

FirstEnergy pays another \$100M fine in bribe case, two former execs indicted

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Kennedy Maize

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Post

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Ohio-based investor-owned utility holding company FirstEnergy Sept. 12 agreed to pay the Securities and Exchange Commission a \$100 million settlement in the long-running nuclear bribery scandal that has seen prominent Ohio politicians and political players jailed. At the same time, Ohio's attorney general indicted two former top company executives on further bribery charges in the HB-6 case.



FirstEnergy headquarters in Akron,
Ohio

FirstEnergy has already agreed to pay Uncle Sam \$230 million to settle the case, in which the company used \$60 million to lobby for and bribe Republican legislative leaders to pass a bill in 2019, HB-6, that would charge customers subsidies to keep two of the company's uneconomic nuclear plants, plus two coal-fired stations, in service. When the conspiracy collapsed, it resulted in the criminal conviction of the Republican Ohio House Speaker Larry Householder, who is now serving a 20-year prison sentence.

Former Public Utilities Commission Chairman Samuel Randazzo was also convicted as a key player in the criminal enterprise. Randazzo committed suicide in April.

FirstEnergy CEO Brian Tierney said, "We are pleased to have reached a resolution with the SEC as we continue to turn a new chapter. Our focus today is investing in our regulated electric companies to improve the customer experience and support the energy transition."

The company in July took a \$120 million reserve in anticipation of the SEC settlement and other pending cases. In August, USA TODAY reported that the company agreed to pay \$19.5 million to the Ohio Attorney General's office and \$500,000 to an independent consultant to review FirstEnergy's ethics policies.

At the same time as the utility and the SEC were announcing the \$100 million settlement, a state court indicted former FirstEnergy CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling on new bribery and corrupt activity charges. Both entered not guilty pleas. As the state indictments were coming down, the Akron Beacon Journal reported that the SEC in a separate lawsuit "filed a complaint against Jones, alleging he misled investors about the utility's payments to former Ohio House Speaker Larry Householder in a pay-to-play scheme."

Akron-based FirstEnergy owns 10 regulated electric distribution companies in five states — Ohio, Pennsylvania, New Jersey, Maryland, and West Virginia — serving some 6 million customers. The company controls some 3,599 MW of coal, solar, and hydro generation, having sold off around 10 GW of coal, nuclear, and gas from 2016 to 2020.

The company reported first half 2024 revenue of \$6.6 billion, with profits of \$298 million (52 cents/share), compared to first half 2023 revenue of \$6.2 billion and a \$527million profit (92 cents/share). Commenting on the first half financial results at the end of July, Tierney said the company "reached an agreement in principle with SEC staff, which remains subject to the SEC's approval, and we are close to resolving legacy issues with the Ohio Attorney General's office. We are proud of the progress we've made and are committed to driving results through a culture focused on performance excellence and continuous improvement."

FirstEnergy's stock (NYSE:FE) has been slowly but steadily rising over the past year, from \$36.89/share on Sept. 14, 2023 to \$44.47/share on Sept. 13, 2024. The company's current market capitalization is \$25.6 billion. The company's credit ratings are investment grade: BBB from S&P, Baa3 from Moody's, and BBB- from Fitch.

First Energy was born in 1997 with the merger of Ohio Edison in the northeast of the state outside of Cleveland and Centerior Energy, which was created in 1986 with the merger of Cleveland Electric Illuminating Co. and Toledo Edison. Serving northwestern Ohio.

—Kennedy Maize

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Former FirstEnergy execs face new charge

 1.next.westlaw.com/Document/Idc12aca0725611efb6e1fd133fbb958c/View/FullText.html

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September 14, 2024

Section: News

Former FirstEnergy execs face new charge

Patrick Williams

September 14, 2024

Two former FirstEnergy executives were indicted this week on an additional conspiracy charge for their alleged roles in a pay-to-play scheme.

The Wednesday indictment also included amended charges against former FirstEnergy CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling.

Prosecutors charged one amended count of bribery against both Jones and Dowling and one amended count of engaging in a pattern of corrupt activity with specifications against both defendants.

During an arraignment Friday in Summit County Common Pleas Court, attorneys for Jones and Dowling entered not guilty pleas on behalf of their defendants.

Ohio Assistant Attorney General Matthew Meyer said the amended charges stemmed from a grand jury finding probable cause.

As part of a separate lawsuit, the U.S. Securities and Exchange Commission (SEC) on Thursday filed a complaint against Jones, alleging he misled investors about the utility's payments to former Ohio House Speaker Larry Householder in a pay-to-play scheme.

In 2023, Householder was sentenced to 20 years in prison for leading a \$60 million bribery scandal to bail out two nuclear power plants in House Bill 6 and providing other favorable treatment to FirstEnergy. House Bill 6 was introduced and signed into law in 2019.

An SEC complaint filed in a federal district court on Thursday alleges that when Householder was indicted in 2020, Jones said "FirstEnergy acted ethically in this matter" and "transparently." But in 2021, FirstEnergy admitted to bribing Householder and Sam Randazzo, former chair of the Public Utilities Commission of Ohio.

The complaint further alleges that Jones approved FirstEnergy's creation of a 501(c)(4) dark money group to allow money to travel undetected from the utility to Householder. The SEC also accuses Jones of misleading FirstEnergy's auditor by not disclosing those payments.

Meanwhile, Jones is facing criminal charges of bribery, telecommunications fraud, money laundering and theft.

The complaint states that FirstEnergy awarded Jones "cash and share-based compensation based on a performance-related incentive compensation program, including a cash bonus of about \$1.6 million, which FirstEnergy paid him in 2019 for achieving certain near-term objectives. FirstEnergy also gave Jones performance-adjusted restricted stock units, valued at approximately \$18.1 million, for a three-year period ending in 2019."

Attorneys for the SEC requested in the complaint that the court order Jones to pay civil penalties, as well as to order him "to disgorge the ill-gotten gains he received because of the violations here, including prejudgment interest."

Also on Thursday, FirstEnergy announced that it had reached a \$100 million settlement agreement with the SEC to resolve the commission's investigation into the House Bill 6 scandal.

Patrick Williams covers growth and development for the Akron Beacon Journal. He can be reached by email at pwilliams@gannett.com or on X, formerly known as Twitter, @pwilliamsOH.

---- Index References ----

Company: U.S. SECURITIES AND EXCHANGE COMMISSION; FIRSTENERGY CORP.

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Coinbase Misled Investors on Anti-Laundering Controls, Suit Says

By Martina Barash

- **COURT:** E.D. Pa.
- **TRACK DOCKET:** [No. 2:22-cv-04915](#)

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Coinbase Misled Investors on Anti-Laundering Controls, Suit Says

By Martina Barash 2024-09-13T17:06:31000-04:00

- **COURT:** E.D. Pa.
- **TRACK DOCKET:** [No. 2:22-cv-04915](#)

Coinbase Global Inc.'s risk disclosures omitted that one of its units had entered into, and breached, an agreement with British regulators to follow anti-money laundering and anti-terrorism requirements, an investor alleges.

Coinbase's stock declined after the U.K.'s Financial Conduct Authority announced July 24 that CB Payments Ltd. enrolled or provided services to thousands of high-risk customers and would pay a fine, named plaintiff Erik Castle says. He filed his proposed class action for securities fraud Friday in the US District Court for the Eastern District of Pennsylvania.

Coinbase provided numerous disclosures, starting with its initial public offering prospectus in 2021, about potential adverse consequences to its business if customers used its cryptocurrency platform to further illegal activities, according to the complaint. But the company failed to disclose that the British agency found in 2020 that CB Payments, which allows fiat currency deposits into electronic wallets for crypto transactions, didn't adequately screen for criminals, Castle says.

It also didn't disclose that CB Payments entered into an agreement with the FCA at that time to institute preventive measures, and later didn't disclose that its subsidiary was breaching the agreement by enrolling high-risk customers and allowing them to deposit about \$25 million, he says.

Coinbase's stock fell 5.5% to close at \$231.52 on July 25.

“As a large, public company with a global presence, Coinbase is occasionally the target of baseless litigation like this,” Coinbase said in an email Friday. “We are confident that we are right on the facts and the law, and we look forward to defending our position.”

Coinbase is involved in securities litigation involving questions about whether cryptocurrency is a security, which isn't at issue in this case. Investors adequately alleged the company misled them about the risk of Securities and Exchange Commission action against it for operating an unregistered securities exchange, a federal court ruled Sept 6.

And a court hearing an SEC enforcement action said in March that the commission 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.

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.

In Castle's suit, the proposed class of those who acquired Coinbase securities between April 14, 2021 and July 25, 2024, inclusive, numbers in the hundreds or thousands, the complaint says.

Castle seeks damages on his securities fraud claims.

The Rosen Law Firm PA represents Castle.

The case is Castle v. Coinbase Global, Inc. , E.D. Pa., No. 2:24-cv-04850, complaint 9/13/24 .

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NEWS

Plaintiff Can't Opt Out of \$97 Million Securities Settlement, NJ Fed Judge Rules

The party seeking to opt out had argued that maintaining its own lawsuit separate from the class action should have provided a "reasonable indication" of its plans.

September 13, 2024 at 05:00 PM

Class Actions



Colleen Murphy



A New Jersey federal court judge refused to allow a plaintiff to opt out of a \$97 million federal securities class action settlement, dismissing the argument that maintaining its own lawsuit separate from the class action was a “reasonable indication” that it was opting out.

The case, *Roofer’s Pension Fund v. Papa*, was filed in June 2017 in the U.S. District Court for the District of New Jersey over alleged violations of federal securities laws against Perrigo Co. and various corporate individuals. The plaintiffs, Sculptor Master Fund and Sculptor Enhanced Master Fund, filed a motion to opt out in August, asking Chief U.S. District Judge Renée Marie Bumb to either excuse them from the now-settled class action or to give them another opportunity to opt out.

In a ruling issued Thursday, Bumb refused, finding that the deadline to do so passed three and a half years ago and dismissing their contention that they gave a “reasonable indication” of opting out by maintaining a separate lawsuit against Perrigo.

“All of Sculptor’s arguments are unpersuasive,” Bumb said. “First, given this court’s clear instructions to class members on how to opt out from this class action that Sculptor failed to follow, the court will not accept Sculptor’s opt out by reasonable indication approach. Even if the court accepted this approach, Sculptor’s conduct would not satisfy it.”

Sculptor offered three potential reasons for its absence from the opt-out list, including that its former counsel never mailed the opt-out request, the request was lost in the mail, or that the request was mailed by Sculptor’s former counsel but never processed by the claims administrator. In addition to arguing that it made a reasonable indication of its intention to opt out, Sculptor argued that the court can excuse the failure to properly do so under the excusable-neglect provisions in 6(b) and 60(b) of the Federal Rules of Civil Procedure.

“According to Sculptor, the due process deficiencies in the class notice require this court to provide class members a second try to opt out,” Bumb said. “Lastly, invoking equitable and judicial estoppel principles, Sculptor contends Perrigo should be estopped from disavowing Sculptor’s opt-out status.”

Bumb also dismissed Sculptor's due process challenge to class notification, finding instead that the class was adequately notified of the consequences of failing to opt out. Sculptor's claim for excusable neglect, which would have allowed a late opt out or another attempt to opt out, was also dismissed, according to the complaint. Bumb called Sculptor's estoppel arguments "equally meritless" because they did not show the missed opt-out deadline was because of Perrigo's conduct.

The lead plaintiff in the underlying case, Perrigo Institutional Investor Group, alleged in its federal securities class action complaint that the defendants misrepresented the company's growth, information on its integration with Omega Pharma, generic drug pricing, and its royalty stream for the drug Tysabri. In a July 2018 ruling, the district court granted, in part, the defense's motion to dismiss, which "significantly narrowed" the lead plaintiff's claims, according to Bumb.

Class certification was granted in the case in November 2019 and the class notice order was approved in July 2020. The notice informed potential class members of their right to opt out and pursue their own lawsuit, according to the opinion.

Bumb said that Sculptor would have received a class notice since it collectively owned roughly 2.6 million shares of Perrigo common stock, which represented 5% of the company. She also said Sculptor's former counsel was aware of the 2020 class notice order.

"Yet Sculptor did not appear in the opt-out list that class counsel filed in early January 2021, listing the individuals and entities who requested exclusion from the Roofer's class action," Bumb said. "The opt-out list was available on the *Roofer's* docket for all to see."

Sculptor was represented by Mariellen Dugan and Luke J. O'Brien of Calcagni & Kanefsky.

Counsel to Perrigo was Katherine St. Romain and Jason S. Kanterman of Fried, Frank, Harris, Shriver & Jacobson and Alan S. Naar of Greenbaum Rowe Smith & Davis.

Michael B. Himmel of Lowenstein Sandler represented Perrigo Institutional Investor Group and Roofers. He declined to comment on the case.

None of the other attorneys immediately responded to requests for comment.

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Second Circuit Affirms Dismissal Of FCPA Related Securities Fraud Action Against Ericsson

 fcpprofessor.com/second-circuit-affirms-dismissal-fcpa-related-securities-fraud-action-ericsson

September 16, 2024

This prior post covered the 2019 Foreign Corrupt Practices Act enforcement action against Ericsson. The enforcement action concerned conduct in Djibouti, China, Vietnam, Kuwait, Indonesia, and Saudi Arabia and included a DOJ and SEC component. The DOJ matter involved a one count criminal information against Ericsson subsidiary Ericsson Egypt Ltd. charging conspiracy to violate the FCPA's anti-bribery provisions resolved through a plea agreement and a criminal information against Ericsson charging conspiracies to violate the FCPA's anti-bribery, books and records, and internal controls provisions resolved through a deferred prosecution agreement. The DOJ matter was resolved through payment of a \$520 million criminal penalty.

As highlighted in this prior post, in 2021 the DOJ suggested that Ericsson was in breach of its DPA obligations and in March 2023 the DOJ announced that "Ericsson has agreed to plead guilty and pay a criminal penalty of more than \$206 million after breaching a 2019 Deferred Prosecution Agreement (DPA)." (See [here](#) for the prior post).

In between, reports suggested that "Ericsson may have made payments to the ISIS terror organization to gain access to certain transport routes in Iraq." (See [here](#) for the prior post).

As sure as the sun rises in the east and dogs bark, investors brought a securities fraud class action in related to the above events.

In mid-2023, Judge William Kuntz (E.D.N.Y.) dismissed the action (see [here](#) for the prior post).

On appeal, the Second Circuit recently affirmed the dismissal (See 2024 WL 4023842).

The decision begins with the following background.

“Plaintiff-Appellant Boston Retirement System (“BRS”) appeals from the district court’s judgment dismissing the putative class action it brought against Defendants-Appellees Telefonaktiebolaget LM Ericsson (“Ericsson”), Borje Ekholm, Carl Mellander, and Xavier Dedullen (collectively, “Defendants”). BRS asserts claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b) and 78t(a), and Securities and Exchange Commission (“SEC”) Rule 10b-5, 17 C.F.R. § 240.10b-5. As relevant here, the claims relate to allegations that Defendants made false and misleading statements about Ericsson’s anti-corruption policies and controls, as well as its resolution of investigations conducted by the United States government, while concealing its allegedly corrupt business practices in Iraq.

...

Ericsson is a Swedish telecommunications company that provides hardware, software, and information technology services to customers in over 180 countries around the globe. In 2016, Ericsson disclosed that the United States Department of Justice (the “DOJ”) and the SEC had launched investigations into Ericsson’s potential violations of the Foreign Corrupt Practices Act (“FCPA”). On December 6, 2019, the DOJ announced that Ericsson had entered into a deferred prosecution agreement (the “DPA”) with the DOJ and a settlement agreement with the SEC, and that those resolutions were made in connection with FCPA violations in “at least five countries.” As part of the DOJ settlement, Ericsson’s Egyptian subsidiary agreed to plead guilty to conspiracy to violate the FCPA’s anti-bribery provisions, and Ericsson admitted to participating in the charged conspiracy. Ericsson explained in a press release that, pursuant to the DPA, it had “agreed to engage an independent compliance monitor for a period of three years while the Company continues to undertake significant reforms to strengthen its Ethics & Compliance program.” The DPA provided that the monitorship would “reduce the risk of misconduct,” given that “[Ericsson] ha[d] not yet fully implemented or tested its compliance program.” Ericsson further agreed that, for the duration of the DPA’s term, it would report to the DOJ “any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery or accounting provisions.”

Several years later, on February 15, 2022, Ericsson issued a press release in response to media inquiries, stating that, in 2019, it had initiated an internal investigation covering the period of 2011 through 2019 of Ericsson employees, vendors, and suppliers, that was triggered by “[u]nusual expense claims in Iraq.” Ericsson reported that its internal investigation, which was supported by external legal counsel, “found serious breaches of compliance rules and the Code of Business Ethics” and “corruption-related misconduct” in Iraq, including, *inter alia*, “payments to intermediaries and the use of alternate transport routes in connection with circumventing Iraqi Customs, at a time when terrorist organizations, including ISIS,

controlled some transport routes.” Ericsson further reported that “[i]nvestigators could not determine the ultimate recipients of these payments,” but “[t]he investigation could not identify that any Ericsson employee was directly involved in financing terrorist organizations.”

On March 2, 2022, Ericsson issued another press release announcing that, one day earlier, the DOJ informed Ericsson that its disclosure to the DOJ “prior to the DPA about its internal investigation into conduct in Iraq in the period 2011 until 2019 was insufficient,” and that Ericsson had “breached the DPA by failing to make subsequent disclosure related to [its Iraq] investigation post-DPA.” On March 2, 2023, Ericsson agreed to plead guilty to the same FCPA violations to which it previously admitted in the DPA concerning countries other than Iraq, in order to resolve the DOJ’s determination that Ericsson breached the DPA based, in part, on the inadequate disclosure to the DOJ regarding Ericsson’s internal Iraq investigation.

BRS brought this federal securities class action on behalf of a putative class of investors who acquired Ericsson’s American Depositary Shares between April 27, 2017 and March 1, 2022. The amended complaint alleges that Defendants, while concealing Ericsson’s corrupt business practices in Iraq, made false and misleading statements to investors relating to: (1) the source of Ericsson’s strong growth in business in the Middle East (the “Middle East Growth Statements”); (2) the strength of its compliance programs (the “Anti-Corruption Policy Statements”); and (3) its entry into the DPA and purported resolution of the DOJ’s investigation into its business practices (the “FCPA Statements”).

The district court granted Defendants’ motion to dismiss all of the claims asserted in the amended complaint under Federal Rule of Civil Procedure 12(b)(6). *See In re Telefonaktiebolaget LM Ericsson Sec. Litig.*, 675 F. Supp. 3d 273, 300 (E.D.N.Y. 2023). The district court held that BRS failed to plead actionable misrepresentations or omissions with respect to its Section 10(b) and Rule 10-5 claims. In the alternative, the district court concluded that BRS did not sufficiently plead scienter or the requisite loss causation with respect to those claims. Finally, because it had concluded that there was no primary Section 10(b) violation, the district court found that there could be no control person liability under Section 20(a) of the Exchange Act and, thus, also dismissed that claim. This appeal followed.”

On appeal, BRS did not challenge the dismissal of its claims relating to the Middle East Growth Statements and thus the Second Circuit analyzed only the claims related to the Anti-Corruption Policy Statements and the FCPA Statements.

The opinion states (certain internal citations omitted):

“The Anti-Corruption Policy Statements

BRS challenges the district court’s dismissal with respect to the Anti-Corruption Statements made by Ericsson between 2016 and 2018, which related to Ericsson’s policies regarding compliance, ethics, and other anti-corruption measures that it was working to improve. The district court held that “[these] compliance- and policy-related statements are unactionable both because of their generality and because [Ericsson] never promised perfect compliance.” We agree.

We have repeatedly held that “general statements about reputation, integrity, and compliance with ethical norms are inactionable ‘puffery,’ meaning that they are too general to cause a reasonable investor to rely upon them.”

Here, as the district court explained, the Anti-Corruption Statements consisted of generalized statements about ethics and compliance, such that no reasonable investor would rely upon them. For example, Ericsson’s 2016 SEC Form 20-F, filed on April 27, 2017, referred investors to its 2016 corporate governance report which stated, *inter alia*, the following: “[T]o ensure compliance with legal and regulatory requirements and the high standards that we set for ourselves, Ericsson has adopted internal rules that include:” a “Code of Business Ethics”; “Group Steering Documents, including Group policies and directives, instructions and business processes for approval, control and risk management”; and a “Code of Conduct, which applies to product development, production, supply and support of Ericsson products and services worldwide.”

Similarly, Ericsson’s 2017 SEC Form 20-F, filed on March 27, 2018, stated, “Ericsson has a zero-tolerance approach to corruption expressed in the Company’s Code of Business Ethics.” That Form 20-F also stated that “[i]n 2017, Ericsson introduced a vetting process that focuses on ethics and compliance” and that “[a]ll members of the current Executive Team have been vetted, and all future recruitment to these positions will also go through mandatory vetting.”

BRS concedes that the Anti-Corruption Statements did not guarantee “perfect compliance,” but asserts that they nevertheless were “false and misleading” because Ericsson “downplayed the risk of FCPA violations when Defendants knew those risks had already materialized.” We find this argument unpersuasive. Indeed, in making these statements, Ericsson expressly cautioned that “[w]e may fail to comply with our corporate governance standards” and “we cannot assure that violations [of laws and regulations] do not occur.” Ericsson also disclosed that it had received hundreds of employee reports of possible misconduct through its “whistle-blower tool, the Ericsson Compliance Line hotline” and other channels.

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

Accordingly, the district court correctly determined that the Anti-Corruption Statements could not form the basis of a plausible Section 10(b) claim.”

Regarding the FCPA Statements the opinion states (certain internal citations omitted):

“BRS also challenges the district court’s dismissal with respect to the FCPA Statements, which included statements made by Ericsson between 2019 and 2022 related to the government’s FCPA investigations and the risk of future enforcement actions. The district court found that Ericsson’s statements regarding entry into the DPA, including the seeming finality of the government investigations, were not misleading given the context in which they were made, “which here includes a steady stream of warnings to investors.” We agree.

It is well settled that “companies do not have a duty to disclose uncharged, unadjudicated wrongdoing” to investors. [...] We have nevertheless recognized that, “when [a company] makes a disclosure about a particular topic, whether voluntary or required, the representation must be complete and accurate.” [...] However, we have emphasized that one disclosure about a particular topic “[does] not trigger a generalized duty requiring defendants to disclose the entire corpus of their knowledge” about related subjects involving the company.

Here, BRS argues that Ericsson “made a series of misrepresentations ... that emphasized the finality of the DPA” and that “[t]hese statements conveyed that the DPA resolved all then-existing corruption.” We are unpersuaded. Ericsson’s statements regarding the DPA were sufficiently limited to the scope of the FCPA investigations *by the government* that had already occurred and conveyed nothing about any internal investigations. For example, Ericsson’s December 6, 2019 press release stated: “The resolution marks the end of the FCPA-related investigations into Ericsson and its subsidiaries undertaken *by the DOJ and the SEC*.” BRS points to the statement by defendant Dedullen, Ericsson’s then-Chief Legal Officer, to an analyst during the December 7, 2019 earnings call that he was not aware of any “follow-on investigations,” and argues that it was misleading because he did not disclose the existence of Ericsson’s internal investigation into alleged illegal conduct in Iraq.

However, the district court correctly determined that, when taken in context, Dedullen’s statement would be reasonably understood to be related to investigations by a regulator, *not* internal investigations that Ericsson took on itself. Dedullen’s statement was made in response to the analyst’s question, which asked for an update on regulators’ investigations and Ericsson’s accounting in its financial statements of the costs of resolving those investigations. In particular, in asking Dedullen the question, the analyst referenced a question he had raised on the prior quarter’s analyst call regarding Ericsson’s provision for the estimated costs of resolving the FCPA investigations by the DOJ and the SEC, and whether “[i]n terms of the potential for other jurisdictions to look into this, [Ericsson could] just comment at this point, has anything else started at this point?” Referencing this earlier question, the analyst stated, “[W]henever we had the last color on this, when you took a provision in Q3, I think it wasn’t clear to you then whether other investigations in other regions around

the same topics might kick off.” The analyst then asked for “an update on whether anything else has or you’ve had any kind of discussions with the regulators.” After Dedullen responded that “[w]e are not aware of any other follow-on investigations in any of the other countries,” the analyst asked two follow-up questions, concerning “the 2 investigations” and the differences between the DOJ and SEC resolutions. Thus, the district court correctly concluded that “[s]ince Defendant Dedullen was responding to a question about the existence of other *government* investigations, he did not mislead investors in stating Ericsson was unaware of further investigations writ large,” because “BRS does not allege that, as of December 7, 2019, any regulator had notified Ericsson of an investigation focused on Iraq.”

We also conclude that the remaining allegedly misleading statements by Defendants about the resolution of the FCPA investigations by the government and post-resolution efforts to monitor the effectiveness of its compliance program—including the statement at the time of the DPA that “[w]e’re now able to move on and fully focus on our business” and the description of “[i]mprovements to Ericsson’s Ethics and Compliance Program,” as well as statements in 2021 regarding the DPA’s monitorship requirement,—were non-actionable “expressions of puffery and corporate optimism [that] do not give rise to securities violations.” [...] Indeed, as the district court noted, these statements were made in the context of “ubiquitous warnings to investors regarding the possibility of future compliance failures and investigations.”

For example, Ericsson’s annual report on its 2019 SEC Form 20-F, filed less than three months after Ericsson entered into the DPA, contained the following warnings: (1) “Ericsson may fail or be unable to comply with laws or regulations and could experience penalties and adverse rulings in enforcement or other proceedings” and “[Ericsson] cannot assure [that violations of laws and regulations] do not occur,”; (2) “[Ericsson] may be subject to further adverse consequences following our recent resolutions with the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) of the previously disclosed investigations under the FCPA,” ; and (3) “there can be no assurance that the remedial measures we have taken [in relation to the DPA] and plan to take in the future will be effective or that there will not be a finding of material weakness in our internal controls,”. In short, the district court correctly held that, “[s]ince Defendants continuously warned investors Ericsson might fail to comply with regulations and could be the target of future investigations, [the remaining FCPA Statements]—which relate to either Ericsson’s purportedly enhanced compliance framework or the resolution of the FCPA investigations—were not misleading.”

Ericsson was represented by Sullivan & Crowell. (See here for the firm’s press release).

Ardelyx Finishes Off Investor Suit Over Drug's New Use Prospects

By Martina Barash

- Investors alleged company misled about FDA approval progress
- Last version of class complaint comes up short, court says

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Ardelyx Finishes Off Investor Suit Over Drug's New Use Prospects

By Martina Barash 2024-09-13T14:13:07000-04:00

- Investors alleged company misled about FDA approval progress
- Last version of class complaint comes up short, court says

The latest version of a securities fraud complaint alleging Ardelyx Inc. misrepresented a drug's approval chances fares no better than the last and must be dismissed, a federal court ruled.

Most of the allegations added to the class complaint were already before the court, Judge Haywood S. Gilliam Jr. said Thursday for the US District Court for the Northern District of California. Gilliam dismissed the complaint with finality.

Ardelyx initially obtained Food and Drug Administration approval in 2019 for its lead product candidate, Tenapanor, to treat irritable bowel syndrome, the investors alleged. But the biotechnology company, which was focused on kidney disease, didn't generate much revenue from its sales for that use, they said. It allegedly pivoted to trying to get the FDA's approval for dialysis patients to use Tenapanor to treat high levels of phosphate in the blood.

Ardelyx and its top officials made misleadingly optimistic statements about how the FDA process was going and about the likelihood of obtaining FDA approval, the investors said on behalf of a proposed class.

When Ardelyx disclosed in July 2021 that deficiencies identified by the federal agency would prevent it from successfully applying for FDA approval, the stock price dropped by 74% to close at \$2.01 per share, they said. That was the largest single-day selloff in the company's history, according to data compiled by Bloomberg.

Gilliam dismissed a previous version of the complaint in March.

In the latest version, “supposedly” new support for two previous allegations of false statements isn’t new at all, Gilliam said Thursday. A third allegedly false statement is bolstered with information from a confidential witness, but the witness isn’t described with enough specificity to allow the new material, he said.

The investors also challenged additional risk disclosures, but Gilliam said he “previously found that these specific risk disclosures revealed the thrust of the allegedly omitted facts and thus undermined Plaintiff’s theory of falsity.”

Ardelyx later got approval for a different high-phosphate treatment, Xphozah. Ardelyx decided against seeking to include that treatment in a Medicare program—prompting another proposed class action, filed in August.

Scott & Scott was lead counsel for the investors. Latham & Watkins LLP represents Ardelyx.

The case is *Strezsak v. Ardelyx Inc.*, 2024 BL 320497, N.D. Cal., No. 21-cv-05868, 9/12/24.

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Humanigen Settles Investor Suit Over Rejected Covid-19 Treatment

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- Investors alleged Humanigen overstated drug's efficacy
- Settlement follows Chapter 11 bankruptcy filing

Humanigen Inc. will pay \$3 million under an approved settlement to resolve allegations that the pharmaceutical company overhyped its drug's ability to treat Covid-19.

Investors said Humanigen repeatedly promoted lenzilumab's prospects as a Covid-19 treatment but "failed to disclose material adverse nonpublic information" over whether the drug would work. The investors sued in the US District Court for the District of New Jersey after Humanigen's stock price dropped when the FDA rejected its application for an emergency use authorization, and when a clinical trial failed to show that lenzilumab was effective as a Covid-19 treatment.

The settlement covers investors who purchased Humanigen securities between May 16, 2020 and Jul. 12, 2022. Judge William J. Martini filed an opinion approving the pact Sept. 13, noting that the pharmaceutical company's Chapter 11 bankruptcy affected how much investors could expect to recover.

Even though the settlement represented "only about 0.58% of the damages alleged," there was a risk of recovering less even if the plaintiffs proceeded and were successful on the merits, Martini said. The bankruptcy also underscored the risks in trying to secure a bigger settlement, weighing in favor of approval, he said.

The consolidated class action complaint alleged Humanigen violated Section 10(b) of the Exchange Act, and that Chief Scientific Officer Dale Chappell and CEO Cameron Durrant violated Section 20(a) of the law. In a separate case, the SEC alleged Chappell avoided millions in losses through insider trading. The Third Circuit upheld a freeze of Chappell's assets in July, agreeing with a lower court that the commission could likely succeed on its insider trading claims.

Martini said the court received 24,594 claims before a submission deadline. The court found the class' response to the settlement was "overwhelmingly positive" other than eight members who asked to be excluded.

Class counsel was awarded \$750,000 in attorneys' fees and \$75,000 in litigation expenses.

Polsinelli PC represented Humanigen. Baker & Hostetler LLP and Kleinberg Kaplan Wolff & Cohen P.C. represented individual defendants.

Levi & Korsinsky LLP and Pomerantz LLP represented the plaintiffs.

The case is In re Humanigen, Inc. Sec. Litig. , D.N.J., No. 2:22-cv-05258, 9/13/24 .

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United Natural Foods Unable to Shake Investors' Profits Suit

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X7A3MSCG000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X7A3MSCG000000)

A federal judge mostly denied United Natural Foods Inc.'s bid to escape a shareholder lawsuit alleging the organic food provider hid its reliance on unsustainable, inflation-based profit gains after Covid-19 struck.

Investors plausibly alleged the company made a series of "misleading half-truths" about what drove its profit margins and how sustainable they would be, Judge Jessica G.L. Clarke in the US District Court for the Southern District of New York said in a Sept. 13 decision.

"By listing potentially positive trends and downplaying potentially negative ones as temporary or discrete, while omitting the elephant in the room, these statements were plausibly misleading," Clarke said.

There was a run-up in food prices after the start of the pandemic, partly driven by consumer pantry-stocking during the health crisis.

Providence, R.I.-based United Natural Foods leveraged the increases through "forward buying," which involved buying excess product ahead of anticipated price increases, the suit said. The practice significantly propped up profits in 2022, the suit said.

But once inflation began to slow, United Natural Foods' profitability began to crumble, the proposed class action said.

United Natural Foods asked for the complaint to be dismissed, arguing the company didn't fully understand the precise impact of its inflation-based buying when it made the statements in question. The company blamed its own antiquated IT systems and a complicated economic environment, according to court documents.

"At this stage, the more compelling and cogent inference is that Defendants did know, and that some of their statements talking around this issue were misleading half-truths," Clarke said.

Clarke did find certain United Natural Foods' statements weren't misleading, including those related to statements about the general impact of inflation.

Glancy Prongay & Murray LLP represents the plaintiffs. Sidley Austin LLP represents United Natural Foods.

The case is *Sills v. United Nat. Foods, Inc.*, S.D.N.Y., No. 23-CV-2364, 9/13/24 .

Pension Board Seeks 9th Cir. Redo in Allianz Fund Collapse Suit

By Jacklyn Wille

- Pension fund invested \$250 million in challenged funds
- 9th Cir. allowed retirees to sue pension board under ERISA

Bloomberg Law News 2024-09-16T10:09:21867810281-04:00

Pension Board Seeks 9th Cir. Redo in Allianz Fund Collapse Suit

By Jacklyn Wille 2024-09-13T11:54:59000-04:00

- Pension fund invested \$250 million in challenged funds
- 9th Cir. allowed retirees to sue pension board under ERISA

A pension fund board that previously sued Allianz Global Investors US LLC over the collapse of its Structured Alpha funds asked the Ninth Circuit to reconsider reviving litigation by plan participants who say they were harmed by the ordeal.

The July decision allowing retirees to press ERISA claims against the pension board creates a lose-lose scenario in which retirement plan fiduciaries can face litigation based solely on the “supposed risks” of any given investment, trustees for the Carpenters of Western Washington said Thursday in a petition for rehearing. This is “antithetical” to the flexibility afforded to plan fiduciaries under the Employee Retirement Income Security Act, the trustees told the US Court of Appeals for the Ninth Circuit.

“This result improperly relies on alleged risks as a stand in for the process undertaken by fiduciaries and will effectively allow plaintiffs to challenge any investment they or their counsel deem too risky (or conversely, too conservative),” the trustees said.

The trustees also criticized the Ninth Circuit’s opinion for eliminating any requirement that ERISA plan participants identify a “meaningful benchmark” when challenging a plan investment. This runs contrary to the analysis of multiple federal appeals courts, the trustees said, and it would allow plan participants to mount ERISA cases based solely on hindsight.

The proposed class action is fallout from the collapse of Allianz's Structured Alpha funds, which were designed to provide protection against a market crash. They instead lost billions of dollars during the tumultuous market conditions of the early days of the Covid-19 pandemic, spurring multiple lawsuits from pension plan investors, including the Carpenters Trusts of Western Washington, which allegedly invested more than \$250 million in the challenged funds.

Allianz ultimately agreed to a global settlement worth billions, and one of its units pleaded guilty to fraud and agreed to pay fines and restitution in connection with the collapse.

But participants in the Carpenters funds say they've been harmed by the "loss of opportunity" to invest in better funds that could have provided greater returns. A Seattle federal judge ruled against them in 2023, but the Ninth Circuit revived the case after determining that the retirees had identified both an injury giving them standing to sue and appropriate comparator investments suggesting that they lost money because of the defendants' misconduct.

The Ninth Circuit also received a rehearing petition from defendant Callan LLC, which served as the pension funds' investment consultant. According to Callan, the appeals court's opinion inappropriately lowered the pleading standard for challenging retirement plan investments while departing from circuit precedent and overlooking key facts.

Skiermont Derby LLP and Engstrom Lee LLC represent the retirees. Groom Law Group and Gordon Rees Scully Mansukhani LLP represent the trustees. DLA Piper LLP US represents Callan.

The case is Johnson v. Carpenters of W. Wash. Bd. of Trs. , 9th Cir., No. 23-35370, rehearing petition 9/12/24 .

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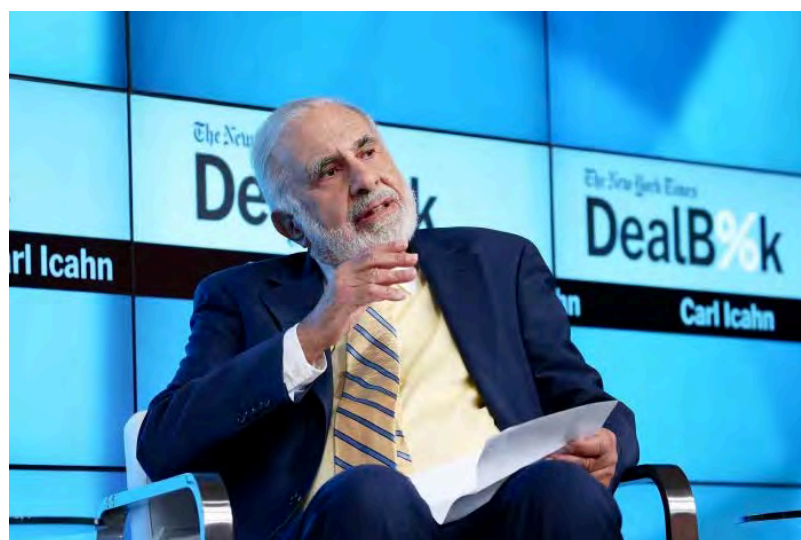
BUSINESS | DEALS

Icahn Enterprises Says Suit Linked to Short-Seller Report Dismissed

The dismissal was the latest development in a public assault on Icahn Enterprises by short-selling firm Hindenburg

By [Adriano Marchese](#) [Follow](#)

Sept. 16, 2024 9:03 am ET



Icahn Enterprises said a judge dismissed a proposed class-action lawsuit against the company and some of its directors. PHOTO: NEILSON BARNARD/GETTY IMAGES

Icahn Enterprises IEP **8.70%** ▲ said a judge dismissed a proposed class-action lawsuit against the company and some of its directors.

Activist investor Carl Icahn's company said District Court Judge K. Michael Moore found reports by Hindenburg Research failed to show that Icahn Enterprises made material misrepresentations or omissions, or did so with an intent to defraud.

The dismissal is the latest development in a public assault on Icahn Enterprises by short-selling firm Hindenburg, which alleged in a report last year that the

company was overvalued, inflated asset marks and paid an unsustainable dividend.

Icahn has spent the past year sparring with lenders and regulators following Hindenburg's claims.

In mid-August, Icahn and his company agreed to settle civil charges from the Securities and Exchange Commission that he failed to disclose pledges of his company's securities as collateral to secure billions of dollars in loans.

Icahn Enterprises then agreed to pay \$1.5 million and Icahn himself agreed to pay \$500,000 in civil penalties to resolve the claims, without admitting or denying the agency's findings.

Write to Adriano Marchese at adriano.marchese@wsj.com

Videos

Icahn Enterprises wins dismissal of investor lawsuit

 [reuters.com/legal/icahn-enterprises-wins-dismissal-investor-lawsuit-2024-09-13](https://www.reuters.com/legal/icahn-enterprises-wins-dismissal-investor-lawsuit-2024-09-13)

Reuters

Carl Icahn, chairman of Icahn Enterprises LP, speaks via video with Ken Squire, founder and president of 13D Monitor, during the 13D Monitor's Active-Passive Investor Summit in New York City, U.S., October 17, 2023. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

Sept 13 (Reuters) - Carl Icahn's investment company Icahn Enterprises (IEP.O) , opens new tab won the dismissal of a lawsuit claiming it artificially inflated its share price by issuing unsustainably high dividends to help the billionaire investor obtain large amounts of personal loans.

In a decision on Friday, U.S. District Judge K. Michael Moore in Miami said shareholders in the proposed class action failed to show that the company made material misrepresentations or omissions and did so with an intent to defraud.

Lawyers for the shareholders did not immediately respond to requests for comment. A spokesman for Icahn Enterprises did not immediately respond to a similar request. Moore gave the shareholders until Oct. 14 to file an amended complaint.

Icahn Enterprises shares have fallen more than three-quarters since May 2023, when the short-selling firm Hindenburg Research questioned its dividends and Icahn's borrowing, and accused Icahn of overseeing a "Ponzi-like economic structure."

Last month Icahn agreed without admitting wrongdoing to pay \$2 million to settle U.S. Securities and Exchange Commission civil charges that he failed to disclose his significant borrowing against the shares.

The shareholders said Icahn Enterprises' true health became evident as its Auto Parts Plus business went bankrupt, the company slashed its dividend and Icahn renegotiated his loans.

Icahn owns about 85% of his company's shares, and personally lost many billions of dollars as the share price fell.

In his 28-page decision, Moore cited the company's disclosures that it could lower dividends, and said its general disclosures about Carl Icahn's borrowing were sufficient to alert investors to the risks.

He also said Icahn Enterprises' 2021 annual report disclosed Carl Icahn's share pledges, and that there were no allegations that any defendant conducted insider trading.

"This conduct suggests that the individual defendants, including Icahn, believed in the long-term value of IEP and is inconsistent with the theory that defendants were engaged in a scheme to artificially inflate the stock price for personal gain," Moore wrote.

The case is Kosowsky v Icahn Enterprises LP et al, U.S. District Court, Southern District of Florida, No. 23-21773.

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Reporting by Jonathan Stempel in New York; editing by Diane Craft

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Baltimore to take drug distributors to trial over opioids

 [reuters.com/legal/government/baltimore-take-drug-distributors-jj-trial-over-opioids-2024-09-16](https://www.reuters.com/legal/government/baltimore-take-drug-distributors-jj-trial-over-opioids-2024-09-16)

Brendan Pierson

Baltimore City Hall is seen in Baltimore, Maryland, U.S. May 10, 2019. Picture taken May 10, 2019. REUTERS/Stephanie Keith/File Photo Purchase Licensing Rights , opens new tab

Sept 16 (Reuters) - The city of Baltimore is scheduled to go to trial this week in its \$11 billion lawsuit accusing drug distributors McKesson (MCK.N) , opens new tab and Cencora (COR.N) , opens new tab of fueling an epidemic of opioid addiction and overdose deaths. The city, which has been especially hard hit by the opioid crisis, opted out of large national opioid settlements in recent years. It's now hoping it can win more money by taking companies to court on its own. Jury selection is expected to begin on Monday in the Circuit Court for Baltimore City, Maryland.

The city accuses Cencora, formerly called AmerisourceBergen, and McKesson of ignoring red flags that opioids they supplied were being diverted into illegal channels. It says the companies must pay the cost of addressing the crisis.

Cencora said in a statement that it "does not determine the supply of the medications it distributes, nor do we impact demand for those medications." It said it distributed opioids to fill prescriptions by doctors, and that it reported suspicious orders to U.S. authorities.

McKesson did not immediately respond to a request for comment.

Baltimore had also been prepared to take drugmaker Johnson & Johnson's (JNJ.N) , opens new tab Janssen to trial over claims that it concealed the risk of addiction when it marketed its relatively little-used, now discontinued opioid drugs Duragesic and Nucynta, but settled over the weekend, according to a court filing on Sunday.

Terms of the settlement were not disclosed. J&J, which has denied the allegations, declined to comment.

Baltimore is one of more than 3,000 local, Native American tribal and state governments across the country that have filed similar lawsuits against drugmakers, distributors and pharmacies over the opioid crisis. The vast majority of those cases have been settled through nationwide agreements, which now total about \$46 billion.

In 2022, Baltimore recorded 904 opioid overdose deaths, out of a total population of about 569,000, while the national opioid overdose death rate was about 25 per 100,000.

GOING SOLO

The city joined some other hard-hit jurisdictions around the country in opting out of the national deals. It has already reached its own settlements with several companies ahead of the trial, most recently with pharmacy operator Walgreens (WBA.O) [↗](#), opens new tab and drugmaker Teva (TEVA.TA) [↗](#), opens new tab, totaling \$402.5 million.

Opting out has both potential upside and risk.

San Francisco obtained a \$230 million settlement from Walgreens after beating it at trial, which it said was the largest for any local government. West Virginia, another opt out, secured about \$1 billion in opioid settlements, a larger recovery per capita than any other state.

The city of Huntington, West Virginia, and its county, however, lost their trial against McKesson, Cencora and distributor Cardinal Health (CAH.N) [↗](#), opens new tab after a judge rejected their public nuisance claims, which are similar to Baltimore's. That means they will receive no money from the distributors if they do not get the verdict overturned on appeal. McKesson supplied about half of Baltimore's opioids between 2006 and 2019, according to U.S. government data. In 2017, it reached a \$150 million settlement with the U.S.

Department of Justice, under which it admitted that it had failed in its duty to prevent illegal drug sales nationwide.

Judge Lawrence Fletcher-Hill, who will be presiding over this week's trial, has ruled that jurors will be allowed to hear about that deal.

Cencora is also currently facing a civil lawsuit by the Justice Department over its alleged role in the opioid crisis.

More than 800,000 people in the United States died of opioid overdoses from 1999 through 2023, according to data from the U.S. Centers for Disease Control and Prevention.

The case is Mayor and City Council of Baltimore v. Purdue Pharma et al, Circuit Court of Maryland for Baltimore City, No. 24-C-18-000515.

For Baltimore: Bill Carmody of Susman Godfrey

For J&J: Steve Brody of O'Melveny & Myers and Mike Brown of Nelson Mullins

For McKesson: Tim Hester and Chris Eppich of Covington & Burling

For Cencora: Anne Bohnet of Reed Smith

Read more:

Baltimore settles with Teva, Walgreens ahead of scheduled opioid trial

McKesson in record \$150 million U.S. settlement over suspicious drug orders

U.S. sues AmerisourceBergen, says distributor helped ignite opioid epidemic

J&J gets \$260 mln talc verdict overturned in Oregon, new trial ordered

 [reuters.com/legal/jj-gets-260-mln-talc-verdict-overturned-oregon-new-trial-ordered-2024-09-16](https://www.reuters.com/legal/jj-gets-260-mln-talc-verdict-overturned-oregon-new-trial-ordered-2024-09-16)

Brendan Pierson

A bottle of Johnson and Johnson Baby Powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Mike Segar/Illustration//File Photo Purchase Licensing Rights , opens new tab

Sept 16 (Reuters) - An Oregon judge has overturned a \$260 million verdict against Johnson & Johnson (JNJ.N) , opens new tab in a lawsuit brought by a woman who said she got mesothelioma, a deadly cancer linked to asbestos exposure, from inhaling the company's talc powder, the company said on Monday.

Judge Katharine von ter Stegge of the 4th Judicial District Circuit Court in Portland, Oregon, granted J&J's motion to toss the verdict and hold a new trial in the case at a hearing late on Friday, according to a spokesperson for the company. Von ter Stegge is expected to issue an opinion explaining her order in the coming days.

Erik Haas, J&J's worldwide vice president of litigation, said the original verdict was "the direct result of numerous egregious errors committed by the plaintiff's lawyers" and had "no basis in the law or science."

A lawyer for the Oregon woman, Kyung Lee, who sued the company along with her husband, did not immediately comment.

J&J is facing more than 62,000 plaintiffs' claims that its baby powder and other talc products were contaminated with asbestos and caused cancer. Most of the lawsuits are over ovarian and other gynecological cancers, with a small minority over mesothelioma. J&J has said that its talc is safe, does not contain asbestos and does not cause cancer.

Lee was diagnosed with mesothelioma last year at age 48. She alleged that she inhaled asbestos-tainted talc over more than 30 years, beginning when her mother used it on her when she was a baby and later when she used it herself as a deodorant.

A lawyer for J&J said at trial that Lee's illness was likely caused by exposure to asbestos used at a factory near where she grew up.

Friday's decision comes as J&J is preparing to have a subsidiary file bankruptcy in order to settle the ovarian and other gynecological cancer lawsuits for about \$9 billion. The company has said it has secured support for the deal from well over 75% of claimants, the legal threshold for a judge to approve the kind of bankruptcy settlement J&J has proposed. The bankruptcy filing and settlement would not affect mesothelioma cases like Lee's.

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Monsanto Scores 2nd Phila. Roundup Verdict, but Fails to Stop Impending Trial

A jury determined Wednesday that Monsanto’s Roundup weedkiller was defective, but the defect did not cause plaintiff Ryan Young’s non-Hodgkin lymphoma.

September 12, 2024 at 05:36 PM

Mass Torts



Aleeza Furman
Litigation Reporter



What You Need to Know

- Monsanto won its second Philadelphia Roundup verdict Wednesday.
- The jury found that Roundup was defective but that the defect did not cause the plaintiff's injuries.
- Jury selection in Philadelphia's next Roundup trial is already underway.

Monsanto has secured its second Philadelphia Roundup verdict.

A jury determined Wednesday that Monsanto’s Roundup weedkiller was defective, but the defect did not cause plaintiff Ryan Young’s non-Hodgkin lymphoma. It also found that neither Monsanto nor its co-defendant, chemical manufacturer Nouryon, were negligent.

“The verdict makes clear that the plaintiff failed to prove that Roundup was the cause of the injuries alleged in this case, consistent with the scientific evidence and the consensus of regulatory bodies and their scientific assessments worldwide,” Monsanto said in a statement. “While we have great sympathy for anyone who suffers a loss or injury, the science proves that Roundup is not carcinogenic.”

Young was represented by Andrew Kirkendall and Kim Loutey of Texas firm Kirkendall Dwyer and Rosemary Pinto of Feldman & Pinto, who did not respond to requests for comment. Jennifer Saulino and Michelle Ramirez of Sidley Austin and Ken Murphy of Tucker Law Group were lead counsel for the defendants.

The case, captioned *Young v. Monsanto* and tried before Judge Angelo J. Foglietta of the Philadelphia Court of Common Pleas, is the fifth Roundup lawsuit to go to verdict in Philadelphia since trials began there about a year ago.

The first three of those trials yielded plaintiffs verdicts of [\\$175 million](#), [\\$3.5 million](#) and [\\$2.25 billion](#) (later reduced to \$404 million), but the fourth trial put an end to the plaintiffs’ winning streak with Monsanto securing its first [defense verdict](#) in the mass tort.

Although plaintiffs verdicts still outnumber defense verdicts in the Philadelphia Roundup mass tort, Monsanto is [ahead](#) by a small handful of trials in the national litigation. And the company is set to have another shot at evening up the Philadelphia verdict tallies very soon.

Jury selection for the city’s sixth Roundup trial, in a case captioned *Melissen v. Monsanto*, began Thursday, and the trial itself is scheduled to start Sept. 16. Representing the plaintiffs there is the same team of Kline & Specter and Arnold & Itkin attorneys that were behind the two highest verdicts to have come out of the Philadelphia litigation so far.

The *Melissen* trial is going forward despite efforts from Monsanto to halt the proceedings in light of a recent ruling from the U.S. Court of Appeals for the Third Circuit. The company had asked the Superior Court to stay the litigation and address how the Third Circuit’s August [Schaffner v. Monsanto ruling](#) should apply to the Roundup cases in Philadelphia.

In *Schaffner*, the Third Circuit held that a federal statute regulating pesticides preempted plaintiffs’ claims that Monsanto had a duty under Pennsylvania law to include a cancer warning on labels for Roundup. However, the Philadelphia trial court rejected Monsanto’s federal preemption arguments and denied the company’s motion for summary judgment in the *Melissen* case.

Monsanto argued in its petition to the Superior Court that *Schaffner* created an “important question mark hovering over this litigation” that must be addressed. But on Wednesday, the Superior Court denied the request for an emergency review and a litigation stay.

The court agreed to consider the petition to appeal, but not on the expedited timeline requested by Monsanto.

RELATED STORIES

[Third Circuit Breaks With Sister Courts in Ruling on Monsanto's Preemption Arguments](#)

[Tracking Monsanto’s Roundup Verdicts Across the US](#)

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23andMe settles data breach lawsuit for \$30 million

 [reuters.com/technology/cybersecurity/23andme-settles-data-breach-lawsuit-30-million-2024-09-13](https://www.reuters.com/technology/cybersecurity/23andme-settles-data-breach-lawsuit-30-million-2024-09-13)

Jonathan Stempel

Attendees purchase DNA kits at the 23andMe booth at the RootsTech annual genealogical event in Salt Lake City, Utah, U.S., February 28, 2019. REUTERS/George Frey/File Photo
[Purchase Licensing Rights](#) , opens new tab

Sept 13 (Reuters) - 23andMe (ME.O) , opens new tab will pay \$30 million and provide three years of security monitoring to settle a lawsuit accusing the genetics testing company of failing to protect the privacy of 6.9 million customers whose personal information was exposed in a data breach last year.

The accord also resolves accusations that 23andMe did not tell customers with Chinese and Ashkenazi Jewish ancestry that the hacker appeared to have specifically targeted them, and posted their information for sale on the dark web.

A preliminary settlement of the proposed class action was filed late Thursday night in federal court in San Francisco, and requires a judge's approval.

It includes cash payments for customers whose data was compromised, and lets customers enroll for three years in a program known as Privacy & Medical Shield + Genetic Monitoring.

In a Friday court filing, 23andMe called the settlement fair, adequate and reasonable.

Citing its "extremely uncertain financial condition," 23andMe also asked the judge to halt arbitrations by tens of thousands of class members, until the settlement is approved or they decide not to participate.

In a statement, 23andMe said it believes the settlement is in its customers' best interest. It also expects about \$25 million of the cost to be covered by cyber insurance coverage.

The breach began around April 2023 and lasted about five months, affecting nearly half of the 14.1 million customers in 23andMe's database at the time. It was disclosed by 23andMe in an October 2023 blog post , opens new tab.

According to the company, the hacker accessed 5.5 million DNA Relatives profiles, which let customers share information with each other, and accessed information for another 1.4 million customers who used a feature called Family Tree.

Lawyers for the plaintiffs said the settlement addressed their clients' main claims, and reflected significant risks of further litigation given 23andMe's "dire" finances.

The South San Francisco-based company lost \$69.4 million on revenue of \$40.4 million in the quarter ending June 30.

Co-founder and Chief Executive Anne Wojcicki has been trying to take 23andMe private, three years after it went public at \$10 per share. Its shares have traded below \$1 since mid-December.

The plaintiffs' lawyers may seek legal fees of up to 25% of the settlement amount.

The case is In re 23andMe Inc Customer Data Security Breach Litigation, U.S. District Court, Northern District of California, No. 24-md-03098.

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

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[NEWS](#)

'Substantial Injustice': Hair Relaxer MDL Lead Counsel Challenge Common-Benefit Order

On Sept. 6, lead counsel in the hair relaxer multidistrict litigation filed a motion to reconsider last month's order in which U.S. District Judge Mary Rowland excluded state court cases from a potential 11% common-benefit assessment.

September 13, 2024 at 06:34 PM

Toxic Torts



Amanda Bronstad
staff reporter



The original version of this story was published on [Law.com](#)

What You Need to Know

- The dispute over who should pay common-benefit fees to lead counsel for their work in multidistrict litigation has become increasingly contentious, with recent challenges brought before judges.
- 'The court's jurisdiction does not extend to cases that are not actually before it,' U.S. District Judge Mary Rowland wrote in an Aug. 22 order.
- Ashley Keller, of Chicago's Keller Postman, called the proposed common-benefit assessment 'improper and impractical.'

Lead counsel in the growing litigation over hair relaxers have asked a federal judge to reconsider an order that limits their potential fees and costs.

Last month, U.S. District Judge Mary Rowland of the Northern District of Illinois approved a common benefit assessment of 8% in fees and 3% costs in the hair relaxer multidistrict litigation, but she agreed with objecting firm Keller Postman that lawyers with state court cases should be excluded.

“The court’s jurisdiction does not extend to cases that are not actually before it even if the plaintiffs in those cases might benefit from work performed in the MDL,” Rowland ruled.

On Sept. 6, lead counsel filed a motion to reconsider that order, noting, in part, that while not all the cases are in federal court, Rowland had jurisdiction over the lawyers before her.

“Failure to apply a common benefit holdback order to an MDL counsel’s cases outside the MDL would work a substantial injustice and undermine the effectiveness of the MDL process,” they wrote. “It would create a perverse incentive for attorneys to keep as many of their cases as possible (beyond the first) outside of the MDL, thereby undermining its effectiveness as a procedural device to efficiently manage mass litigation.”

Lead counsel—Diandra “Fu” Debrosse, of DiCello Levitt in Birmingham, Alabama; Fidelma Fitzpatrick, of Motley Rice in Providence, Rhode Island; Michael London, of New York’s Douglas & London; and Ben Crump, of Ben Crump Law in Tallahassee, Florida—did not respond to a request for comment.

The dispute over who should pay common-benefit fees to lead counsel for their work in multidistrict litigation has become increasingly contentious, with recent challenges brought before judges. Common-benefit fees are used in multidistrict litigation to compensate lead counsel while preventing “free riders,” or lawyers who collect fees on cases they generate but don’t necessarily litigate.

In recent years, lawyers, particularly those with related state court cases, have challenged the common-benefit fees, which are funded through assessments against their settlements. Disputes have arisen in cases over [opioids](#) and [Bard IVC filters](#), for instance.

In 2021, U.S. District Judge Vince Chhabria of the Northern District of California, in the multidistrict litigation over Monsanto's Roundup, called common-benefit fees in multidistrict litigation "[totally out of control](#)," sending shock waves through the mass tort bar.

Chhabria excluded state court cases when he significantly trimmed the scope of lead counsel's proposed common-benefit fund, concluding that the potential for \$800 million was enough for each firm to "buy their own island." Lead counsel in the Roundup MDL ended up [distributing \\$20.23 million](#) this year to a handful of firms for their common benefit work.

The common benefit doctrine, while frequently applied in multidistrict litigation, does not allow "unbridled jurisdiction by chance of who plaintiff hired as counsel," Rowland wrote in her order in the hair relaxer multidistrict litigation.

"An MDL court cannot enter orders affecting plaintiffs outside of the MDL to better manage its litigation," she wrote.

'The Outer Bounds of Its Inherent Authority'

Lawsuits allege that hair relaxers caused women to get various types of cancer. The multidistrict litigation, created in 2023, has grown to more than 8,400 lawsuits against at least seven defendants.

Lead counsel first notified Rowland about a proposed common-benefit order on Oct. 30. They suggested the order would apply to all lawyers with cases in the multidistrict litigation, regardless of whether they signed a participation agreement.

"It cannot be understated the massive amount of work that goes into the prosecution, management, coordination, oversight communication and overall litigation in a complex multidistrict litigation," they wrote.

The proposed order also applied to lawyers with unfiled or state court cases. According to a status update filed last month, about 85 lawsuits are pending in state courts, most in Cook County Circuit Court in Illinois.

Ashley Keller, of Chicago's Keller Postman, called the proposed common-benefit assessment "improper and impractical" in a Nov. 1 filing. He said Keller Postman represented "thousands of women" with cancer claims tied to hair relaxer products, many of whom planned to sue in state courts.

"The proposed order provides no legal support for the contention that plaintiffs' leadership can tax all hair relaxer plaintiffs regardless of whether they are subject to this court's jurisdiction nor receive any benefit whatsoever from the MDL," Keller wrote.

Keller declined to comment to Law.com.

In a Dec. 22 motion, lead counsel clarified that they were unable to reach a final agreement with "the objecting firm," which they said has cases in the MDL. The proposed order, they wrote, "does not, by its terms, apply to any attorney or law firm that only has hair relaxer claimants outside of the MDL."

Keller, in a Jan. 12 objection, said the proposed order "asks the court to exceed the outer bounds of its inherent authority and to prematurely impose one of the highest common-benefit assessments ever levied in an MDL composed of cancer victims."

The proposed order also is premature given that, so far, no settlement, and thus no common-benefit fund, exists.

In a reply, lead counsel attached an Aug. 18 email last year in which Keller Postman partner Rebecca King proposed to Fitzpatrick, one of the lead counsel, that the firm pay a "common benefit tax" on all its cases, regardless of federal or state court.

"Despite the clear and unambiguous position taken by Keller Postman in August 2023, Keller Postman has raised objections to the proposed CBO (common-benefit order)," says the Jan. 24 reply. "Through the course of several meet and confer efforts, Keller Postman crystalized their position that it would not agree to any assessment of their non-MDL cases, irrespective of whether they received common benefit work in the MDL, irrespective of whether they used that work in their non-MDL cases, and, incredibly, even if they submitted work performed in state courts as common-benefit work for purposes of the MDL."

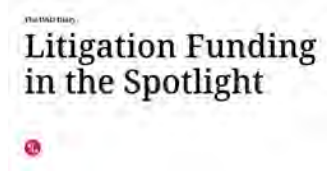
The impasse between Keller Postman and lead counsel was "immaterial" to Rowland's decision, the judge wrote in her order. And the "free riding" problem, while potentially justified in theory, has had little effect in dissuading lawyers from seeking leadership positions in multidistrict litigation.

"Regardless of the magnitude of the free rider problem," she wrote, "the court's jurisdiction cannot be arbitrarily expanded to redress this aggrieved inequity."

Litigation Funding in the Spotlight

K [dandodiary.com/2024/09/articles/litigation-financing-2/litigation-funding-in-the-spotlight](https://www.dandodiary.com/2024/09/articles/litigation-financing-2/litigation-funding-in-the-spotlight)

September 15, 2024



By Kevin LaCroix on September 15, 2024

Posted in Litigation Financing



It has been a while since I have had occasion to write about third-party litigation financing.

However, recent developments at the SEC, in which the agency has pursued enforcement actions alleging that various purported vehicles

to finance litigation had defrauded prospective investors, have brought litigation funding back onto my radar screen. Once again, as in the past, various groups are sounding alarm bells about third-party litigation funding, as discussed below.

The specific development that drew my attention back to litigation funding is the enforcement action the SEC filed on September 6, 2024, against a Florida-based father-and-son team, Michael Chhabra and his father Vineet “Vincent” Chhabra, in which the agency alleged that the two men defrauded investors in connection with a litigation funding scheme. The pair allegedly promised investors specified returns and interest income by lending law firms money to finance mass tort litigation. The two men used special purpose vehicles to raise money and advertised the investment on social media. However, the SEC alleged, the vehicle did not provide such funding and did not enter agreements with law firms to do so. The alleged scheme apparently raised \$125,000, which the men used for personal expense (including legal fees Michael Chhabra incurred in bankruptcy proceedings). The SEC asked the court to order the Chhabras and their company to disgorge profits and pay civil penalties, as well as to enter an officer bar against them. The SEC’s September 6, 2024, press release about the action against the Chhabras can be found [here](#). The SEC’s complaint can be found [here](#).

The SEC’s action against the Chhabras in fact followed just days after an earlier action in which the SEC targeted another alleged litigation funding scheme. On September 3, 2024, the SEC filed an enforcement action in the Eastern District of California against Maria Dulce Pino Dickerson and Creative Legal Fundings, in which the agency alleged that Dickerson defrauded more than 20 Filipino American investors in a Ponzi scheme that raised \$7 million

allegedly to fund personal injury litigation. A copy of the SEC's September 3, 2024, complaint can be found [here](#). Hat Tip to Martina Barash who reported the lawsuit in a September 4, 2024 Bloomberg article, [here](#).

These two recent SEC enforcement actions involving litigation finance funding schemes are certainly concerning, but on the other hand it could also be that two data points are not enough to constitute a trend. Just the same, there are observers that are trying to raise the alarm bell about litigation funding, perhaps none more than the U.S. Chamber of Commerce's Institute for Legal Reform (ILR).

In a recent report entitled "Grim Realities: Debunking Myths in Third-Party Litigation Funding," the ILF contends that third-party litigation funding (TPLF) "has become a dominant feature of the civil justice system in the United States and abroad," all without "any meaningful oversight." The report notes that the defenders of litigation funding typically claim that it is "benign – and usually salutary – business model that increases litigants' access to justice." The ILF reports that "far from serving as an altruistic business endeavor for allegedly injured claimants, TPLF is just a vehicle for maximizing funders' return on their investments – often to the detriment of the plaintiffs whose claims they are bankrolling." The ILF's September 12, 2024 press release about the report, including a link to the report itself, can be found [here](#).

The report contends that the lack of transparency around TPLF means that funders "bleed off recovery intended for litigants," as their "primary goal" is to "maximize their own profit, often at the expense of the plaintiffs they fund"; exercise immense control over cases, including strategic decision and settlement negotiations, which can undermine the interests of the actual parties involved. The report also contends that funding "can be exploited by foreign adversaries" to "undermine U.S. national security and economic interests by funding litigation against American companies."

A lengthy part of the ILF's report is a discussion of a recent dispute involving Burford Capital, one of the largest TPLF firms. Burford had reached an agreement with food company Sysco Corporation to fund antitrust litigation that Sysco filed against pork and beef suppliers. Disputes arose between Burford and Sysco, particularly with respect to Sysco's ability to enter into settlements regarding the litigation. Eventually Burford instituted proceedings to enjoin Sysco from entering the settlements. Sysco then reached an agreement under which Sysco's claims against the pork and meat suppliers were assigned to a Burford affiliate, Carina Ventures.

When Burford sought to substitute Carina for Sysco in the antitrust litigation, a magistrate judge rejected the motion to substitute, saying that "condoning Burford's effort to maximize its return on investment" would cause the harm of "forcing litigation to continue that should have settled." In June 2024, the district court upheld that magistrate judge's order, saying

that the magistrate judge “was rightly concerned that allowing substitution ... could encourage litigation financiers everywhere to use mid-litigation assignments and substitutions to undermine agreements between parties otherwise willing to settle.” To be sure, as discussed here, in March 2024 order, the district court in a separate case brought by Sysco against chicken suppliers allowed Burford to substitute Carina for Sysco.

The ILF report asserts that the Sysco dispute “is not anomalous,” and that the allegations of control there “are consistent with numerous other examples of actual TPLF agreements that grant a TPLF entity authority to control or influence aspects of the funded litigation.”

It should be noted that there is relatively little overlap between the two examples of fraudulent fund-raise alleged in the SEC actions cited above, and the allegedly overbearing control that the ILF report contends should raise alarm bells about the litigation funding industry. Nevertheless, there certainly appears to be enough going on to raise concerns about the litigation funding and the problems it can present. The ILF contends that all of these kinds of problems warrant transparency and greater oversight with respect to the funding industry.

I know from past posts about litigation funding that raising questions about the industry raises ire in certain quarters. Litigation funding has its defenders, and the funders themselves are not shy from presenting their own defense. I will say that in the course of my many travels I have seen how the availability of litigation funding allows innovative litigation efforts to go forward; this is particularly true overseas, but also true in the U.S. as well. But while there may be more to be said about litigation funding, it seems likely that advocates, such as, for example, the ILF, will continue to agitate for greater scrutiny of the litigation funding industry. I expect that we will hear more about this topic in the weeks and months ahead.

Special thanks to a loyal reader for sending me a link to the SEC’s complaint in the Chhabra action.

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NEWS

'Illegal Conspiracy'?: EDNY Antitrust Class Action Challenges Publishers' 'Unpaid Peer Review Rule'

Academic journal publishers “essentially agreed to hold the careers of scholars hostage” and “force them to provide their valuable labor for free” in violation of the Sherman Act, according to the complaint, filed by Lieff Cabraser lawyers.

September 13, 2024 at 02:53 PM

Antitrust



Sulaiman Abdur-Rahman



What You Need to Know

- Lieff Cabraser Heimann & Bernstein filed the antitrust class action on behalf of Dr. Lucina Uddin.
- The complaint accuses top academic journal publishers of forcing peer reviewers to work for free in violation of the Sherman Act.
- John Wiley & Sons Inc. said the allegations lack merit.

An antitrust class action filed in Brooklyn federal court accuses elite journal publishers of exploiting the volunteer work of peer reviewers through an anticompetitive scheme to “maximize their profits and maintain their market dominance” in violation of the Sherman Act.

The world’s six largest publishers of academic journals, including Elsevier and John Wiley & Sons Inc., have “engaged in an illegal conspiracy” that “coerced peer reviewers into working for free,” according to the allegations in the complaint.

The complaint, filed Thursday in U.S. District Court for the Eastern District of New York, was surfaced by [Law.com Radar](#).

[Lieff Cabraser Heimann & Bernstein](#) filed the action on behalf of Dr. Lucina Uddin, a UCLA neuroscience professor and former New York University researcher who has written and peer reviewed well over 100 published academic articles.

In addition to Elsevier and John Wiley & Sons, the other defendants named in the complaint include publishers Wolters Kluwer, Sage Publications Inc., Taylor and Francis, Springer Nature and the International Association of Scientific, Technical and Medical Publishers trade group.

“Defendants formed a cartel to fix the price of peer review labor at zero,” the complaint alleges. “They did so through STM, the industry trade association they controlled.”

These publishers “essentially agreed to hold the careers of scholars hostage” and “force them to provide their valuable labor for free,” according to the allegations in the complaint. The alleged scheme proved “remarkably profitable” for the publishers “while doing tremendous damage to science and the public interest.”

The publishers through their alleged “collusion” generated more than \$10 billion in annual revenue from their peer-reviewed journals in 2023, according to the complaint.

By enforcing STM’s “unpaid peer review rule,” the publishers have prevented peer reviewers from receiving any compensation, according to the allegations in the complaint.

Peer reviewers received zero wages for their work in 2020 despite performing the “equivalent of 15,000 years of peer review work,” according to a 2021 study cited in the complaint. These scholars would have earned at least \$1.5 billion in wages in 2020 if compensated for their work, the lawsuit alleges.

The academic journal publishers are accused of forcing scholars to work for free and submit written articles to only one journal at a time while being subjected to a “gag rule” preventing them from “freely sharing their scientific findings,” according to the allegations in the complaint.

A spokesperson for John Wiley & Sons suggested the proposed class action is meritless.

“We are aware of the lawsuit filed against us and other publishers, and, while we cannot comment on the specifics of the claims at this time, we believe they are without merit,” the spokesperson said Friday in a statement. “We remain dedicated to supporting the scholarly community by delivering excellence in all aspects of scholarly publishing.”

Wolters Kluwer does not comment on pending litigation, and Taylor & Francis had no comment for this article. The other named defendants in the lawsuit did not immediately respond to requests for comment.

Lieff Cabraser and Justice Catalyst Law filed the complaint on behalf of Uddin and members of the proposed class. Most of the defendants named in the complaint have offices in New York.

Uddin seeks treble damages on behalf of herself and members of the proposed class and an injunction ordering the publishers to “dissolve” their alleged “unlawful agreements.”

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

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IPOs Are About the Future

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By Matt Levine

(Bloomberg Opinion) --

Zymergen

Here's a little thought experiment. Let's say that you run a tech startup that is looking to do an initial public offering, and you would like to do fraud. You want to raise a lot of money from public investors at a high valuation, and you are willing to lie to do it. *How* should you lie? (It goes without saying that nothing here is legal advice.)

One obvious idea is: You could fake your financial statements. If you had \$10 million of revenue last quarter, just write that you had \$100 million. Investors will pay more for more revenue, so you will raise extra money at a high valuation.

There are at least two problems with this approach. One is that, when you go public, you will need to publish financial statements that have been audited by a respectable accounting firm, and they will probably check stuff like your revenue. You *can* fake your accounts, and companies do, but it's not *easy*; the auditors really are supposed to check.

But a subtler problem is that, if you are a promising tech startup, people are not buying your stock because of your *historical* financial results. You are a young company in the early stages of your growth, and people care about your *future* financial results. For a mature company, historical financial results are often the best guide to future results: How much money you made last year is a pretty good predictor of how much you'll make next year. But for a young growing company, that is less true. Investors will happily buy your stock even if you have never made any money, as long as you have a good story about how you soon *will* make a lot of money.

So really what you want to do is fake your financial *projections*. If you think you'll make \$10 million of revenue next year, write that you'll make \$100 million. This is both easier and more important than faking your financial results: Your projections aren't audited, and the projections are the main input into valuing your company.

Terrific. So when you write the prospectus for your IPO, you make the historical financial statements scrupulously accurate — they say “we lost \$2 million on \$5 million of revenue” or some similarly modest claim — and the auditors sign off on them, and then you put in grandiose projections, “but

next year we'll make \$1 billion on \$3 billion of revenue."

Obviously people might not *believe* you; I'm not saying that doing fraud is easy.

But there is also a dumb mechanical problem here, which is that, in modern US practice, your IPO prospectus *doesn't have any projections*. This is for essentially legal reasons.¹ It is strange, though. Again, for a young company looking to go public, the future really is more important than the past: Investors want to see projections, not historical financial results. They care about the company's *future* results, and in many cases (not yours — you're doing fraud) the best indicator of future results is the company's own predictions. But the prospectus only contains the historical financial results.

(This is inconvenient enough that, a few year ago, there was a boom in US special purpose acquisition company deals, basically because SPAC companies were allowed to go public using financial projections. This was good, in that younger, less mature companies were able to raise money based on their future plans rather than their past results. It was also bad, in that a lot of the projections were wildly wrong.)

But there is a standard way around this problem, which is that the company makes financial projections, and it gives them to sell-side research analysts at the investment banks leading the IPO, and the analysts incorporate the projections into their financial models of the company, and then they share the models with the investors. And so the company's projections indirectly find their way to investors.

I suppose the research analysts are supposed to check the projections and make sure they are plausible, but this is a somewhat lower bar than auditing the financial statements.

And so, if you want to do IPO fraud, the way to do it is to make extremely optimistic projections and then smuggle them to investors through the banks' research analysts.

Again, this is not any sort of advice, I am just telling you all this because it's kind of a weird roundabout process. Anyway here is a US Securities and Exchange Commission enforcement action against a company that allegedly did this:

The Securities and Exchange Commission [Friday] announced settled charges against Zymergen Inc., an Emeryville, California-based biotechnology company, for misleading IPO investors about its overall market potential, revenue prospects, and customer pipeline for its only commercially available product, an electronics film named Hyaline. Zymergen raised approximately \$530 million through its IPO in April 2021 and filed for bankruptcy in 2023. Zymergen agreed to pay a \$30 million civil penalty to resolve the SEC's charges. ...

"Pre-revenue and early-stage companies that seek to tap the capital markets must do so

with reasonable estimates of their market potential,” said Monique C. Winkler, Director of the SEC’s San Francisco Regional Office. “Today’s order finds that Zymergen failed to satisfy this obligation when it misled investors with what amounted to unsupported hype.”

From the SEC’s order:

In February 2021, Zymergen held meetings with research analysts who regularly published reports to investors on publicly-traded companies. Zymergen’s goal in these meetings was to educate the analysts on Zymergen’s business. Zymergen expected the analysts would report on Zymergen after the IPO and that they would also speak with and provide information to investors during Zymergen’s roadshow.

Zymergen’s financial model and its projections for revenue, profits, and cash flow for 2022 and 2023 were important benchmarks that investors used to value Zymergen’s stock.

To enable the analysts to build their own models, Zymergen provided them with an internal financial model that included revenue projections for Zymergen’s products for 2021 through 2025. Zymergen also met with analysts to describe the model, provide context for the projections, and answer questions. Because Zymergen was a pre-revenue company, its internal financial estimates were important to analysts in building their own models. When analysts subsequently shared their models with investors, those investors knew that the analysts’ models were built using information that Zymergen provided to the analysts but could not provide to investors directly.

And Zymergen allegedly built its model by (1) asking the sales team for “its highest-confidence revenue projections based on a detailed, customer-by-customer analysis and assessment of potential market share,” (2) throwing those out and (3) asking the sales team for much larger numbers instead. And then those larger numbers diffused out through the analysts: An IPO company can’t just *tell* investors its projections, but the investors understand that the analysts’ projections come from the company.

To be fair, one projection sort of snuck into the IPO prospectus itself:

In its Form S-1, Zymergen made representations regarding the market opportunity and risks for Hyaline. Specifically, Zymergen represented that although Hyaline had not yet generated sales, “we estimate that the display market alone for Hyaline was over \$1 billion in 2020.” ... Zymergen knew or should have known its statements concerning the \$1 billion display market opportunity were materially misleading and lacked a reasonable basis.

“We think our market could be \$1 billion” is a projection, and if it’s fake then you get in trouble.

Who controls OpenWeb?

If you are the founder and chief executive officer of a tech startup, you might raise money from outside investors. In the course of this fundraising, you might hear some horror stories about other tech founders who were forced out of their startups, and you might think about how to protect yourself from that fate. There are various ways to do this; here are some:

1. Most straightforwardly, probably, just keep a majority of the shares of the company for yourself, so no one can force you out. (This is harder if you have several equal co-founders: They could gang up on you with the outside investors.)
2. Or, even if you sell a majority economic stake, keep super-voting stock for yourself, so that you have a majority of the *votes*. (Again, harder with co-founders. ²)
3. When you raise money from venture capitalists, check to see if they are “founder-friendly,” or if they have a history of pushing out founders of their portfolio companies. Stick with the founder-friendly ones.
4. Just do a really good job, so that it never occurs to anyone to try to fire you.
5. Look: You run a startup. It’s a small company, with a small staff of mission-driven employees. It’s your mission; you’re the charismatic founder-CEO; the employees are loyal to you. Keep them that way. If performance ever suffers and the board of venture capital-affiliated directors tries to push you out, you say “fine I’ll leave if you want, but the value of this company is in its employees and I’ll take them with me.” (This is somehow how OpenAI works?)
6. Look: You run a startup. It’s a small company. Could you be, you know, the only one with all the passwords? “Fine I’ll leave if you want, but good luck logging into the computers tomorrow!”

“Who controls a company,” we often ask around here, and I sometimes say that “the night watchman controls the company, sort of, if he can change the locks overnight and not let the managers and directors and shareholders in the door the next morning.” At a fast-moving tech startup it is possible for one person to be the founder, CEO, biggest shareholder, chairman of the board *and* night watchman.

Anyway here’s this:

OpenWeb, a Samsung-backed billion-dollar tech company, has just announced a new CEO. The only problem? Its founder, Nadav Shoval, is refusing to step down from the top job.

Earlier [last] week, OpenWeb’s board announced Shoval was being replaced by the content moderation platform’s chairman, Tim Harvey—and the news didn’t go down with its current leader, who went on to blast his bosses and deny the transition in an email to

all staff.

The Israeli tech entrepreneur then continued his rant publicly on LinkedIn, where he claimed that he had been sacked for calling out “concerning conduct” and that he does not “accept” his removal.

“I have not stepped down as OpenWeb’s CEO,” Shoval wrote on the networking platform yesterday.

Here’s more from CTech:

Following Shoval's subsequent letter to the company's employees, Harvey wrote to the staff: "Apologies to everyone who received this email. We are progressing with the CEO transition process as planned.

Here’s Shoval’s LinkedIn post. Here’s OpenWeb’s website, which lists Harvey as the interim CEO, which means that Shoval at least does not have the passwords for the website.

Commerzbank

What portion of high finance can be explained by big investment banks fighting for league-table credit? Like:

1. Goldman Sachs Group Inc. and JPMorgan Chase & Co. are mandated as joint bookrunners of some large offering.
2. JPMorgan finds some clever way to structure the deal to be better for the issuer, but there is a catch. The catch is that the new structure can only have *one* bookrunner; if the issuer wants the good deal it has to kick out Goldman.
3. The issuer does it, JPMorgan gets full credit (and fees) for the deal, and financial innovation marches on.

I used to be an equity capital markets banker, and it sometimes felt like the main jobs of an ECM banker are:

1. Get yourself mandated on big deals to sell stock for companies, and
2. Once you are mandated, get all the *other* banks kicked off the mandate, or at least demoted, so that your bank can *lead* the offering.

That is not quite what happened here, but it’s close:

Top officials in Berlin were not briefed in advance about an invitation for UniCredit to bid

for a German government stake in Commerzbank, according to three people familiar with the events, despite the move opening the door to a full takeover by the Italian lender.

JPMorgan Chase bankers who advised the government on the 4.5 per cent stake sale invited the Milan-based bank to participate, the people said, giving it the impression that Berlin welcomed its interest.

The sale on Tuesday in an after-hours auction enabled UniCredit to jump to a 9 per cent stake without previously disclosing any interest — something that could have pushed up the price.

Last week the German government sold a 4.5% chunk of Commerzbank AG to investors, part of a stake that it acquired during the financial crisis. It did this in a fairly standard accelerated bookbuild stock offering: It hired two banks, JPMorgan and Goldman, to call a bunch of investors and find buyers for the stake after the market closed on Tuesday.

Goldman, one assumes, called up a bunch of typical investors — asset managers, hedge funds, etc. — and offered them shares of Commerzbank, perhaps at a discount to Tuesday's closing price. JPMorgan, though, apparently took a shortcut: It called UniCredit SpA, which is considering acquiring Commerzbank, and invited it to buy all of the shares. UniCredit was happy to do so, at a *premium* to the closing price, which no one else would do:

As a result of a significant outbid of all other offers within the accelerated bookbuilding, the entire package was allocated to UniCredit Group. At EUR 13.20 per share, the allocation price was higher than the daily closing price of EUR 12.60 per share.

This seems to have *displeased* the German government, which felt compelled to do a “transparent, non-discriminatory and market friendly” offering of the Commerzbank stake but does not seem jazzed about the possibility of a UniCredit takeover. So it was perhaps not great customer service on the part of its bankers, though they did get the highest possible price so maybe it was. On the other hand it had one other important benefit for JPMorgan:

Goldman, which organised the auction alongside JPMorgan, had to withdraw midway through the process once UniCredit's interest became clear, leaving JPMorgan to complete the bookbuild alone.

Goldman is a longtime strategic adviser to Commerzbank and is now advising on its takeover defence. JPMorgan has previously been an adviser to UniCredit.

If you are advising a company on its takeover defense you probably can't *also* be selling a block of

stock to the main bidder. “So sorry to see you go but we understand,” JPMorgan’s bankers presumably chuckled, as Goldman and the client fumed.

Insider trading

Here’s a US Securities and Exchange Commission insider trading case that features this quote in the press release:

“The first rule of material nonpublic information is: You don’t talk about material nonpublic information,” said Eric I. Bustillo, Director of the SEC’s Miami Regional Office. “As alleged in our complaint, Federico Nannini broke the rule and federal law when he shared information about MasTec’s probable acquisition of IEA with his dad and high school buddy.”

Fine fine fine, true, but it would be much funnier if Bustillo went on to say “... and of course the second rule is, if you are trading on material nonpublic information, don’t do it using short-dated out-of-the-money call options on merger targets.” Obviously these guys are accused of doing that too.

And then the third rule is, if you are going to trade on MNPI, don’t text or email about it. Once again, a problem for these guys. Federico Nannini was an associate at a consulting firm, his firm advised MasTec Inc. on its acquisition of Infrastructure and Energy Alternative Inc., and he allegedly tipped his father Mauro Nannini and his buddy Alejandro Thermiotis about the deal. This allegedly happened mostly on phone calls, because they *kind of* knew not to text about it. They just kept forgetting, and also reminding each other in writing:

Nannini provided periodic updates to Thermiotis about the status of Project Indigo, often through text messaging. In these text messages, Nannini and Thermiotis shared their desire to keep communications about the acquisition to a minimum and acknowledged they should not be texting about it.

And:

On June 15, 2022, beginning at 9:23 a.m., Thermiotis and Nannini held two back-to-back phone calls lasting approximately 16 minutes in total. Shortly thereafter, at 9:47 a.m., Thermiotis texted Nannini asking “Whats [sic] ticker[?] Don’t even tell me just call me later.”

And (from the parallel federal criminal case):

When Federico Nannini received confidential financials that indicated the acquisition was

going forward, he texted Thermiotis: “Its going thru ... Holy shit bro.” Thermiotis responded: “Don’t text ... But lfg.”

Meanwhile, Thermiotis allegedly told *his* buddy Francisco Tonarely about the deal:

Thermiotis also passed the confidential acquisition information to Tonarely, shortly after Tonarely texted him: “I want to make some money right now ... What we do?” After Thermiotis passed the confidential information to Tonarely, he texted: “Not a soul okay.” According to the indictment, Tonarely responded back: “Obviously ... You told me not to.” Days later, Tonarely’s family member signed a letter sponsoring Thermiotis’s membership at a Miami yacht club.

Tonarely, though, got impatient, and managed to sell his IEA shares at a loss before the deal was announced.

Also, traditionally the way insider trading works is that there is some insider (here, Federico Nannini) who gets the material nonpublic information and tips it to some outsider (here, his dad, Thermiotis, etc.), who trades on it. And, for it to be illegal insider trading, the insider technically has to receive some “personal benefit” for sharing the tip. This rule is not all that binding, and certainly “the benefit of providing a gift of inside information to a family member” (the SEC’s words) counts as a personal benefit. But often the outsider who gets the tip really *will* share some of his profits with the insider who gives it, sometimes by handing him a sack of cash in a parking lot. Here, though, it was a Rolex:

On July 15, 2022, the day after Nannini notified Thermiotis that the deal was going through, Nannini texted Thermiotis a screenshot from Instagram of a Rolex Cosmograph Daytona with a stated value of approximately \$30,000. ... Upon receiving the text with the screen shot, Thermiotis responded, “I got you.” ...

On July 27, 2022, two days after the Announcement, Nannini and Thermiotis revisited purchasing a Rolex in text messages, with Nannini sending a link to a Rolex watch for sale and asking Thermiotis: “You wanna hook it up for the boy. I know its [sic] a little over budget but this is the one.”

On October 13, 2022, Nannini text messaged Thermiotis he was “dead broke.” Thermiotis suggested that he owed Nannini money and responded “[y]ou should take the 25 i owe you cash ngl [not gonna lie]” (presumably referring to \$25,000) “[f]or buying opportunities.” Nannini said he would rather “pop a daytona,” referencing the Rolex watch model discussed in previous communications. Thermiotis later told Nannini that they should go to a store to purchase a pre-owned Rolex because Thermiotis was not going to purchase one online.

Yeah you don't want to buy that Rolex online, that might tip people off.

Things happen

Deutsche Bank Mulls Ways to Hinder Orcel's Commerzbank Move. The Suave Italian Banker Who Wants to Be the Jamie Dimon of Europe. ECB Has Always Favored Cross-Border Bank M&A, Guindos Says. The Fanatic Amateur Investors Behind Palantir. Amazon CEO Wants Workers in Five Days a Week, Leaner Teams. Bankers Willing to Work Long Hours on Interesting Deals, Lazard CEO Says. Chipotle's New Guac Robots Can Peel Your Avocados in 26 Seconds. Twins Release Minor League Catcher Accused Of Tipping Pitches Because He Wanted To Go Home.

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1. Roughly: A regular public company can give projections of future income, and gets some protection from shareholder lawsuits for good-faith projections that turn out to be wrong. But this rule does not apply to IPOs, and so if you have projections in your IPO filings and they turn out to be wrong, you will get sued. Now: *You* may not care about this, since you are after all doing fraud. But the problem is that since essentially no IPO prospectuses contain projections, if yours does, people will notice that that's weird.
2. Also, even founders with a majority of the votes can be, if not quite forced out, at least pushed out by outside investors who convince them that they need to go to save the company.

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<https://www.wsj.com/business/autos/after-layoffs-teslas-supercharger-expansion-slows-0d12cbaa>

BUSINESS | AUTOS

After Layoffs, Tesla's Supercharger Expansion Slows

Rollouts have lagged behind while the company is adding partners and getting more public funding for charging stations

By [Becky Peterson](#) [Follow](#)

Sept. 16, 2024 5:30 am ET



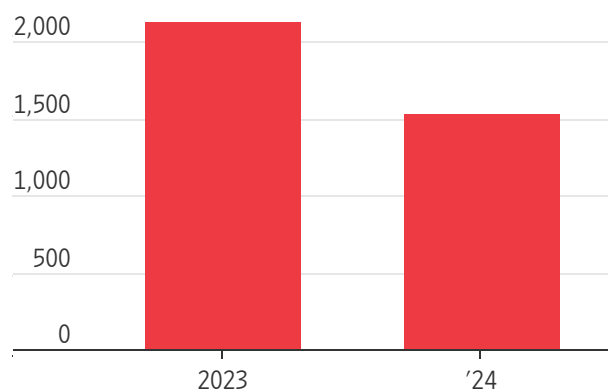
Tesla is under pressure to expand its network of fast chargers. PHOTO: KENA BETANCUR/VIEWPRESS VIA GETTY IMAGES

Tesla's TSLA **-1.57%** ▼ expansion of its Supercharger network has slowed in recent months, after widespread layoffs in April gutted the team responsible for installing new electric-car chargers and stations.

While Tesla has been trying to rebuild the group, including rehiring some employees previously let go, the number of new Supercharger ports opened in May through August fell 28% over the same period a year earlier, according to EV analytics firm EVAdoption.

For the first eight months of this year, that number was down 11% over 2023, the firm's data show. The decline comes as the electric-car maker has received millions of dollars in government funding this summer to install new chargers in states, including Maryland and Arizona.

Number of newly opened Supercharger ports in the U.S., May through August



Source: Alternative Fuels Data Center via EVAdoption

Tesla is under pressure to expand its network of fast chargers and open it to a wider array of drivers, including those with non-Tesla vehicles.

Ford Motor and Rivian Automotive already have access to Tesla's plug-in technology and several other car companies have forged agreements to use the chargers for their own customers, a shift that could help broaden the once-exclusive service.

The rollout to other automakers has hit some obstacles this year, owing in part to software challenges and holdups distributing the plug-in adapters needed by non-Tesla customers.

"Tesla actually has one of its biggest challenges in front of it since the Supercharger was first released," said Nick Nigro, founder of the research and consulting group Atlas Public Policy.

"What's important for them, in planning around where to allocate resources, is what's coming in the next 12 to 24 months—that is millions of drivers," Nigro said.

Tesla didn't return requests for comment. Last week, Tesla Chief Executive Elon Musk posted on X that Tesla is "opening a lot more Superchargers."

Getting back on track

With 6,500 charging locations globally, Tesla's Supercharger network is widely regarded as one of the industry's most robust and reliable services, and it has become a major selling point for buyers considering the electric-car brand.

The service's growth was disrupted this spring when Tesla abruptly let go of the entire Supercharger team and its head, Rebecca Tinucci, amid companywide layoffs, according to people familiar with the events.

The move threw the industry into chaos, pausing construction on some Supercharger sites that were under development and causing confusion among property owners who were in the middle of negotiations at the time of the job cuts.



A number of car companies with access to Tesla's plug-in technology have forged agreements to use Superchargers for their own customers. PHOTO: CELAL GUNES/ANADOLU AGENCY VIA GETTY IMAGES

Months later, Tesla is trying to get back on track with a smaller team and new leadership of the group. Their task is the same as before—to expand Tesla's network. Only now, they need to do it with fewer employees, the people said.

Musk has tried to reassure customers that Tesla would continue to build out the service, just at a slower pace for new locations. In May, he said the company plans to spend well over \$500 million to improve the network with thousands of new chargers this year.

“That’s just on new sites and expansions, not counting operations costs, which are much higher,” Musk said.

The reality has been more complicated. For the first few weeks after the layoffs, Tesla’s partners and contractors struggled to reach their contacts at Tesla, most of whom no longer worked at the company or had access to email.

By the end of May, Tesla brought back several senior members of the Supercharger team, including Max de Zegher, who leads the program, and a handful of managers who run it in North America.

Mike Snyder, a longtime executive at Tesla who had previously run its industrial-battery program, has since assumed oversight of the charging group, according to an organizational chart viewed by The Wall Street Journal. He now oversees several programs once under Drew Baglino, Tesla’s former senior vice president of energy, who left in April.

Construction on Supercharger stations remains active across the country, and in recent weeks, the team has continued rehiring some former workers, people involved in those conversations say.

Network build-out

A continued slowdown could have an impact on the charging experience for electric-vehicle customers across the industry.

Tesla, in late 2023, agreed to make its charging service available to other automakers for the first time. The move also allowed Tesla to qualify for a share of the billions in federal dollars available for enlarging the country’s EV charging infrastructure.

So far, the company has secured about \$37 million in public funding to build 88 Supercharger stations in the U.S., making it one of the top recipients in a federal program to expand EV charging access, according to EVAdoption, which tracks the awards.

Some of that money was doled out via state programs after the layoffs. In August, Tesla received \$2.9 million to install six charging sites in Arizona. A

month earlier, it got \$1.8 million from Maryland to install its fast chargers, which can allow EVs to repower in about 30 minutes.

Tesla's need for expansion is coming into sharper focus with more automakers poised to join the network. Already, Tesla drivers are worried about congestion at existing stations and the potential for longer wait times.

Earlier this year, the company opened its charger network to Ford and Rivian drivers. It also had plans to expand access to General Motors, Volvo Cars and Polestar by the spring of 2024, but its website now says those additions are coming soon.

“That was one downside that came as a result of opening up that network to the non-Tesla owners,” said Brent Gruber, executive director of the EV practice at J.D. Power, which studies charging satisfaction. “They no longer had access to that exclusive club. Now they’re sharing it with other owners.”



Tesla drivers are worried about congestion at existing stations. PHOTO: VCG VIA GETTY IMAGES

Write to Becky Peterson at becky.peterson@wsj.com

Videos

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<https://www.wsj.com/articles/walgreens-to-pay-106-8-million-over-alleged-fraudulent-healthcare-billings-da8aa66a>

RISK & COMPLIANCE JOURNAL

Walgreens to Pay \$106.8 Million Over Alleged Fraudulent Healthcare Billings

The settlement resolved three cases pending in New Mexico, Texas and Florida

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

Updated Sept. 13, 2024 8:24 pm ET



Walgreens will receive a credit for \$66.3 million after having refunded that amount in relation to the settled claims. PHOTO: GJP/ASSOCIATED PRESS

Walgreens Boots Alliance has agreed to pay a combined \$106.8 million to the federal government and states for submitting claims to federal healthcare programs for prescriptions it never dispensed.

The Justice Department on Friday alleged that Walgreens violated the False Claims Act and state statutes between 2009 to 2020. During that period, the healthcare company billed Medicare, Medicaid and other federal healthcare programs for prescriptions that it processed but that were never picked up.

As a result, Walgreens received tens of millions of dollars for prescriptions that weren't actually provided to healthcare beneficiaries, the DOJ said.

“Due to a software error, we inadvertently billed some government healthcare programs for a relatively small number of prescriptions our patients submitted but never picked up,” Walgreens said in a statement. “We corrected the error, reported the issue to the government and voluntarily refunded all overpayments.”

Walgreens will receive a credit for \$66.3 million after having refunded that amount in relation to the settled claims, the DOJ said. The company also implemented enhancements to its electronic pharmacy-management system to prevent the problem from occurring in the future and self-reported certain conduct, the DOJ added.

The federal share of the recovery is \$91.9 million, and a total of \$14.9 million will be returned to individual states.

The settlement resolved three cases pending in the District of New Mexico, Eastern District of Texas and Middle District of Florida.

Two former Walgreens employees, who filed lawsuits against the company under the whistleblower provision of the False Claims Act, were awarded \$14.9 million and \$1.6 million, respectively. The provision allows private parties to file suit for false claims on behalf of the U.S. and to share in the recovery of any funds.

“This settlement marks another major achievement in our ongoing commitment to combat healthcare fraud,” Roger Handberg, U.S. attorney for the Middle District of Florida, said.

—David Smagalla contributed to this article.

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

Investors Push Deere to Explain DEI Rollbacks With New Bid

By David Hood

Documents

 [As You Sow proxy proposal](#)

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- Investors seek clarity on tractor giant's new DEI approach
 - Shareholder proposal asks for workforce data disclosures

Bloomberg Law News 2024-09-16T10:07:24185166061-04:00

Investors Push Deere to Explain DEI Rollbacks With New Bid

By David Hood 2024-09-13T12:47:18000-04:00

- Investors seek clarity on tractor giant's new DEI approach
- Shareholder proposal asks for workforce data disclosures

A shareholder advocacy group is pressing tractor giant Deere & Co. to answer for its rolled-back diversity, equity, and inclusion measures via a new proxy proposal that seeks disclosures about employee recruitment and retention.

As You Sow, a nonprofit that represents investors interested in environmental and social issues, filed the proposal Thursday as a corporate ballot submission for votes at Deere's next annual shareholder meeting.

The proposal comes after the farm machinery maker said in July that it would cease to participate in "cultural awareness parades" and refocus its employee resource groups on professional development.

Deere had bowed under pressure from conservative social media influencer Robby Starbuck, who led a campaign this summer to dismantle DEI initiatives across corporate America. Starbuck claimed credit for seven total companies so far that have withdrawn some of their commitments.

Supporters of corporate diversity programs like As You Sow have pledged to push back in different ways, including through shareholder proposals. The bid at Deere is meant to help start a conversation with the company's board and management to get a better sense of what their intentions are, As You Sow CEO Andy Behar said.

"We don't want to overreact to Robby Starbuck," he said. "We have to look at exactly what the company is actually changing."

As You Sow submitted the proposal on behalf of sustainability-focused Amalgamated Bank. It asks Deere to disclose data about recruitment, retention, and promotion of its employees that's categorized by ethnicity, gender, and race.

With such data, investors could "assess and compare the effectiveness of companies' efforts to ensure meritocratic workplaces through DEI efforts," the proposal says.

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

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Missouri Appeals Ruling That Blocked Its ESG Investing Limits

By Andrew Ramonas

- Secretary of State Jay Ashcroft appealed to Eighth Circuit
- Lower court judge ruled in favor of Wall Street trade group

Bloomberg Law News 2024-09-16T10:08:57629538983-04:00

Missouri Appeals Ruling That Blocked Its ESG Investing Limits

By Andrew Ramonas 2024-09-13T16:47:50000-04:00

- Secretary of State Jay Ashcroft appealed to Eighth Circuit
- Lower court judge ruled in favor of Wall Street trade group

Missouri Secretary of State Jay Ashcroft (R) on Friday appealed a court decision that blocked the state's environmental, social and governance investing restrictions.

Ashcroft asked the US Court of Appeals for the Eighth Circuit to review a federal judge's August decision barring Missouri from enforcing the 2023 rules, according to a notice of appeal.

The regulations require investment firms to obtain written consent from their Missouri customers before using any "social objective or other nonfinancial objective" in their decisions. Judge Stephen R. Bough of the US District Court for the Western District of Missouri found that the rules violated federal law that gives the Securities and Exchange Commission the power to regulate investment firms.

Lawyers for Ashcroft didn't say in the notice why the secretary of state filed the appeal. A spokesperson for Ashcroft didn't immediately respond to a request for comment.

Bough ruled in favor of the Securities Industry and Financial Markets Association, which sued Ashcroft last year to stop the regulations. The rules were "burdensome state regulation that Congress prohibited," the group said.

Brokers and investment advisers needed their customers' written permission to invest based on matters such as "socially responsible criteria," "social or environmental goals," and "corporate governance structures based on social characteristics," according to Missouri's regulations, which are under headings labeled, "Dishonest or Unethical Business Practices."

A SIFMA spokesperson didn't immediately respond to a request for comment. (Bloomberg Law is an affiliate of Bloomberg LP, which is an associate member of SIFMA.)

The case is Securities Industry and Financial Markets Association v. Ashcroft , W.D. Mo., No. 2:23-cv-04154, appeal filed 9/13/24 .

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Law360's Legal Lions Of The Week

By **Law360 Staff**

Law360 (September 13, 2024, 2:35 PM EDT) -- Sheppard Mullin Richter & Hampton LLP attorneys and Texas litigator Richard L. Stanley lead this week's edition of Law360 Legal Lions after the Federal Circuit on Monday revived a patent infringement case for their client Contour IP Holding LLC against GoPro Inc.

In a precedential decision, the Federal Circuit **reversed** a lower court's decision invalidating two of Contour's video camera patents in light of the U.S. Supreme Court's Alice v. CLS Bank decision. The court sent the case back for further proceedings, finding that Contour's patent claims against GoPro do not cover an abstract idea. Contour is represented by John R. Keville and Michael C. Krill of Sheppard Mullin Richter & Hampton LLP and Richard L. Stanley of the Law Office of Richard L. Stanley.

Sidley Austin LLP and Shook Hardy & Bacon LLP attorneys also top the list this week for their work in securing **a jury trial win** in Philadelphia for Bayer AG unit Monsanto in a case alleging the company sold its flagship weedkiller Roundup despite knowing about its cancer-causing properties. This marks the second trial win in the **fifth case** to be tried in Philadelphia's Roundup mass tort. Monsanto is represented by Jennifer Saulino, Michelle A. Ramirez, Elizabeth N. Ertle and Jaime R. Simon of Sidley Austin, and Erin Leffler, Nicolai A. Schurko, Thomas J. Sullivan and Dalton R. Mott of Shook Hardy.

Jason M. Erlich of Erlich Law Firm and Jennie Lee Anderson of Andrus Anderson LLP roared on Thursday after U.S. District Judge Jacqueline Scott Corley in California **certified two nationwide classes** they are representing in a suit accusing Southwest Airlines Co. of penalizing flight attendants who take family or medical leave.

Attorneys from Labaton Keller Sucharow LLP, Cohen Milstein Sellers & Toll PLLC, Robbins Geller Rudman & Dowd LLP and litigator Craig C. Reilly make the list after successfully guiding investors past a motion to dismiss in their securities fraud suit against Boeing. A Virginia federal judge late last week **gave the green light** to the Boeing investors to continue the proposed class suit over the company allegedly making false statements to investors about the design, engineering and overall safety of its 737 Max fleet. The investors are represented by Carol C. Villegas, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow, Steven J. Toll and S. Douglas Bunch of Cohen Milstein Sellers & Toll, Chad Johnson, Noam Mandel, Jonathan Zweig, Desiree Cummings and Brent E. Mitchell of Robbins Geller and Craig C. Reilly of The Office of Craig C. Reilly.

Jones Day and Milbank LLP **secured a victory** for trading platform KalshiEx LLC when a Washington, D.C., federal judge ruled last Friday against the U.S. Commodity Futures Trading Commission and lifted an order that prohibited Kalshi from offering users of its platform the opportunity to place bets on the outcome of upcoming U.S. congressional elections. KalshiEx LLC is represented by Yaakov M. Roth, John Henry Thompson, Amanda K. Rice and Samuel V. Lioi of Jones Day and Joshua Sterling of Milbank LLP.

Littler Mendelson PC triumphed after the Second Circuit **upheld the dismissal** of an employee's suit against Regeneron Pharmaceuticals Inc. While a three-judge panel disagreed with the reasoning behind the lower court's decision, it still rejected a former employee's appeal seeking to revive claims Regeneron illegally denied her a remote work situation, ruling there was no evidence the company had willfully broken the law. Regeneron is represented by Shawn Clark and Craig Benson of Littler Mendelson PC.

Gordon Rees Scully Mansukhani LLP makes the list this week after **being named** the most active law

firm representing plaintiffs in trade secrets disputes, according to a new report by Lex Machina analyzing a three-year period from 2021 to 2023.

--Editing by Law360 staff.

Note: Law360 is owned by LexisNexis Legal & Professional, a RELX company, which owns Lex Machina.

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The 2024 Regional Powerhouses

By **Cara Bayles**

Law360 (September 15, 2024, 8:02 PM EDT) --



The law firms on Law360's list of 2024 Regional Powerhouses reflected the local peculiarities of their states while often representing clients in deals and cases that captured national attention.

Here, Law360 examines the forces driving legal work in California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Massachusetts, Michigan, New Jersey, North Carolina, Pennsylvania, Texas and Washington, and the accomplishments of the firms leading the pack.

California

This year's California Powerhouse firms have won intellectual property litigation related to artificial intelligence and virtual reality, defended pharmaceutical companies against securities claims, and helped tech giants and entertainment companies with public offerings and acquisitions. The firms' work covered industries and legal issues stretching from Hollywood to Silicon Valley, with an array of clients including Google and Snoop Dogg.

Cooley • Gibson Dunn • Hueston Hennigan • Kirkland • Morrison Foerster • Robbins Geller • Wilson Sonsini

Colorado

Colorado's burgeoning legal might is on full display with this year's Colorado Powerhouse firms, with some that use the state as a home base for their national advocacy and others focusing on litigation with deep roots in the state, including lawsuits involving a local grocery chain, a cannabis cultivation company and the Denver International Airport.

Holland & Hart • Spencer Fane • Wheeler Trigg O'Donnell

Connecticut

Real estate, and in particular affordable housing, topped the list of matters handled by Connecticut's top law firms, with attorneys helping local government agencies and developers with financing, development and construction projects across the state.

McCarter & English • Pullman & Comley

Delaware

Delaware continues to have a busy corporate law practice, and this year's Regional Powerhouse firms illustrate the diversity of the state's legal scene, with securities and investor rights litigation, bankruptcy proceedings, corporate control cases, patent trials and significant transactional practices.

Bernstein Litowitz • Morris Nichols • Pachulski Stang • Richards Layton

Florida

Florida's Powerhouse firms focused on real estate, capitalizing on the state's active residential market and booming tourism industry. They represented the state's iconic companies, including the Miami Dolphins and Royal Caribbean Group; navigated distinctly Floridian problems, such as advising insurance companies after major hurricanes; and helped the city of Jacksonville investigate corruption at a local utility company.

Bilzin Sumberg • Greenberg Traurig • Holland & Knight • Podhurst Orseck • Smith Hulse

Georgia

The firms named as Georgia Powerhouses represented nationally known brands with Atlanta roots, like The Coca-Cola Co., Home Depot and Delta Air Lines, helped bolster the state's growing cannabis industry, and defended energy and utility companies against lawsuits and regulation.

Alston & Bird • Dentons • Eversheds Sutherland • Kilpatrick • Troutman Pepper

Illinois

Some of the nation's largest law firms dominated the list of Illinois Powerhouses this year, though only one has its headquarters based in Chicago. That showcases how the state has become an important destination for national firms, which in turn have ushered in tech deals, defended hometown giants like McDonald's and Abbott Laboratories against litigation, and were on both sides of major litigation over allegations that trade groups and producers were gouging the price of eggs.

Jenner & Block • Jones Day • King & Spalding • Latham

Massachusetts

Tech, pharmaceutical and healthcare companies were top clients for all the firms that were this year's Massachusetts Regional Powerhouses, with lawyers in the Bay State ushering in licensing and acquisition deals for software and healthcare companies, filing intellectual property suits on behalf of pharmaceutical companies, and advising major asset management firms.

Foley Hoag • Ropes & Gray • WilmerHale

Michigan

This year's Michigan Powerhouse firms have worked in high-stakes, headline-grabbing litigation involving issues as varied as health insurance price-fixing claims, a dispute over a stolen Vincent van Gogh painting, lawsuits over lead in municipal drinking water, and the insurance fallout of litigation over a University of Michigan physician accused of abusing athletes for decades.

Bodman • Varnum

New Jersey

New Jersey's top firms focused on familiar corporate litigation involving pharmaceutical, life sciences and gaming companies, as well as relatively new industries like cannabis. They also advised on major real estate deals, drafting contracts, filing lawsuits and ushering in public offerings for a redevelopment company.

Duane Morris • Gibbons • Seeger Weiss • Sills Cummis

North Carolina

This year's North Carolina Powerhouse firms showcased the diversity of legal issues within the state, representing industries from the biotech startups of the Research Triangle Park to traditional agricultural clients like shrimpers and hog farmers.

Brooks Pierce • McGuireWoods • Smith Anderson

Pennsylvania

Mass tort cases topped the litigation handled by Pennsylvania's Powerhouse firms, with trials involving Monsanto's Roundup weedkiller and a major settlement involving the toxic train derailment in nearby East Palestine, Ohio. Many suits represented by the state's top firms also involved hot-button issues including pandemic-era policies and voting machines used in the 2020 presidential election.

Cozen O'Connor • Hangley Aronchick • Kline & Specter • Lynch Carpenter

Texas

Energy companies remained the top clients for Texas' Regional Powerhouse firms, which helped broker major deals, end contract disputes, fight personal injury claims and reach settlements, representing both traditional oil and gas clients and renewable energy companies. The firms also litigated trade secret cases and ushered in transactions for tech and analytics companies.

Baker Botts • Beck Redden • Bracewell • Haynes Boone • Vinson & Elkins

Washington

Washington state's top firms represented hometown tech behemoths like Microsoft and Amazon, but also counseled real estate developers on major commercial and residential projects and represented healthcare organizations facing labor litigation.

Davis Wright • Stoel Rives

--Editing by Lakshna Mehta.

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SEC Inks \$100M Deal With FirstEnergy, Sues Ex-CEO

By Law360 Staff

Law360 (September 13, 2024, 5:19 PM EDT) -- The U.S. Securities and Exchange Commission reached a \$100 million settlement with FirstEnergy Corp. over its role in a \$60 million corruption scandal Thursday, the same day the agency sued a former executive who collected tens of millions of dollars in executive perks while the wrongdoing unfolded.

The agency's actions mark the latest development in a scheme that saw FirstEnergy officials bribe politicians to pass bailout legislation that would save two struggling nuclear plants. It has spawned criminal charges, a securities lawsuit and consumer protection probes in addition to SEC actions.

The \$100 million civil **penalty** was revealed in the company's **Form 8-K filing** with the agency Thursday. In a statement, FirstEnergy President and CEO Brian X. Tierney touted a "new chapter" for the Ohio-based utility.

"Our focus today is investing in our regulated electric companies to improve the customer experience and support the energy transition," Tierney said.

The agency's **lawsuit** against CEO Charles E. Jones, also filed Thursday, cites his control over the company's internal financial reporting and notes that Jones' concealment of the company's secret payments to politicians "would have been important to FirstEnergy's investors." FirstEnergy handed Jones performance-tied incentives in the form of \$18.1 million in restricted stock units and a \$1.6 million cash bonus around the time the scandal played out, acceding to the agency's suit, which seeks an unspecified civil penalty.

These latest developments come nearly a month after FirstEnergy agreed to pay **\$19.5 million** to settle Ohio Attorney General Dave Yost's probe into the scandal, and three years after it inked a **\$230 million deal** with federal prosecutors to head off a wire fraud conspiracy charge.

The legal fallout stems from the Ohio Legislature's controversial \$1.3 billion bailout of two FirstEnergy nuclear plants.

Former Ohio House Speaker Larry Householder and lobbyist Matthew Borges have **appealed** their federal court convictions and prison sentences for pocketing \$60 million in bribes in exchange for their help in getting the bailout legislation passed.

This story mentions suicide. If you are experiencing thoughts of suicide, the Suicide and Crisis Lifeline is available 24 hours a day at 988 or online at 988lifeline.org.

Householder was also **criminally charged** by Yost alongside Jones and former Senior Vice President of External Affairs Michael Dowling. Former Ohio Public Utilities Commission Chair Sam Randazzo, who was also charged in the state matter, **died** by suicide in April.

FirstEnergy, meanwhile, is **appealing** an Ohio federal court's certification of a class of investors who claim company officials concealed that it was handing bribes to politicians in order to save its nuclear plants.

The scandal also sparked consumer protection probes from Ohio and **Pennsylvania** enforcers,

although the Buckeye State **paused** its investigation to avoid interfering with the criminal prosecutions.

A representative for the SEC declined to comment Friday on the civil penalty and lawsuit against Jones.

Counsel information for Jones was unavailable.

The SEC is represented by Jonathan Polish of the agency's Chicago Regional Office.

The case against FirstEnergy Corp. is the case is In the Matter of FirstEnergy Corp., administrative proceeding number 3-22111, before the U.S. Securities and Exchange Commission.

The case against Jones is U.S. Securities and Exchange Commission v. Charles E. Jones, case no. 5:24-cv-01560, in U.S. District Court for the Northern District of Ohio.

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Emergent BioSolutions Pays \$40M To Settle COVID Vax Suit

By Law360 Staff

Law360 (September 13, 2024, 4:22 PM EDT) -- Emergent BioSolutions has agreed to pay \$40 million to settle a consolidated class action alleging it misled investors about how prepared it was to handle two high-profile deals to manufacture COVID-19 vaccines.

In a Thursday motion urging Judge Deborah L. Boardman of the U.S. District Court in Maryland to approve the deal, lawyers for the class also said they would seek attorneys' fees not to exceed 30% of the settlement amount, which under the current proposal would be just more than \$13 million, and expenses not to exceed \$500,000. The settlement motion is unopposed by Emergent, according to the plaintiffs' motion.

The proposed \$40 million recovery is "objectively an excellent result" for the settlement class, according to the plaintiff attorneys, which they said is nearly three times the median recovery in securities class actions in 2023. Absent the settlement, the class would face risk of continued litigation, particularly in establishing both liability and damages that would result in a litigated judgment greater than the settlement. A particular risk facing the settlement class if litigation continues is proving that the company's statements were materially false and misleading and were made intentionally or recklessly, they said.

Despite the class certification, later removal of certification or granting of a summary judgment motion by defendants is always a possibility in class actions and could result in no recovery for plaintiffs, the lawyers said. Furthermore, even prevailing at trial would not guarantee recovery larger than the \$40 million settlement, the lawyers noted.

"The lead plaintiffs are very pleased to present the proposed settlement to the court. We believe this to be an outstanding result for the class after years of hard fought litigation. We look forward to the Court's upcoming order," Matthew L. Tuccillo, a partner at Pomerantz LLP, which is lead counsel for the class, told Law360.

The class of investors claimed in an April 2021 complaint that Emergent BioSolutions misled them about the company's readiness to handle two high-profile contracts to manufacture COVID-19 vaccines. According to the investors, the company's stock price plummeted after a March 31 media report that Emergent had mixed up ingredients for two coronavirus vaccines, contaminating as many as \$15 million worth of doses of the Johnson & Johnson vaccine.

Prior to the negative report, the company's stock had been boosted by Emergent's manufacturing deals with COVID-19 vaccine developers Johnson & Johnson and AstraZeneca and a contract with the federal government as part of Operation Warp Speed to produce and develop coronavirus vaccines. Together, the private and public contracts were worth more than \$1.5 billion, the investors said.

Roughly a year ago Judge Boardman **trimmed claims** from the plaintiffs, led by Nova Scotia Health Employees' Pension Plan and the City of Fort Lauderdale Police and Firefighters' Retirement System, ruling that they failed to adequately back up fraud claims regarding Emergent's reported results and internal controls.

The judge did, however, preserve a claim that Emergent and the other defendants misrepresented the company's performance and capabilities, specifically in relation to Emergent's anti-contamination measures.

Emergent and its attorneys did not respond immediately to a request for comment.

The class is represented by Matthew L. Tuccillo, Jeremy A. Lieberman, Jennifer Banner Sobers, Dolgora Dorzhieva and Jennifer Pafiti of Pomerantz LLP, Steven J. Toll, Daniel S. Sommers, S. Douglas Bunch and Brendan Schneiderman of Cohen Milstein Sellers & Toll PLLC, and Robert D. Klausner and Stuart Kaufman of Klausner Kaufman Jensen & Levinson.

Emergent and the other defendants are represented by William M. Krulak Jr. and Ariana K. DeJan-Lenoir of Miles & Stockbridge PC, and Michael G. Bongiorno, Timothy J. Perla, Arjun K. Jaikumar and Kim A. Crowley of WilmerHale.

The case is In re: Emergent Biosolutions Inc. Securities Litigation, case number 8:21-cv-00955, in the U.S. District Court for the District of Maryland.

Update: This story has been updated with comment from lead counsel of the class.

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Apple App Developers Seek Permission For \$1B Class Action

By **Sophia Dourou**

Law360, London (September 16, 2024, 4:50 PM BST) -- A lawyer for a consumer advocate told Britain's antitrust tribunal on Monday that a proposed £785 million (\$1 billion) claim by app developers against Apple over payments for commission should be allowed to go ahead as a class action.

Sean Ennis, a professor at Norwich Business School, is urging the Competition Appeal Tribunal to certify a claim on behalf of thousands of developers in the U.K. that are accusing Apple of abusing its dominant position. His barrister, Paul Stanley KC of Essex Court, told the tribunal that this is just the sort of case that is suitable for collective opt-out proceedings.

"We have got a case here which involves numerous thousands of claims, vanishingly few of them of a size that even approaches viability in terms of individual claims," Stanley said. "There is a mass of common issues to be determined."

Ennis is seeking to represent more than 1,500 developers of apps. The group alleges that Apple's rules that prohibit direct downloads of apps or competing app stores on the iPhone and iPad amount to an **abuse of dominance**. Ennis, a professor of competition policy, argues that that has allowed the tech giant to maintain "excessive" commissions on apps and in-app purchases of up to 30%, according to documents submitted to the tribunal.

Apple failed to get the claim tossed in April, when the CAT found that the claimants **had an opportunity** to show that the case was governed by U.K. law.

Stanley said on Monday that the only objection Apple had raised to certification apart from a question about funding is an argument that there are conflicts of interest within the class.

"What had been identified as conflicts are not conflicts," Stanley added. "They are ordinary and harmless differences between members of the proposed class of the sort that can be expected with many classes hyperbolically inflated to conflicts."

Stanley said that this is a case which "in itself is not massively complicated," if the point of conflict can be resolved. He added that it is "quite clear," because of the number of developers, that collective proceedings represented a "very sensible way" of deciding the disputes.

The CAT should decide which factors to consider when it determines whether a class action should be on an opt-out or opt-in basis, Stanley said. Legislators intended to give the court that choice based on the "individual circumstances of a case" and not to create "a preference either way."

Stanley said that the class would capture only "a fraction of those affected" if it went ahead on an opt-in basis as Apple suggests.

"We are looking here at real, substantial losses, which is the very purpose of collective proceedings to be able to capture," Stanley said. He added that it "would leave a large number of far-from-insignificant claims lying on the table" if the claim was made opt-in.

Counsel for Apple, Marie Demetriou KC of Brick Court Chambers, accused Ennis of trying to "sweep under the carpet" the problem of significant conflicts between potential class members. Demetriou

said that Ennis has already made choices in the litigation which benefited some members over others, including restricting the relief to damages rather than further orders.

"The claim as presently formulated does not work," Demetriou said. The proposed class representative "cannot avoid acting for the interest of some class members and against the interests of others."

Demetriou argued that Ennis is seeking to steer "a middle course" because he is not able to reconcile the conflicting interests of different members of the class. He has a fiduciary duty to the class as its proposed representative and cannot act out of "divided loyalty," she added.

Apple argued in written submissions that it is "practicable" in a claim such as this to engage with enough potential members of the class to build an opt-in claim. It indicates that the claim "should not be pursued at all" if Ennis cannot persuade enough developers to take part.

This is the latest legal battle involving Apple's store charges. The CAT ruled in June 2022 that a £1.5 billion consumer lawsuit that also **targeted the App Store** commissions could go ahead.

The company reached a \$100 million settlement in the U.S. in 2021 with a class of app developers. That decision also required revisions to App Store rules allowing developers to talk to consumers outside the app about alternative purchasing methods

Ennis is represented by Paul Stanley KC of Essex Court Chambers and Daniel Carall-Green and Victoria Green of Fountain Court Chambers, instructed by Damien Geradin, Stijn Huijts and David Gallagher of Geradin Partners Ltd.

Apple is represented by Marie Demetriou KC, Daniel Piccinin KC and Hugo Leith of Brick Court Chambers, instructed by Doug Watson of Gibson Dunn & Crutcher UK LLP.

The case is Dr. Sean Ennis v. Apple Inc. and others, case number 1601/7/7/23, in the Competition Appeal Tribunal.

--Additional reporting by Richard Crump, Joanne Faulkner and Bryan Koenig. Editing by Ed Harris.