Meta Beats Investor Suit Over iOS Change, Sandberg Compensation

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Meta Platforms Inc. beat a lawsuit alleging it falsely reassured investors about the impact of privacy changes to Apple Inc.'s iOS software and hid former Chief Operating Officer Sheryl Sandberg's use of corporate resources for her personal benefit.

Various statements investors pointed to weren't false, wouldn't have misled them, or concerned press reports about issues Meta is still investigating, a federal judge said Tuesday. The complaint also included allegations related to Meta's short-form video offering, Reels.

"Despite its girth of over 100 pages, the SAC fails to state actionable securities law claims under the law, and dismissal is therefore required," Judge Yvonne Gonzalez Rogers in the US District Court for the Northern District of California said, referring to the plaintiff's second amended complaint.

The complaint was dismissed with prejudice, meaning it cannot be refiled.

Investors brought the suit in 2022, after Apple began requiring app makers to ask users if they consent to being tracked. Investors said Meta's implication that the changes were "manageable" was undermined by revelations the company forecast about $10 billion in related ad revenue losses that year.

Rogers said there was no tension between the statements.

"Something can be challenging, risky, or perhaps even material, as well as manageable," she said.

Investors also said Meta misled them about Sandberg's use of corporate resources to plan her wedding, suppress unflattering news stories, and write her book, "Option B: Facing Adversity, Building Resilience, and Finding Joy," among other things.

Rogers said the allegations, drawn from reports by the Wall Street Journal, were still being investigated by Meta.

"Even if such allegations are credited as showing certain events actually occurred (not just that they are alleged to have happened), the Court finds plaintiffs' allegations are implausible, insufficiently detailed, or both," she said.

Pomerantz LLP is counsel for the lead plaintiffs. Latham & Watkins LLP represents Meta.

The case is Plumbers and Steamfitters Local 60 Pension Trust v. Meta Platforms, Inc. , N.D. Cal., No. 22-cv-01470, 9/17/24 .

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Allianz Sues Santander Over Directors Coverage for Investor Suit

B bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEC9BGTG000000

Class Action
A Banco Santander SA branch in New York on Sept. 13, 2024.

Photographer: Yuki Iwamura/Bloomberg

Sept. 18, 2024, 8:38 AM PDT

Olivia Alafriz

- **COURT:** D. Mass.
- **TRACK DOCKET:** 1:24-cv-12377

A directors and officers and entity liability insurance policy issued to Banco Santander SA's US arm doesn't afford coverage for litigation brought by shareholders of a different Santander subsidiary acquired in 2022, an Allianz SE insurance unit said in a lawsuit.

The excess policy issued to Santander Holdings USA Inc. didn't provide coverage for costs incurred as a result of the investors' proposed class action due to several exclusions, Allianz Global Risks US Insurance Co. said in a complaint filed Tuesday in the US District Court for the District of Massachusetts.

In the underlying lawsuit, shareholders of Santander Consumer USA Holdings Inc. alleged actions connected to the other US unit's $2.5 billion acquisition of Consumer resulted in shareholders not being fairly compensated for their investment.

Allianz said coverage was barred by policy exclusions for claims tied to the acquisition transaction, claims resulting from wrongful acts committed before the transaction closed, and claims for securities-related transactions subject to the Securities Exchange Act.

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

Sloane & Walsh LLP represents Allianz.

The case is Allianz Global Risks US Ins. Co. v. Santander Holdings USA Inc. , D. Mass., No. 1:24-cv-12377, 9/17/24 .

To contact the reporter on this story: Olivia Alafriz in Washington at oalafriz@bloombergindustry.com

Trump Media's Suit Over Merger Headed Back to Florida Court (1)

B bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X1FNIHKC000000

Trump Media & Technology Group Corp. may pursue in state court its claims against the people and entities involved in the merger that created it, a federal judge ruled.

Nothing in this lawsuit required the state court "to determine whether the alleged conduct amounts to a violation of federal securities law, and the existence of a securities law violation" isn't an essential element to any claim by Trump Media, Judge Steven D. Merryday of the US District Court for the Middle District of Florida said.

The state court needs only to "adjudicate whether the alleged conduct amounts to a violation of Florida law," Merryday said Tuesday, granting Trump Media's motion for remand.

The ruling is the latest installment in the litigation involving Trump Media, which was created through the merger of two other companies, and some of its investors. Trump Media sued earlier this year alleging that an executive in one of the companies that would merge, Patrick Orlando, falsely represented to the SEC some issues with the merger.

Former President Donald Trump owns millions of shares in Trump Media, which have an estimated value of almost $2 billion. His recent announcment that he wouldn't sell his shares when he's legally able to do so on Sept. 19, increased their value.

Trump Media was created when TMTG Sub Inc. merged with Digital World Acquisition Corp. Patrick Orlando was the chairman and CEO of DWAC. Defendant ARC Global Investments II LLC, which was allegedly controlled by Orlando, was DWAC's sponsor before the merger and invested in DWAC, Merryday said. Defendants Wesley Moss and Andrew Litinsky served as de facto officers of Old TMTG, and defendant United Atlantic Ventures LLC was founded by them, the judge said.

According to Trump Media, before DWAC went public, the defendants devised an unlawful scheme to merge DWAC and Old TMTG, but Orlando falsely represented to the Securities and Exchange Commission and investors that DWAC didn't intend to merge with a specific company before its initial public offering.

The SEC concluded that DWAC violated federal securities laws and imposed an $18 million penalty and cease-and-desist order on it, Merryday said. Separately, Trump Media said that Moss and Litinsky failed to properly manage Old TMTG, which delayed the successful launch of the social media site, Truth Social. It also accused Orlando of incompetently running DWAC and said that he obstructed the merger.

Trump Media filed this lawsuit in February 2024 in state court and the SEC filed a civil enforcment action against Orlando on July 17, 2024, accusing him of violating federal securities law, Merryday said.

The SEC’s investigation into the merger caused Trump Media to lose hundreds of millions of dollars due to the delay and damage to its reputation, Trump Media said.

ARC and Orlando filed a notice to remove this case to federal court on Sept. 12, which Trump Media opposed. The defendants said that federal jurisdiction was proper because the investigation was into alleged violations of federal securities law.

Trump Media said that adjudication of its claims does “not require the resolution of a federal question,” but rather “requires a determination of whether this already determined federal question also amounts to a breach of Defendants’ fiduciary duties to Plaintiffs,” Merryday said.

The mere availability of a federal private cause of action is irrelevant, Merryday said. Plaintiffs are the master of the complaint and can “avoid federal jurisdiction by structuring their case to fall short of a requirement of federal jurisdiction,” he said. “Plaintiffs have done so here by alleging only state law claims,” he said.

DLA Piper US LLP, Lawson Huck Gonzalez PLLC, and and Hutton Dominko Swaim & Stall represent Trump Media. Homer Bonner Jacobs Ortiz, Vedder Price, Dechert LLP, and Icard Merrill Cullis Timm Furen & Ginsburg PA represent the defendants.

The case is Media v. Arc Glob. Invs. II LLC , 2024 BL 325842, M.D. Fla., No. 8:24-cv-02161-KKM-AEP, 9/17/24 .

(Updated throughout to add context and additional information from judge’s opinion.)

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Securities Law News

Sept. 17, 2024, 10:54 AM PDT

Trump SPAC Founder Orlando Wins More Shares in Media Company (2)

By Jef Feeley and Bailey Lipschultz

Bloomberg Law News 2024-09-18T11:23:2721740064-04:00

Trump SPAC Founder Orlando Wins More Shares in Media Company (2)

By Jef Feeley and Bailey Lipschultz2024-09-17T13:54:41106-04:00

The former head of the firm that took Donald Trump's social media company public was awarded about 800,000 more shares of Trump Media & Technology Group Corp.by a Delaware court, two months after federal regulators accused him of misleading investors.

Patrick Orlando, who left his leadership roles at Digital World Acquisition Corp. (DWAC) in early 2023 and sued it this year, is entitled to almost 8.2 million class A shares rather than the 7.4 million or so he was allotted earlier, Delaware Chancery Court Judge **Lori Will** decided.

Will found that the special purpose acquisition company, or SPAC, which brought Trump's Truth Social platform to the stock market, had used the wrong stock conversion ratio. For Orlando and his company Arc Global Investments II, the difference is a potential windfall of about $13 million at the stock's current price. It was a tempered win — he had asked the court for an additional 2.6 million shares.

The judge's decision doesn't appear to affect the former president's shareholding of about 60% in the media company. With Trump Media stock trading down 3.7% to $16.64 at 1:49 p.m. in New York, that 115-million-share stake is currently valued at roughly $1.91 billion.

Patrick Orlando in 2011
Source: AP

“What should have been a straightforward exercise in contract interpretation and math was obscured by the parties’ injection of other issues,” Will said in her ruling. “ARC claims the members of DWAC’s board of directors calculated the conversion ratio and made related disclosures in bad faith out of personal animus for ARC’s founder Patrick Orlando.”

The judge said DWAC in turn raised defenses “concerning unrelated and purported misconduct by Orlando” — and that she rejected it all as “diversions.”

Orlando and insiders including Trump and Trump Media co-founders Andy Litinsky and Wes Moss may be able to sell shares for the first time as soon as Thursday evening, when restrictions preventing such sales are expected to be lifted. That could unlock roughly $135 million in paper profits for Orlando, though that number was closer to $500 million when the shares peaked. Trump has said he would be holding on to his shares.

Trump Media, which owns Truth Social, has erased two-thirds of its value in the past four months as investors positioned themselves ahead of the lockup expiration. Trump has done little to inspire investors to back the company that trades under his initials, returning to Elon Musk’s X social media platform last month and pushing things like nonfungible tokens.

Long Road

The decision is the latest twist in the legal drama over Trump's social media company.

The deal to take Trump Media public was delayed for years after the US Justice Department and Securities and Exchange Commission launched investigations — delays that DWAC says cost it more than $100 million. Last year it agreed to pay $18 million to settle claims by the SEC that the SPAC misled investors about its plans. And in mid-July the SEC made similar claims against Orlando himself.

Neither Orlando nor his lawyers have responded to requests for comment on the SEC suit. Trump himself wasn't accused of wrongdoing by the agency in the prior case against the company.

In yet another case, two founders of the media company claim Trump unlawfully sought to massively dilute their stake to "take the lion's share" for himself. He has denied wrongdoing.

A SPAC lists shares and then finds a company to merge with, taking it public. If it doesn't find such a company, it's supposed to return the funds it raised to its investors.

Volatile Shares

Trump Media's shares have been volatile ever since they began trading in March, two and a half years after the deal was announced in October 2021. They gained 16% in their first day on the Nasdaq stock market as swaths of retail traders touted the company across social media platforms including Reddit, X and Truth Social itself.

The shares tumbled to $22.55 three weeks later as Trump's fortunes wavered and, just this year, spiked as much as 50% with his defiant reaction to the failed assassination attempt at a mid-July campaign rally in Pennsylvania. Trump Media, which was worth nearly $10 billion in mid-May, has fallen by about two-thirds since its market capitalization peaked and is now worth roughly $3.34 billion.

The highs contrast with the financial performance of Trump Media, which brought in less than $1 million in revenue in the three months to June 30 and posted a net loss of $16.4 million.

If it weathers the storms of politics and the markets, Trump's shareholding could be a financial lifeline. The Republican nominee in this year's presidential race faces hundreds of millions of dollars in legal judgments after he lost New York state's case against him over fraudulent asset valuations and a pair of lawsuits by writer **E. Jean Carroll** over sexual abuse and defamation. He also has legal bills for his defense against several criminal cases.

Fight Over Ratio

Orlando, a former Deutsche Bank AG derivatives trader who launched the Benessere Capital SPAC, argued that Arc should have received 1.78 class A shares for each class B share it held. DWAC said it used the correct ratio, 1.34. The shares in question were placed in an escrow account during the dispute.

"The escrowed shares would either go to the SPAC organizers or Arc, so either way they should not affect Donald Trump's share of Trump Media," said **Usha Rodrigues**, a professor of corporate law at the University of Georgia School of Law.

The case is Arc Global Investments II v. Digital World Acquisition Corp., 2024-0186, Delaware Court of Chancery (Wilmington).

(Updates with details, context and background throughout, starting in third paragraph.)

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Peter Jeffrey, Elena Popina

Critical Mass With Law.com's Amanda Bronstad: Beasley Allen Sues Talc Co-Counsel, Hair Relaxer Lead Counsel Challenge Common Benefit Order

September 18, 2024 at 11:54 AM

Critical Mass

Amanda Bronstad
staff reporter

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

This week: After Allen Smith came out in support of **Johnson & Johnson**'s talc bankruptcy, **Beasley Allen** sued him. Lead counsel in the multidistrict litigation over **hair relaxers** are asking a federal judge to reconsider her order limiting their proposed common benefit fees. Find out who **Giant** supermarkets retained in a class action alleging its branded orange soda contains FDA-banned brominated vegetable oil.

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

'Numerous Egregious Errors' in Talc Verdict

Allen Smith (**Smith Law Firm**)'s decision to support **Johnson & Johnson**'s latest talc bankruptcy plan could garner the needed support of 75% of claimants—but not without some serious pushback from his former co-counsel.

Beasley Allen, which shares nearly 12,000 talc clients with the Smith Law Firm, sued Smith and his firm for breaching a 2014 joint venture agreement. Beasley Allen, which continues to oppose a talc bankruptcy, said the Smith Law Firm's work on the talc litigation had diminished—an accusation that Smith called "laughable." The suit claims Smith, faced with financial problems, owes Beasley Allen $1.16 million in expenses. Beasley Allen also sued **Porter Malouf**, which is part of the joint venture agreement.

The bankruptcy plan, focused on ovarian and other gynecological cancers, excludes victims of mesothelioma, but trials this year have hit Johnson & Johnson with $368 million in verdicts. Another trial started this month in Connecticut.

On Sept. 13, **Multnomah Circuit Court Judge Katharine von Ter Stegge** said she would reverse the largest of those verdicts: a $260 million award in Oregon. At the close of trial, the judge had sanctioned plaintiffs attorneys for referencing other talc lawsuits while cross-examining one of Johnson & Johnson's experts. As a sanction, she shaved $100 million off the $300 million in punitive damages they had been seeking.

Here's what both sides had to say about the reversal of the verdict:

Johnson & Johnson **Worldwide Vice President of Litigation Erik Haas**: *"The trial judge correctly vacated the indefensible $260 million verdict that, as previously stated, was the direct result of numerous egregious errors committed by the plaintiff's lawyers. Only through such prejudicial conduct have these lawyers secured their recent aberrant adverse jury verdicts, which have no basis in the law or science."*

Ben Adams (**Dean Omar**), for plaintiff Kyung Lee: *"While we respect the court and its ruling, we also disagree. We are prepared to explain to the appellate court our views on why the verdict should be allowed to stand and that no new trial is necessary."*

Hair Relaxer Judge Excludes State Court Cases From Fee Assessment

Lead counsel in the multidistrict litigation over **hair relaxers** have asked a federal judge to reconsider her order, which granted their request for a 10% common benefit assessment but excluded lawyers with state court cases.

U.S. District Judge Mary Rowland approved the fees and costs in an Aug. 22 order but sided with objecting firm **Keller Postman** in concluding that her "jurisdiction does not extend to cases that are not actually before it."

Ashley Keller (Keller Postman) claims to have thousands of clients with cancer claims tied to hair relaxer products, many of whom plan to sue in state courts.

Lead counsel, who filed their reconsideration motion on Sept. 5, are Diandra "Fu" Debrosse (**DiCello Levitt**), Fidelma Fitzpatrick (**Motley Rice**), Michael London (**Douglas & London**) and Ben Crump (**Ben Crump Law**).

Common benefit fees are becoming increasingly challenged in multidistrict litigation, particularly by lawyers with related state court cases.

Case in point: After a June 26 confidential settlement of personal injury cases, lead counsel in the multidistrict litigation over **Abbott**'s recalled infant formula asked for holdbacks of 8% for fees and 2% for costs, but lawyers T.J. Preuss (**Preuss Foster**), Claudia Guerrero (**Dilley Law Firm**) and Daniel Sciano (**Tinsman & Sciano**), who have two cases involving babies with "severe neurologic impairment" and "permanent brain damage," both of which were planned for bellwether trials, have objected. They argued that, should they opt out of the settlement, the assessments against their cases should not be the same as those that participate in the deal.

On Sept. 5, **U.S. District Judge Matthew Kennelly** granted the assessments, writing:

"This order is without prejudice as to any party who decides against participation in the confidential settlement program to come back before the court to re-determine any holdback amount at a later date."

Who Got the Work?

James LaRocca (**Hunton Andrews Kurth**) stepped in for **Giant** supermarket chains in a lawsuit alleging its branded orange soda contains brominated vegetable oil, which is used in citrus food and drinks as an additive. Gary Lynch (**Lynch Carpenter**) and Paul Doolittle (**Poulin Willey Anastopoulo**) filed the class action on Aug. 15, days after the FDA's ban on brominated vegetable oil in food went into effect.

Here's what else is happening:

Monsanto Milestone: **Monsanto** won a second **Roundup** verdict in Philadelphia after a jury found on Sept. 11 that the pesticide was defective but did not cause plaintiff Ryan Young's non-Hodgkin lymphoma. The first Roundup trials in Philadelphia came out with verdicts of $175 million, $3.5 million and $2.25 billion, but the fourth handed Monsanto, now owned by **Bayer**, its first defense verdict. Jury selection in the city's sixth Roundup trial began on Sept. 12, despite Monsanto's attempt to halt the proceedings in light of the **U.S. Court of Appeals for the Third Circuit**'s ruling last month on federal preemption.

Exxon Expansion: A Philadelphia judge upheld a $725.5 million benzene verdict against **Exxon Mobil**, then added another $90.8 million in delay damages. **Philadelphia Court of Common Pleas Judge Carmella Jacquinto** on Sept. 13 rejected Exxon's challenges that the verdict was "legally and constitutionally impermissible, factually unsupported and manifestly irrational," or that one of the jurors had posted comments online after the trial that showed bias.

Talc Verdict: A jury in Massachusetts state court awarded $39 million to a man who claimed he got mesothelioma from exposure to asbestos-containing talc during a surgical procedure in 2014. The Sept. 13 verdict was against **Cinbar Performance Minerals**, which supplied "Elite Talc 2000," the talc used to manufacture a powder administered during the procedure, which was designed to prevent future recurrence of collapsed lung. **The Lanier Law Firm**'s Mark Linder and Darron Berquist, along with Danny Kraft (**Meirowitz & Wasserberg**) and Christopher Duffy (**Duffy Law**) led the trial for plaintiff Bryce Zundel against defense counsel from **Husch Blackwell**: Brad DeJardin, Erin Carpenter and Mallarie Simonds.

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

Facebook Messenger, Messenger Kids Class Action to Move Forward

B **bloomberglaw.com**/product/blaw/bloomberglawnews/class-action/X12VHBTC000000

Meta Platforms Inc. will continue to face a putative class action alleging that its Facebook Messenger and Messenger Kids applications improperly collected and possessed biometric identifiers a federal court said.

The plaintiffs adequately alleged that Meta's applications violated the Illinois Biometric Information Privacy Act by claiming that Meta scanned users' face geometries, and that these scans can identify the people from whom they were taken, Judge Nancy J. Rosenstengel of the US District Court for the Southern District of Illinois said in a Tuesday order denying a motion to dismiss.

Meta argued that the scans aren't covered by BIPA because the data at issue aren't biometric. The scans aren't unique to individual users, and are therefore incapable of identifying the users, Meta said.

The court disagreed because the plaintiffs alleged that the applications created face scans to identify individuals' locations, expressions, and movements in real time, and that the resulting scans modeled users' faces based on an estimation of the location of parts of their faces.

This allowed users to superimpose filters and effects like bunny ears or cat whiskers on faces, the court said.

“These allegations permit an inference of personalization that supports the uniqueness of each scan based on the user from whom it was taken,” the court said.

The court also rejected Meta's argument that the plaintiffs' failed to adequately allege that the applications collect and possess biometric data.

The plaintiffs' allegation that Meta stores their biometric data on its servers, which the court accepts as true, undercuts Meta's argument, the opinion said.

Meta also failed to show that a federal law, the Children's Online Privacy Protection Act, expressly preempted the BIPA claims with respect to Messenger Kids, the court aid.

BIPA regulates biometric identifiers and biometric information, while COPPA regulates personal information like one's name, address, and telephone number, the court said.

“The thematic difference between biology-based and data-based identifying information should be apparent,” the court said.

Keane Law LLC represents the plaintiffs. Gibson Dunn & Crutcher LLP and Mayer Brown LLP represents Meta.

The case is Hartman v. Meta Platforms Inc. , S.D. Ill., No. 23-cv-2995, 9/17/24 .

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TikTok Hit With Class Action Over Collection of Children’s Data

B bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X4TFCSF8000000

Legal pressure on TikTok Inc. increased Tuesday with the filing of a new proposed class action alleging the company collected the personal information of children without parental consent in violation of the Children’s Online Privacy Protection Act.

Jody Villanueva, Angela Faucett, and Lamartine Pierre Jr. alleged that TikTok allows users who indicate they are younger than 14 to register for “TikTok For Younger Users” or “Kids Mode” accounts, but doesn’t notify parents or obtain their consent as required under COPPA.

The lawsuit comes five years after TikTok agreed to pay $5.7 million to settle a previous lawsuit from the Federal Trade Commission alleging it collected information about kids in violation of COPPA, and a month after the Department of Justice filed a lawsuit alleging that TikTok continues to allow children under 13 to create accounts without their parents’ knowledge or consent.

TikTok, which is owned by Beijing-based ByteDance Inc., is also the target of a federal law signed in April by President Joe Biden that would ban the social media service in the US unless it is sold before the end of 2024.

The measure was prompted by national security concerns that Beijing could access user data or influence what’s seen on the app. ByteDance says it is independent of the Chinese government and has challenged the law in court.

ByteDance didn’t respond immediately to a request for comment.

TikTok and its employees have long known that children misrepresent their ages to gain access to the platform, and that millions of children have access to TikTok content despite measures purportedly designed to prevent their access, the complaint alleged.

The company relies on human moderators to review flagged accounts potentially belonging to children, but requires them to ignore external information indicating a user is a child, it alleged.

TikTok also uses algorithms to predict user ages based on their online behavior, but refuses to use the algorithms to identify children under the age of 13 and stop them from using TikTok accounts, the complaint alleged.

The plaintiffs seek to represent a national class and California, New York, and Washington subclasses of children under the age of 13 whose information was collected by Bytedance without parental consent. The number of affected children is in the millions, the complaint said.

The complaint brings claims of unjust enrichment and violations of the California Unfair Competition Law and the Washington Consumer Protection Act.

The plaintiffs are seeking compensatory, actual, benefit-of-the-bargain, nominal damages, and punitive damages; restitution and disgorgement; equitable, injunctive, and declaratory relief; attorneys’ fees and costs; and prejudgment interest.

Cohen Milstein Sellers & Toll PLLC and Schonbrun Seplow Harris Hoffman & Zeldes LLP represent the plaintiffs and the proposed class.

The case is Villanueva v. Bytedance Inc. , C.D. Cal., No. 2:24-cv-07922, complaint filed 9/17/24 .

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GSK settles two California lawsuits related to heartburn drug Zantac

reuters.com/legal/gsk-settles-two-california-lawsuits-related-heartburn-drug-zantac-2024-09-18

Reuters

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

Sept 18 (Reuters) - British drugmaker GSK (GSK.L), opens new tab said on Wednesday it had agreed to settle two lawsuits in California that claimed its discontinued heartburn drug Zantac caused cancer.
GSK does not admit to any liability in either settlement, it said in a statement.

The drugmaker has settled a series of lawsuits related to Zantac over the past 12 months, including several in California.

California is generally seen as a more challenging legal environment for multinational companies as courts are known to be friendlier to plaintiffs.

Former Zantac makers GSK, Pfizer (PFE.N), opens new tab, Sanofi (SASY.PA), opens new tab and Boehringer Ingelheim are facing about 4,000 claims in California state court and about 2,000 in various other state courts around the country.
The bulk of the cases against GSK are in Delaware, where the British drugmaker faces more than 70,000 lawsuits.

A Delaware judge's decision in June to allow the lawsuits in the state to go forward dealt a blow to GSK, which appealed the decision.

Last month, the Delaware Supreme Court said it would hear the appeal by GSK and the other former Zantac makers.

Reporting by Yadarisa Shabong in Bengaluru; Editing by Shreya Biswas

Amazon slams authors' class action over audiobook distribution

reuters.com/legal/transactional/amazon-slams-authors-class-action-over-audiobook-distribution-2024-09-17

Mike Scarcella

The logo of Amazon is seen on the door of an Amazon Books retail store in New York City, U.S., February 14, 2019. REUTERS/Brendan McDermid Purchase Licensing Rights, opens new tab

Sept 17 (Reuters) - Amazon.com has asked a U.S. judge to dismiss what it called a "far-fetched" lawsuit by independent authors accusing the e-commerce giant of monopolizing the retail market for audiobooks and causing them to overpay for the distribution of their works.

In a filing, opens new tab in Manhattan federal court, Amazon on Monday night defended the 90-day exclusivity provision that its digital audiobook subsidiary Audible offers to self-published authors.

Amazon also said the market for audiobooks was competitive, with Apple and Google offering rival platforms.

Author Christine DeMaio, who publishes under the name CD Reiss, alleged in her June lawsuit that Amazon violates U.S. antitrust law by charging higher fees for writers who decline to participate in Audible's exclusivity program.
Amazon and lawyers for Reiss did not immediately respond to requests for comment on Tuesday.

Amazon bought Audible for about $300 million in 2008. The lawsuit called Audible the world's largest audiobook retailer, accounting for more than 60% of domestic purchasing compared with about 20% for Apple.

Industry-wide sales of audiobooks have steadily risen in recent years, reaching nearly $2 billion in 2022, according to the lawsuit.

Amazon's exclusivity program offers self-published authors 40% royalties for the distribution of their work, compared with 25% for authors who chose non-exclusive, competitive distribution.

Amazon's filing said its optional exclusivity provisions, which do not apply to top-sellers from major publishers, are "limited in both duration and share of affected audiobook sales." It said the program's 90-day window is shorter than the 1-to-3 year range that courts use to determine competitive harm from an exclusivity arrangement.

“The complaint alleges no facts showing that Audible has somehow hobbled Google or any other identified rival by inducing some self-published authors to sign exclusive deals,” Amazon’s filing said.

Switching from exclusive to general distribution is permanent, Reiss’ lawsuit said. Reiss said Audible’s policy “is designed to prevent experimentation, innovation, and a test of competition by discouraging authors from ever distributing on a competitive basis.”

Amazon also said it was lawful for the company to spend more resources promoting its exclusive content than on other titles.

Reiss is seeking class-action status for thousands of authors and rights holders.

The case is CD Reiss v. Amazon.com, U.S. District Court for the Western District of Washington, No. 2:24-cv-00851.

For plaintiff: Steve Berman of Hagens Berman Sobol Shapiro and Phillip Cramer of Sperling & Slater

For defendant: Carrie Mahan, Benjamin Mundel and Randi Singer of Sidley Austin

Read more:

Amazon accused of audiobook monopoly in author class action
Amazon defeats US consumers' class action over Whole Foods delivery fees
FTC lawsuit over Amazon's Prime program set for June 2025 trial
Amazon fends off US class action over 'guaranteed' delivery window
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Refugio Oil Spill $70 Million Settlement Wins Court Approval

B bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XERJSNSK000000

Litigation
Sept. 18, 2024, 10:12 AM PDT

Shayna Greene

A $70 million class action settlement between California property owners and a pipeline company stemming from the 2015 Refugio oil spill was approved by a federal court.

The plaintiffs alleged that a crude oil pipeline built in Santa Barbara County in the late 1980s wasn't properly maintained, resulting in hundreds of thousands of gallons of oil spilling onto their properties and into the Pacific Ocean.

- The settlement was finally approved on Tuesday by Judge Philip S. Gutierrez of the US District Court for the Central District of California; he gave the deal an early nod in May
- The agreement is between Pacific Pipeline Co., which took over ownership of the pipeline from Plains All American Pipeline LP; its owner Sable Offshore Corp.; and affected landowners
- Sable will pay $35 million up front to a qualified fund and provide a letter of credit for the other half; the median payout will be about $90,000 and the average payment about $230,000

The plaintff class is represented by Lieff Cabraser Heimann & Bernstein LLP, Keller Rohrback LLP, and Cappello & Noel LLP. Plains is represented by Munger, Tolles & Olson LLP.
The case is Grey Fox LLC v. Plains All Am. Pipeline LP , C.D. Cal., No. 2:16-cv-03157, 9/17/24 .

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US honey producers stung by dismissal of all RICO claims against importers

DJ dailyjournal.com/articles/380978-us-honey-producers-stung-by-dismissal-of-all-rico-claims-against-importers

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Sep. 18, 2024

The claims of a conspiracy by importers, certifiers and packers of foreign honey failed the particularity requirement for fraud cases by not giving the "who, what, when, where and how," U.S. District Judge Daniel Calabretta wrote.

A federal judge dismissed with prejudice claims by three U.S. honey producers accusing several importers, certifiers and packers of engaging in a conspiracy to import, certify and sell fake honey from India, Thailand and Vietnam.

The omnibus motion to dismiss was granted on Sept. 13 by U.S. District Judge Daniel J. Calabretta of the Eastern District of California, who found the plaintiffs failed to allege sufficient facts to satisfy the particularity requirement under Federal Rule of Civil Procedure 9(b). *Henry's Bullfrog Bees v. Sunland Trading Inc.*, 2:21-cv-00582 (E.D. Cal., filed March 29, 2021).

That rule states that "when a claim or complaint is 'grounded in fraud,'" the plaintiff must "state with particularity the circumstances constituting fraud or mistake," Calabretta wrote, citing *Kearns*, 567 F.3d.

The reason for the rule, the judge wrote, is to give defendants notice of the particular misconduct "so that they can defend against the charge and not just deny that they have done anything wrong."

In this case, he found, the plaintiffs did not allege the "who, what, when, where and how" of the alleged fraud or conspiracy.

The plaintiffs' claims of "sham audits" "testing" and "boilerplate accusations" implying that honey imported from certain countries is likely to be adulterated or manufactured of resins, were not supported by any facts, such as who did the audits or tests, or how the alleged conspiracy scheme was carried out, Calabretta wrote.

Calabretta noted that Rule 9(b) not only provides defendants adequate notice but protects those whose reputation would be harmed as a result of being subject to fraud charges" and prohibits plaintiffs "from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

American honey producers must meet U.S. Department of Agriculture standards. The plaintiffs claimed in the lawsuit that the defendants were concealing their honey is of a lower quality by marking it as "True Source Certified," and named True Source as a defendant also.

True Source Honey LLC says on its website it is "a not-for-profit organization launched in 2010 by a group of honey companies and importers to call attention to the problem of illegally sourced honey from China. Today, True Source Honey has more than 750 members, including beekeepers and honey importers, exporters and packers. An estimated 40% of honey sold in the United States and Canada is True Source Certified, which requires honey to be fully traceable, from hive to table, tested to confirm authenticity and audited by a third party."

The lawsuit claimed that True Source is "aided in providing these fraudulent certifications by Defendant Intertek Food Services GmbH, a food testing lab, and Defendant NSF International, an auditing organization, both of whom are employed by Defendant True Source."

#380978

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Looking back at top insurance lawsuits across the industry

DI dig-in.com/list/looking-back-at-top-insurance-lawsuits-across-the-industry

Frank Gargano September 17, 2024

Lawsuits

A look at the insurance lawsuit woes of Allstate, State Farm and more

By Frank Gargano
September 17, 2024 5:00 AM

The insurance industry has seen a surge in lawsuits in recent years, as policyholders and regulators alike have taken a closer look at the practices of insurance companies — highlighting the importance of due diligence in underwriting standards. But with the promises of improved efficiency that come with artificial intelligence, how can insurers safely implement these tools?

Research published by Digital Insurance in January polled 100 experts from carriers to brokers on predictions for what 2024 would yield in terms of threats to industry growth, digital transformation opportunities, the growing use of AI and more.

Respondents from carriers and agencies both agreed that there is value in using traditional AI and generative AI tools, but 73% found that it was too risky to deploy within their organizations.

Broken down by each individual group, that view was prevalent among 83% of carriers and 60% of agency professionals.

A further 68% held that it was too risky to insure clients that use AI in some capacity, which yielded a smaller disparity in views among carriers and agency experts at 71% and 66% agreeing respectively.

John Romano, principal with Baker Tilly's principal financial services risk advisory practice, said that securely implementing AI-powered tools in an insurance organization requires regular audits to continually monitor their transparency and explainability.

"Assessing transparency will determine what data is used to come to an answer, and assessing explainability will determine if AI tools can provide understandable and clear reasons behind decisions," Romano said.

Read more: Does technology make it easier to perpetrate insurance fraud?

The rise in lawsuits against insurance providers over the last few years, while not centered around technology per se, highlights the growing trend of legal action involving business liability, business interruption and non-hurricane homeowners policies.

Lex Machina, a division of LexisNexis company, published its Insurance Litigation Report in June covering the period of 2021 to 2023. Across that time frame, roughly $1.56 billion in total damages was awarded as approved class action settlements, as originally reported by Digital Insurance's Kaitlyn Mattson.

Romano highlighted the importance of consistent communication between insurers and policyholders as part of managing customer relationships — especially in anticipation of an impending claims event.

"In today's insurance market, particularly with the increasing frequency and severity of natural disasters, consumers fear they won't receive the claims payouts they expect. … At the same time, regulators are focused on ensuring that insurers uphold their responsibility to policyholders, with concerns centered on both solvency and the fair treatment of consumers," Romano said.

Read more: **Carriers must educate policyholders on weather damage risks, Nationwide P&C exec says**

Read on to dive into some of the top lawsuits that have plagued insurers over the last few years and how they impacted firms and consumers alike.

Yuki Iwamura/Photographer: Yuki Iwamura/AFP/G

Allstate, State Farm sued over $4B Maui fire settlement

Six victims of the devastating wildfires that destroyed much of Maui last year have launched a lawsuit against a cohort of insurers, including State Farm and Allstate, for allegedly sabotaging plans to settle their claims.

The $4 billion deal would create a settlement fund to provide residents on the island with the capital necessary to continue rebuilding, while also resolving numerous outstanding lawsuits against Hawaiian Electric Industries Inc. and other companies considered to have caused the fires.

The lawsuit filed in state court in July goes after insurers seeking to garner roughly $2 billion from the fund as reimbursement for claim payments made last year. Hawaii state law includes what is known as a "made-whole doctrine," which dictates that insurance-policy customers must be "made whole" from losses before providers can call for a reimbursement.

"This action arises out of the greed of Hawaii's insurance industry to put their own selfish profits ahead of the suffering of the people of Maui who are the true victims of the Maui fires," according to the lawsuit, filed by lawyers for homeowners and business owners.

Read more: Allstate, State Farm sued over $4B Maui fire settlement

COMMENTARY

Hyperlinked Documents: The Latest e-Discovery Challenge

As courts and discovery experts debate whether hyperlinked content should be treated the same as traditional attachments, legal practitioners are grappling with the technical and legal complexities of collecting, analyzing and reviewing these documents in real-world cases.

September 17, 2024 at 11:19 AM

E-Discovery

By Ryan Hemmel and Luke Groth | September 17, 2024 at 11:19 AM

The original version of this story was published on Law.com

What You Need to Know

- Dynamic files shared as links rather than attachments — known as hyperlinked documents — are emerging as a new frontier in the e-discovery landscape.
- The choice between sending a link or an attachment is often dictated by the platform.
- The evolving case law will continue to shape best practices, but proactive strategies and flexibility will be key to effectively managing hyperlinked content in e-discovery.

Dynamic files shared as links rather than attachments — known as hyperlinked documents — are emerging as a new frontier in the e-discovery landscape. As courts and discovery experts debate whether hyperlinked content should be treated the same as traditional attachments, legal practitioners are grappling with the technical and legal complexities of collecting, analyzing and reviewing these documents in real-world cases.

How Cloud Storage Changed File Sharing

Cloud storage services such as OneDrive, SharePoint, and Google Drive have revolutionized file sharing, facilitating collaboration in an increasingly global workplace. By sharing links, users can distribute documents quickly, bypassing email attachment limits and physical transfers. These links allow recipients to view and edit files in real time, ensuring they always see the most up-to-date version. While convenient, hyperlinked documents introduce significant challenges for e-discovery professionals.

Understanding Hyperlinked Documents

A hyperlinked document is shared via a link or URL in an email or chat, rather than being physically transmitted as an attachment. The underlying file remains on a cloud server and can be accessed by clicking the link. Examples include:

- **Microsoft:** Share > Copy Link > Paste the link.
- **Google Docs:** Bookmark icon > Right-click Link > Copy link address.
- **Box:** Hover over file/folder > Create and Copy Shared Link > Send Shared Link > Enter collaborator's email/name > Type a message > Send.

These documents are common in collaborative applications, offering advantages such as reduced email storage and real-time collaboration. However, their dynamic nature poses unique challenges for e-discovery.

Hyperlinked Documents or Modern Attachments?

The terminology surrounding hyperlinked documents is not yet standardized. Some e-discovery experts refer to them as "modern attachments," while others prefer terms like "pointers" or "embedded files." This evolving terminology reflects the shift from traditional email attachments to more dynamic forms of document sharing.

New Challenges In e-Discovery

Hyperlinked documents introduce several challenges in e-discovery, including:

- **Searchability:** Early case assessment and filtering tools may not search the content of hyperlinked files. These files can only be searched locally after download.
- **Accessibility:** Links may become inaccessible over time if the underlying files are deleted, moved, or renamed.
- **Document Families:** Relating a hyperlinked document to the chat or message containing the link can be difficult, complicating the reconstruction of document "families." The same file may have been shared in multiple different email/chat threads.
- **Versioning:** Hyperlinked documents' collaborative nature means the final version can differ significantly from the original. Preserving and collecting every version can be impractical due to increased costs.
- **Platform Capabilities:** Platforms vary in their handling of hyperlinked documents. For example, Google introduced hyperlinked attachment collection in Google Vault in December 2023 but lacks versioning capabilities. Microsoft Purview eDiscovery (Premium) provides a load file to link parents to attachments, whereas Google relies on metadata and file names. Slack exports only include download links. Even within the same platform, organizations with different licenses may have access to different features. For example, with Microsoft Purview eDiscovery (Standard), available with an E3 license or equivalent, hyperlinked attachments need to be collected separately, whereas with Microsoft Purview eDiscovery (Premium), available with an E5 license or equivalent per custodian, hyperlinked attachments can be collected alongside the parent email/Teams chat in which they were shared.

Plan Ahead: Address Hyperlinks in ESI Protocol

The choice between sending a link or an attachment is often dictated by the platform. For instance, Gmail automatically converts files over 25MB into links; Slack eDiscovery exports include only links to shared files; and Microsoft Teams exclusively uses hyperlinked documents. Discovery teams must consider the platform's custodian use and the nature of linked content when planning ESI collections and processing. When negotiating an ESI protocol, it's important to be clear about how hyperlinked documents will be treated.

Judicial Perspectives

Case law on hyperlinked documents in e-discovery is still developing. Courts have not yet reached a consensus on treating hyperlinks as attachments, resulting in varied decisions that highlight the unsettled nature of this issue. A few recent case law examples illustrate the varied perspectives.

"Hyperlinked documents are not attachments"

In the case of *Nichols v. Noom, Inc.*, No. 20-CV-3677 (LGS) (KHP) (S.D.N.Y. Mar. 11, 2021), the court ruled that hyperlinks are different from physical document attachments for the purpose of e-discovery production. This is often viewed as the case that started the debate on whether hyperlinks should be viewed as attachments.

In their ESI protocol, the parties had agreed to use Google Vault to collect data that defendants stored in Gmail and Google Drive. During review, plaintiffs discovered that a common practice was to include hyperlinks to internal files instead of physically attaching documents to their emails. Plaintiffs asked the court to have defendants use an outside vendor that could re-collect and produce hyperlinks as part of the document family, as this could not be accomplished with Google Vault.

U.S. Magistrate Judge Katharine Parker stated that the court does not agree that a hyperlinked document is an attachment:

"While the Court appreciates that hyperlinked internal documents could be akin to attachments, this is not necessarily so. When a person creates a document or email with attachments, the person is providing the attachment as a necessary part of the communication. When a person creates a document or email with a hyperlink, the hyperlinked document/information may or may not be necessary to the communication. For example, a legal memorandum might have hyperlinks to cases cited therein. The Court does not consider the hyperlinked cases to be attachments."

"Hyperlinked documents ARE attachments"

In *In re StubHub Refund Litig.*, No. 20-md-02951-HSG (TSH) (N.D. Cal. April 25, 2023), California Magistrate Judge Thomas S. Hixson granted the plaintiffs' motion to compel and ordered the defendant to produce the linked documents as agreed to in the ESI protocol or "produce for deposition within 14 days after the deadline to complete document production a Rule 30(b)(6) witness with full knowledge of everything StubHub and its vendors did in attempting to produce linked documents as attachments as required by the ESI Protocol."

"Requirement to produce contemporaneous version"

In *In re: Uber Technologies, Passenger Sexual Assault Litig.*, 2024 WL 1772832 (N.D. Cal. April 23, 2024), U.S. District Court Judge Lisa Cisneros ordered Uber to produce "to the extent feasible on an automated, scalable basis … the contemporaneous document version" of Google Drive documents sent via URL or hyperlink. Judge Cisneros further agreed that where no automated solution exists, Uber was required to manually produce "up to 200 hyperlinks" identified by plaintiffs.

"Hyperlinks are not the same as traditional attachments"

In the case *In re Insulin Pricing Litig.*, No. 3:17-cv-0699 (BRM) (RLS), MDL No. 2080 (D.N.J. May 28, 2024), New Jersey Magistrate Judge Rukhsanah L. Singh ruled on several contested ESI issues related to the parties' respective proposed ESI protocols, including hyperlinks, where she agreed with the defendants that "hyperlinks are not the same as traditional attachments." Judge Singh further stated, "Defendants have sufficiently proffered that such tools are either not feasible whatsoever or unduly burdensome to apply to their respective data environments," and denied the plaintiffs' request for additional meet and confers.

Best Practices

Given the complexities, e-discovery professionals should adopt the following best practices.

- **Understand your technology:** Know the capabilities and limitations of the platforms you use.
- **Negotiate ESI protocols:** Clearly define how hyperlinked documents will be handled in ESI protocols.
- **Tailor solutions:** Be flexible and adapt strategies to the specifics of each case.

Hyperlinked documents represent a significant shift in the e-discovery landscape, reflecting broader changes in how we share and collaborate on information. As legal professionals navigate this new terrain, understanding the technical nuances and developing robust protocols will be essential. The evolving case law will continue to shape best practices, but proactive strategies and flexibility will be key to effectively managing hyperlinked content in e-discovery. By staying informed and adaptable, attorneys and e-discovery professionals can better address the challenges posed by these dynamic documents and ensure a thorough, efficient discovery process.

*****

Ryan Hemmel is a 10-year veteran of the legal technology industry. As a ProSearch solutions engineer, Ryan leads the Microsoft 365 Managed Services initiative, where he assists ProSearch clients in managing their Microsoft 365 discovery strategies and workflows. As an engagement manager at ProSearch, **Luke Groth** oversees the business portfolios of multiple clients and manages a client services team that supports a smooth acclimation for all new ProSearch clients.

This article appeared in Cybersecurity Law & Strategy, an ALM publication for privacy and security professionals, Chief Information Security Officers, Chief Information Officers, Chief Technology Officers, Corporate Counsel, Internet and Tech Practitioners, In-House Counsel. Visit the website to learn more.

Securities Law News

Sept. 17, 2024, 8:53 AM PDT

US Wants Some of Ocwen Whistleblowers' Fraud Claims Thrown Out

By Daniel Seiden

- Prosecutors say pre-2017 claims have been publicly litigated
- Whistleblowers have low probability of success, US says

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US Wants Some of Ocwen Whistleblowers' Fraud Claims Thrown Out

By Daniel Seiden 2024-09-17T11:53:56000-04:00

- Prosecutors say pre-2017 claims have been publicly litigated
- Whistleblowers have low probability of success, US says

US prosecutors say that a portion of a False Claims Act suit alleging that Ocwen Loan Servicing LLC and others defrauded a federal mortgage assistance program should be dismissed.

The government filed Monday a motion to intervene in part, and to dismiss in part, with the US District Court for the Eastern District of Texas.

Dismissing claims that accrued on or before Feb. 17, 2017, will prevent whistleblowers Jean-Marc Eichner and Brandon Loyd from continuing to pursue conduct that was dismissed with prejudice in another suit, *United States ex rel. Fisher v. Ocwen Loan Servicing* , the government said.

Eichner and Loyd allege that Ocwen and others made false certifications under the Department of the Treasury's Home Affordable Modification Program during the 2008 housing crisis.

Defendants in this case also include hundreds of identified residential mortgage-backed securities trusts comprised of mortgages serviced by Ocwen, and US Bank N.A., Deutcsche Bank National Trust Company, The Bank of New York Mellon, and Wells Fargo Bank N.A. The whistleblowers say that Ocwen acted as the RMBS trust defendants' agent when it serviced loans.

The court denied the defendants' motion to dismiss in February 2023. The RMBS trust defendants Sept. 11 filed a motion for partial summary judgment based on res judicata conduct through Feb. 17, 2017.

Under the FCA, the government can move to end whistleblower suits viewed as meritless or burdensome by giving notice of a motion to dismiss with opportunity for a hearing on the motion.

The government here cited the US Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources Inc.* , which clarified the standard for what the government must do to secure the dismissal of a whistleblower suit.

For the government to win dismissal, it must intervene in the suit and then show that the motion satisfies the voluntary dismissal standard rule in Federal Civil Procedure 41, the Supreme Court said.

The government here said it has good grounds to dismiss the pre-Feb. 17, 2017 alleged conduct because these claims have already been publicly and extensively litigated.

Information about that conduct is in the public domain, and the whistleblowers don't bring additional knowledge to the pre-2017 portion of their case against the defendants, the government said.

The whistleblowers' low probability of success also favors dismissal because they don't deny that they are precluded from litigating the pre-2017 claims under the doctrine of res judicata, the government said.

The government also said no in-person hearing is necessary for the court to grant dismissal because there are no constitutional concerns about the whistleblowers' rights in this case.

O'Melveny & Myers LLP and Locke Lord LLP represent Ocwen. Morgan, Lewis & Bockius LLP and Plunk Smith PLLC represent US Bank, Deutsche Bank, and Bank of New York Mellon. Jones Day represents Wells Fargo. Boyd & Associates LLC, Bragalone Olejko Saad PC, and Sanders, Motley, Young & Gallardo represent the whistleblowers.

The case is United States ex rel. Eichner v. Ocwen Loan Servicing LLC , E.D. Tex., No. 19-cv-524, motion 9/16/24 .

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https://www.wsj.com/tech/biotech/23andme-board-resigns-in-new-blow-to-dna-testing-company-12f1a355

TECHNOLOGY | BIOTECH

23andMe Board Resigns in New Blow to DNA-Testing Company

CEO Anne Wojcicki 'surprised and disappointed' after independent directors say she failed to produce 'actionable' buyout proposal

By Rolfe Winkler Follow

Sept. 18, 2024 1:29 am ET

23andMe has struggled to find a profitable business model. PHOTO: DAVID PAUL MORRIS/BLOOMBERG NEWS

All seven independent directors of DNA-testing company 23andMe ME 1.64% ▲ resigned Tuesday, following a protracted negotiation with founder and Chief Executive Anne Wojcicki over her plan to take the company private.

It is the latest challenge for 23andMe, which has struggled to find a profitable business model. The stock price fell to $0.30 a share after hours on Tuesday. At that price, the company is worth less than the cash on its balance sheet.

In a letter addressed to Wojcicki, the directors wrote that "after months of work, we have yet to receive from you a fully financed, fully diligenced, actionable proposal that is in the best interests of the non-affiliated shareholders."

It is very rare for a publicly traded company to see so many directors resign simultaneously. The board members wrote that they differ with Wojcicki on the "strategic direction for the company" and because of her voting power, it was best that they resign.

Wojcicki controls 49% of 23andMe votes, giving her a level of control that blocked board members from shopping the company to other potential bidders. She is the only remaining board member after the resignations.

"I am surprised and disappointed by the decision of the directors to resign," Wojcicki wrote in a late Tuesday memo to her employees. She wrote that taking 23andMe private, "outside of the short term pressures of the public markets," is still the best plan for the company and said she would find new independent directors.

23andMe has never made a profit and is burning cash so quickly it could run out next year. Customers only need to take its DNA test once, and Wojcicki's plan to sell subscriptions has foundered.

Another strategy to use its DNA database to develop drugs has also been a money loser.

In April, Wojcicki announced her intention to acquire all 23andMe shares she doesn't own, saying that she wouldn't support a bid by another buyer. In late July, she proposed a price of $0.40 a share, but directors wrote in a letter a few days later that they were disappointed because it offered no share-price premium and lacked committed financing.

The directors threatened to engage a consultant to find a sustainable business model if she didn't revise her offer quickly.

Days later, Wojcicki's sister Susan Wojcicki, the former CEO of YouTube, died suddenly, delaying any action from the board.

Last month, 23andMe said it would shut down its drug-development group, though it is continuing development of two drug candidates in clinical trials and hopes to develop other drugs with pharmaceutical company partners in the future. Its latest strategy: joining the rush of telehealth companies prescribing GLP-1 weight-loss drugs.

Write to Rolfe Winkler at Rolfe.Winkler@wsj.com

Videos

23andMe independent directors quit board over unsatisfactory buyout plan from CEO

reuters.com/business/healthcare-pharmaceuticals/23andme-independent-directors-quit-board-over-unsatisfactory-buyout-plan-ceo-2024-09-17

Reuters

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 17 (Reuters) - The independent directors of genetic testing firm 23andMe (ME.O), opens new tab said on Tuesday they have resigned from the company's board after not receiving a satisfactory take-private offer from CEO Anne Wojcicki.
Wojcicki, who has been trying to take the company private since April, proposed to acquire all outstanding shares of 23andMe not owned by her or her affiliates for $0.40 per share, in July.
"After months of work, we have yet to receive from you a fully financed, fully diligenced, actionable proposal that is in the best interests of the non-affiliated shareholders," said the seven directors in a letter to the company's co-founder and CEO.

A special committee formed by the company rejected Wojcicki's previous proposal, deeming it insufficient and not in the best interest of the non-affiliated shareholders.
"That we have not seen any notable progress over the last 5 months leads us to believe no such proposal is forthcoming," the directors added.

They also said the special committee is unwilling to consider further extensions, and that the company's board agrees with it.

Earlier this month, Wojcicki said she would be open to considering third-party takeover proposals for the company.
23andMe, best known for its saliva-based test kits that offer users a glimpse into their genetic ancestry, went public in 2021.

Keep up with the latest medical breakthroughs and healthcare trends with the Reuters Health Rounds newsletter. Sign up here.

Reporting by Puyaan Singh in Bengaluru; Editing by Alan Barona

Securities Law News

Sept. 17, 2024, 9:42 AM PDT

Kubient’s Stock Offerings Touted False Revenue From AI, SEC Says

By Martina Barash

- **COURT:** S.D.N.Y.
- **TRACK DOCKETS:** No. 1:24-cv-06990 and No. 1:24-cv-06988

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Kubient’s Stock Offerings Touted False Revenue From AI, SEC Says

By Martina Barash 2024-09-17T12:42:42000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKETS:** No. 1:24-cv-06990 and No. 1:24-cv-06988

Kubient Inc.'s former president schemed to misrepresent the technology company’s revenue ahead of public stock offerings by falsely claiming its flagship AI product was in beta testing, the SEC says.

The executive, Paul Roberts, who was also the company’s interim CEO and chair, has entered into a partial settlement in which he has agreed to orders against further securities law violations, according to a filing Monday in the US District Court for the Southern District of New York.

The Securities and Exchange Commission separately sued Joshua Weiss, Kubient’s former chief financial officer, and Grainne Coen, its former audit committee chair, for allegedly making false statements about revenue after becoming aware that the artificial intelligence tool hadn’t been tested. Their misconduct included lying to Kubient’s independent auditor, the SEC alleges.

Kubient said it was developing its product to determine digital advertising prices by detecting software activity rather than human views, according to the SEC. It entered into two contracts with customers to test their data, but they never provided the data, the SEC says. Nevertheless, Kubient recorded $1.3 million in revenue from the deals in advance of its initial public offering, according to the commission.

On the day that Kubient launched its secondary public offering, Weiss and Coen learned that the tests hadn’t been performed, the SEC says. They allegedly made false statements to investors, the public, and an auditor.

Marcum LLP was Kubient's auditor, according to an auditing regulator's website.

Roberts' agreement with the SEC doesn't resolve issues of disgorgement, a civil penalty, or an officer and director bar, according to the proposed judgment filed by the SEC.

The US Attorney's Office for the Southern District of New York on Monday announced parallel criminal charges against Roberts, according to an SEC press release.

The SEC brings claims for securities fraud, false statements to an accountant, falsifying records, false certifications, false SEC filings, and related violations. It seeks injunctions, an officer and director bar, disgorgement, and civil penalties against all three defendants.

Judge Lewis J. Liman is assigned to Weiss' case.

Paul Krieger of Krieger Lewin LLP, an attorney for Weiss, declined to comment in an email Tuesday. Attorneys for Roberts and Coen at Cohen & Gresser LLP and Eversheds Sutherland (US) LLP, respectively, didn't immediately respond to emailed requests for comment.

The SEC represents itself.

—With assistance from Amanda Iacone.

The cases are SEC v. Roberts , S.D.N.Y., No. 1:24-cv-06990, complaint 9/16/24 and SEC v. Weiss , S.D.N.Y., No. 1:24-cv-06988, complaint 9/16/24 .

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Matt Levine’s Money Stuff: Archegos’ Banks Had Some Chats

By Matt Levine 2024-09-17T14:37:33741-04:00

Archegos antitrust

A lot of problems in finance come from fire sales and contagion, and a lot of regulation is organized around preventing them. Most classically, there is bankruptcy law: When a company runs into financial trouble, all of its creditors have an incentive to demand their money back and grab collateral to get paid back before everyone else, but if they all do that then the company will collapse and there won’t be much value left for anyone. So bankruptcy law gives the company the ability to stall its creditors and pay them all back equally, which prevents a rushed fire sale and preserves more value for all of them.

This problem is even more acute in *banking* — when a bank is troubled, depositors will run to get their deposits back — so there are things like deposit insurance and the central bank’s lender-of-last-resort function, which are designed to prevent value-destroying runs on the bank.

More generally, in financial markets, there is a classic bad cycle where:

- A lot of firms all hold a lot of the same sort of asset.
- One firm runs into trouble and has to sell its assets.
- This drives down the price of the asset.
- Now the *other* firms that own it are in trouble, so *they* have to sell.
- Etc.

This is called “contagion,” and financial regulators think a lot about how to manage it. Mostly they try to prevent it, trying to limit crowded positions and run-prone firms. But sometimes, when a crowded position *has* gone wrong, regulators step in to manage the fallout and limit contagion. The most famous modern case is probably Long-Term Capital Management, a hedge fund that collapsed with a lot of very levered, very crowded trades, where the Federal Reserve Bank of New York organized a bailout by creditors to avoid a fire sale of assets and contagion to other funds and banks. “The Fed came to be concerned," it says, "that if LTCM's extensive list of counterparties tried to exit their positions at the same time, it would create a rapid and widespread sale of assets, a fire sale, which could potentially impair the economy."

Meanwhile US antitrust law prohibits "every contract, combination … or conspiracy in restraint of trade." In particular, when competitors agree on the price or quantity of the thing they are selling, that's bad. If two companies get together and agree not to sell more than 10,000 widgets each per day, or not to sell widgets for less than $50 per widget, that's a federal crime.

And this rule applies pretty broadly, so generally if two *securities firms* each own some *stock*, and they agree with each other not to sell more than 10,000 shares per day, or not to sell the shares for less than $50 each, that is also possibly a federal crime. Though, in many cases, not: An initial public offering, for instance, is normally done by a group of banks, all of whom agree on how many shares they will sell and at what price.

And, you know. Some gray areas. If you are a swaps counterparty of LTCM, and it has busted, and you are thinking of blowing it out of its swaps and selling its collateral, and the Fed calls you into a meeting with a dozen other swaps counterparties of LTCM, and the Fed says "don't blow them out of their swaps and sell their collateral, because if you all do that at once it will drive down the prices of the collateral and cause contagion and possibly impair the economy," you will be inclined to say "sure okay that's reasonable" and do what the Fed asks.

And, similarly, if you are a swaps counterparty of Archegos Capital Management, and it has busted, and you are thinking of blowing it out of its swaps and selling its collateral, and Archegos gets you on a phone call with a dozen of its other swaps counterparties, and Archegos says "lol sorry guys but you all have the same swaps against the same collateral and if you all sell at once it will drive down the prices of the collateral and cause contagion," and the other counterparties on the call say things like "hmmm maybe we should not do that then," you *might* be inclined to say "hmmm good point let me think about that," and you might then *get arrested:*

The US Justice Department is ramping up scrutiny of banks that collectively lost billions of dollars in the collapse of Bill Hwang's investment firm — mere months after scoring a conviction against him for deceiving those very firms.

Prosecutors in the Justice Department's criminal antitrust division have kicked back to life a dormant probe examining how Hwang's lenders unwound more than $150 billion in bets placed by his family office, Archegos, according to people familiar with the matter.

Since Hwang’s trial, the department’s San Francisco office has made fresh inquiries, zeroing in on emergency talks the banks held in March 2021, where participants floated proposals to coordinate an orderly liquidation of their client’s portfolio to minimize their own losses, the people said.

The DOJ is probing if there was collusion or a conspiracy to collude to control prices in those chats. At least three banks — Credit Suisse, Nomura Holdings Inc. and UBS Group AG – reached a managed liquidation agreement to sell down parts of their Archegos exposure. Others like Goldman Sachs Group Inc., Morgan Stanley and Deutsche Bank AG explored such an agreement before deciding against it. …

“The Justice Department says nothing justifies coordinating your decision-making on something that’s going to impact the value of or the price of a stock,” said Lisa Phelan, an antitrust attorney with Morrison Foerster in Washington and a former DOJ criminal antitrust chief.

“People might think it will be really helpful and good, but they should check. Generally DOJ is loath to give an exception,” said Phelan, who isn’t involved in the case.

You could imagine telling an economic story like:

- 1. It is bad for widget manufacturers to coordinate to sell widgets at prices higher than their fundamental value (cost of production, etc.), so a conspiracy to limit widget production is Bad.
- 2. But it is *good* for securities dealers to coordinate not to sell stock at prices *below* its fundamental value, so an agreement not to dump all of the stock at once in a way that will predictably push down prices is Good.

And I have: When we talked about a possible Archegos antitrust probe a few years ago, I wrote that in most markets high prices are understood to be a bad, anti-consumer thing, while in financial markets “low volatility is sort of a social good, and frankly high prices are popular.”

But that is a flawed story. For one thing, it’s not really the law. (Not legal advice!) Even if you think it is “helpful and good” to coordinate not to dump all your stocks at once, it can still land you in trouble.

Also, though, it is hard to know what fundamental value is.

In fact, Archegos’s collateral — the dozen stocks underlying its large swaps positions — was arguably trading *way above* fundamental value, because Archegos had been manipulating those stocks up. A collapse in the stock prices was chaotic for the market and bad for Archegos’s banks, but perhaps it was fundamentally justified. One of Archegos’s big positions was ViacomCBS (now Paramount Global), which closed at $100.34 per share on March 22, 2021, just before Archegos blew up and fell below $47 a few days later. This was a precipitous, chaotic, fire-sale-driven drop, but also correct; the stock never got above $47 again, and it closed yesterday at $10.42. The fire sale of Archegos’s stocks arguably pushed their prices to the correct levels.

Private credit

Classically, big investment banks help companies with two sorts of financing. There is what I guess you could call normal financing, things — stocks, bonds, syndicated loans, etc. — with fairly standardized terms, which the banks *sell* to investors. If a big A-rated company comes to a bank and says “we’d like to borrow $1 billion unsecured for 10 years at a fixed interest rate,” the bank will say “ah yes what you are looking for is an investment-grade bond,” and the bank will structure the bond and go find investors — mutual funds, insurance companies, hedge funds — to buy it. The bank is in “the moving business, not the storage business”; there’s no reason for the *bank* to buy those bonds, to give the company the money itself from its own balance sheet. The bank just matches the company to the investors and collects a fee for its troubles.

And then there is what you could call weird financing, where the company comes to the bank and says “I’ve got some weird asset or cash flow or idea and I would like to get financing against it,” and the bank has some people back in a lab who will cook up some complicated structure to give the client what it wants. “Ah sure we can lend you money non-recourse for 53 months secured by airline leases and a non-transferable stake in a joint venture, but it will cost you,” the bank will say, and then do it. This sort of thing is much harder to syndicate, to sell to investors. It’s weird and nonstandard, normal bond investors don’t understand it, it will take a lot of time for the bank’s sales force to get up to speed on it, and the *client* wants to deal flexibly with a single bank rather than a bunch of faceless investors. So the weird stuff gets done by the bank as principal, on its balance sheet, to make the client happy. Sometimes the bank is in the storage business.

This is all very generalized and of course things converge. In particular, once a bank has done some weird trade more than once, it will get to work on standardizing and syndicating it. There is in fact a large investor market for aircraft-backed securities. "We can lend money against this weird stuff" is okay, for a bank, but "we can create a market for financing this weird stuff and match lenders and borrowers" is generally better. And investors are happy to be pitched on weird stuff, because it usually offers higher returns — and more intellectual entertainment — than standardized stuff. But it helps if the weird stuff has a large enough market to be interesting and liquid.

And so we talked recently about deal-contingent hedges, a somewhat weird financing product that banks offer from their own balance sheets, but that are increasingly syndicated to hedge funds. In part because syndicating anything is a good business for the banks, but also in part because banks tend to face financial and regulatory constraints: It is *expensive* for them to take a lot of risk on their balance sheet, because of regulatory capital requirements and general regulatory concerns about risk, while hedge funds can kind of do whatever. Or we have talked about the "capital solutions" business at credit funds, which involves calling up distressed companies and saying "hey we'll lend you some more money if you pull a weird trick on your other lenders."

And so increasingly if you are a company that wants weird financing, and you call up your big investment bank, it will say "well *we* can't give you that weird financing, but we'll try to find someone for you." And given that, you might *not* call up your big investment bank. The people — hedge funds, private credit firms — that have balance sheets they can use to do weird financing trades will also just *hire former bankers* to *market* those trades. You don't call up Goldman Sachs Group Inc. to get your weird financing, you call Apollo Global Management Inc. Or Apollo calls you:

Apollo says it could originate more than $200bn in overall corporate loans annually by 2026. One part of that effort is what it calls its "high-grade capital solutions" strategy. Apollo then places the paper it spins up into its retirement annuities affiliate Athene, as well as third-party insurers and other asset managers, the latter two generating management and transaction fees. …

Each deal has different terms but all transform a cash flow waterfall into investment-grade debt that is supposed to simultaneously solve a challenge for the Apollo counterparty, support retirement savings of Athene's elderly customers and give Apollo a higher rate of return for its shareholders. ...

The pitch to corporate clients is just one part of Apollo's broader lending push, as it looks for loans of all kinds that can feed both its own and third-party insurers. It provides financing underlying rail cars, aeroplanes, music royalties, machinery, inventory, real estate and even other asset managers who are in need of capital.

"They just really understand how to drive through these alternative structured pathways and then they get paid for it," said an executive from one firm that is financed by Apollo. "They have worked out a way to make sure they are compensating themselves pretty richly."

And for a firm whose heritage lies in swashbuckling corporate takeovers, its $500bn credit business has essentially become about replicating a traditional banking model. Insiders describe an intensive marketing effort resembling a Wall Street sellside apparatus, where Apollo executives are relentlessly trying to get an audience with Fortune 500 treasurers and chief financial officers in order to pitch them on Apollo-designed transactions.

Yes it's just a better pitch! "You need money in some complicated way? Well, good news: We love complication, and we have a lot of money, and we can lend it to you."

Cell phones

We talk a lot about the US Securities and Exchange Commission's push to fine every company in or near the financial industry for texting about work on their cell phones, and it gets a little repetitive. The SEC thinks it's illegal for financial industry employees to text about work on their personal cell phones, every company in the financial industry has had at least one employee who has done that at least once, and so every company in the financial industry has to pay the SEC a fine. The SEC is rolling through these in batches over time.

The latest batch today is about municipal bond advisors. These firms are small, so the fines range from $40,000 up to $250,000, and the misdeeds are pretty minor. Here's Specialized Public Finance Inc., which paid $250,000:

For example, a municipal advisor principal at Specialized Public Finance sent a text to a municipal issuer client describing current municipal market conditions, explaining the likelihood of a successful competitive sale for certificates of obligation or general obligation bonds and the reasons for keeping the bonds as a private placement. For another example, a municipal advisor principal at Specialized Public Finance sent a text to a municipal issuer client responding to a question about reimbursement from a bond offering for costs incurred before the bond offering and explaining how to achieve the reimbursement.

Here's CSG Advisors Inc., which paid $40,000:

For example, a Principal at CSG exchanged text messages with a General Manager at a municipal issuer client discussing the pricing of a negotiated bond offering, including the demand for the different maturities, the investor pool and the impact on the amount of bond proceeds. For another example, an Associate at CSG and a CSG Executive exchanged text messages regarding the construction budget for an affordable housing project and the allocation of bond proceeds to pay post-construction interest and other fees to bond indenture accounts.

Montague DeRose & Associates LLC, $40,000:

For example, a Managing Director at Montague DeRose and an Assistant Superintendent at a municipal issuer client exchanged text messages discussing edits needed to a Preliminary Offering Statement to update language in the section about Other Post-Employment Benefits, and a rating agency presentation. For another example, a Principal at Montague DeRose and Comptroller and Chief Financial Officer of a municipal issuer client exchanged text messages discussing projected present value savings from and cost of debt service for a planned bond refunding.

If you're an investment banker and you text a client to say "market conditions are good, you should do a bond," that is, in the SEC's view, *obviously illegal* and your firm has to pay a fine. But if you're an investment banker and you *don't* have your clients' cell phone numbers and occasionally text them to catch up, you are not very good at your job.

Every time it does these cases, the SEC talks about how important it is not to text about work on personal cell phones, but that case is undermined a bit by the fact that *every single firm,* and *also the SEC* , does it. They should start putting out press releases about firms that don't. "Today the SEC is bringing an enforcement action saying that XYZ Securities, an investment banking boutique founded in 2023, has been very very good and none of its employees ever text about work on their personal phones, so we just want to congratulate them." And then you have a quote from the enforcement director saying "keeping work texts off your personal cell phone is foundational to the integrity of the financial markets, and we finally found a firm that does it."

World, *sigh*, Liberty, *sigh*, Financial

Two main political positions about crypto in the US are:

- 1. Crypto is a potentially world-changing set of technologies, and US regulators should foster innovation in crypto to avoid being left behind by the rest of the world.
- 2. Crypto is mostly scams, and US regulators should crack down mercilessly on crypto to prevent the scams.

This does not seem like an entirely partisan divide; some people just believe in it and others don't. If you're pro-crypto, you think it serves some useful purpose; if you're anti-crypto, you think it is mostly a grift.

There is a possible synthesis of these views, which is "crypto is mostly for scams, and US regulators should allow it, so I can do scams." This strikes me as a very *bad* case for a politician to make about crypto, both for the politician (why would we want our politicians doing scams?) and for crypto (why would crypto boosters want politicians to highlight the scammiest bits of crypto?). It is not a case that anyone would make explicitly. You can get arbitrarily close however:

A day after an apparent assassination attempt against former President Donald J. Trump, he appeared on a livestream on Monday to champion his latest business venture: cryptocurrencies.

"Crypto is one of those things we have to do," Mr. Trump said on X. "Whether we like it or not, I have to do it."

Beside him were his collaborators, including a family friend; Mr. Trump's two oldest sons, Donald Trump Jr. and Eric Trump; and two little-known crypto entrepreneurs with no experience running a high-profile business. Together, they were rolling out Mr. Trump's crypto venture, World Liberty Financial, a project that has already raised concerns about the former president's conflicts of interest and even alarmed some of his most vocal supporters in the industry.

Mr. Trump has promoted the venture since August, but its exact purpose remains unclear. No official launch date has been set. On the livestream, he did not address the project directly, leaving the details to the two entrepreneurs, Chase Herro and Zachary Folkman. Mr. Herro has described himself as "the dirtbag of the internet," while Mr. Folkman used to teach classes on how to seduce women.

Here is Bloomberg's Zeke Faux on the project and its backers. I have no idea what this thing is or what it will do or what useful problems it will solve, I am absolutely certain that neither does Donald Trump, and I get the feeling that he finds it as exhausting as I do.

Just on a lark I emailed Andreessen Horowitz, the venture capital firm that is all-in on crypto and Trump, to ask if they are investing in World Liberty Financial; they declined to comment.

Things happen

JPMorgan in Talks With Apple to Take Over Credit Card From Goldman. An Endowment ETF Plans to Ride Wall Street's Private-Asset Craze. Red Lobster Exits Chapter 11 Bankruptcy With New Owners, CEO. Biggest Question from Kroger-Albertsons Trials: What's a Grocery Store? Cigna Sues Federal Trade Commission Over 'Defamatory' Report. Trump's Banker Brawls With Whistleblowers, Marxists and Shorts. Best business schools. Best business books. Lego business cards.

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- 1. Often, for largely historical reasons, these transactions are formally structured as the bank buying the security and reselling it to investors, but the point is that the bank is not intending to hold all that much of it on its balance sheet.
- 2. The "and we have worked out a way to make sure that we are compensating ourselves pretty richly" part is implicit.

Securities Law News

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FTX Auditor Prager Metis to Pay $2 Million Over SEC Probe (2)

By Amanda Iacone

- FTX, Alameda Research transactions lacked auditor scrutiny
- Audit partner didn't understand crypto industry, SEC claims

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FTX Auditor Prager Metis to Pay $2 Million Over SEC Probe (2)

By Amanda Iacone 2024-09-17T13:03:33000-04:00

- FTX, Alameda Research transactions lacked auditor scrutiny
- Audit partner didn't understand crypto industry, SEC claims

Prager Metis has agreed to pay $1.95 million to settle SEC charges brought over botched audits for collapsed crypto trading platform FTX and separate conflict of interest violations.

The auditor, with little crypto industry experience, failed to follow basic audit standards when vetting the books of the exchange from 2021 to 2022, the Securities and Exchange Commission said Tuesday. The agency said one of the firm's significant failures was not addressing risks from FTX's relationship with Alameda Research LLC, the crypto hedge fund founded by Sam Bankman-Fried, who was also the crypto exchange's CEO.

Prager Metis CPAs LLC, a New York-based accounting firm, and a related professional services firm Prager Metis CPAs LLP also agreed to limits on their ability to accept new clients, in addition to other penalties.

Prager Metis neither admitted nor denied the SEC's charges and is pleased to have resolved the matter, the firm's lawyer Bruce Braun, a Sidley Austin LLP partner, said in a statement. "Like others, it was a victim of the collusive fraud by management at FTX," Braun said.

In 2022, the firm told Bloomberg Tax that it stood by its work for FTX. Investors have sued Prager Metis and a second accounting firm Armanino LLP for their audits of FTX.

FTX collapsed in November 2022 and filed for bankruptcy soon after. Creditors agreed to its reorganization plan in August and earlier this year the firm said it would repay customers and other creditors.

In March, Bankman-Fried was sentenced to 25 years in prison for defrauding customers of FTX and lenders to Alameda Research.

Auditor Misunderstood FTX

In its complaint made public on Tuesday, the SEC describes a lead engagement partner who lacked basic knowledge of how the crypto industry works, from wallets to the underlying blockchain technology, and "fundamentally didn't understand FTX."

The unnamed audit partner, who has not been charged, critically also didn't understand the flow of FTX customer funds nor Alameda's role, according to the SEC's complaint.

"The engagement team never understood or evaluated Alameda's unique ability to borrow virtually unlimited amounts from FTX, and how that ability to borrow might affect the accuracy of FTX's financial statements," the complaint said.

Related party transactions pose big risks for auditors because they can mask fraud or conceal misappropriated assets.

Prager's audit procedures "largely excluded Alameda" even though the hedge fund's relationship with FTX was "at the heart of the misappropriation of billions of dollars" of FTX customer assets. The team didn't test a pair of $400 million transactions that misappropriated FTX customer assets, according to the complaint.

Other Prager Metis partners questioned why the firm would take on the first-time audit of a complicated, risky client with "virtually nonexistent" financial reporting capabilities. But the regulator said that those and other concerns were never addressed.

"Auditors must, among other things, be independent, exercise due professional care and skepticism, and comply with all applicable professional standards. As we allege in these enforcement actions, Prager Metis fell short in all of these areas," Gurbir Grewal, director of the SEC's enforcement division, said in a statement. The result was that investors lacked key protections an audit is meant to deliver, he said.

The SEC is continuing to investigate Prager Metis' audits of FTX, the regulator said.

Prager Metis also agreed to settle separate 2023 charges for violating US auditor independence rules. Prager Metis had included indemnification clauses in engagement letters covering more than 200 audits, reviews, and examinations for companies, broker-dealers, and investment advisers.

The letters included provisions that indemnified, or would hold harmless, Prager Metis from liability or costs associated with any “knowing misrepresentations by management” or any “inaccurate or incomplete information” the client might provide the auditor.

(Updates with a statement from Prager Metis plus details from the SEC complaint.)

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Big Four Accounting Firms Ebb as Feeder for Corporate CFO Jobs

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- Accountants, consultants have fueled finance chief pipeline
- Recruiting trends show rise in investment banking backgrounds

Long-term recruiting trends show top accounting and consulting firms are slipping as a dominant contributor to the talent pipeline for chief financial officers at big publicly traded companies, though they remain a common launching point.

About one-quarter of CFOs at large US-listed companies in the S&P 500 index bring past work experience at PricewaterhouseCoopers and its Big Four firm peers Ernst & Young, Deloitte, and KPMG. Add in other common firms where CFOs have previously worked—such as McKinsey & Co. and Boston Consulting Group—and that figure rises to one-third with an accounting or consulting background. That's according to an analysis of Bloomberg data on company management profiles, LinkedIn profiles, and corporate leadership biographies.

The remaining two-thirds of CFOs at S&P 500 companies, however, have taken a different path. Many have come from finance-focused jobs in investment banking, private equity, or venture capital. Corporate finance chiefs such as John Lawler at Ford Motor Co. and Rachel Ruggeri at Starbucks Corp. have worked their way up from prior internal roles, while others built external experience elsewhere in corporate America.

That mix reflects how the C-suite position has evolved beyond traditional duties of financial reporting and compliance to a more recent emphasis on business strategy and operations, recruiters say. CFOs are responsible for cash flow management and risk mitigation, as well as communications with analysts and investors.

As a result of the role's shift, fewer CFOs are coming from the Big Four's "feeder function" or other accounting training grounds of the past, said Jim Lawson, who co-leads the global financial officers practice at leadership advisory firm Russell Reynolds Associates.

"Investment bankers are filling a lot of that gap," along with internal promotions to CFO, said Lawson, a former PwC manager and a Certified Public Accountant (CPA).

Client Experience

At companies in the S&P 2000 index, 43% of CFOs held a CPA credential in 2022, down from 55% in 2012, according to a Russell Reynolds analysis published last year.

The analysis also looked at the top 25 businesses feeding the talent pipeline for S&P 2000 CFOs. Over the same time period, it found a 17 percentage point increase in financial services backgrounds from firms such as Goldman Sachs, Morgan Stanley, and Credit Suisse.

A generational divide also may be at play. More Baby Boomer CFOs hold CPAs than Generation X and Millennial CFOs, the Russell Reynolds analysis showed. Meanwhile, more GenX and Millennial CFOs bring investment banking experience than Baby Boomer CFOs.

Accounting, consulting, and investment banking are all “really worthwhile” foundations for corporate finance chiefs, said Jeff Constable, who leads management consulting firm Korn Ferry’s financial officers practice in North America and co-leads it globally.

“Those experiences give you exposure to a lot of different clients,” Constable said. Client-centric training can help CFOs build relationships with their chief executive officer, business unit leaders, and other stakeholders, he added.

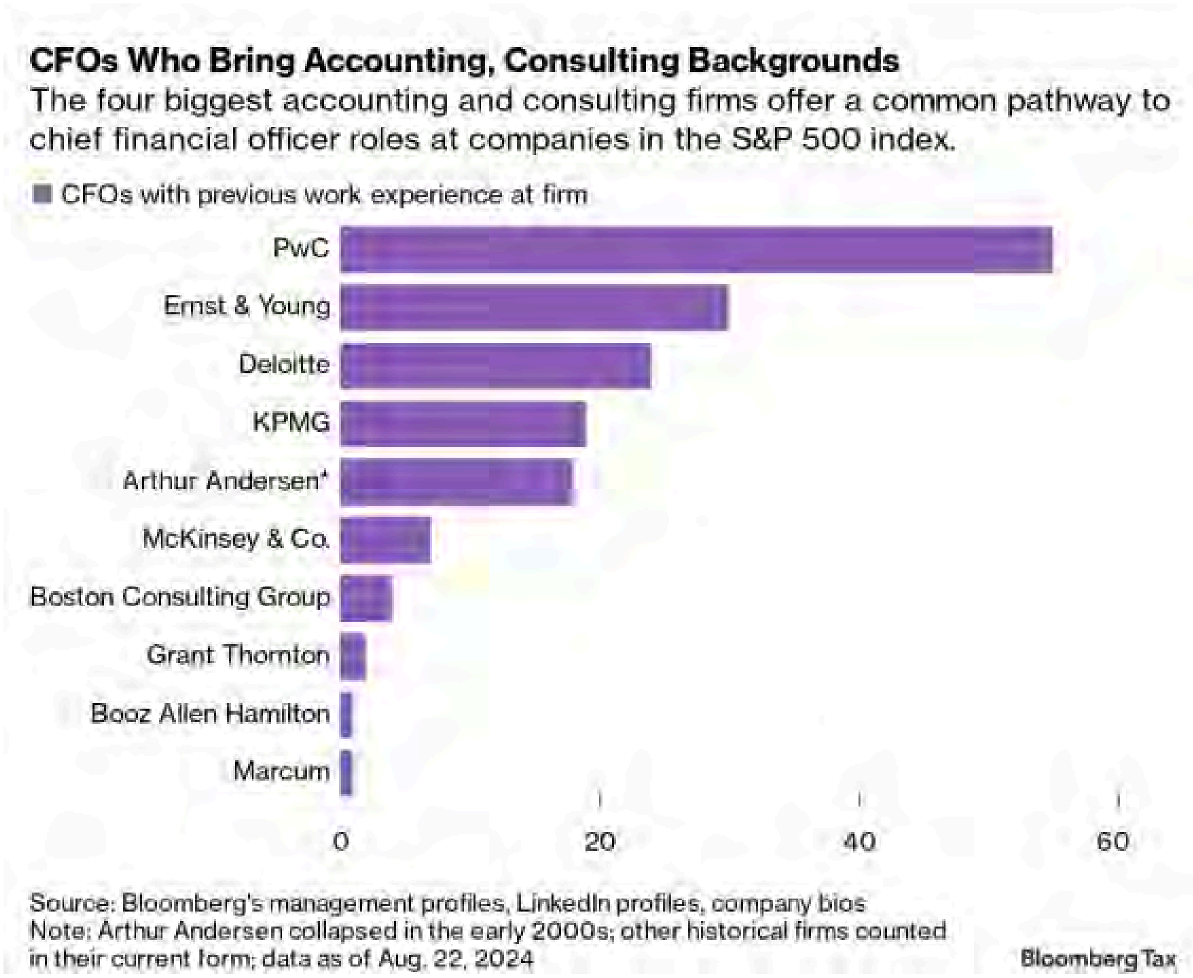
Big Four Background

Many of the S&P 500 CFOs with accounting and consulting backgrounds held early-career jobs at PwC, EY, Deloitte, and KPMG, as well as past firms that became part of these Big Four brands.

PwC leads top accounting and consulting firms in spinning out future CFOs at companies such as the Coca-Cola Co. and Ulta Beauty Inc.

Lauren Sandor, PwC’s deputy people leader, says the firm’s employees are prepared for positions like the corporate CFO job thanks to a wide range of professional experiences working with clients across industries. The firm is readying its workers for emerging technology trends by investing $1 billion in developing artificial intelligence capabilities. PwC also supports its alumni’s careers through networking opportunities, Sandor said.

“We like to say, ‘once a PwCer, always a PwCer,’” she said in a statement.



About 20 of the S&P 500's corporate finance chiefs previously worked at Arthur Andersen, an accounting firm that collapsed in the early 2000s following scrutiny of its work vetting financial statements for the now-defunct companies Enron and WorldCom.

A ramp-up in corporate financial reporting rules in the aftermath of those scandals drove an emphasis on compliance and a demand for accountants as CFOs, said David Arnold, founder and president of Arnold Partners, which recruits CFOs for tech companies. Arnold said he's seen more interest in wider skillsets lately due to evolving demands of the finance chief's job.

"The role of the CFO has become much broader than it used to be," he said.

A few executives, like PayPal Holdings Inc.'s CFO Jamie Miller, have more than one accounting and consulting firm on their resume.

Educational Profiles

Experience at accounting and consulting firms can be a helpful background for future CFOs because it exposes workers to financial reporting, tax transactions, and treasury functions at different companies, said Lillian Mills, dean of The University of Texas at Austin's McCombs School of Business.

"You'll have seen good systems and bad systems, best practices and weaknesses," Mills said. "So if 20 to 30 years later you're a CFO, you have a breadth of experience that helps you evaluate decisions."

Educational profiles still show sitting CFOs overwhelmingly majored in accounting instead of finance or other subject areas, according to an analysis by executive search firm Crist Kolder Associates that looked at companies from the Fortune 500 and S&P 500. About half of the CFOs examined hold a Master of Business Administration, or MBA, Crist Kolder found.

The McCombs business school brings CFOs and CEOs to campus to talk about career paths, Mills said. Aspiring CFOs should seek out opportunities to develop skills in financial forecasting, team leadership, and other areas that hiring managers value, according to a survey led by the Massachusetts Society of CPAs.

Talent Squeeze

Attention on CFOs' past experience comes against the backdrop of a shrinking pipeline for accounting professionals, with fewer workers and a decline in graduates in recent years. Some companies have cited insufficient staff in accounting and other departments as a reason for potential earnings statement errors.

With CFOs in high demand, "there is a growing shortage of qualified candidates," said Michael LaPorte, partner at Ormsby Park, an executive search firm that specializes in recruiting for roles like the CFO.

"As traditional talent pools for CFOs shrink," companies are often turning to "step-up candidates," such as chief accounting officers, that rank just below finance chiefs, LaPorte said. "This trend further depletes the pool of CAOs, intensifying the shortage of qualified leaders in both roles," he said.

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Bitget Bought $30 Million of Toncoin Before Telegram CEO Arrest

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Securities Law
Sept. 18, 2024, 3:00 AM PDT

Suvashree Ghosh

Bloomberg News

Crypto exchange Bitget bought $30 million of Toncoin, the token linked to messaging app Telegram, in July in the over-the-counter market, according to Chief Executive Officer **Gracy Chen**.

- The purchase came shortly before Telegram CEO **Pavel Durov** was arrested in France, setting off a tumble in Toncoin
- Bitget made the investment through Foresight Ventures, in which Bitget is an investor, Chen said
- The tokens were bought at a 40% discount with a three-year lock-in, a person familiar with the matter said, asking not to be identified. Bitget didn't immediately return a message seeking comment
- "The reason why we want to buy the Ton token is it's a top token," Chen said in an interview. "We see lots of volumes in terms of users from the Telegram ecosystem."
- Crypto VC fund Pantera in May said it bought Toncoin in what it called its biggest-ever investment
- Toncoin has recovered about 16% since hitting a low in early September
-

Crypto VC Investors Embraced Telegram Token, Then CEO Tumult Hit

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Philip Lagerkranser

Hackers Got Record Ransom of $75 Million for Cencora Breach

Published: Wed Sep 18 13:48:48 EDT 2024

- Payment made through three Bitcoin installments in March
- Dark Angels hacking gang pursues high prices and low profile

By Katrina Manson

(Bloomberg) --

The hackers behind a cyberattack against the drug distributor Cencora Inc. received a total of $75 million, the largest known cyber extortion payment ever made, according to people familiar with the matter.

The payment made for the Cencora hack occurred in three installments in Bitcoin in March, according to people familiar with the matter who declined to be named in order to discuss sensitive details. The initial ransom demand was $150 million, according to two of the people. Cencora learned that data was stolen from its systems in February, according to a regulatory filing.

A representative for Cencora said the company doesn't comment on rumor or speculation. The representative added that the company stands by publicly available information, pointing to a July quarterly report that included expenses incurred by a cybersecurity event.

Shares of Cencora fell as much as 3.1% to a session low of $227.20 following Bloomberg's report on the ransom payment.

Cencora, a Conshohocken, Pennsylvania-based company, has a market capitalization of about $46 billion and generated $262 billion in revenue in the last fiscal year. It was formerly known as AmerisourceBergen.

Reports of a $75 million ransom first surfaced in July, when the cybersecurity firm Zscaler Inc. and the blockchain analytics company Chainalysis Inc. said the hacking gang Dark Angels received the massive payment, without identifying the victim. Bloomberg's reporting marks the first confirmation that the drug distributor was the victim of the hack.

Brett Callow, a managing director at FTI Consulting, an advisory services company with a large cybersecurity practice, said paying $75 million was previously "unthinkable." The highest known cyber extortion before that was $40 million, paid in 2021 by insurance company CNA Financial Corp., Bloomberg reported that year.

“Lottery jackpot-level payouts like this make the health and medical sector a more attractive target than it already is,” Callow said. “We’re not talking about buy-a-Ferrari amounts here. It’s build-your-own-army amounts.”

Charles Carmakal, chief technology officer at Mandiant Consulting, Google’s cybersecurity unit that helps customers deal with cyber incidents, said the $75 million payout is on the top end of the spectrum he’s seen previously. He added that there have been payments higher than $40 million.

“It happens, but it’s not common,” he said.

Two months after disclosing the incident, Cencora started notifying individuals and state authorities that personal data including names, addresses, dates of birth, diagnoses, prescriptions and medications had been taken. The company’s July quarterly report says the majority of $31.4 million in “other” expenses, for the nine months ending June 30, were incurred as a result of a cybersecurity event in which data was exfiltrated. It’s not clear what that money covered related to the cyberattack.

Read More: CNA Financial Paid $40 Million in Ransom After March Cyberattack

Cybercriminals often demand money after major hacking incidents in which they deploy ransomware to lock up computer systems, steal sensitive data they threaten to reveal, or both.

Hospitals and health-care organizations have become a regular target for hacking gangs. In February, a cyberattack against Change Healthcare, a unit of insurer UnitedHealth Group Inc., roiled the country’s health-care systems and exposed patient medical data. UnitedHealth paid a $22 million ransom payment.

The $75 million extortion payment comes after years of efforts by the Biden administration to try to curb criminal hacking. For instance, the administration has been pushing some critical sectors to meet minimum cybersecurity practices to make them harder to hack but has met with some resistance. The US Securities and Exchange Commission now requires public companies to report material cybersecurity incidents, while law enforcement has tried to disrupt hacking gangs’ efforts through indictments, sanctions and other methods.

Read More: White House to Push Cybersecurity Standards on Hospitals

The value of total ransom payouts is rising, according to Chainalysis. The median ransom payment made for the most severe ransomware strains stood at $1.5 million in June, up from just under $200,000 early last year, according to an August report from Chainalysis. The company predicts total ransom payments in 2024 will eclipse the record $1 billion it says was paid last year.

Paul Nakasone, a retired four-star army general who led the National Security Agency for nearly six years until February, said the US is failing to tackle ransomware. “We’re not making the progress that we need. In fact, we’re not even keeping up,” he told Bloomberg in an interview when asked about the high payout. He watched both the number of ransom hacks — and their damaging impact — grow during his tenure, he added.

Cencora told the SEC the incident will impact neither the company’s financial condition nor its operations in any material way. Cencora has said there is no evidence that any of the information stolen “has been or will be publicly disclosed.”

Paying ransoms cannot guarantee what a hacker will do with stolen data in the future, Callow said. “They certainly have no way of knowing whether the payment of a demand will result in the criminals deleting their copy of the data. It’s a bit like wiring money to a burglar in the hope he’ll return your belongings,” he said.

(Updates with stock movements in fourth paragraph.)

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Fortress, Goldman Seek to Tap the Wealthy for New Debt REITs (1)

By Miles Weiss and Natalie Wong2024-09-18T11:45:52745-04:00

- REITs aim to meet rising demand for commercial-property debt
- Firms look to individual investors as institutions pull back

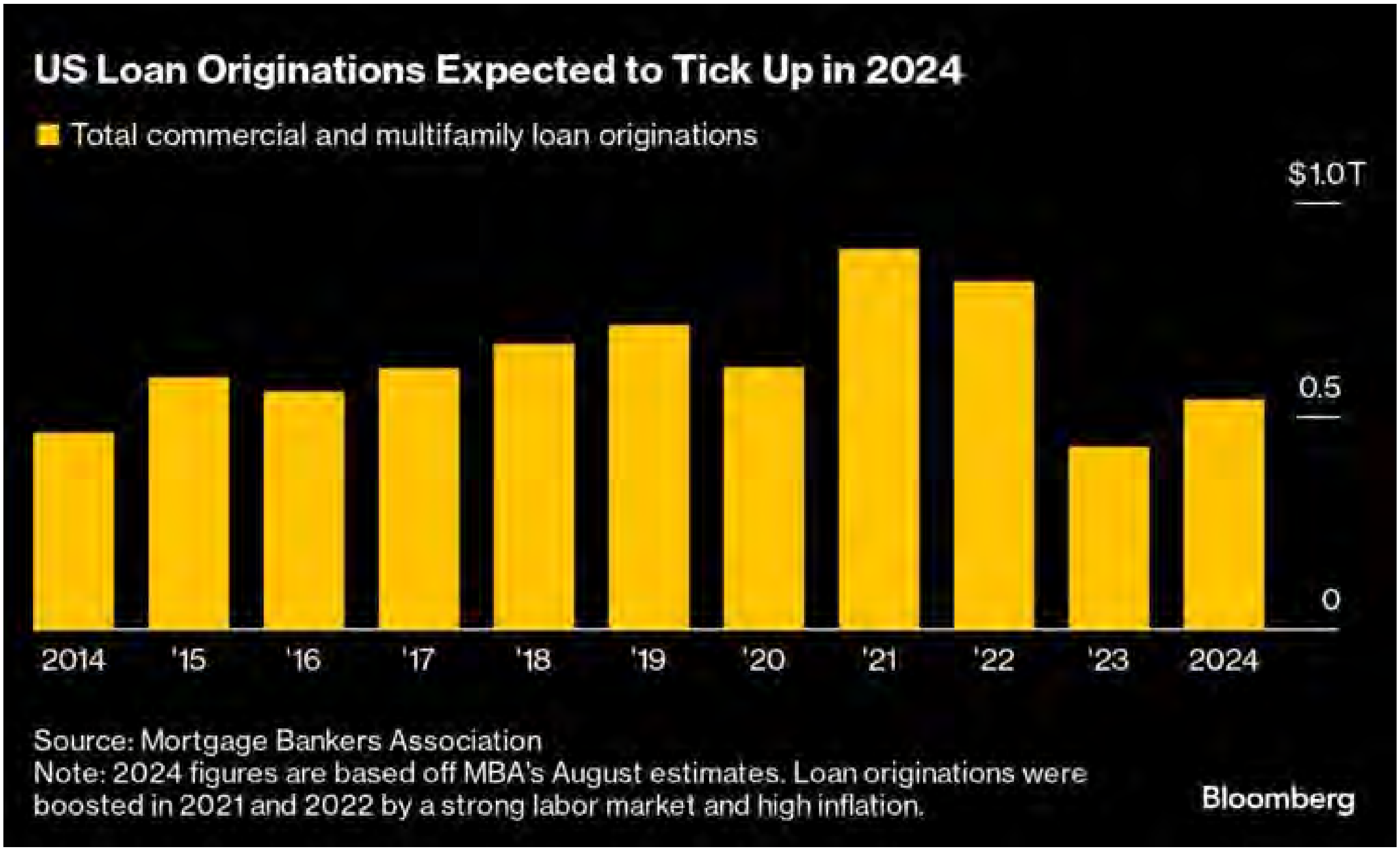
Fortress Investment Group is preparing to raise money from individual investors for a vehicle that finances commercial real estate debt, as money managers seek to meet an expected spike in demand for such loans.

Fortress — which has traditionally catered to large institutions — filed with regulators this month to set up a nontraded, perpetual-life real estate investment trust. The Fortress Credit Realty Income Trust will finance loans for a range of real estate ventures, including multifamily, hospitality and industrial properties.

Goldman Sachs Group Inc. and Principal Financial Group Inc.each filed in July to make commercial real estate loans through the same type of REIT.

Wall Street anticipates a jump in requests for commercial real estate loans, driven by forecasts that the Federal Reserve will lower interest rates and that developers will refinance billions in property debt. Total commercial and multifamily mortgage borrowing and lending is expected to finish the year at $539 billion, a 26% increase from 2023, according to a report last month from the Mortgage Bankers Association.

The Fed was widely expected to make its first rate cut in four years on Wednesday. Still, Moody's said in a note ahead of the Fed's decision on rates that commercial real estate activities "hinge on the clarity of future interest rate trajectory."



Banks have been pulling on commercial real estate lending, as they're already saddled with a glut of troubled loans. Institutional investors, meanwhile, have been reducing their exposure to commercial real estate, spurring alternative asset managers to look to individual investors.

"People are getting creative because there's so much demand" for commercial real estate financing, said Christian Gore, founder of real estate investment firm G-1 Capital Partners. The nontraded REITs, Gore said, "are another way for folks to access retail capital in large quantities."

Spokespeople for Goldman Sachs, Fortress and Principal all declined to comment. The Goldman REIT aims to initially raise as much as $1 billion, according to its filing.

While many REITs list their stock on an exchange, the firms' nontraded vehicles will let investors periodically cash in their shares at net-asset value. These types of semi-liquid vehicles are typically marketed to accredited investors, people whose net worth exceeds $1 million — not including their primary residence — or whose annual income exceeds $200,000.

The largest and best-known of the nontraded REITs is Blackstone Inc.'s BREIT, which raises money from wealthy individuals to invest in income-producing real estate. BREIT, which debuted in 2017, had a net asset value of about $56 billion as of July 31. Other major alternative investment managers have also launched their own REITs.

“The private equity shops realized the banks have access to all this cash” held by their private wealth clients, said Matt Sharp, a cofounder of Hamilton Point Investments, a real estate private equity investment firm. “And so they started raising nontraded REITs.”

Capital Gap

Fortress aims to originate and acquire senior-secured, floating-rate loans tied to commercial real estate, according to the filing. It will also invest in residential debt, including property tax liens, single-family rental loans and jumbo mortgages. Goldman and Principal said their REITs will focus on making senior-secured and subordinated loans on commercial properties.

Other alternative asset managers are also getting into real estate financing — with Blue Owl Capital agreeing to buy real estate lender Prima Capital Advisors and Paul Singer’s Elliott Investment Management backing a platform offering short-term, secured loans for residential development.

These ventures could help fill a financing void left by banks that have reined in lending ahead of an anticipated increase in capital requirements. While the Fed recently agreed to cut these proposed requirements by half, banks may still be loath to ramp up lending again even with pared-back rules.

“When bank lenders tighten lending and offer lower loan-to-value ratios,” Principal wrote in its filing, “borrowers will turn to nonbank sources to fill the capital gap.”

Fortress had lagged behind other private equity firms’ efforts to tap private wealth, but it’s starting to catch up.

In February, a nontraded, perpetual life REIT called Fortress Net Lease REIT filed to raise money from wealthy individuals to buy, finance and lease single-tenant commercial properties. As of mid-June, it raised $551 million from investors, according to a filing.

“These vehicles have less scrutiny than a publicly listed REIT,” Gore of G-1 Capital said. “With that comes more flexibility and more creativity.”

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Police Pension Fund Says Store Chain Inflated Stock Price

By **Law360 Staff**

Law360 (September 17, 2024, 9:15 PM EDT) -- Discount retailer Five Below is facing securities class claims in Pennsylvania federal court from a Florida police officers' pension fund, which says the company falsely attributed poor financial performance to inventory shrinkage while concealing deeper operational issues, causing substantial investor losses.

The lawsuit — filed by the City of Orlando Police Officers' Pension Fund on behalf of all investors who purchased or otherwise acquired Five Below common stock between Dec. 1, 2022, and July 16, 2024 — alleges the company and three of top executives violated the Securities Exchange Act and U.S. Securities and Exchange Commission Rule 10b-5.

The fund, which manages approximately $700 million in assets for active and retired participants, asserts that "[a]s a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's common stock, Plaintiff and other Class members have suffered significant losses and damages."

According to the complaint, the class period begins on Dec. 1, 2022, following a conference call where Five Below allegedly presented strong financial results and growth, despite underlying issues.

Throughout the class period, Five Below assured investors of its ability to execute its business plan despite macroeconomic headwinds and attributed disappointing financial results to increased rates of lost or stolen inventory, known as "shrink," according to the complaint.

Despite acknowledging higher rates of shrink, Five Below assured investors it was taking steps to mitigate the issue, the pension fund said. However, the company used the issue of shrink to mask broader problems with its business, misleading investors about its ability to manage and grow its operations, according to the complaint.

As a result of the alleged misrepresentations, the pension fund that Five Below's stock traded at artificially inflated prices during the class period.

The truth began to emerge on March 20, 2024, the complaint says, when Five Below reported fourth-quarter 2023 results that missed analyst expectations, causing the stock price to decline by over 15%. Despite these results, the company's executives continued to attribute the negative performance to higher-than-expected shrink, the proposed class claims.

On June 5, Five Below disclosed a nearly 15% year-over-year decline in operating income and made significant cuts to its sales guidance, resulting in an additional 11% drop in stock price, according to the complaint.

The situation allegedly worsened on July 16, when the company announced the departure of its CEO, Joel Anderson, and further reduced its net sales and earnings guidance, leading to a 25% decline in stock price.

The pension fund claims former CEO Joel Anderson, interim CEO Kenneth Bull and CFO Kristy Chipman had the power and authority to control the contents of Five Below's SEC filings, press releases, and other market communications, and are liable for the false statements and omissions.

The pension fund seeks compensatory damages for itself and other class members who purchased Five Below stock during the relevant period.

This is not the only lawsuit targeting Five Below with claims tied to growth potential. In August, the retailer was **hit with similar class claims** in the Eastern District of Pennsylvania.

The City of Orlando Police Officers' Pension Fund is represented by Ryan T. Degnan, Naumon A. Amjed and Joshua Keszczyk of Kessler Topaz Meltzer & Check LLP; Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP; and Robert D. Klausner and Stuart A. Kaufman of Klausner Kaufman Jensen & Levinson.

Counsel for Five Below Inc., Joel Anderson, Kenneth Bull and Kristy Chipman was not immediately available.

The case is City of Orlando Police Officers' Pension Fund v. Five Below Inc. et al., case no. 2:24-cv-03820, in the U.S. District Court for the Eastern District of Pennsylvania.

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Chancery Sides With Truth Social Backer In SPAC Deal Payout

By **Law360 Staff**

Law360 (September 17, 2024, 9:59 PM EDT) -- A Delaware Chancery judge sided Tuesday with the investment sponsor of the entity that took former President Donald Trump's Truth Social media company public, on claims it was shortchanged in the deal, ordering a larger share of the stock be handed over from the transaction.

In a 44-page post-trial opinion, Vice Chancellor Lori W. Will ruled that special purpose acquisition company Digital World Acquisition Corp., now known as successor Trump Media Technologies Corp., breached its contract with ARC Global Investments II LLC by diluting its equity from the deal with an improper conversion rate for the investment sponsor's shares.

The vice chancellor interpreted DWAC's certificate of incorporation to set a conversion rate of 1.49 to 1, higher than the 1.35 to 1 ratio DWAC was pushing for, but lower than ARC's contention the rate ought to be 1.82 to 1.

"ARC has prevailed in part on its claim that DWAC breached Section 4.3 of the charter by excluding certain securities from its calculation of the conversion ratio," Vice Chancellor Will wrote. "ARC is entitled to an order specifically enforcing Section 4.3 of the charter based on the correct conversion ratio of 1.4911:1 and to related declaratory relief."

While the vice chancellor sided with ARC on the breach of contract claims, she did not go as far as blessing its breach of fiduciary claims against DWAC, ruling that the SPAC's disclosures to shareholders were neither materially false nor misleading, nor that any alleged misstatement would be important to investors in deciding how to vote.

"I cannot conclude that the descriptions of the conversion ratio in the proxy statement were materially false or misleading," Vice Chancellor Will wrote. "This litigation demonstrates that the conversion ratio is complicated in application. ARC itself has changed its preferred calculation approach multiple times. The director defendants accurately communicated in the proxy statement that they were tasked with calculating the conversion ratio and that a decision on the calculation would be forthcoming."

The vice chancellor also rejected a suite of affirmative defenses from DWAC about alleged misconduct from ARC managing member Patrick Orlando, who is considered the architect of the deal and was at one point CEO of DWAC until his firing in 2023 as the transaction came under regulatory scrutiny, ruling they were "diversions" that were "meritless, irrelevant, or untimely."

The dispute over the plan to take Trump's Truth Social platform public landed in the Chancery Court in February when investors on both sides of the deal filed complaints alleging they would be shortchanged by tens of millions of dollars in the transaction. The go-public deal closed in March, and at the time was valued north of $10 billion, but that value has dropped by billions since then as the stock in the venture has fallen.

The dispute over the conversion rate went to Vice Chancellor Will for a one-day trial on the papers in July.

In an email to Law360 Tuesday, ARC attorney Matthew D. Perri of Richards Layton & Finger PA, said, "It's unfortunate that [Trump Media and Technology Group's] inability to honor its obligations required ARC to take TMTG to court to vindicate its rights and the rights of other stockholders."

Counsel for DWAC declined to comment.

DWAC attorney Traci Zeller of Paul Hastings LLP was second trial chair in the case and died unexpectedly Aug. 25, according to an obituary.

ARC Global Investments II LLC is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud, Alfred P. Dillione, and Rae Ra of Richards Layton & Finger PA.

Digital World Acquisition Corp. and its members are represented by Bradley J. Bondi, D. Scott Carlton, Traci Zeller and Nicholas Griepsma of Paul Hastings LLP and Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP.

The case is ARC Global Investments II LLC v. Digital World Acquisition Corp. et al., case number 2024-0186, in the Court of Chancery of the State of Delaware.

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Allstate Freed From Texas Auto Insurance Class Action

By **Law360 Staff**

Law360 (September 17, 2024, 8:32 PM EDT) -- A Texas federal judge handed Allstate a win in a proposed class action over allegedly discriminatory auto insurance premium rates, adopting a magistrate judge's recommendations that the class not be certified and that the insurer be freed from the suit before trial.

U.S. District Judge Alan D. Albright issued a two-page order Monday adopting January and August reports and recommendations by U.S. Magistrate Judge Mark Lane in the four-year lawsuit. The January report addressed the class action certification while the most recent report in August addressed Allstate's summary judgment motion.

Plaintiffs Sara Shannon and Rosa Palacios **filed their proposed class action** against Allstate Insurance Co. in April 2020, claiming they were charged higher premiums for automobile insurance coverage than otherwise identically situated policyholders. According to the plaintiffs, Allstate used a retention model that projected "whether and how much premium each policyholder will tolerate being charged and still remain an Allstate customer," resulting in significantly different rates among customers.

Allstate moved for summary judgment in May, arguing in part that the plaintiffs had not pointed to any other policyholder of the same class that had been charged a different premium and that they had failed to show they were damaged in any way.

Judge Lane wrote in a report and recommendation last month that the filed rate doctrine bars the plaintiffs' claims, a conclusion he also reached in his January recommendation. The doctrine prevents state-regulated entities from charging rates other than those that are mandated by their regulatory authority.

Noting in his most recent report that the court has "the benefit of yearslong discovery" in making its decision, Judge Lane repeatedly pointed to the 2010 Fifth Circuit case Winn v. Alamo Title Insurance Co., contending that many of the facts of the Winn case are "parallel" to Shannon and Palacios' lawsuit. The plaintiffs in that case sued a host of insurance companies over allegations of artificially inflated homeowners insurance prices. The suit was ultimately dismissed based on the filed rate doctrine.

Similar circumstances include Shannon and Palacios' "self-admission" that the actions they complain of have been the subject of review by Allstate's regulatory authority, specifically through investigation and review by the Texas Office of Public Insurance Counsel and the Texas Department of Insurance.

Judge Lane also wrote that it's "undisputed" that Allstate filed its rating plan with the Texas Department of Insurance.

Allstate, which has since discontinued the use of its retention pricing model, also never received a "cease and desist" letter from the Insurance Department, as the plaintiffs assert, Judge Lane stated.

"Plaintiffs' assertion that TDI sent AFCIC [Allstate Fire & Casualty Insurance Co.] a cease and desist is wishful thinking — if not misleading," he said. "Instead, they misrepresent the contents of correspondence between AFCIC and TDI after AFCIC decided to discontinue the use of retention models in Texas. The deadline purportedly imposed by TDI was merely a request that AFCIC confirm the date on which AFCIC would discontinue the use of the models."

Judge Lane also recommended that the plaintiffs' request for additional discovery be denied, stating that they "do not offer any reason why they did not pursue such third-party discovery over the previous months and years."

Counsel for the parties did not immediately return a request for comment.

The plaintiffs are represented by John R. Davis and Michael L. Slack of Slack Davis Sanger LLP, Joe K. Longley of the Law Offices of Joe K. Longley, and Roger N. Heller, Jallé H. Dafa and Kenneth S. Byrd of Lieff Cabraser Heimann & Bernstein LLP.

Allstate is represented by Michael P. O'Day, William W. Reichart III and John M. Guaragna of DLA Piper.

The case is Shannon et al. v. Allstate Insurance Co., case number 1:20-cv-00448, in U.S. District Court for the Western District of Texas.