies Ocwen and Wells Fargo could be considered fiduciaries to the union plan when they argued there was no awareness on the companies' part of the UFCW fund's investments until the fund's lawsuit.

"If that is true, how can they be expected to be fund fiduciaries if they don't even know that a fund has invested?" Judge Chin asked.

Miller responded that Wells Fargo and Ocwen might not have known the specifics about the UFCW plan's investments, "but they certainly knew the benefit plans were very significant investors."

"It is just not credible to argue that they didn't know that there were benefit plan investors," Miller said.

The trustees of the UFCW pension fund first sued in 2018, alleging Ocwen and Wells Fargo breached their fiduciary duty under ERISA by pushing struggling homeowners into foreclosure during the financial chaos of 2007 to 2009.

The fund accused the companies of breaching ERISA by mismanaging the mortgage loans underlying the fund's mortgage-backed security investments, which ultimately tanked when the market crashed. Wells Fargo — which the trustees said was a co-fiduciary — stood by while Ocwen, which it was supposed to supervise, executed risky mortgages, the trustees said.

Another comment from U.S. Circuit Judge Susan L. Carney during an exchange with Miller also suggested the panel might conclude the ERISA fiduciary liability with regard to mortgage-backed security investments might rest elsewhere — namely, with the union fund trustees.

The exchange occurred when Miller said to the court that under the DOL's so-called look-through rule, an equity characteristic that could defeat characterization of a mortgage-backed security's underlying investment as debt was the investment's "thin capitalization."

"How can anyone look at these instruments and not say these were very thinly capitalized?" Miller said to the panel.

But that led Judge Carney to interrupt with a question.

"And yet your clients, who had a fiduciary obligation to the fund, made the investment, right?" Judge Carney said.

Wells Fargo declined to comment on the proceedings Thursday. Counsel and spokespeople for the union fund and Ocwen didn't immediately respond to requests for comment.

U.S. Circuit Judges Richard J. Sullivan, Denny Chin and Susan L. Carney sat on the panel for the Second Circuit.

The United Food & Commercial Workers Union & Employers Midwest Pension Fund trustees are represented by R. Bradley Miller of R. Bradley Miller Law.

Ocwen is represented by Jenya Godina and Anton Metlitsky of O'Melveny & Myers LLP and Richard A. Jacobsen and Aaron Rubin of Orrick Herrington & Sutcliffe LLP.

Wells Fargo is represented by Yaakov Roth of Jones Day.

The case is *Powell v. Ocwen Financial Corp.*, case number 23-999, in the U.S. Circuit Court of Appeals for the Second Circuit.

--Editing by Bruce Goldman.



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## Fla. Law Firm Says It's Owed \$247K In Fees From Chiquita MDL

By **David Minsky**

Law360 (September 5, 2024, 4:50 PM EDT) -- A South Florida law firm has urged a federal court to grant it \$247,000 for its work in reaching a settlement from the long-running multidistrict litigation over Chiquita Brands International Inc.'s funding of Colombian paramilitaries, saying a fellow attorney waived objections after failing to meet with other lawyers in the case.

Conrad & Scherer LLP, which represents a set of plaintiffs who are not a party to a \$12.8 million agreement in the case, said a \$246,611 charging lien should be enforced for the work the firm said it did for the settling plaintiffs, **according to a reply** filed Wednesday.

Additionally, Conrad & Scherer said attorney Paul Wolf didn't follow a local rule requiring him to meet with the firm in order to resolve his dispute over the fees.

"Given his blatant, ongoing disdain for the local rules, the Court should find that Mr. Wolf waived all objections to C&S's charging lien, and award C&S the full amount of that lien," Conrad & Scherer said.

Wolf, who represents the settling plaintiffs, objected to Conrad & Scherer's motion to enforce the charging lien, saying last month the firm didn't do any work for the plaintiffs who **reached a settlement** with Chiquita in June.

The dispute stems from attorney Terry Collingsworth's representation of a group of plaintiffs in the MDL between Chiquita and the family members of those killed by the paramilitary group Autodefensas Unidas de Colombia, which Chiquita has admitted to funding.

Shortly after filing an action against Chiquita on behalf of 144 plaintiffs, Collingsworth joined Conrad & Scherer, and several of the firm's lawyers represented the plaintiffs, court records show.

But Collingsworth left Conrad & Scherer, and the court granted Wolf's request to disqualify the firm from representing those plaintiffs. The court, however, instructed the firm to file a notice of charging lien to preserve its claim to fees, according to Conrad & Scherer. The firm **filed a motion** late August asking a court to enforce the lien now that the plaintiffs have settled.

Conrad & Scherer argued Wednesday that Wolf violated Local Rule 7.3(a) when Wolf didn't confer with the firm over the fees or object to them in writing. Wolf also violated Local Rule 7.3(b), which required Wolf to "describe with reasonable particularity each time entry or nontaxable expense to which [he] objects, both as to issues of entitlement and as to amount, and shall provide supporting legal authority."

One or both of the violations are enough to waive Wolf's objections, Conrad & Scherer argued.

The firm also urged the court to reject Wolf's arguments that the lien request is "outrageous," saying it's only seeking compensation for work done until the court discharged the firm from representing the 144 plaintiffs.

"In short, C&S is requesting a modest amount of fees and costs supported by the law, competent evidence (including expert testimony), and Mr. Wolf's own reasoning," the firm argued. "Mr. Wolf's knee-jerk, conclusory objections — which he waived — do not rebut C&S's showing of entitlement

and amount."

Wolf and Conrad & Scherer representatives didn't respond to requests for comment Thursday.

The non-Wolf plaintiffs are represented in the MDL by John Scarola, Victoria Mesa-Estrada and Mariano Garcia of Searcy Denney Scarola Barnhart & Shipley PA, James K. Green of James K. Green PA, Rick W. Herz, Maryum J. Jordan, Marissa Vahlsing and Marco B. Simons of EarthRights International, William J. Wichmann of the Law Offices of William J. Wichmann PA, William R. Scherer of Conrad & Scherer LLP, Agnieszka Fryszman and Leslie M. Kroeger of Cohen Milstein Sellers & Toll PLLC, Jonathan C. Reiter of the Jonathan C. Reiter Law Firm PLLC, Terry Collingsworth of International Rights Advocates, and Gabriela Paola Valentin Diaz.

Chiquita is represented by Michael L. Cioffi, Frank A. Dante, Melissa F. Murphy, Michael A. Stoolman and Serena S. Gopal of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc., Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Jack Karp, Carolina Bolado and Kevin Penton. Editing by Lakshna Mehta.

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## NCAA's \$2.78B NIL Deal Misses 1st Shot At Initial OK

By **Dorothy Atkins**

Law360 (September 5, 2024, 10:01 PM EDT) -- A California federal judge declined Thursday to preliminarily approve a \$2.78 billion deal to settle an antitrust class action targeting the NCAA's name, image and likeness compensation rules, saying counsel must "go back to the drawing board" on some of the deal's terms.

U.S. District Judge Claudia Wilken's comments came during an hourslong hearing held via Zoom on two separate motions to preliminarily approve a pair of settlements that seek to resolve yearslong antitrust litigation brought by college athletes against the NCAA and its conferences.

One proposed deal would resolve a **certified** class action **filed in 2020** and led by former swimmer Grant House, who represents more than 184,000 former student-athletes, and it would pay them **\$2.78 billion in damages** over the next 10 years.

The House settlement also establishes a framework to distribute athletic revenues, primarily from the schools in the five so-called power conferences, to the athletes for 10 years, starting in the 2025-26 academic year, as well as the benefits they already receive in scholarships and other compensation.

The other \$200 million deal **would resolve** litigation launched last year and led by former Oklahoma State University football player Chuba Hubbard. The deal would resolve claims by class members who competed on a Division I athletic team between April 1, 2019, and Sept. 15 of this year and who would have otherwise earned academic achievement awards absent the NCAA's allegedly anticompetitive rules prohibiting such compensation.

During the hourslong hearing on the motions, counsel representing two groups of objectors attacked various aspects of the settlements, including arguing that the settlements' damages estimates don't do enough to compensate women athletes who were allegedly discriminated against by NCAA's biased marketing efforts.

Counsel representing the athletes, Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Jeffrey L. Kessler of Winston & Strawn LLP, repeatedly noted the antitrust settlements don't restrict plaintiffs from pursuing Title IX discrimination claims and don't limit future athletes from seeking damages.

For her part, Judge Wilken appeared unconvinced by most of the objectors' arguments, and she indicated that she would likely preliminarily approve the Hubbard deal likely with some minor tweaks.

However, the judge indicated that she wouldn't preliminarily approve the House settlement due to her concerns about a provision in the proposed settlement that bars college athletes from entering private NIL agreements with "boosters," which the NCAA specifically defines as an entity or individual that has promoted or assisted the school's athletic department or the student-athlete unless the NCAA approves such agreements.

Judge Wilken worried that the restriction may end up harming athletes who currently have such deals, which may be lucrative, and she questioned how the NCAA and member schools would interpret what and who constitutes a booster even under the NCAA's current definition.

The NCAA's counsel, Rakesh Kilaru of Wilkinson Stekloff LLP, responded to the judge's concerns by noting that current NCAA rules already prohibit such third-party booster deals, so if some college athletes have them, the NCAA could enforce its rules barring them. He also suggested that there's not enough evidence in the case record to show that such third-party booster deals are significant for

athletes.

"I don't think it's appropriate to blow up the deal based on payments that may or may not be made," he added.

Kilaru told the judge that the parties' agreement prohibiting such deals is a key provision in the House settlement, and although the athletes' counsel suggested the Hubbard settlement could be preliminarily approved even if the parties continued to negotiate the House settlement, Kilaru disagreed. He said the NCAA wouldn't agree to the Hubbard settlement unless both deals were preliminarily approved.

Kessler emphasized that in negotiating the current settlement, the athletes' counsel was "not trying to make anything prohibited that's not already prohibited," and he attempted to assure the judge that the parties could address the court's concerns and the NCAA's needs.

But the judge doubted Kessler's assurances.

"That might be your view, but I'm not sure that that's the NCAA's view," Judge Wilken told Kessler. She added that she had "some other things to talk about here" in regard to tweaking certain aspects of the notices and proposed settlements, "although maybe not so much anymore."

In light of the judge's comments, the parties agreed to go back to the negotiation table to try to address her concerns, and they agreed to give her an update within three weeks.

The athletes were represented by Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Jeffrey L. Kessler of Winston & Strawn LLP.

The NCAA was represented by Rakesh Kilaru of Wilkinson Stekloff LLP.

The Pac-12 was represented by Whitty Somvichian of Cooley LLP.

The Big Ten was represented by Britt Marie Miller of Mayer Brown LLP.

The Big 12 was represented by Angela C. Zambrano and Natali Wyson of Sidley Austin LLP.

The ACC was represented by Christopher S. Yates of Latham & Watkins.

The SEC was represented by Robert Walker Fuller III of Robinson Bradshaw Hinson PA.

The objectors were represented by Steven F. Molo of MoloLamken LLP and Garrett Ray Broshuis of Korein Tillery.

The cases are In re: College Athlete NIL Litigation, case number 4:20-cv-03919, and Hubbard et al. v. National Collegiate Athletic Association et al., case number 4:23-cv-01593, in the U.S. District Court for the Northern District of California.

--Additional reporting by Elaine Briseno. Editing by Jay Jackson Jr.

*Update: This story has been updated to include additional counsel information.*