

Apple's \$490 Million Securities Fraud Settlement Gets Court Nod

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- Class settlement met all prerequisites for certification
- Attorneys awarded 22% of settlement fund, or \$108 million

By Bernie Pazanowski

(Bloomberg Law) --

Apple Inc. received final approval from a federal court for a \$490 million settlement in a securities fraud class action alleging misleading statements about the technology company's sales prospects.

Investors accused Chief Executive Officer Tim Cook of making false statements about the company's business in China that caused Apple stock to trade at artificially inflated prices. Apple settled the case but denied liability.

On June 6, Judge Yvonne Gonzalez Rogers granted preliminary approval to the third-largest securities class-action recovery in the US District Court for the Northern District of California. On Tuesday, Rogers gave her final approval to the settlement, saying that it met all the prerequisites for class certification. She said that class members were given adequate notice of the settlement terms, there were no objections, and the settlement "is fair and reasonable and treats class members equitably relative to one another."

The class attorneys asked for 25% of the settlement in fees, which was \$122.5 million dollars. But Rogers said that amount was 4.4 times the applicable lodestar amount and was therefore too high. She also noted that one class member objected to a 25% award of fees.

Given the size of this settlement, Rogers reduced the award to 22%, or approximately 3.88 times the lodestar. The award is still "extraordinarily high," she said.

The \$108 million award of attorneys' fees "accounts for the skill and strategic vision, as well as the risk taken by plaintiffs' counsel, while balancing the interests of the class members to obtain a larger share of the settlement," Rogers said. She also awarded class counsel \$2.7 million in costs and interest, and authorized paying the lead plaintiff a \$30,000 incentive award.

Robbins Geller Rudman & Dowd LLP represents the plaintiffs. Paul, Weiss, Rifkind, Wharton & Garrison LLP and Orrick Herrington & Sutcliffe LLP represent Apple.

Apple's \$490 Million Securities Fraud Settlement Gets Court Nod

The case is *In re Apple Inc. Sec. Litig.*, N.D. Cal., No. 4:19-cv-02033, order granting final approval issued 9/18/24.

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Mallinckrodt Reaches \$46 Million Settlement in Securities Suit

By Mallory Culhane 2024-09-19T13:17:53000-04:00

- Company allegedly lied to investors about litigation, drug
- Settlement ends years-long class action that began in 2020

Pharmaceutical giant Mallinckrodt Public Limited Co. and its top officers have agreed to pay \$46 million to settle a securities class action alleging they misled investors about problems with a drug for amyotrophic lateral sclerosis.

The company's "misstatements and omissions caused Mallinckrodt common stock to trade at artificially inflated prices," according to a Wednesday brief filed with the proposed order for preliminary approval of the settlement in the US District Court for the District of New Jersey.

Canadian Elevator Industry Pension Trust Fund brought the class action on behalf of itself and representing Mallinckrodt investors between May 3, 2016, and March 18, 2020. The pension fund alleged the company lied about safety issues and the viability of Acthar — an injectable drug used for rheumatoid arthritis and other conditions — to treat amyotrophic lateral sclerosis; other bankruptcy litigation the company was facing; and Medicaid rebates it owed to the federal government.

The proposed settlement would end long-running litigation against 10 of the pharmaceutical giant's top executives, who were accused of failing to disclose information to investors about issues with one of Mallinckrodt's top-selling drugs, H.P. Acthar Gel, according to [the 2020 complaint](#).

In December 2022, Mallinckrodt was [dismissed from the suit](#) following the company's bankruptcy in March of that year.

In addition to the \$46 million payment, lead plaintiffs will seek an additional \$10,000 for representing the class of investors. Counsel for the plaintiffs will also seek an attorneys' fee award of up to one-third of the settlement amount, not to exceed \$1.5 million, according to the settlement motion.

Carella Byrne Cecchi Brody & Agnello PC and Robbins Geller Rudman & Dowd LLP represent lead plaintiff Canadian Elevator Industry Pension Trust Fund. Hogan Lovelles US LLP represents the

Mallinckrodt Reaches \$46 Million Settlement in Securities Suit

Mallinckrodt executives.

The case is [Strougo v. Mallinckrodt Public Limited Company et al](#) , D.N.J., No. 3:20-cv-10100, 9/18/24 .

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Legal Fee Tracker: Google, privacy lawyers clash over \$217 million fee bid

 [reuters.com/legal/transactional/legal-fee-tracker-google-privacy-lawyers-clash-over-217-million-fee-bid-2024-09-19](https://www.reuters.com/legal/transactional/legal-fee-tracker-google-privacy-lawyers-clash-over-217-million-fee-bid-2024-09-19)

David Thomas

The logo of Google is seen outside Google Bay View facilities during the Made by Google event in Mountain View, California, U.S. August 13, 2024. REUTERS/Manuel Orbegozo
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Sept 19 (Reuters) - After more than four years of litigation, one sticking point remains in a sprawling lawsuit over Google's alleged secret tracking of millions of Americans' internet browser use.

But it's a big one.

A federal judge in California is poised to rule on a petition by the plaintiffs' lawyers at Boies Schiller Flexner, Morgan & Morgan and Susman Godfrey for Google to pay them \$217 million in legal fees, as part of a settlement requiring the Alphabet unit to delete billions of records and update its privacy disclosures to users who set their browsers to "incognito" or "private."

Google has asked U.S. District Judge Yvonne Gonzalez Rogers to award the firms no more than \$40 million, arguing that they are seeking a windfall for a settlement that includes no money for consumers after they failed to get the lawsuit certified as a class action. The company denies violating privacy law.

After a hearing in the case last month, Google told Reuters the lawyers' fee bid was "just another attempt to generate news and line their own pockets in a case they settled for \$0."

The firms counter that Google's promised privacy reforms are worth \$3 billion to \$6 billion to consumers. They told Rogers they invested \$62.4 million in lawyer time in the case — 78,880 hours — and that their achievements warrant a fee award more than three times that amount.

Attorneys from Morgan & Morgan did not immediately respond to requests for comment. Susman Godfrey partner Bill Carmody and Boies Schiller managing partner Matthew Schwartz declined to comment.

A Google spokesperson reiterated the company's prior statement criticizing the fee request. The company's lawyers at Quinn Emanuel Urquhart & Sullivan did not immediately respond to a request for comment.

Class action settlements don't always include a damages fund for plaintiffs. It is also not uncommon for judges to award fees in such cases, experts said.

"Courts have to come up with some assessment of the benefit created for the class, but in the absence of damages, it's mainly guesswork," University of Michigan law professor Adam Pritchard said in an email.

Rogers has not said when she will rule on the fee clash, which has been fully briefed and argued, and finalize the settlement. Plaintiffs who brought similar privacy claims against the internet search giant in California state court are also trying to intervene in the federal case. They are now appealing Rogers' denial of their intervention to the 9th U.S. Circuit Court of Appeals.

Rogers offered some clues about her thinking on the fees at last month's hearing, saying the plaintiffs were not "entirely successful" given their failure to win damages, but calling the proposed settlement they achieved "not insignificant." She questioned some of the plaintiffs' billing records, telling them that charging \$667 per hour fees for document review seemed "excessive."

Arguing for the lawyers, Boies Schiller chairman David Boies emphasized the difficulty of the case and said Google was unfairly taking aim at some plaintiffs lawyers logging 12-hour days when corporate defense attorneys routinely do the same.

Boies Schiller's share of the requested Google award is roughly \$73 million, according to a Reuters analysis of the fee request. It would add to a lucrative year in fees for the New York firm, which was part of the team awarded a \$667 million legal-fee award stemming from a \$2.67 billion civil antitrust settlement with Blue Cross Blue Shield Association.

- In other legal fee news, involving a case that is also before Rogers, the judge on Wednesday awarded a reduced fee to plaintiffs lawyers who reached a \$490 million settlement with Apple earlier this year over allegations that CEO Tim Cook defrauded shareholders by concealing falling demand for iPhones in China.

Rogers said the original fee request of \$122.5 million sought by Robbins Geller Rudman & Dowd and Labaton Keller Sucharow relied on a multiplier to their standard rates that was "extraordinarily high." She reduced the fee award to \$107.8 million, or 22% of the settlement.

- Office Depot has been awarded \$927,000 in legal fees in a failed U.S. copyright lawsuit against it after a judge questioned its lawyers' billing records and rejected its fee bid for more than \$2 million.

- A federal judge in New York last week awarded \$102 million to Quinn Emanuel and Cohen Milstein Sellers & Toll for their work on a \$580 million settlement for investors who accused major banks of conspiring to curb competition in the stock lending market.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com , opens new tab.)
(Additional reporting by Mike Scarcella)

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Invivyd Escapes Investor Suit Over Covid Vaccine Optimism

Published: Thu Sep 19 10:58:25 EDT 2024

- Invivyd's treatment less effective against omicron variant
- Judge found no misleading statements or intent to defraud

By Matthew Bultman

(Bloomberg Law) --

Invivyd Inc. beat a shareholder lawsuit alleging the biopharma company misled shareholders with optimistic projections about the effectiveness of its Covid-19 treatment against the omicron variant.

The proposed class action was filed after test results showed the treatment, ADG20, was much less effective against the omicron variant compared to its effectiveness against earlier variants, sending Invivyd's stock price down.

But investors haven't shown Invivyd, formerly Adagio Therapeutics, made misleading statements or that the company intended to defraud shareholders, Judge Julia Kobick in the US District Court for the District of Massachusetts said in a Wednesday opinion.

"As alleged in the SAC, the defendants here had no conclusive evidence that ADG20 was ineffective against Omicron at the time of their statements," Kobick said, referring to the plaintiffs' second amended complaint.

The complaint was dismissed with prejudice, meaning it can't be further amended.

Waltham, Mass.-based Invivyd was formed in June 2020, in the midst of the pandemic, to develop drugs for treating and preventing Covid-19, as well as future coronavirus outbreaks.

ADG20, its lead product candidate, was successful against early variants of the virus. While Invivyd predicted it would be effective against the omicron variant, test results later showed it was 300 times less effective, the lawsuit said.

Invivyd argued the alleged conduct was the "antithesis of securities fraud," saying it was open about the basis for its optimism and repeatedly cautioned that more testing was underway.

The relevant statements were opinions, and there weren't any allegations that Invivyd knew the drug would ultimately be ineffective against omicron, Kobick said in the ruling.

Similarly, Kobick said the statements weren't misleading simply because Invivyd omitted warnings of Anthony Fauci, then the director of the National Institute of Allergy and Infectious Diseases, and other public health officials at the time that omicron may be resistant to antibodies like ADG20.

"As the SAC itself alleges, several public health leaders warned—on at least two national television networks—that omicron's mutations might render it resistant to available vaccine and antibody treatments," the judge said. "Accordingly, the market was aware of that risk, and the defendants had no obligation to repeat such warnings."

Robbins Geller Rudman & Dowd LLP, Hutchings Barsamian Mandelcorn LLP, and Johnson Fistel LLP represent the lead plaintiffs. Wilmer Cutler Pickering Hale and Dorr LLP represents Invivyd.

The case is *Brill v. Invivyd, Inc.*, D. Mass., No. 23-cv-10254, 9/18/24.

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Lawyers Seeking Big Fees Can Be Less Shamelessly Self-Interested

By Roy Strom

Column

Bloomberg Law News 2024-09-19T10:12:33989620636-04:00

Lawyers Seeking Big Fees Can Be Less Shamelessly Self-Interested

By Roy Strom 2024-09-19T05:00:00000-04:00

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at something class-action lawyers don't do: hire their own lawyers to argue fee petitions. Sign up to receive this column in your Inbox on Thursday mornings.

Lawyers' process for getting paid in class-actions is well known. They file a fee petition, telling a judge how long they worked on a case and describing the results they achieved. Then they argue for how much money they deserve. The same process plays out in other types of cases, including frequently in Delaware Chancery Court.

The result of the process is a monumental moment for law firms. The judge's decision will determine the success of the financial investment in the case. And fees are exiting the stratosphere.

After successfully challenging Elon Musk's lucrative compensation package at Tesla Inc., a group of lawyers asked the Delaware Chancery Court to award them shares at one time valued at more than \$7 billion.

Who is the best lawyer to call to make that \$7 billion argument? Well, that's the point of this column. There isn't one.

I've covered fee petitions frequently, since they offer a rare look at the economics of a real case. Recently, a simple question started gnawing at me: Why do lawyers make these arguments for themselves?

I wondered if there was a case to be made for proactively hiring lawyers to make these specialized arguments, in part because of challenges I've seen with the current process.

The arguments firms make for themselves sometimes feel shamelessly self-interested. The logic of judges' decisions seem increasingly complex. Members of the class sometimes challenge fee petitions, creating disputes over money between lawyers and their own clients.

And I have seen instances where lawyers press arguments for themselves—both in style and substance—that judges disliked. “If I had \$187 million on the line, I’d probably lose my cool a little bit too,” a federal appeals court judge told a Quinn Emanuel partner arguing for his firm’s nine-figure fee in 2022.

Lawyers often hire academics to brief the court on how their fee request stacks up to historical cases.

But there’s nothing stopping them from going further. Firms in some cases might benefit from the expertise and objectiveness that an outside lawyer could provide. Plus, so much of the law has become niche and specialized—fee attorneys would fit that trend.

There isn’t a specialized bar that markets expertise around class-action fee petitions. I found only one case where lawyers brought in their own counsel to argue for their fees—more on that later.

Standing Up for Their Work

I asked experts why the status quo has existed for so long, given my questions about bringing in outside lawyers.

One explanation stems from class counsels’ intimate understanding of the case and the results they achieved.

These lawyers have developed trust with the judge throughout the process: They first convinced the judge they were the right pick to steward the case. Then they achieved a result the judge signed off on.

Those lawyers stand on the results to argue why they deserve their fee. It’s not obvious that outsiders hired to make that argument would know more about the work the lawyers did or have developed more credibility with the judge.

“One of the key things about getting final approval in a class action and getting fees paid in any case is establishing yourself as skilled and credible in front of the judge,” class-action lawyer Jay Edelson told me in an email. “I don’t want to look like I’m hiding behind someone else.”

A second explanation is based on the purpose of fee petitions.

The petitions are designed to be a substitute for negotiations between the lawyers and the class, which has so many people it can’t easily negotiate as one body. In typical negotiations over fees, lawyers don’t hire counsel to barter with their clients—they handle it themselves.

"I trust markets to come up with good working arrangements," said Charlie Silver, a professor at the University of Texas law school who gives expert testimony in class-action fee requests. "Since I've never heard of a law firm farming out responsibility for arguing fees in this context, I'm confident that there's a good reason for the existing practice."

Judges Want More

Still, there is evidence that fee petitions have become more complicated. Judges are looking for better information.

The Delaware Court of Chancery was so torn over calculating a fee award in a Dell Technologies Inc. securities litigation last year that it asked academics to weigh in.

The request for advice told me the court either didn't completely trust the briefs coming from the lead counsel or that the documents didn't give a full picture.

Two sets of academics submitted competing answers to the question: Should courts discount the percentage of the lawyer fee as the size of the underlying settlement grows larger? It's a question that hits at the tension between rewarding attorneys for good work and avoiding signing off on a windfall.

The court last month awarded the full \$267 million fee to the lawyers who obtained a \$1 billion settlement, declining to apply a discount as the fee grew.

Calling for More Experts

The Delaware court isn't alone in wanting better information.

Three university law professors argued in a paper last year that plaintiff's lawyers often try to convince judges their fee request is reasonable by comparing it to cherry-picked cases that paid lawyers the most money.

The academics argued that courts should instead force lawyers to provide the average fee percentage and multiplier (an award for successful representation) in cases involving settlements of similar sizes.

"I'd love to see special masters appointed in many of these cases to review billing records and the law firm's performance in the case," said Jessica Erickson, a University of Richmond law school professor who co-authored the paper. "We need more experts with specialized knowledge about the area as well as the incentives to ask hard questions."

An Alternative

The law professors didn't suggest lawyers need to hire counsel to argue for their fees. But one lawyer who did just that provided a compelling argument for the idea.

Stuart Garson is not your typical class-action lawyer. He's a workers' compensation attorney in Ohio. He filed a 2017 lawsuit against the state, arguing it had charged excessive premiums to certain companies.

The suit led to a change in state policy and, in 2014, a \$420 million settlement.

When it was time to argue for the law firms' fees in the case, Garson said he never gave it a second thought. He hired another Ohio attorney to make his case.

It seemed like "common sense" that a judge would prefer to hear about how successful the case was from somebody other than the lawyer who stood to gain from that argument, Garson said.

His decision paid off. The judge signed off on the request for attorneys' fees amounting to \$136.5 million, or nearly one-third of the settlement total.

Garson figured it was standard practice hire separate attorneys to make fee arguments. It is not.

Brian Fitzpatrick, a Vanderbilt University law school professor who is one of the country's leading fee petition experts, said Garson's case is the only instance he's ever seen a lawyer hired specifically to make a fee argument.

The case—while a decade old—holds a place in what might be considered the class-action fee Hall of Fame.

It was cited last month as one of 51 class-actions that recovered \$100 million or more and paid lawyers 30% or more of that recovery. It also was one of only 12 of those cases that went to trial.

The citation was in an expert report arguing for a 33% lawyer fee in a series of settlements totaling nearly \$1 billion. The settlements were the result of another prominent class-action, antitrust litigation against the National Association of Realtors and a group of major brokerages.

Garson is proud of his case and the changes it made for Ohio worker's compensation policies, but he won't take a victory lap. "My father told me that self-praise stinks," he said.

As for his strategy of hiring a lawyer to argue for his fees, he said, "I enjoyed being more of a spectator in that than being my own advocate. I'd have been really uncomfortable standing up there tooting my own horn."

Worth Your Time

On Cahill: Cahill Gordon & Reindel managing partner Herb Washer tells Meghan Tribe about his plans for the firm after a slump in its leveraged finance practice and rare partner departures.

On Political Fundraising: Lawyers gave more to Vice President Kamala Harris in the first 10 days of her presidential campaign than to former President Donald Trump in nearly two years, Tatyana Monnay and K. Sophie Will report.

On Law Firm Mergers: Bloomberg Law columnist Rob Chesnut is not convinced mergers will lead to better service and price savings for clients, who says working with mega-firms comes with tradeoffs.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

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Walgreens Hit With Shareholder Suit Over VillageMD Partnership

By Matthew Bultman

- **COURT:** N.D. Ill.
- **TRACK DOCKET:** [24-cv-08559](#)

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Walgreens Hit With Shareholder Suit Over VillageMD Partnership

By Matthew Bultman 2024-09-18T14:47:09000-04:00

- **COURT:** N.D. Ill.
- **TRACK DOCKET:** [24-cv-08559](#)

Walgreens Boots Alliance Inc. botched the expansion of its partnership with VillageMD, while falsely assuring investors it knew how to scale the clinic operator's model, a shareholder alleged in a new lawsuit.

Walgreens concealed from investors that growth in its US health-care segment was slower than expected because it oversaturated markets with VillageMD clinics, the complaint, filed Tuesday in the US District Court for the Northern District of Illinois, said.

The oversaturation led "these newly created medical clinics to be understaffed, have less patients coming in to be treated, and culminating in a greater than expected impact on Company's short-term profits than what Defendants presented to investors," the proposed class action said.

Deerfield, Ill.-based Walgreens has invested billions of dollars in VillageMD, with plans to open hundreds of doctors offices in its drug stores as part of a push into primary care. The partnership began in earnest in 2020, the lawsuit said.

Walgreens said last month it was considering selling its VillageMD business following a strategic review of its US health-care portfolio.

The investor lawsuit alleges Walgreens didn't know how to scale the VillageMD model, despite the company's repeated assurances. Executives also failed to manage investors' expectations about the negative impact on short-term profits, the suit said.

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

Cohen Milstein Sellers & Toll PLLC and Saxena White PA represent the plaintiff.

The case is Westchester Putnam Counties Heavy & Highway Laborers Local 60 Benefits Fund v. Walgreens Boots Alliance, Inc. , N.D. Ill., No. 24-cv-08559, 9/17/24 .

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Wynn Agrees to \$70 Million Settlement in Worker Abuse Lawsuit

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Class Action

Photographer: Patrick T. Fallon/Bloomberg via Getty Images

- Class action plaintiffs say deal was reached after mediation
- Defendants accused of misrepresentations to investors

Wynn Resorts Ltd. and certain executives have agreed to pay \$70 million to settle a class action accusing the company of securities fraud related to sexual misconduct allegations against founder Steve Wynn, according to a court filing.

The settlement followed over six years of litigation and two mediation sessions, the motion said. The plaintiffs were concerned that the defendants would have an opportunity to eliminate a portion of the class period, and reduce the maximum potential recoverable damages if the case had continued, the motion said.

Class representatives filed the unopposed motion for preliminary approval of the settlement with the US District Court for the District of Nevada on Sept. 16.

The plaintiffs alleged that the defendants knew or recklessly disregarded allegations of sexual misconduct against Steve Wynn, and concealed them. As a result, the defendants made material misrepresentations to investors, the motion said.

Judge Andrew P. Gordon granted the plaintiffs' motion to certify the class in a March 2023 order.

The settlement should be approved because the amount "is more than adequate in light of the risks of continuing litigation and the best possible recovery for the Class," the motion said.

The plaintiffs are confident in the merits of their claims, but "success was not guaranteed, and the road to success remained long and arduous," the motion said.

Counsel for Wynn Resorts didn't immediately respond to a request for comment.

Pomerantz LLP, Muehlbauer Law Office Ltd., and The Rosen Law Firm PA represents the plaintiffs. Snell & Wilmer LLP and Kirkland & Ellis LLP represent Wynn Resorts.

The case is Ferris v. Wynn Resorts Ltd. , D. Nev., No. 18-cv-479, unopposed motion 9/16/24

Facebook parent Meta Platforms beats lawsuit over Apple privacy, Sandberg disclosures

 [reuters.com/legal/facebook-parent-meta-platforms-beats-lawsuit-over-apple-privacy-sandberg-2024-09-18](https://www.reuters.com/legal/facebook-parent-meta-platforms-beats-lawsuit-over-apple-privacy-sandberg-2024-09-18)

Jonathan Stempel

Meta, U.S. flag and judge's gavel are seen in this illustration taken, August 6, 2024.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Sept 18 (Reuters) - Meta Platforms (META.O) , opens new tab won the dismissal of a lawsuit claiming it defrauded shareholders by concealing how changes to Apple's (AAPL.O) , opens new tab privacy settings would make Facebook and Instagram less desirable for advertisers.

In a decision on Tuesday, U.S. District Judge Yvonne Gonzalez Rogers also rejected claims that Meta concealed former Chief Operating Officer Sheryl Sandberg's use of company resources on personal matters, including her wedding and her best-selling book "Lean In."

The Oakland, California-based judge also turned aside claims that Meta knew its transition to Reels, which copied TikTok's short-form video format, would hurt revenue because it offered fewer ads per hour than older formats.

Shareholders led by four Israeli insurers and pension funds challenged 17 allegedly false and misleading statements that Meta made in 2021 and 2022.

They said Meta's stock price fell 53% in less than a year as the truth came out, wiping out well over \$500 billion of the Menlo Park, California-based company's market value.

But in her 34-page decision, Rogers said Meta's eventual admission that Apple's iOS privacy changes could pose a \$10 billion "headwind" in 2022 did not demonstrate that its earlier disclosures were false.

She also said the claims about Sandberg came "entirely from press reports" and were unproven, and found no proof that the transition to Reels hurt Meta's financial performance.

"The court determines plaintiffs have not plausibly alleged violations of federal securities law," Rogers wrote.

She dismissed the lawsuit with prejudice, meaning it cannot be brought again.

Other defendants included Sandberg, Chief Executive Mark Zuckerberg, Chief Financial Officer Susan Li and her predecessor David Wehner.

Lawyers for the plaintiffs did not immediately respond to requests for comment on Wednesday. Meta had no immediate comment.

The case, which has a different named plaintiff, is Plumbers and Steamfitters Local 60 Pension Trust v Meta Platforms Inc et al, U.S. District Court, Northern District of California, No. 22-01470.

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

Senate confirms LA County Judge Michelle Court to federal bench

DJ [dailyjournal.com/articles/380985-senate-confirms-la-county-judge-michelle-court-to-federal-bench](https://www.dailyjournal.com/articles/380985-senate-confirms-la-county-judge-michelle-court-to-federal-bench)



Williams Court

Los Angeles County Superior Court Judge Michelle Williams Court was confirmed as a federal judge by the U.S. Senate on Wednesday. The Senate voted 49-44 to confirm her to a seat on the Central District of California.

U.S. Sen. Susan Collins of Maine was the only Republican senator to cross party lines to vote for Court. Seven senators did not vote.

U.S. Sen. Alex Padilla, D-CA, applauded the confirmation vote. "Throughout her career, Judge Michelle Williams Court has demonstrated a deep commitment to serving low-income clients and fighting for justice in the greater Los Angeles community," he said in a statement.

Court will replace Senior U.S. District Judge Dale S. Fischer and will preside over cases in Los Angeles in the court's Western Division. She was appointed to the superior court in 2012 by Gov. Jerry Brown and has worked as supervising judge of the civil division since December 2022.

Before becoming a judge, Court worked at Bet Tzedek Legal Services, a nonprofit firm that focuses on poverty law, as its vice president and general counsel after previously working as deputy director of litigation, director of litigation, interim president and CEO.

A 1993 graduate of Loyola Law School, Court also was an associate at Milberg, Weiss, Bershad, Hynes & Lerach from 2000 to 2002, focusing on consumer and civil rights class actions. She worked from 1994 to 1995 as a project attorney for the ACLU of Southern California.

She is married to Jamie Court, a political activist and consumer advocate who is president of Consumer Watchdog, a nonprofit public interest group.

Lena Zwarensteyn, senior director of the fair courts program at The Leadership Conference on Civil and Human Rights, hailed the Senate's confirmation of Court.

"Her robust career has included advancing a broad array of civil and human rights, and this underrepresented professional experience is greatly needed in our judiciary," she wrote in a statement. "Judge Court also brings vital lived experience and will be the fifth Black woman to serve as a lifetime judge on the Central District of California."

Court was one of three Central District nominees awaiting a Senate vote, with a fourth position remaining without a nomination by President Joe Biden. Three other nominees -- Los Angeles County Superior Court Judge Anne Hwang and State Bar Court Judge Cynthia Valenzuela Dixon in the Central District; and Alameda County Superior Court Judge Noel Wise in the Northern District of California -- have been approved by the Senate Judiciary Committee but are awaiting a floor vote.

San Diego County Superior Court Judge Rebecca S. Kanter, who was nominated by Biden in January for a seat on the Southern District of California bench, has yet to have a Senate Judiciary Committee nomination hearing.

The president has yet to nominate anyone to fill two vacancies, one in the Southern District, where Senior U.S. District Judge Gonzalo P. Curiel took senior status in September 2023; and the Central District, where U.S. District Judge Cormac J. Carney retired in May.

Carl A. Tobias, a professor at the University of Richmond School of Law, said he expects Senate Majority Leader Chuck Schumer, D-New York, to move forward with the nominations of Hwang and Valenzuela Dixon, possibly before the Senate goes into recess until after the November election.

But he said Biden and Senate Democrats are running out of time to move forward with judicial nominations, even if they try to advance more of them - as expected - during the lame duck session. That's especially true when the president has yet to nominate possible judges.

"It's still do-able, but they have to get them out of the White House and moving," he said in a phone interview. "The later it gets, the harder it is."

Control of the White House and the Senate is up for grabs in November. Even if Vice President Kamala Harris wins the election, there is a strong possibility she will face a Senate controlled by Republicans - which will make it much more difficult for her to get judges confirmed.

Los Angeles County Presiding Judge Samantha P. Jessner lauded Court's work, both on the bench and behind the scenes, in a statement.

"Judge Court's dedication to court technology innovation as a result of having served as Chair of the court's Technology Committee for many years, where she has guided strategic and significant technology projects that have maximized the court's efficiency for the benefit of all court users, will pay dividends on the federal bench," she wrote.

#380985

Craig Anderson

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US Senate Confirms Michelle Williams Court to California's Central District

The Los Angeles County Superior Court judge will be moving from the largest state trial court in the nation to a federal bench serving more than 19 million residents in seven counties.

September 18, 2024 at 05:53 PM



Cheryl Miller



The U.S. Senate on Wednesday confirmed Los Angeles state Judge Michelle Williams Court to the federal bench, leaving three remaining vacancies on the U.S. District Court for the Central District of California.

Court was confirmed on a largely partisan 49-44 vote. She will join the court’s western division, and her chambers will be in Los Angeles.

The Great Falls, Montana, native will become the fifth Black woman to serve as an Article III judge on the most populous federal court in the nation.

Court told the Senate Judiciary Committee at her May 22 confirmation hearing that diversity on the bench “goes a long way toward engendering trust in the judiciary when lawyers and litigants come to court. ... I think it sends a message, especially in a community like Los Angeles that is so diverse, with so many people who come from so many different places.”

The committee advanced Court’s nomination on a party-line 11-10 vote, though she escaped much of the verbal [grilling](#) Senate Republicans have given to many Biden judicial nominees.

Court will fill the vacancy created in May, when U.S. District Judge Dale Fischer took senior status.

Court has served as a Los Angeles County Superior Court judge since 2012, when she was appointed by Gov. Jerry Brown. She has served most recently as presiding judge of the court’s civil division.

Court previously worked as an attorney at the nonprofit law firm Bet Tzedek for almost 10 years, first as the deputy director of litigation and later as vice president and general counsel. She also spent two years as an associate in the Tennessee office of the firm known then as Milberg, Weiss, Bershad Hynes & Lerach.

Court is a member of California’s Judicial Council.

“I have been steeped in not only the day-to-day of managing large caseloads and increased filings but I have also been involved in policy and research concerning ways that we can address the increase in caseloads using technology and other resources,” Court said at her confirmation hearing. “I have every intention to continue the work I do in this area because I think it’s mission critical to the work that the branch does.”

Court is married to Jamie Court, the president of the nonprofit group Consumer Watchdog. They have two sons.

Court’s confirmation leaves two other Central District nominees waiting for final Senate votes: Anne Hwang and Cynthia Valenzuela Dixon. The Senate Judiciary Committee advanced their nominations, along with Court’s, in July.

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SDNY Judge Dismisses Antitrust Class Action Alleging Global Bank Price-Fixing Conspiracy

“Here, the plaintiff has failed to allege any facts to show that the defendants engaged in parallel conduct that suggests the existence of a price-fixing conspiracy and each defendant’s participation in that conspiracy,” U.S. District Judge John G. Koeltl wrote in his memorandum opinion. “This kind of barebones group pleading of parallel conduct is insufficient.”

September 18, 2024 at 06:47 PM



Sulaiman Abdur-Rahman



What You Need to Know

- Judge John G. Koeltl of the Southern District of New York dismissed an antitrust class action filed by Scott+Scott.
- The complaint accused Citigroup and other global banks of conspiring to fix the price of U.K. government bonds sold in the United States.
- Scott+Scott filed the complaint on behalf of the Oklahoma Firefighters Pension and Retirement System.

A federal judge has dismissed an antitrust class action accusing Citigroup, Morgan Stanley and other global banks of inflating the prices of U.K. government bonds sold in the United States, ruling the plaintiffs have failed to allege a plausible price-fixing conspiracy.

U.S. District Judge John G. Koeltl of the Southern District of New York dismissed the complaint without prejudice, citing deficiencies in the lawsuit filed by an Oklahoma public pension fund.

“Here, the plaintiff has failed to allege any facts to show that the defendants engaged in parallel conduct that suggests the existence of a price-fixing conspiracy and each defendant’s participation in that conspiracy,” Koeltl wrote in his memorandum opinion filed Sept. 13. “This kind of barebones group pleading of parallel conduct is insufficient.”

Scott+Scott filed the complaint in June 2023 on behalf of the Oklahoma Firefighters Pension and Retirement System naming affiliates of Citigroup, Deutsche Bank, HSBC, Morgan Stanley and Royal Bank of Canada as defendants.

Big Law firms representing the defendants include Skadden, Arps, Slate, Meagher & Flom for Citigroup; Simpson Thacher & Bartlett for Deutsche Bank; Willkie Farr & Gallagher for HSBC; Cravath, Swaine & Moore for Morgan Stanley; and Sullivan & Cromwell for Royal Bank of Canada, according to the case docket.

The Oklahoma pension fund alleged it and other investors in the U.K. “Gilt Bonds” market have suffered “injuries and damages” from global banks inflating and “manipulating” the prices of Gilts in violation of the Sherman Act.

“The plaintiff’s factual allegations fail to render plausible such a wide-ranging conspiracy,” Koeltl wrote in his memorandum opinion. “In sum, the plaintiff offers only ‘skeletal allegations of the possibility of a conspiracy.’”

“Much more is required,” Koeltl added, “namely, specific allegations that demonstrate parallel conduct and tie each defendant to the alleged price-fixing scheme.”

Koeltl gave the Oklahoma pension fund an Oct. 4 deadline to file an amended complaint if it wishes to cure the “deficiencies” cited in his opinion. The lawsuit will be permanently closed or “dismissed with prejudice” if the plaintiff fails to act or misses the deadline.

Counsel for the Oklahoma Firefighters Pension and Retirement System did not respond to requests for comment on this article.

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A second Zantac cancer trial ends with hung jury

 [reuters.com/legal/second-zantac-cancer-trial-ends-with-hung-jury-2024-09-18](https://www.reuters.com/legal/second-zantac-cancer-trial-ends-with-hung-jury-2024-09-18)

Brendan Pierson

By Brendan Pierson

September 19, 2024 5:19 AM PDT Updated 2 hours ago

Item 1 of 2 The logo of German pharmaceutical company Boehringer Ingelheim is seen at its building in Shanghai, China February 1, 2019. Picture taken February 1, 2019.

REUTERS/Stringer ATTENTION EDITORS - THIS IMAGE WAS PROVIDED BY A THIRD PARTY. CHINA OUT. ?/File Photo

[1/2] The logo of German pharmaceutical company Boehringer Ingelheim is seen at its building in Shanghai, China February 1, 2019. Picture taken February 1, 2019. REUTERS/Stringer ATTENTION EDITORS - THIS IMAGE WAS PROVIDED BY A THIRD PARTY. CHINA OUT. ?/File Photo [Purchase Licensing Rights](#) , opens new tab

- Hung jury in latest Zantac cancer trial in Chicago
- Boehringer Ingelheim only defendant after settlements with GSK, Pfizer
- FDA pulled Zantac in 2020 over NDMA carcinogen concerns

Sept 18 (Reuters) - The latest trial over claims that the discontinued heartburn drug Zantac causes cancer ended with a hung jury on Wednesday, as jurors in Chicago were unable to agree on whether Boehringer Ingelheim must pay damages to an Illinois man who said he developed prostate cancer as a result of taking the drug, according to the man's lawyer.

It was the second time a jury failed to reach a verdict at trial during the ongoing wave of litigation over the now-discontinued drug.

"We appreciate the jury's careful consideration," Eric Olson, a lawyer for plaintiff Ronald Kimbrow, said in an email. "Boehringer Ingelheim has now twice failed to convince a jury that Zantac was safe."

He said the case would go to trial again. Boehringer Ingelheim did not immediately respond to a request for comment.

The privately held German drugmaker was the only defendant at the trial in Cook County Circuit Court, after plaintiff Ronald Kimbrow settled with others including GSK (GSK.L) , opens new tab, which originally developed the drug, and Pfizer (PFE.N) , opens new tab.

Kimbrow, 73, said he took Zantac from 1995 to 2019.

Boehringer Ingelheim, GSK, Pfizer and Sanofi (SASY.PA) , opens new tab all sold brand name Zantac at various times since it was approved in 1983, and have been named in tens

of thousands of lawsuits over the alleged cancer link.

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

Three lawsuits over Zantac had previously gone to trial, all in Illinois, with two ending in verdicts for the defense and one with a hung jury.

The drugmakers won a significant victory in 2022, when a federal judge in Florida rejected the plaintiffs' expert witnesses for about 50,000 cases that had been centralized in her court on the grounds that they did not use reliable scientific methods. Without those witnesses, the cases could not go forward, though some plaintiffs are appealing.

The Delaware Supreme Court last month said it would consider drugmakers' bid to keep similar expert testimony out of court in that state, where more than 70,000 lawsuits - the vast majority of the remaining litigation - have been brought. A lower court judge refused to exclude the experts, allowing the cases to go forward.

Sanofi has agreed to settle about 4,000 cases against it, while Pfizer has reportedly agreed to settle more than 10,000.

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Reporting By Brendan Pierson in New York, Editing by Alexia Garamfalvi and Marguerita Choy

Judge: Only One Plaintiff for Upcoming Bellwether Trial Over J&J Talc

U.S. District Judge Michael Shipp, in New Jersey, struck down a proposal from plaintiffs’ lawyers in lawsuits over Johnson & Johnson's talcum powder to consolidate two cases for the first federal bellwether trial.

September 18, 2024 at 07:02 PM

Mass Torts



Amanda Bronstad
staff reporter

What You Need to Know

- The first federal bellwether trial in the multidistrict litigation over Johnson & Johnson's talcum powder is scheduled for Dec. 3.
- Judges in other multidistrict litigation have ordered consolidated trials, but defense attorneys say they encourage gargantuan verdicts.
- In Tuesday's order, U.S. District Judge Michael Shipp cited a 2021 decision by the former judge to limit the first bellwether trial to one plaintiff.

A federal judge struck down a proposal from plaintiffs’ lawyers in lawsuits over Johnson & Johnson’s talcum powder to consolidate two cases for the first federal bellwether trial.

The bellwether trial, which is part of the talc multidistrict litigation in the District of New Jersey, is scheduled for Dec. 3. Plaintiffs’ lawyers had pushed to consolidate two separate cases.

Judges in multidistrict litigation have ordered consolidated trials in numerous other mass torts involving [hip implants](#), pelvic mesh, [3M’s combat earplugs](#) and talc cases involving mesothelioma filed in New Jersey’s state courts.

Plaintiffs lawyers have pushed for consolidated trials as a more efficient means of resolving multidistrict litigation, which often involves thousands of cases, but [defense attorneys say](#) combining plaintiffs leads juries to award gargantuan verdicts.

On Tuesday, U.S. District Judge Michael Shipp of the District of New Jersey sided with Johnson & Johnson in concluding that the only judge whose opinion mattered was retired U.S. District Chief Judge Freda Wolfson, who had decided the first bellwether trial in the talc multidistrict litigation would involve only one plaintiff. Wolfson, the original

judge assigned to oversee the talc multidistrict litigation, retired last year.

“With Chief Judge Wolfson’s previous findings in mind, the PSC’s contentions that consolidated cases are permitted by the federal rules and present common issues of law and fact are of no moment,” Shipp wrote, citing Wolfson’s 2021 order and remarks she made at a status conference months before that, stating: “I’m not trying multi-plaintiff cases. They are going to be single-plaintiff cases. So let’s put aside that idea.”

He ordered the plaintiffs steering committee to come up with a single case for the bellwether trial by Sept. 24.

“The plaintiffs’ steering committee viewed the request for a consolidated trial as a means to expedite the long-delayed bellwether process, but we understand and respect the decision of the court in denying that request,” Beasley Allen’s Leigh O’Dell, in Montgomery, Alabama, and Michelle Parfitt, of Ashcraft & Gerel in Washington, D.C., who are co-lead counsel in the talc multidistrict litigation, said in a statement. “We look forward to trying the first case in the MDL in December, consistent with the current scheduling order, to provide a foundation for gaining justice for tens of thousands of women and their families.”

A representative of Johnson & Johnson and its lawyer, Susan Sharko, of Faegre Drinker Biddle & Reath in Florham Park, New Jersey, did not respond.

‘Defendants Are Puzzled’

The trial planning in the multidistrict litigation comes amid Johnson & Johnson’s efforts to garner the support of 75% of talc claimants for a third Chapter 11 bankruptcy by one of its subsidiaries. If filed, a bankruptcy would halt all talc trials, including the one on Dec. 3. The talc multidistrict litigation, which began in 2016, and now has nearly 60,000 lawsuits alleging Johnson & Johnson’s baby powder caused ovarian cancer, ended up on hold after a first and second talc bankruptcy froze all trials starting in late 2021 through the middle of 2023.

A year ago, after the second talc bankruptcy was dismissed, lawyers reconvened before Shipp, who took over after Wolfson’s retirement. Ahead of a status hearing, lawyers for the plaintiffs’ steering committee [suggested a consolidated trial](#), while Sharko referenced Wolfson’s earlier ruling limiting the bellwether to a single plaintiff.

She also brought up the only talc verdict for the plaintiffs that’s been upheld in state courts: a \$4.7 billion award in 2018 for 22 women whose cases were consolidated in St. Louis, Missouri, in a trial that “made a mockery of defendants’ due process rights.” The amount was lowered to \$2.1 billion on appeal, but the U.S. Supreme Court upheld the verdict in *Ingham v. Johnson & Johnson*.

In an order earlier this year, Shipp scheduled the date for the bellwether trial, anticipated to last 10 days.

This month, the dispute over a consolidated trial reemerged. In a Sept. 5 letter, plaintiffs lawyers noted that both cases had facts in common.

“Both women were frequent users of Johnson’s baby powder for more than 45 years during the same time period,” they wrote. “Both women were diagnosed with epithelial ovarian cancer, serous subtype. Both women have undergone surgery and similar therapeutic regimens of chemotherapy.”

One woman, Carter Judkins, who lives in Dover, New Hampshire, was diagnosed with ovarian cancer in 2016. The other, Pasqualina Rausa, who is from Ponte Vedra, Florida, said she was diagnosed with ovarian cancer in 2018. Last month, Johnson & Johnson moved for summary judgment against both cases and four others.

“Frankly,” Sharko wrote in a Sept. 6 letter, “defendants are puzzled at this selection.”

“To the extent that any case management orders have discussed the possibility of consolidated trials, they represent drift rather than a reasoned change of course following briefing and argument,” she wrote. “Judge Wolfson granted the PSC the right to choose the first case for trial subject to the limitation that the PSC could choose only one case for the first trial.”

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Align-SmileDirectClub Collusion Settlement Nixed by Judge

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Align Technology Inc.'s \$27.5 million deal to settle claims in an antitrust case accusing the company of colluding with the now-defunct SmileDirectClub to inflate prices of aligner products has been rejected by a federal judge.

Judge Vince Chhabria of the US District Court for the Northern District of California on Wednesday denied preliminary approval of the deal designed to cover 1.45 million class members who purchased SmileDirectClub clear aligners.

Align must now come back with a renewed motion for preliminary approval within 35 days to resolve long-standing claims that it schemed with SmileDirect to reduce competition in the direct-to-consumer clear aligner market, leading plaintiffs to pay more clear aligners purchased from SmileDirect.

Chhabria's rejection adds to a series of major antitrust settlements denied by the courts this year, signaling that judges are carefully evaluating deals to ensure class members are fairly compensated.

In February, Judge James Donato, also of the Northern District of California, denied a \$700 million proposed settlement with states and consumers to resolve claims that the Google Play app store abuses its market power. Judge Richard F. Boulware of the US District Court for the District of Nevada in July rejected a motion to preliminarily approve a \$335 million deal that would provide UFC fighter members of two classes with payouts that constitute significant shares of their lifetime earnings from the organization.

Competition Concerns

The Align plaintiffs asked the court earlier this month for preliminary approval of their deal, calling it fair, adequate, and reasonable.

But Chhabria outlined a number of concerns, including why the motion didn't consider whether claim members should receive different payouts depending on their payment plan and the appropriateness of providing \$300 coupons for Invisalign treatment as part of the deal. Align makes the popular clear teeth straightening treatment as an alternative to braces.

"Why would it be appropriate, in an antitrust case where the defendant is the dominant player in the market, to approve a settlement involving the distribution of coupons that would incentivize even more customers to do business with that defendant?" Chhabria asked. "The

motion for preliminary approval contains no discussion of this, and no discussion of the effects that the coupon distribution could have on competition in the aligner industry.”

If the revised settlement continues to have a coupon element, Chhabria will allow people who aren’t a party to the suit to weigh in.

The plaintiffs are represented by law firms including Hagens Berman Sobol Shapiro LLP. Align is represented by law firms including Manatt, Phelps & Phillips LLP and Paul Hastings LLP.

The case is Snow v. Align Tech Inc. , N.D. Cal., No. 3:21-cv-03269, 9/18/24 .

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AT&T agrees to settle case over abandoned lead cables beneath Lake Tahoe

 [courthousenews.com/att-agrees-to-settle-case-over-abandoned-cables-underneath-lake-tahoe](https://www.courthousenews.com/att-agrees-to-settle-case-over-abandoned-cables-underneath-lake-tahoe)

Alan Riquelmy

SACRAMENTO, Calif. (CN) — AT&T on Wednesday signaled it will resolve a yearslong legal struggle over abandoned telecommunication cables contaminating Lake Tahoe, and remove the disused lines.

The California Sportfishing Protection Alliance filed suit in 2021 over the cables that it said were leaching toxic lead into the lake that bridges California and Nevada. The two cables, about 8 miles long, are at the bottom of the lake and contain over 68 tons of lead.

The federal case was advancing through court when both the alliance and AT&T on Wednesday filed documents in support of a consent decree. A hearing on that decree is set for Nov. 7.

“This is a monumental win for the environment, the communities who drink Lake Tahoe water, and people with lake-dependent livelihoods, and the millions of annual visitors,” said Chris Shutes, executive director of the alliance, in a statement.

Lake Tahoe is a major tourist destination in both summer and winter, with visitors drawn to boating and skiing, as well as the town of South Lake Tahoe and casinos on the Nevada side.

According to the alliance, the abandoned cables are on the western side of the lake. One of them has its cut ends submerged. Damaged over the years, the lead sheathing is now exposed in certain spots.

Investigations supported by the alliance revealed lead in the water and sediment near the cables. Additionally, lead was found in algae — a base of the food chain for lake fisheries — as well as clams and crawdads near the cables.

“Designated as an Outstanding National Resource Water, Lake Tahoe has no major pollution sources of lead or other metals entering the lake,” said Sudeep Chandra, director of the Global Water Center at the University of Nevada, Reno, in a statement. “So, our expectations were to see minimal to low concentrations of lead in this exceptionally clean and clear lake.”

Instead, the alliance said it discovered in one sample that biofilm on a cable showed lead at 67,000 times more concentrated than a sample taken from a rock.

AT&T in a statement to Courthouse News said it wants to remove the cables by December. If that proves impossible, it intends to remove them next year, pending weather and permitting issues.

“We are working with Keep Tahoe Blue and are grateful for their assistance with this process,” AT&T said.

While opting to resolve the case against it, AT&T said that multiple analyses have determined that the cables don’t threaten the environment or public health. Despite being confident in its case and of the cables’ safety, the communications giant chose to reach a settlement.

“With the litigation behind us, we are fulfilling our original commitment to remove the cables in Lake Tahoe,” AT&T president-California Marc Blakeman said.

AT&T said that in 2021 it agreed to remove the cables to avoid the distraction and expense of a lawsuit. However, after news reports about the cables emerged in summer 2023, it opted to pause removing them and have experts perform more analysis. That analysis now complete, AT&T will continue the removal process.

The alliance said AT&T chose to restart the litigation to reveal the merits of the alliance’s claims after conditionally settling the case years ago.

“We are proud to have fought for the removal of this toxic waste from Lake Tahoe and we are happy that AT&T decided to finally step up,” Shutes said.

The League to Save Lake Tahoe also praised the agreement.

“We welcome this announcement and appreciate AT&T’s commitment to resume the removal of these cables,” said Jesse Patterson, chief strategy officer for the League to Save Lake Tahoe, in a statement. “Lake Tahoe is a special place and deserves this kind of protective action to Keep Tahoe Blue.”

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SUSTAINABLE BUSINESS

Tyson Foods Sued for Greenwashing

Environmentalists say the meat company's 'net-zero by 2050' claims don't hold water

By H. Claire Brown

Updated Sept. 18, 2024 2:34 pm ET | **WSJ PRO**



Tyson Foods is the second major meat company to be sued in the U.S. this year for greenwashing.
PHOTO: MIKE BLAKE/REUTERS

Tyson Foods, the meat company that produces about 20% of the meat sold in the U.S., was sued for greenwashing on Wednesday.

Since 2021, the company has claimed it will reach net-zero emissions by 2050, and about two years ago, it began touting plans for its “climate-smart” beef. The lawsuit, brought by the advocacy organization Environmental Working Group, alleges that these statements are misleading because Tyson Foods has no real plans to achieve these goals.

“Greenwashing claims are really targeting well-meaning consumers who want to do good with their money, who want to try to take some individual responsibility and purchase foods that are more climate-friendly,” said Carrie Apfel, an attorney for Earthjustice, an environmental law firm representing the plaintiff.

“If they’re being fed a lot of false or misleading statements, then they really can’t make an informed decision about where to spend their money,” she said.

A Tyson Foods representative said the company wouldn’t comment on the litigation, but added that it “has a long history of sustainable practices that embrace good stewardship of our environmental resources.” Beef represents 36% of the [company’s sales](#) and 65% of its [total emissions](#).

Tyson Foods is the second major meat company to be sued in the U.S. this year for greenwashing. In February, New York Attorney General Letitia James challenged JBS, the Brazilian meat conglomerate, on similar grounds, alleging that the company’s pledge to reach net-zero emissions by 2040 wasn’t backed by a feasible plan. That lawsuit came after Earthjustice successfully challenged JBS’s environmental messaging in front of an advertising industry self-regulation group last year.

“We’re seeing quite a growth in greenwashing lawsuits around the world,” said Michael Gerrard, founder of the Sabin Center for Climate Change Law at Columbia Law School. “Europe and Australia have been the leaders in these suits, and their advertising integrity boards have been issuing a large number of violations. We also see them in the U.S., although at a lower volume.”

The complaint against Tyson Foods was filed in Washington, D.C., where a consumer protection law allows interest groups to sue companies for false advertising on behalf of consumers. [Coca-Cola](#) is currently a defendant in a suit filed under the same law alleging the beverage company overstated its recycling goals.

Unlike many of its meat industry peers, Tyson Foods does have emissions reductions targets that have been validated by the Science-Based Targets initiative, a nonprofit that assesses corporate climate goals.

However, the SBTi has only reviewed Tyson Foods' plans for emissions reductions by 2030, and hasn't approved any net-zero targets submitted by the company.

"Tyson has put out no plan or real meaningful steps toward making the scale of reductions that it would have to make, given the enormity of its emissions, to achieve net-zero or really any meaningful reduction in its emissions," Apfel said.

The plaintiffs are hoping the court will issue an injunction forcing Tyson Foods to pull back on its climate messaging or publish an actionable plan to back up its claims.

Write to H. Claire Brown at claire.brown@wsj.com

Appeared in the September 19, 2024, print edition as 'Tyson Foods Is Sued Over Climate Claims'.

Green Bonds Aren't Driving Climate Action in US, Study Says (1)

By Ishika Mookerjee

- Only 2% of proceeds initiate entirely unique green projects
- Global market for the bonds has grown to more than \$3 trillion

Bloomberg Law News 2024-09-19T10:16:4113600945-04:00

Green Bonds Aren't Driving Climate Action in US, Study Says (1)

By Ishika Mookerjee2024-09-19T06:50:05007-04:00

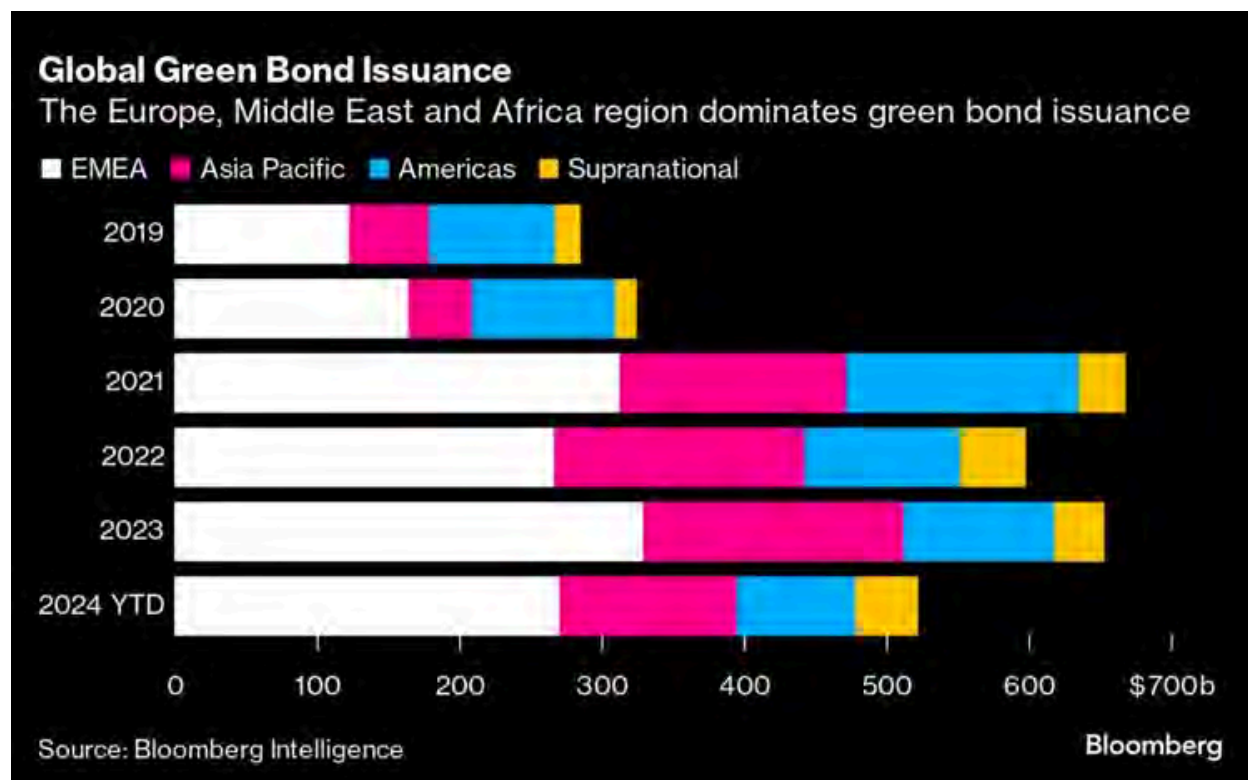
- Only 2% of proceeds initiate entirely unique green projects
- Global market for the bonds has grown to more than \$3 trillion

Almost all green bonds issued in the US fail to drive real action to tackle climate change, undermining the merits of a global market that's grown to more than \$3 trillion, according to a study.

An analysis of the first green bonds sold by corporate and municipal issuers between 2013 to 2022 found that about 2% of proceeds were used to fund projects that are genuinely unique or don't replicate existing work, Pauline Lam and Jeffrey Wurgler said in a working paper published this month by the National Bureau of Economic Research.

Roughly 30% of proceeds from corporate green bonds and 45% in the case of municipal bonds were used to refinance ordinary debt, while in many other instances funds were directed to expanding existing projects or to new developments that were similar to previous work.

Investors also typically don't differentiate between bonds based on their "additionality," a term used to measure activities that generate a positive climate impact that wouldn't have otherwise occurred, according to the NBER study.



"A cynical interpretation of the results is that the green bond market is largely a financing sideshow," Lam and Wurgler, both of New York University's Stern School of Business, said in the study. "The empirical conclusion is that the green bond label itself provides little assurance that the funds are being directed toward a project whose green traits are novel for the issuer."

The green instruments are the largest component in a market for climate bonds now worth more than \$5 trillion as governments and companies seek capital for projects at lower borrowing costs. While Europe — which has stricter environmental, social and governance rules than the US — accounts for the largest share of green bond issuance, volumes increased in the past three years in the Americas and were about \$79.7 billion in the first eight months of 2024, up 11% from the same period a year ago, according to Bloomberg Intelligence.

As regulators aim to improve quality and amid a broader questioning of ESG objectives, green bonds are becoming subject to increasing scrutiny. Rising investor skepticism has contributed to an erosion in the so-called greenium.

Using proceeds for refinancing isn't necessarily problematic, said Nneka Chike-Obi, senior director and head of Asia-Pacific ESG ratings and research at Sustainable Fitch.

"In some sectors, such as real estate, bonds are typically used for refinancing and this includes green bonds if the projects meet green eligibility criteria," she said. Some ratings methodologies already assign better scores when a larger share of proceeds is allocated to new and additional activities.

Lam and Wurgler's study was "misguided to denigrate the green bond market for supplying finance to existing green projects," **Ulf Erlandsson**, chief executive officer of the Anthropocene Fixed Income Institute, a research organization, said in a blog post.

Bonds are typically used to replace more expensive sources of capital for existing ventures, and "green bonds make refinancing green projects cheaper, therefore encouraging companies to initiate more of them," he said.

With the issuance of sustainable debt continuing to increase, "we hope our findings will encourage greater scrutiny of green bond proceeds, and more precise notions of additionality, so that the market might achieve its real promise," Lam and Wurgler wrote in their report.

(Adds comment from paper's authors in final paragraph.)

--With assistance from **Alastair Marsh**.

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Fund management**Oxford endowment fund boss Sandra Robertson to give up investment role**

Neamul Mohsin will take over chief investment officer position at university's £6.5bn fund



OUEM, established in 2007, runs money for individual Oxford colleges and other institutions © Chris Hellier/Alamy

Harriet Agnew in London 4 HOURS AGO



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Sandra Robertson, who has run Oxford university's £6.5bn endowment fund since it was founded almost two decades ago, is stepping back as chief investment officer, according to three people familiar with the situation.

Robertson, who is currently CIO and chief executive of Oxford University Endowment Management, will give up the investment role as of January next year and remain CEO. Deputy-CIO Neamul Mohsin, who joined the institution 12 years ago, will become chief investment officer.

OUEM was established in 2007 and is one of the largest endowments in the UK. It runs money for individual Oxford colleges, including Christ Church, Brasenose and Balliol, as well as other institutions such as Radley College and the Wolfson Foundation.

The Oxford endowment fund has gained 4.4 per cent a year over the past three years to December 31, hurt by a sell-off in US equity markets in 2022. It is up 9 per cent in the 12 months through July and has gained 8.7 per cent a year since its inception at the start of 2009 to the end of July. It distributed £1.6bn to investors over this period.

At the end of 2023, a third of OUEM's assets were invested [in private equity](#), with a further 35 per cent in public equities. The remainder is largely split across credit, property, short-term bonds and cash. The investment team has been tweaking its asset allocation at the margin, slightly reducing exposure to managers investing in US tech stocks and private equity, according to a person close to the firm.

OUEM confirmed the changes and said that splitting the CEO and CIO roles is a “natural progression” that reflects how the institution has grown since its formation. Back then it managed £600mn for a single investor, the University of Oxford. Now it manages more than £6.5bn on behalf of 46 investors.

The endowment, whose investment committee is stacked with luminaries from the world of finance, has been run by Robertson since it was founded. Sir Paul Ruddock, chair of Oxford university's investment committee, is also in the process of stepping down after more than a decade in the role, and will be replaced by private equity executive Zeina Bain.

Two years ago the Financial Times reported that OUEM had [lost more than half of its investment staff](#) over an 18-month period, marking a rare period of turbulence at the institution. Departures included the then-deputy CIO Jack Edmondson. At the time, some investors said that Robertson's leadership style, and frustration with the length of her tenure, had contributed to some of the departures.

At the time, Ruddock said Robertson had “built a very strong team, respected by peers, investors and other members of the investment industry” and that OUEM served as an “engine room for talent”.

The person close to the firm said that the high turnover following the pandemic, which was common to many firms, had now stabilised.

Mohsin began his career as a consultant at PwC, where he specialised in commercial due diligence and business valuations. He joined the investment team of OUEM in 2012 and has been deputy CIO for the past two years.

Before joining OUEM at its creation in 2007, Robertson held senior positions at the Wellcome Trust, the UK's largest endowment, latterly as co-head of portfolio management.

That £36.8bn foundation is undergoing its own generational shift on its investment team. Chief investment officer Nick Moakes is retiring in March after 17 years. He will be replaced by Lisha Patel and Fabian Thehos, who are currently managing directors of Wellcome's investment team.

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The Am Law 100 Leads The Charge On Billable Rate Increases

 abovethelaw.com/2024/09/the-am-law-100-leads-the-charge-on-billable-rate-increases

Kathryn Rubino

September 18, 2024

Ed. Note: Welcome to our daily feature Trivia Question of the Day!

According to the Thomson Reuters Institute's *Law Firm Rates in 2024* report, what was the year-to-date growth in worked billable rates for the Am Law 100?

Hint: While the Am Law 100 are leading the way, billing rates also increased in the Am Law Second Hundred and midsize law firms at a clip of 5.9% and 5.6%, respectively.

See the answer on the next page.

1 2

Topics

Biglaw, Billable Rates, Trivia Question of the Day

The Am Law 100 Leads The Charge On Billable Rate Increases

 abovethelaw.com/2024/09/the-am-law-100-leads-the-charge-on-billable-rate-increases/2

Kathryn Rubino

September 18, 2024

Answer: 8.4%. [Read more here.](#)

Biglaw, Billable Rates, Trivia Question of the Day

Law firm rates in 2024: New report finds that rates continue strong growth, but could face shifting trends

 [thomsonreuters.com/en-us/posts/legal/law-firm-rates-report-2024](https://www.thomsonreuters.com/en-us/posts/legal/law-firm-rates-report-2024)

September 17, 2024

Law firms are continuing their impressive run of growth in billing rates; however, potentially softer demand in 2025 may make such continued strong rate growth an important necessity

No observer of the legal market should be surprised to hear that law firm billing rates continue to be watched closely by both law firms and corporate law departments — each side, however, has their own reasons for this.

For law firms, growth in law firm rates has been one of, if not *the* key driver of the growth in firm profitability for the past decade, making the rates they charge tantamount to their profitability. Clients, on the other hand, are facing mounting pressure to control costs and dealing with increasing matter volumes and a largely flat headcount. That means, they potentially will have to rely more on outside counsel, making the rates they pay of critical importance.

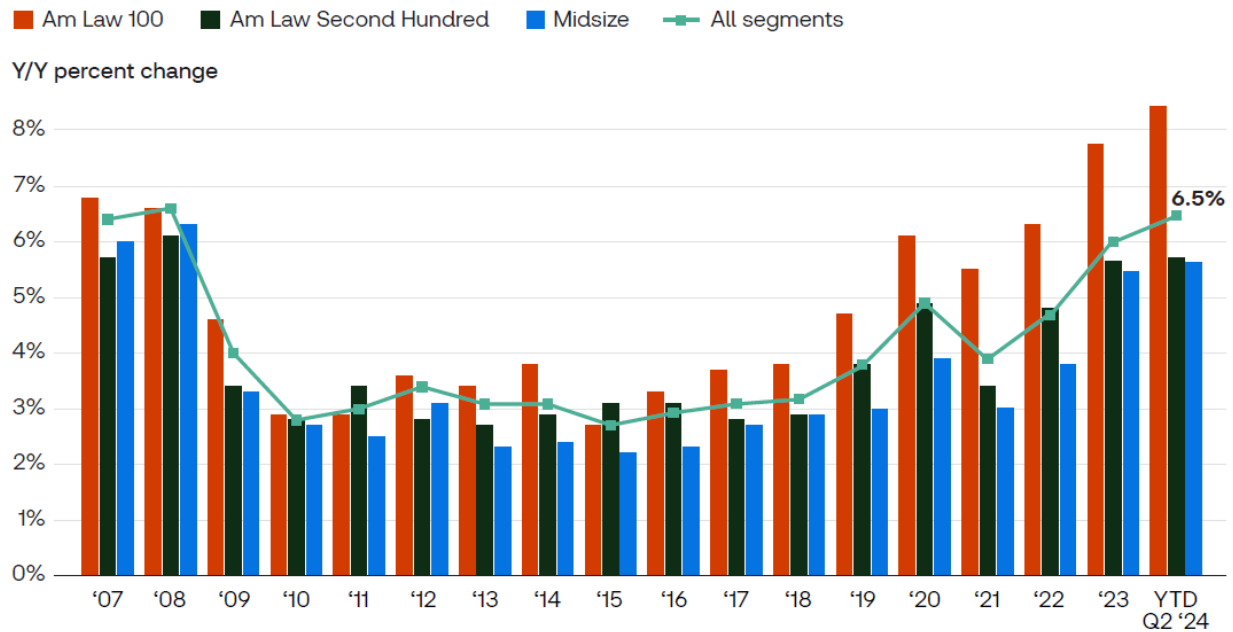
Though the motivation for watching rate performance may differ, both sides readily agree that rates are a key indicator when evaluating the legal market economy.

Partnering once again with the True Value Partnering Institute, the Thomson Reuters Institute's *Law firm rates in 2024* report explores how rate performance so far in 2024 has doubled-down on the long-term trend of strong rate growth on a year-over-year basis. However, this year has also seen the continuation of a relatively recent phenomenon of steadily increasing rate growth throughout the year.

However, there are signals that clients may be starting to push back more actively on rates, leading to increasing questions about how long this surge in rates will be sustainable. Yet, law firms should not necessarily rush to restrain rate growth in places where the market is willing to tolerate it, but rather just be aware of clients' sentiment.

Through the mid-year point of 2024, a years-long trend of steadily increasing growth in worked rates, also known as agreed rates, has continued, with no real signs of slowing. Through the mid-year point, worked rates grew by an average of 6.5% compared to the time last year.

FIGURE 1:

Worked rate growth

All timekeepers; billable time type; non-contingent matters.

Source: Thomson Reuters 2024

Broad growth with support from practice demand

The report shows that acceleration in rate growth is remarkable not only for its height but also its breadth, with all major law firm segments reaching new heights in rate growth. Am Law 100 law firms, for example, continue to lead the market with growth in worked rates of 8.4% year-to-date (YTD), but both Am Law Second Hundred and Midsize law firms have similarly been aggressive in their growth for the past two years as well. The most recent quarterly results found Am Law Second Hundred and Midsize law firms at 5.9% and 5.6% growth in worked rates, respectively.

As recently as 2022, both of these segments had constrained their rate growth below 5%. However, both Am Law Second Hundred and Midsize law firms seem to have taken note of the aggressive pace of rate growth pushed by their larger Am Law 100 counterparts and seem to be willing to strike while the iron is hot.

Further boosting profitability for law firms thus far in 2024 has been the coupling of rate growth with impressive growth in demand, from counter-cyclical practices like litigation as well as a resurgence in general corporate demand.

How long can it last?

As the report discusses, however, that extra boost for profitability may not be reliable in the long term. Current indications for the direction of the overall economy indicate that law firms may need to continue to look to rates as their primary profitability driver as they move into 2025. Continued high interest rates, downward revisions to US jobs numbers, a troubling real estate market, and the upcoming US presidential election are all contributing to the uncertainty that many people feel about how the economy will emerge in 2025.

This economic uncertainty paints a potentially foreboding picture for transactional practices into next year, meaning a potentially gloomy legal demand outlook overall. Without the benefit of additional working hours, firms will once again rely on their rate structures to provide the basis for increased revenue and, ultimately, profit.

Indeed, we are seeing early signs that the pace of rate growth seen for the last few years across the globe may already be slowing, as indications from regions such as Australia demonstrate a potentially cooler rates environment there. Should those early indications prove to be the vanguard of a trend, law firms may well find themselves pivoting in 2025 toward strategies that emphasize not only getting the most out of rate increases through negotiations, but also capturing as much of those increases as possible through aggressively pursuing collections.

For more in-depth analysis of law firm rates in 2024 and what the future may hold, you can download a copy of the full “Law firm rates in 2024” report by filling out the form below:

Volkswagen AG

VW audit of Xinjiang plant failed to meet international standards

Leaked report, which the carmaker claimed cleared it from forced labour allegations, shows audit fell short, according to experts



A Volkswagen factory sits on the outskirts of Urumqi in in western China's Xinjiang Uyghur Autonomous Region on April 22, 2021. © AP

Patricia Nilsson in Frankfurt and **Edward White** in Shanghai 4 HOURS AGO



The audit that Volkswagen claimed cleared it of allegations of forced labour in Xinjiang failed to meet international standards, according to a review of the leaked report on its findings.

VW said in December that an audit had found “no indications of any use of forced labour” at its plant in the western Chinese region, where human rights groups have documented widespread abuse against the mainly Muslim Uyghur ethnic group.

Löning, the Berlin consultancy founded by former German human rights commissioner Markus Löning, had applied the “internationally renowned” social auditing standard SA8000, VW said in a press release then. This prompted global index provider MSCI to remove a “red flag”, which since 2022 had barred ESG-focused investors from buying VW shares because of the Xinjiang allegations.

But the audit report, seen by the Financial Times, shows that the Chinese firm involved in the work with Löning, Guangdong Liangma Law, did not adhere to critical aspects of the SA8000 auditing standard.

“The conclusion of [VW’s] press release is not substantiated by the audit,” said Judy Gearhart, professor with the Accountability Research Center at American University’s School of International Service, who helped develop the SA8000 rules.

The report highlights the difficulties in carrying out credible audits in Xinjiang, and more broadly throughout China, for western companies with large operations in the country. VW is China’s best-selling foreign auto group and the country of 1.4bn people has been generating at least half of the German group’s profits.

Western governments and international human rights groups say that hundreds of thousands of Uyghurs and other Muslims were detained in the region from 2017 to 2019 and that many have also been subjected to re-education and forced labour. Beijing has denied allegations of human rights abuses.

Gearhart said that VW’s audit “departs” from the SA8000 standard “in several important ways”, chief among them the way interviews with staff were conducted.



A Volkswagen Lavalida Blue Motion car is displayed at Auto China 2014 in Beijing, April 20, 2014. © REUTERS

Notably, the interviews, carried out at the plant in the regional capital Urumqi, were live streamed to the law firm’s headquarters in Shenzhen.

The live broadcast placed workers in a situation that was “intimidating [and] did not guarantee confidentiality”, Gearhart said. “The interviews have no value [and] cannot be used as confirmation of the situation in the factory.”

VW said that the SA8000 standard had only been used by the auditors as a “basis” but that “full examination of all points mentioned in the standard were [not] necessary”.

The carmaker said it “always complies with legal requirements in its communications”, adding that “investors or the public have never been deceived”.

Rushan Abbas, founder of the NGO Campaign for Uyghurs, who first received the leaked audit report and shared it with the FT, Der Spiegel and ZDF, said that VW’s “deceit and obfuscation are an insult to . . . millions of victims”.

VW has for years faced questions over potential forced labour at its Xinjiang plant, which is run by a joint venture with state-owned SAIC.

The plant, which was built in 2013, wound down production after the pandemic and its 197 remaining employees — just under a quarter of whom are Uyghur — now carry out quality checks on cars shipped from other Chinese plants.

VW managers briefed on the matter have previously said that the company is reluctant to leave the region before its existing agreement with SAIC expires in 2029, as this would hurt its relationship with the Chinese state-backed partner.

The report by Liangma, dated November 20, two weeks before VW communicated on its findings, shows that only managers were asked questions related to forced labour.

One question was: “Have you ever witnessed or heard of instances of forced or compulsory labour practices within the factory or its supply chain?”

Questions to floor workers allowed only yes, no or other pre-determined answers and did not directly address forced labour. “Discrimination witnessed/experienced: a) Yes b) No”, one read.

“All interviewees were very relaxed and with smiling faces,” the audit report further noted.

Under China's legal system, factory workers risk committing an administrative violation or criminal offence, including breaching national security laws, if they publicly comment about forced labour practices, "even if the statements are true", according to a Beijing-based legal expert, who required anonymity for safety reasons.

China's foreign ministry did not immediately comment.

VW's summary of the audit last December created [a staff rebellion at Löning](#), which days after its publication admitted: "The human rights situation in China and Xinjiang and the challenges in collecting meaningful data for audits are well known and are also present in this project."

In a statement on LinkedIn, the German consultancy added that "no other team member" apart from the founder and the employee who had been on the ground in China "supported or backed this project". Several of the firm's employees have since left, according to their LinkedIn profiles.



About a year before Clive Greenwood helped VW audit its Xinjiang plant, he published this post on LinkedIn

According to the leaked report, the audit was conducted by two senior lawyers, Simon Choi and Wen Xu, and the Chinese law firm's chief compliance officer Clive Greenwood. The report makes no mention of Löning or Christian Ewert, the Löning employee who VW said accompanied the Liangma lawyers.

VW declined to comment on the discrepancy, citing "contractual confidentiality obligations".

A spokesperson for VW's works council said that in light of the fresh details about the audit, it expected the company to "provide a complete clarification of the allegations" as well as "transparency regarding the responsibilities of top management and the board of directors".

"The key question is: how reliable are the conclusions of the audit in light of the latest findings?" the spokesperson said.

Greenwood, a British citizen who has spent decades in China, until recently stated in one LinkedIn profile that he joined the Chinese law firm weeks before the audit took place. His profile was edited to remove the reference shortly after the FT sought to contact him for comment.

According to a separate, older, LinkedIn profile, he spent almost a decade running an expat bar in the Chinese city of Suzhou called The Drunken Chef until 2013, although an X account associated with him and the bar was posting updates as recently as 2016. Companies House filings and social media activity shows that he was in Birmingham as recently as 2019, where he ran the city's oldest pub, The Lad in the Lane.

Greenwood returned to China in January 2020, according to posts on LinkedIn, and founded a firm carrying out quality control audits for small and medium-sized European businesses. He did not reply to a request for comment.

About a year before he helped VW audit its Xinjiang plant, Greenwood published a post on LinkedIn that featured a picture of a pile of peanuts with the question: "What's the value of a SA8000 audit in China" next to it.

VW said that "to the best of our knowledge, all persons involved in the audit had the appropriate qualifications and experience required for their respective activities", and stressed that it had contracted Löning to carry out the audit and had "not commissioned any other companies".

Markus Löning declined to comment. Ewert did not reply to a request for comment, nor did Liangma and the two lawyers involved in the audit.

In its December statement, VW claimed that the Chinese law firm that had carried out the audit had "extensive experience in social audits".

However neither Liangma or Löning are accredited to carry out SA8000 audits, according to a list compiled by Social Accountability International, the standard-setting body.

Adrian Zenz, a researcher whose analysis of Chinese government records was instrumental to exposing China's internment system in Xinjiang, said "the most central claims" made by VW about the audit were "misleading or false".

He also noted that the audit referred to staff activities to promote that “all ethnic groups were in harmony”, which he said implied that the VW plant was “aiding the [Chinese] state in enforcing its coercive ethnic policies”.

VW said that the Liangma lawyers who carried out the audit had “many years of practical experience with audits according to SA8000 and Chinese labour law”.

Contacted for comment, MSCI said its decision to remove Volkswagen’s red flag had reflected the “public findings of an audit commissioned by Volkswagen and performed by Löning Human Rights & Responsible Business GmbH, which found no ‘indication or evidence of forced labour among the employees’, while acknowledging “challenges in collecting data for audits”.

It added that it would “continue to monitor any future public disclosures related to this case.”

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Matt Levine's Money Stuff: There's a Robot Warren Buffett ETF

By Matt Levine 2024-09-18T14:11:26805-04:00

Warren Buffett

What is Warren Buffett? Like, if you were trying to describe and recreate his essential features, how would you do it? I guess a decent answer is “he is fully described by his DNA, so I would simply get his DNA and clone him in a lab,” but that does not seem quite possible on current technology and anyway let’s try for something more parsimonious. We do not really need to capture his physical appearance and personal foibles and ineffable humanity; we are interested in Warren Buffett because he is good at investing, and we just want to capture *that*. What we want is some way to reduce the complex humanity of Warren Buffett to some reproducible formula that picks stocks the way he picks stocks.

A lot of research in finance aims to answer questions like this, how to measure and describe someone’s investing approach. There’s a [kind of famous paper](#) from Andrea Frazzini, David Kabiller and Lasse Pedersen at AQR, titled “Buffett’s Alpha,” that “decompos[es] Buffett’s performance into its components due to leverage, shares in publicly traded equity, and wholly owned companies,” “reveals that Berkshire Hathaway loads significantly on the BAB and QMJ factors,” and finds that “these factors almost completely explain the performance of Buffett’s public portfolio.” Warren Buffett can be reduced to a set of coefficients on various common investing factors, plus a smallish residue of ineffable humanity.

And that was sort of the state of the art of quantitative finance a decade ago, coefficients on factors. In 2024, though, we have large language models, and Warren Buffett is voluble. He has, over the years, written a lot of shareholder letters describing his investment philosophy and his views about particular stocks, and you can learn a lot from them. People do: The letters are popular, and aspiring investors regularly read Buffett’s back catalogue to learn how to think and invest like him.

They do this not only because his stock picks are good, but also because his *prose* is good. The letters are clear, entertaining and compelling explanations of how Buffett invests; he does not just give the particular reason why he likes some particular stock, but he explains it in a generalizable way. The letters convey a sense of his mind. They could, perhaps, teach you some general skills;

reading his descriptions of the stocks he picks could teach you how to think about *other* stocks, stocks he's never even thought about, but that *you* can think about by copying his habits of mind. You can learn to make Warren Buffett-like decisions in your own investing, in situations that Warren Buffett himself has never faced.

And, again, people do that; there are a lot of investors who fancy themselves the next Warren Buffett. But that takes work — you have to read all the letters and apply them with a certain amount of trial and error — and with modern technology it does seem like there would be a shortcut. The shortcut is:

- 1. You feed all the letters into ChatGPT.
- 2. You ask it “recommend me a stock in the style of Warren Buffett.”
- 3. It picks a stock that Buffett *would* pick, and writes up the thesis for the investment in the way that Buffett would.
- 4. You go buy the stock, because Warren Buffett — refracted through a model of his mind based on his writings — recommended it to you.
- 5. It goes up, because Warren Buffett is good at picking stocks, and his writings provide a good model of his mind, and ChatGPT is good at building that model from those writings.

This thesis feels (1) obvious but also (2) insane? I have been suggesting it for years, and I've been embarrassed each time. Back in 2020, when GPT-2 was the state of the art in large language models, I wrote:

If you trained GPT-2 on a bunch of Money Stuff columns it could probably say some stuff that sounds like Money Stuff. If you trained it on a bunch of Warren Buffett annual letters maybe it would say some stuff that sounds like Warren Buffett? Not just in terms of folksy sex jokes but also in terms of penetrating investment insight? Maybe GPT-2 would digest Buffett's mind, or rather specifically the parts of Buffett's mind that are exposed when he writes prose, and it would use that understanding of his mind to write Buffett-like prose recommending Buffett-like investing decisions?

Or if you run an investment firm and you've got a corpus of memos from your analysts recommending investment decisions, why not take the memos that *worked out*—the ones recommending investments that went up—and feed them into GPT-2? Then have it write you a new memo and see if it's any good?

I mean it's still kind of a joke, obviously. The normal approach to artificial intelligence in finance is, you know, the computer looks at stocks that went up and tries to spot patterns, to figure out what the stocks that went up had in common. Doing that through the medium of prose—look at the memos recommending stocks that go up and figure out what they had in common—is a weird form of indirection, a dumb and unnecessary complication. But sort of a charming one? One criticism that you sometimes see of artificial intelligence in finance is that the computer is a black box that picks stocks for reasons its human users can't understand: The computer's reasoning process is opaque, and so you can't be confident that it is picking stocks for good reasons or due to spurious correlations. Making the computer write you an investment memo solves that problem!

Would it work? On current technology? I have my doubts. (As a dumb empirical test, this morning I asked ChatGPT to channel Buffett and write a memo evaluating Trump Media & Technology Group's stock and, woof, no.) Still there is something philosophically satisfying about it. Reducing Buffett to a set of factor loadings feels somehow unnatural; the unexplained residue is where all the magic happens. Reducing Buffett to his words, and modeling his mind based on those words, feels more natural and human; maybe his *style* is where the magic happens, and maybe the computer can capture that.

Anyway!

Fintech startup Intelligent Alpha is launching a chatbot-powered ETF that promises to harness the brainpower of the investment world's most illustrious minds — Warren Buffett, Stanley Druckenmiller, David Tepper, and more.

With the not-so-subtle moniker — the Intelligent Livermore ETF — the product is built around investment ideas generated by ChatGPT, Gemini and Claude, dubbed the “investment committee,” that are set to be inspired by the thinkings and doings of the famed money managers. It starts trading on Wednesday.

The firm, with roots in engineering and emerging technologies, will instruct the large language models (LLMs) to emulate the investors' personalities. The trio of chatbots will spit out 60 to 90 global firms that span a number of sectors, themes and geographies, including health care, renewables and Latin America, to name just a few.

The list of personas targeted by the ETF — besides Buffett, Druckenmiller and Tepper — will include Dan Loeb, Paul Singer and others, though the fund's holdings may not necessarily reflect the real-life

bets by those investors.

I could not love this more. Here is [the press release](#). Here is [the prospectus](#), which describes the approach:

A human analyst (the “Analyst”) establishes the Intended Strategy for the underlying portfolio. ...

A large language model, which is a type of AI algorithm that uses deep learning techniques and massively large data sets to understand, summarize, generate and predict new content, is consulted to identify 4-6 major trading trends inspired by the greatest traders in the world. The Analyst will define the list of famous traders and investors for the AI by reviewing long-term (5 years or greater) track records of famous investors as compared to broad market benchmarks, which will vary based on the nature of the trading trend(s) observed. A major trading trend is a clearly defined and articulated trading view expressed by the famous trader. ...

The AI will analyze numerous information sources (such as 13F filings, public statements, and interviews) relating to the identified traders and trends when conducting its overall analysis. ...

The Analyst gathers the details, information and Philosophy set forth in Step 1 and translates them into an instruction set to be submitted to three large language models (the “AI Models”) for portfolio creation. Each AI Model is similarly instructed to review the data and instructions to create a portfolio of up to 20-30 stocks each, including weights for each position. The AI Models are instructed to limit the maximum weight of any one holding to 10%. Each AI Model has its own discretion in creating its portfolio, which is reviewed by the Analyst in Step 3. The AI Models represent the Fund’s AI investment committee, whereby the AI Models provide their independently created portfolios based on each AI Model’s independent evaluation of the instructions provided to it.

Et cetera. There is a lot of human intervention; this seems more like “ask ChatGPT what Buffett would do and then noodle on the answer” than “ask ChatGPT to pick the stocks Buffett would pick and then buy them.”

They don’t really name the investors — I guess they’d get sued? — but the proposed ETFs include the Intelligent Livermore ETF (ticker: LIVR) and the Intelligent Omaha ETF (ticker: AIWB), which I assume will train on Buffett’s writings. I don’t really know what it would mean to train on Jesse Livermore’s writings. Livermore apparently [wrote a book](#), though I feel like the Jesse Livermore book that everyone reads is [the one that he didn’t write](#). And he published his book in 1940, a few months

before [he died](#), so it's not clear how he would trade the Magnificent 7 or whatever. But I guess the ETF will find out!

Stock investing is *so obviously* a domain in which it makes sense to apply artificial intelligence:

- 1. There is a ton of data.
- 2. Humans have pretty well-known weaknesses in dealing with it — limited memories and processing power, emotions, biases, lunch breaks — and a computer could avoid those weaknesses.
- 3. Everything happens on computers anyway. You don't have to, like, avoid pedestrians in a self-driving car; you just generate buy and sell orders that get routed by computer to an exchange's matching engine.
- 4. If you get it right you make a ton of money.

And when you put those things together, it is *so natural* to think “yes, I will build a robot that is *better* than people, that is more rational and logical and data-driven and calculating than people, that finds signals that people miss, that can do things that no human investor can do.” Your computer takes the raw information of financial markets and turns it into buying signals, free from the biases and weaknesses of human intelligence.

This is not that! This is the other, more soothing approach: “Surely no computer can be better at reading the spirits of the market than a 94-year-old guy in Omaha, or for that matter a charming and roguish day trader who died 80 years ago, so what we need to do is to program a computer to think like those guys.”

What would it mean if it's *true* that the best an investing robot could do is imitate those guys? What would it mean if imitating those guys is easier than applying AI directly to market data? “Humans are better than machines at investing, but humans are easy to reduce to machines”? I don't know, I love it.

Steve Cohen

What is Steve Cohen? As with the other founders of giant multimanager hedge funds, you could tell a basic story like:

- 1. He's a guy who was really, really good at picking stocks that would go up, on a fairly rapid basis.
- 2. He got so good at it, and raised so much money, that he had to hire other people to pick stocks for him just to manage all that money.
- 3. Not everyone can make this transition: The skill of picking stocks is not identical to the skill of picking people to pick stocks. Identifying, training, managing and allocating capital to good portfolio managers has some overlaps with identifying good stocks, but the overlaps are not perfect, and many good stock pickers will not also be good managers and allocators at multimanager funds.
- 4. But Cohen made the transition very successfully (with, fine, [some hiccups](#)), and now manages a giant firm, Point72, with a lot of managers, a good track record, and a commitment to thoughtful processes for picking and training managers.

On the one hand, picking and managing portfolio managers does seem to be an even more lucrative, higher-leverage skill than picking stocks, which is why the really top hedge fund managers tend to end up doing that. On the other hand, if you got to that position by being really good at picking stocks, and if you then spend a lot of time thoughtfully evaluating stock pickers, you might reasonably come to the conclusion: "Wait, I'm better than these guys are." An important constraint on the big multimanager firms is that there are just not that many people who are consistently really good at picking stocks, but the boss is one of them.

And so Cohen for a long time kept his hand in picking stocks too. But now he's stopping:

While the billionaire hedge fund founder remains Point72 Asset Management's co-chief investment officer along with Harry Schwefel, he's no longer investing clients' capital. Cohen, 68, is instead focused on driving the firm's growth and mentoring and developing talent, the firm said in an emailed statement.

Cohen has been one of the dominant forces in the industry for more than three decades and rebuilt his hedge fund into one of the world's biggest after a costly insider-trading scandal. Even as he grew his firm into one with more than 185 trading teams and branched out into other interests, including his 2020 purchase of the New York Mets, he retained a small book that he traded regularly.

"There's huge value in having Steve as an impactful mentor for our investment professionals," Point72 spokesperson Tiffany Galvin-Cohen said in the statement, adding that he's "engaged as ever." "The only change here is that he will spend less time in front of his computer screens and more

time working with investment teams and developing talent at the firm.”

I hope they've had a robot follow him around for the last year, observing him closely, and now the robot will take over his book.

Ryan Cohen

A lot of US antitrust law is about preventing two companies from doing a merger if the merger would be bad for competition. If one supermarket chain wants to buy another supermarket chain, the Federal Trade Commission or the Department of Justice will review the merger, and if the FTC decides that it would create a monopoly, it will try to block the deal.

Antitrust law is about other things, too, and if a company grows organically to become a giant monopoly, the FTC and DOJ will take an interest and maybe even try to break it up. But it is generally much harder to break up an existing company than it is to *stop* a merger that hasn't happened yet, so a lot of the action is in reviewing and blocking mergers.

And so it is very important for antitrust enforcement that the regulators get a chance to review mergers before they happen. If two companies merged without telling anyone, and then the FTC looked into it and decided the deal was bad for competition, it might sue to break them up, but by the time the case was heard the two companies might be fully integrated with each other and breaking them up would be really disruptive.

And so there is a rule, [the Hart-Scott Rodino Antitrust Improvements Act of 1976](#), which says that, before two companies merge, they have to file a notice with the FTC saying that they intend to merge, and the FTC gets 30 days to decide what to do about it. And usually the FTC is like “yeah that's fine” and they go ahead and merge, but sometimes the FTC asks for more information, and occasionally it demands changes in the deal or tries to block it altogether. And all of this happens before the merger closes.

Now there are a few technical notes on this. First, the rule does not apply to *every* merger, because a lot of mergers are too small for the FTC to care about. There is a [threshold](#) for HSR notification; it changes each year but it's currently \$119.5 million. If you are buying a \$100 million company, go ahead; if you're buying a \$200 million company, you have to tell the FTC first. (Not legal advice!)

Second, the rule does not apply *only* to mergers. There are lots of other ways to buy control of a business, besides a merger. You can buy assets from a company. Or you can buy *stock* in an existing company: Buying 51% of the stock of a competitor is more or less as good as acquiring that competitor in a merger, and buying 45% of the stock is pretty close too. So the HSR rules apply to buying stock. If you buy more than \$119.5 million worth of stock in a public company, you have to file HSR.

Well, no, that can't really be true. Much of the time, that's just not very much stock: Buying \$119.5 million of Apple Inc. stock would give you less than 0.004% of its outstanding stock, which is not at all like buying control. BlackRock Inc.'s index funds own more than \$119.5 million worth of stock of pretty much every large public company, and nobody could possibly think *that* is an antitrust problem. Ha, I'm kidding, lots of people think that. But, still, the antitrust rules recognize that, most of the time, when someone buys a \$120 million block of public stock, they are not looking to *acquire control of a business*; they are looking to make a financial investment in a company. There's no need for antitrust review there. And so you don't need to make an HSR filing if (1) you buy less than 10% of the stock of a company *and* (2) you are doing it "solely for the purpose of investment."

And so if you're BlackRock buying 5% of a company as a passive index investor, no filing. If you're an aggressive acquirer buying 9% of a large competitor to influence their business and maybe as a prelude to a merger, though, you are not doing it "solely for the purpose of investment," and you have to file HSR.

And then there is an odd gray area, which is: What if you are an activist hedge fund? You might buy 9% of a public company with the intention of influencing its business, changing its management and strategy. But you are not really an *antitrust* problem, are you? You are not a competitor of the company, or a supplier or customer. You're just a hedge fund, a financial investor. The FTC should not really be concerned with your activism.

And on the one hand, that's clearly right: The FTC is not going to block an activist hedge fund's acquisition of 9% of a public company. But on the other hand, *the FTC gets to make that decision*: The rule is that you file for HSR, and the FTC reads your filing and says "yeah obviously this is fine," and you go ahead and buy the stock. But you do have to make the filing first.

And activist hedge funds *forget* to do this, with some regularity, and then they get fined by the FTC. Because this is so far afield from where we started, with "a lot of US antitrust law is about preventing two companies from doing a merger if the merger would be bad for competition." This has nothing to

do with *mergers*, and nothing to do with *competition*: This is not one company acquiring a competitor, but rather a hedge fund making an investment in a single company. But the rules are the rules, and they make sense in the broad context of preventing anticompetitive mergers, even though they don't make sense in this particular context.

Anyway it would be extraordinarily, extraordinarily, extraordinarily funny if (1) GameStop Corp. merged with Wells Fargo & Co. and (2) that created a monopoly in banking and/or videogame retailing, but that is not [what is going on here](#):

Today, the Federal Trade Commission announced that Ryan Cohen, managing partner of RC Ventures, LLC, and Chairman and CEO of GameStop Corp., will pay a \$985,320 civil penalty to settle charges that his acquisition of Wells Fargo & Company (Wells Fargo) shares violated the Hart-Scott-Rodino (HSR) Act.

According to the complaint, Cohen, who is also the founder and former CEO of Chewy, Inc., acquired more than 562,000 Wells Fargo voting securities resulting in aggregated holdings of Wells Fargo securities that exceeded HSR filing thresholds. Cohen's purchase triggered an obligation to file an HSR form with federal antitrust agencies and wait before completing the acquisition. Yet Cohen failed to do so, which violated the HSR Act, according to the complaint.

Here is [the complaint](#). He started buying Wells Fargo stock in 2016, and in February 2018 he emailed the company with some business tips and a suggestion that he join the board of directors. In March 2018, he bought a bit more stock, which tipped him over the relevant threshold of \$168.8 million at the time. He never seems to have gotten to even 1% of the stock, but because he was doing (pretty modest) activism — emailing about joining the board of directors — he did not own it “solely for the purpose of investment,” so he had to file an HSR notification. And he didn't, perhaps because he understandably didn't think there was any antitrust problem with him buying some Wells Fargo stock. And there wasn't, not really, but there was a *filing the form* problem.

FTX audit

I don't know how important it was to the fraud at FTX Trading Ltd., the big crypto exchange that collapsed in 2022, that it had audited financial statements. FTX was not a public company, and its financial statements were not released publicly; crypto investors did not trust FTX with billions of dollars of their crypto because they read and relied on its audit reports.

FTX *did* have audited financial statements, though, and it sent those to its *equity* investors, venture capitalists and others who [invested](#) hundreds of millions of dollars in FTX at as much as a \$32 billion valuation. I suppose that VC backing, and that valuation, did make crypto traders feel more secure about trusting FTX with their money (“after all, there’s a \$32 billion equity cushion”), so if the equity investors relied on the audits then perhaps the audits were indirectly responsible for the collapse. Did they? Eh, maybe. My impression is that FTX’s investors were much more interested in Sam Bankman-Fried’s vision and personality, and the general crypto gold rush atmosphere, than they were in rigorous due diligence and audited financials. But, sure, FTX *got* audits — from a firm called Prager Metis CPAs LLC, not one of the Big Four accounting firms — which at least suggests that somebody cared about seeing audited results.

Whether or not the audits *mattered*, though, it does seem fair to say that they were *bad*. I have not seen FTX’s audited financial statements, but I *have* seen the infamous quasi-balance sheet that Bankman-Fried sent around in November 2022, looking to raise more money because there was — in the *words of the balance sheet* — a “hidden, poorly internally labeled ‘fiat@’ account” with a balance of negative \$8 billion. If you raise money at a \$32 billion valuation with tidy audited financial statements, and then later you try and fail to raise money at a \$0 valuation with an Excel spreadsheet saying “uh we forgot we misplaced \$8 billion,” your audit missed something important.

Yesterday the US Securities and Exchange Commission got around to [fining Prager Metis \\$745,000](#) for those audits:

According to the SEC’s complaint, from February 2021 to April 2022, Prager issued two audit reports for FTX that falsely misrepresented that the audits complied with Generally Accepted Auditing Standards (GAAS). The SEC alleges that Prager failed to follow GAAS and its own policies and procedures by, among other deficiencies, not adequately assessing whether it had the competency and resources to undertake the audit of FTX. According to the complaint, this quality control failure led to Prager failing to comply with GAAS in multiple aspects of the audit—most significantly by failing to understand the increased risk stemming from the relationship between FTX and Alameda Research LLC, a crypto hedge fund controlled by FTX’s CEO.

Yes I mean it would be weird if Prager *did* follow all of the appropriate auditing standards and missed that!

Cell phones

We talk all the time about here about the US Securities and Exchange Commission's crackdown on financial firms whose employees sometimes text about work from their personal cell phones. (Which is all of them.) For instance, I wrote yesterday about some municipal bond advisers who paid the SEC five- or six-digit fines for "describing current municipal market conditions" to clients over text messaging. This strikes me as pretty harmless behavior, but rules are rules I guess, and the SEC will fine firms whose employees text about work.

A reader emailed:

Last week a coworker arrived at the office early, saw rainwater pouring in through the ceiling, and texted the manager something along the lines of OMG we have water pouring through the ceiling.

She has now had to endure several calls from compliance and has to write a report detailing why she sent a text about company business.

I'm sure this is exactly the kind of situation the investment act of 1933 was enacted to prevent.

Yes this is how financial industry compliance works now.

Things happen

Fifty basis points. Hedge Fund Titans Breed a \$14 Billion Pack of Startup Cubs. Citadel Securities Shelves Plan to Join Ranks of Fed Dealers. SEC Poised to Vote on Overhaul of Stock Pricing, Exchange Fees. Switzerland's SIX explores launching [crypto exchange](#). Banks Ready to Forget Pain of Hung Debt Go Big on Buyout Funding. BlackRock, Microsoft Partner on Massive New [AI Infrastructure Fund](#). Looming Insurance Crisis Threatens [Taxis and Ubers](#) in New York City. Liverwurst [discontinued](#). Train cancelled after squirrels board and 'refuse to leave.'

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- 1. “Betting against beta” and “quality minus junk,” but it’s more fun if you take them as unexplained variable names. They are pretty explainable though: Intuitively, they mean that “a significant part of the secret behind Buffett’s success is the strategy of buying safe, high-quality, value stocks.”
- 2. Plus cheap leverage from insurance float. Plus wholly owned companies. One reason not to, say, launch an exchange-traded fund that mirrors Buffett’s factor loadings is that some of his returns are explained by running a conglomerate containing an insurance company, which is hard to replicate in an ETF. “Warren Buffett is a really good picker of public stocks” is an important part of the folklore of Warren Buffett, but not a complete explanation of his success, and if you perfectly replicate his track record of picking public stocks you still won’t be quite Warren Buffett.
- 3. Also, if you apply his advice, it involves a lot of reading of annual reports, which is even more work.
- 4. The first time I suggested a related idea was in 2018, when I wrote: “This is super not investing advice, but if your investment strategy is to email yourself a list of stocks and see if Gmail says ‘buy’ or ‘sell,’ I would be interested to hear about it.” I never got any responses. But the point is that one form of language model is the predictive text feature of Gmail, iMessage, etc., so a crude AI-based investment strategy would be to type “I have looked at Microsoft’s stock and think that I should” and see if the predicted next word is “buy” or “sell.”
- 5. To be clear, when I say “woof, no,” I don’t mean to suggest that ChatGPT made the wrong investment recommendation about Trump Media. (I don’t know what the right recommendation is, and in fact ChatGPT’s recommendation was kind of wishy-washy.) I just mean it didn’t sound like Buffett.
- 6. “AI Warren Buffett,” one assumes.
- 7. Except in weird degenerate cases where, like, you own 9% of all the competitors.
- 8. This is not the same as the \$119.5 million threshold I quoted before. That’s the “\$50 million threshold” (as adjusted); this one is the “\$100 million threshold,” for subsequent acquisitions.

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New Chatbot ETF Promises to Mimic Warren Buffett, David Tepper

By Vildana Hajric and Justina Lee

- ChatGPT, Gemini, Claude to generate the ETF's investment ideas
- ETF can invest in firms that the big-name investors don't hold

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New Chatbot ETF Promises to Mimic Warren Buffett, David Tepper

By Vildana Hajric and Justina Lee2024-09-18T08:15:41874-04:00

- ChatGPT, Gemini, Claude to generate the ETF's investment ideas
- ETF can invest in firms that the big-name investors don't hold

It might just be the most audacious bid on Wall Street to exploit newfangled AI tools to mimic the legends of finance.

Fintech startup Intelligent Alpha is launching a chatbot-powered ETF that promises to harness the brainpower of the investment world's most illustrious minds — **Warren Buffett, Stanley Druckenmiller, David Tepper**, and more.

With the not-so-subtle moniker — the Intelligent Livermore ETF — the product is built around investment ideas generated by ChatGPT, Gemini and Claude, dubbed the "investment committee," that are set to be inspired by the thinkings and doings of the famed money managers. It starts trading on Wednesday.

The firm, with roots in engineering and emerging technologies, will instruct the large language models (LLMs) to emulate the investors' personalities. The trio of chatbots will spit out 60 to 90 global firms that span a number of sectors, themes and geographies, including health care, renewables and Latin America, to name just a few.

The list of personas targeted by the ETF — besides Buffett, Druckenmiller and Tepper — will include Dan Loeb, Paul Singer and others, though the fund's holdings may not necessarily reflect the real-life bets by those investors.

"If you think about the hedge-fund world today, that has pods that each focus on specific areas of expertise," said **Doug Clinton**, Intelligent Alpha's CEO and founder. "In a sense, we're recreating the very basics of that structure where we have these different inspirations for investors we really respect."

While the product's ambitions stand out as particularly bold — even for the buzzy world of ETF investing — it's Wall Street's latest attempt to weaponize AI to create new riches for investors of all stripes. Some hedge funds already use chatbots for research and investing processes and say that AI can significantly cut down time spent on menial tasks.

Read more: Hedge Funds Battle to Turn ChatGPT from Intern to Analyst

The overall idea still remains largely experimental and untested. Little evidence exists that AI is disrupting and displacing investing units en masse, and much has yet to be resolved when it comes to issues like chatbots making things up in their answers.

There's also no proof just yet that investments chosen by AI have a leg up over passive investing. Of the 16 AI-centered ETFs in the US tracked by Bloomberg Intelligence, just one is outperforming the S&P 500 this year: the Franklin Intelligent Machines ETF (ticker IQM). The fund returned 19% while the stock index gained 18% as of last close.

Further, only one — the Global X Artificial Intelligence & Technology ETF (AIQ) — has seen meaningful inflows, taking in more than \$1 billion this year. That's followed by a \$117 million haul for the Roundhill Generative AI & Technology ETF (CHAT). The rest have seen tiny inflows or outright outflows year-to-date.

Clinton says that many of the other AI-centered ETFs tend to rely on traditional machine-learning techniques and might not yet be incorporating LLMs like his fund. "That limits those strategies to the crowded market of quantitative insights," he said.

The idea for the ETF arose last year when Clinton started experimenting with ChatGPT to create a portfolio that could beat the S&P 500, which he says he had luck doing. Over time, his tinkering turned into 40 different strategies whose performances are measured against various indexes, and led to the founding of Intelligent Alpha.

The company, an affiliate of Deepwater Asset Management, is an independent registered investment adviser that's built to use large-language AI models for portfolio management. The ETF is its first fund, but the firm will look to launch a suite of products that also includes custom portfolios and hedge funds, according to Clinton.

It will also aim to tailor its offerings to both retail and institutional investors. Intelligent Alpha has already filed for other ETFs as well.

Minneapolis-based Deepwater — formerly known as Loup — manages roughly \$400 million across venture capital and public equity funds. Alongside Clinton, it was co-founded by the well-known tech analyst **Gene Munster**.

The new AI ETF pays homage to Jesse Livermore — one of the early 20th century's most legendary stock traders — with its ticker LIVR. It charges a 0.69% fee, and may invest in a company that Buffett's Berkshire Hathaway conglomerate, for instance, does not hold. The fund does, however, have final human oversight.

"Just to make sure there's not some sort of a hallucination in the portfolio, like a company that committed fraud or some egregious issue," Clinton said. "And also that the portfolio will meet any regulatory or compliance constraints that we might know about that the AIs may not be thinking about when they create the portfolio."

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Securities Law News

Sept. 18, 2024, 1:54 PM PDT

'Supposed' Crypto DeFi Platform Operators Settle With SEC

By Olga Kharif

- SEC accused Rari Capital of acting as an unregistered broker
- Operators also accused of offering unregistered securities

Bloomberg Law News 2024-09-19T10:16:0602261501-04:00

'Supposed' Crypto DeFi Platform Operators Settle With SEC

By Olga Kharif2024-09-18T16:54:13776-04:00

- SEC accused Rari Capital of acting as an unregistered broker
- Operators also accused of offering unregistered securities

The US Securities and Exchange Commission has settled charges against Rari Capital Inc., a "supposed" decentralized finance protocol, and its founders for misleading investors and acting as an unregistered broker for investment platforms that once held more than \$1 billion in assets.

Rari Capital offered two investment products, which worked like crypto asset investment funds and let investors deposit tokens into lending pools and earn returns. Investors in the pools received a token representing their interest in the pools and the right to receive profits earned by the pools. Certain investors also received a governance token, called the Rari Governance Token, or RGT. With both tokens, Rari engaged in unregistered offers and sales of securities, the SEC said in a statement Wednesday.

The complaint alleged that Rari Capital and its three co-founders "falsely" told investors that their pools would automatically rebalanced their crypto assets into the highest yield-generating opportunities available "when, in reality, the rebalancing mechanism often required manual input, which Rari Capital sometimes failed to initiate." The SEC also accused Rari Capital and its co-founders of "misleadingly" touting the high annual percentage yield that investors would earn; but "ultimately, a significant percentage of Earn pool investors lost money on their investments."

Rari Capital and Fei Protocol suffered a \$77 million hack in 2022, five months after their merger. Rari also was exploited in 2021.

Co-founders Jai Bhavnani, Jack Lipstone and David Lucid, without admitting or denying the allegations, consented to the entry of final judgments ordering various forms of relief, including civil penalties, disgorgement and equitable officer-and-director bars for a period of five years. The SEC's complaint was filed in the U.S. District Court for the Central District of California.

The settlement is just the latest in a string of enforcement actions from the SEC to rein in the crypto industry. Many industry participants have called the enforcement actions too aggressive, and are calling for Congress to pass legislation that would take away some of the SEC's powers and make it easier for crypto companies to do business in the US.

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Dave Liedtka

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Biotech Co. Escapes Stock-Drop Suit Over COVID-19 Drug

By **Brian Dowling**

Law360 (September 18, 2024, 3:01 PM EDT) -- A Massachusetts biotech company won dismissal Wednesday from a proposed class action by investors who say their shares tanked in value after it allegedly came to light that executives had falsely touted an unproven prospective COVID-19 medicine.

U.S. District Judge Julia E. Kobick **said** alleged false or misleading statements in November and December 2021 by executives at Invivyd Inc. — then Adagio Therapeutics Inc. — didn't cross a line under the federal Private Securities Litigation Reform Act because reasonable investors should have seen them as protected expressions of scientific opinion, rather than stated facts.

The proposed class of investors claimed they relied on **overly optimistic statements** from the biotech's executives in press releases, in a media interview and at a conference about the prospects of a COVID-19 monoclonal antibody therapy's ability to protect against the Omicron variant of the virus.

But the judge said all the statements were couched in language — such as "expects," "anticipates," "to date," "likely," "yet to come" and "so far up to that point" — that would lead an investor to understand they were not guarantees or made with a sense of unshakable certainty.

One executive's statements to a local business journal that the therapy "will neutralize SARS-CoV-2 and all its known variants" didn't cross the line despite being a "closer call" for the court, the judge said.

Those comments, "read in context, also convey a lack of certainty," Judge Kobick said, concluding that a reasonable investor wouldn't have taken the statement to be a guarantee that the medicine would knock out the Omicron variant.

The judge added that the lawsuit's second amended complaint also falls short of establishing that executives knew the statements might not have been true.

The executives "had no conclusive evidence that ADG20" — the prospective therapy — "was ineffective against Omicron at the time of their statements," the court said while rejecting the argument that expressing hope in the monoclonal antibody was reckless absent such solid scientific knowledge.

Judge Kobick also denied the plaintiffs' request to amend the complaint in the event that the court thought dismissal was warranted.

She explained that the investors failed to "identify any additional substantive allegations that would be included in a possible third amended complaint" or "offer any argument as to why justice otherwise requires amendment."

Counsel for Invivyd and its executives, Elizabeth Driscoll of WilmerHale, told Law360 that the company "is pleased with the court's decision."

Representatives for the investors were not immediately available for comment Wednesday.

The proposed class of investors is represented by Stephen R. Astley, Brian E. Cochran and Samuel H. Rudman of Robbins Geller Rudman & Dowd LLP, Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP and Enoch Hicks and Michael I. Fistel Jr. of Johnson Fistel LLP.

Invivyd and the executives are represented by Peter J. Kolovos, Michael G. Bongiorno, Peter A. Spaeth and Elizabeth E. Driscoll of WilmerHale.

The case is Brill et al. v. Invivyd Inc. et al., case number 1:23-cv-10254, in the U.S. District Court for the District of Massachusetts.

--Editing by Daniel King.

Clarification: This article has been updated to clarify that the Invivyd therapy is a monoclonal antibody rather than a vaccine.

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\$24.5M Fee Sought In Del. For \$125M Discovery Suit Deal

By **Jeff Montgomery**

Law360 (September 18, 2024, 9:02 PM EDT) -- Class attorneys who secured a proposed \$125 million settlement in a Delaware Court of Chancery suit filed by former Discovery Inc. stockholders challenging the company's \$43 billion merger with AT&T in April 2022 proposed a \$24.5 million fee for their efforts Wednesday.

The fee — slated to be part of a settlement fairness hearing on Oct. 10 — would rank as the second-largest pretrial settlement in Chancery Court history, according to attorneys for the stockholders, topped only by a \$148.2 million settlement of stockholder claims in 2016 after a \$1.6 billion sale of Dole Food Co. Inc.

Attorneys for former Discovery stockholders and the company notified Vice Chancellor J. Travis Laster in June that a deal had been reached to end the case, pending agreement on final terms. The tentative agreement followed a settlement recommendation in May from former federal judge and mediator Layn R. Phillips.

The suit accused Discovery's controlling investors of coercively extracting a \$1.1 billion side benefit from the deal, in violation of the company's charter.

"Plaintiffs believed that if the court awarded damages, the most realistic outcome was in the \$100-\$300 million range, with a high end in the \$550 million range," a brief detailing the fee request said. "Even assuming maximum damages of \$787 million, the settlement equates to 15.9% of maximum damages, which is in line with the median" for 16 precedent settlements.

Class attorneys "determined that the \$125 million settlement compared favorably to the case's expected value," the brief said, after considering the probability that the court would award no damages based on deference to business judgment or a finding that a side deal with large Discovery shareholders was entirely fair.

Combined in the case are multiple suits and parties alleging breaches of fiduciary duty in the run-up to the Discovery-Warner tie-up with AT&T's WarnerMedia business in 2021. The deal created Warner Brothers Discovery Inc., with AT&T shareholders owning 71% and former Discovery shareholders receiving the balance.

Those sued, along with third parties, produced 130,299 documents and nearly 1 million pages during the litigation, according to the settlement brief.

"While plaintiffs ultimately never had to file a motion to compel, recalcitrance from certain critical third parties prompted plaintiffs to draft them, only to be mooted at the deadline," the motion said.

Heading toward discovery and trial before the settlement was announced were claims targeting Advance/Newhouse and its three designates to Discovery's pre-merger board: Robert Miron, Steven Miron and Susan Swain.

Under the terms of the agreement, Advance/Newhouse Partnership and Advance/Newhouse Programming Partnership will pay \$100 million of the total. Discovery's chairman, Robert Miron — formerly Advance/Newhouse Partnership CEO — and current Advance/Newhouse Partnership CEO Steven Miron will pay \$12.5 million apiece. No liability was assigned to Susan Swain, CEO of C-SPAN.

Labaton Sucharow LLP, Kessler Topaz Meltzer & Check LLP and Bernstein Litowitz Berger & Grossmann LLP led the litigation on behalf of Bricklayers Pension Fund of Western Pennsylvania, City Pension Fund for Firefighters & Police Officers in the City of Pembroke Pines, Key West Police and Firefighters Pension Fund and stockholder Steve Silverman.

Also representing the stockholders were Kessler Topaz Meltzer & Check LLP, Klausner Kaufman Jensen & Levinson, Friedman Oster & Tejtell PLLC, Kaskela Law LLC and the Law Office of Alfred G. Yates Jr. P.C.

A Discovery agreement with its largest shareholders included a special rights agreement requiring an 80% supermajority approval of the company's shares for some actions, including mergers. That gave each of the three major stockholders, including Advance/Newhouse Partnership and Advance/Newhouse Programming Partnership, a veto right over any merger.

Co-lead plaintiff Bricklayers Pension Fund of Western Pennsylvania is represented by Ned Weinberger, Brendan W. Sullivan, Jiahui (Rose) Wang, Domenico Minerva, John Vielandi and Joshua M. Glasser of Labaton Keller Sucharow LLP.

All class members are represented by Gregory V. Varallo, Andrew E. Blumberg and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP.

Key West Police and Firefighters' Pension Fund is represented by Jeroen van Kwawegen of Bernstein Litowitz.

City Pension Fund for Firefighters & Police Officers in the City of Pembroke Pines is represented by Lee D. Rudy, J. Daniel Albert, Grant D. Goodhart, Kevin M. Kennedy and Cameron N. Campbell of Kessler Topaz Meltzer & Check LLP and Robert D. Klausner of Klausner Kaufman Jensen & Levinson.

Steve Silverman is represented by Jeremy Friedman, David Tejtell and Christopher M. Windover of Friedman Oster & Tejtell PLLC and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

The case is *In re Warner Bros. Discovery Inc. Stockholders Litigation*, case number 2022-1114, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.



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Meta Ditches Investor Suit Over Apple Ad Changes For Good

By **Bonnie Eslinger**

Law360 (September 18, 2024, 7:29 PM EDT) -- A California federal judge on Tuesday tossed an investor suit against Meta alleging the tech giant hid the financial impact of Apple's privacy changes on its business, finding the suit's allegations weren't detailed enough to avoid dismissal.

U.S. District Judge Yvonne Gonzalez Rogers granted Meta Platforms Inc.'s motion to dismiss with prejudice in the investor class action led by the Plumbers and Steamfitters Local 60 Pension Trust.

"Having carefully considered the briefing and pleadings ... the court determines plaintiffs have not carried their burden," the judge said in her **decision**. "Despite its girth of over 100 pages, the [second amended complaint] fails to state actionable securities law claims under the law, and dismissal is therefore required."

Since the plaintiffs had already tried bolstering their complaint, Judge Gonzalez Rogers said she wasn't willing to give them another chance.

"Given plaintiffs have amended their pleadings twice, including to remedy substantially similar issues previously identified by this court, further amendment would be futile," the judge stated.

The lawsuit against Meta, first filed in March 2022, also named CEO Mark Zuckerberg and other executives as defendants. Meta's mobile apps — including Facebook, Instagram, Messenger and WhatsApp — are collectively used by 3.5 billion people. Nearly all of Meta's revenue comes from the advertising displayed in the apps, Tuesday's decision notes.

The operative complaint challenged statements by Meta about the effects of Apple's 2021 iOS privacy changes. It also claimed Meta misled investors to believe that its transition to its new in-app video format Reels was not impacting its business, and alleged that Meta hid information about benefits that former Chief Operating Officer Sheryl Sandberg had received.

In her Tuesday decision, Judge Gonzalez Rogers noted that the two sides disagreed about a statement made by Meta Chief Strategy Officer David Wehner during an investor call in February 2022, when he was the company's chief financial officer.

According to the order, Wehner told investors that Meta had said that the revenue impact of iOS was "in line with our expectations and similar to the Q3 headwind" and "we believe the impact of iOS overall as a headwind on our business in 2022 is on the order of \$10 billion," adding that it was "a pretty significant headwind for our business."

While the investors alleged in their suit that Wehner's statements were a direct admission that the iOS roll-out materially impacted Meta's business in 2021, the judge disagreed.

"Wehner's prediction of Meta's 2022 financial condition was not a corrective disclosure of past, 2021 performance," the judge said in her decision. "It strains credulity to reverse engineer this forward-looking observation into a retrospective analysis."

Statements on the investor call did not correct, but confirmed earlier disclosures by Meta concerning the impact of Apple's iOS privacy changes, the judge said.

"There simply is not support for the notion that the statements on the February 2, 2022 ... investor call were a corrective disclosure," the judge said.

The investors also tried to convince the court that the word used by Meta's executives, "manageable," held the same meaning as "immaterial," the judge said.

Wehner, however, told investors he was not saying that Meta was suggesting it was not seeing a material impact, the judge said.

"Meta's prediction as to 2022 headwinds is therefore irrelevant to statements ... which concern Q2 and Q3 2021," the judge concluded.

In addition, the investors targeted statements Meta made concerning mitigation efforts the company made in relation to the iOS changes in order to report the number of customers whose viewing of an ad "converted" into a sale, app installation or other desired activity on an advertiser's website.

The investors say Meta only later admitted that under-reporting of web conversions was "a very small slice of the overall ... revenue landscape," so the efforts touted didn't mitigate the impact of the iOS changes.

Judge Gonzalez Rogers said the statements challenged by the investors were inactionable, calling the claims, "strained and overwrought."

When Sandberg told investors during a 2021 third-quarter call that targeting and measurement were two big challenges arising out of the Apple iOS privacy changes, she didn't say they were the only problems, the judge said.

Similarly, the judge didn't find support for the investors' assertion that Meta made misleading statements related to impact of the company's focus on short-form videos in Reels. The plaintiffs didn't show that the introduction of Reels negatively impacted Meta during the second and third quarters of 2021, the judge said.

The judge also dismissed claims alleging that the company's disclosures related to Sandberg's compensation and benefits were false and misleading on claims they did not mention that the former executive used Meta resources for personal matters. According to the complaint, that assistance included staffers who handled public relations issues related to an ex-boyfriend, employees who helped write and promote Sandberg's second book and that Sandberg used company resources to help her plan her wedding. These allegations were not sufficiently supported, the judge said.

Last year, Gonzalez Rogers had slammed the plaintiffs' **"kitchen sink"** approach to creating the 113-page complaint, saying the investors had not adequately shown Apple's iOS changes impacted Meta's business as of the second and third quarters of 2021.

The investors filed a second amended complaint in September 2023 and Meta responded in November with a motion to dismiss. In that filing, the company argued that it had warned investors about "the major challenges ahead and kept them apprised of the rapidly evolving situation."

In January, the investors argued that the latest version of the complaint **fixed the issues** that led to a previous dismissal.

Counsel for the parties did not respond to requests for comment Wednesday.

The investors are represented by Jeremy A. Lieberman, Austin P. Van, Jennifer Pafiti, Orly Guy and Eitan Lavie of Pomerantz LLP.

Meta and its executives are represented by Andrew Brian Clubok, Susan E. Engel, Melanie M. Blunski and Nicholas Rosellini of Latham & Watkins LLP.

The case is Plumbers and Steamfitters Local 60 Pension Trust v. Meta Platforms Inc. et al., case number 4:22-cv-01470, in the U.S. District Court for the Northern District of California.



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PureCycle Investors Seek Final OK Of \$12M Settlement

By **Sydney Price**

Law360 (September 18, 2024, 10:17 PM EDT) -- Investors in plastic recycling company PureCycle have asked a Florida federal judge to grant final approval to a \$12 million deal to end a proposed class action alleging the company misled shareholders about its technology, financial projections and access to raw materials, roughly two years after the court temporarily tossed it for being imprecise.

The proposed settlement, which was preliminarily approved in June, provides recovery of about 5% of the estimated damages under plaintiffs' "best case" scenario, which estimates damages of \$230 million, according to Tuesday's motion for final approval.

Lead counsel for the plaintiffs intend to request fees of up to approximately one-third of the settlement fund and litigation expenses to be determined at a later date.

According to the settlement motion, the parties reached an agreement to settle following a full-day mediation session in February. Additional litigation would be difficult given "PureCycle's financial condition and limits on Defendants' insurance," according to the motion.

"PureCycle has never earned any profit," the motion states. "The company has one operation, its polypropylene recycling technology, from which it has yet to earn any material revenue."

After the suit was **dismissed** in August 2022, the investors filed their most recent version of the complaint. The amended complaint alleges PureCycle's shares declined nearly 40% when Hindenburg Research published a report that warned PureCycle's recycling technique was shoddy and not scalable.

The complaint also targeted former PureCycle CEO Michael Otworth and Chief Sustainability Officer Tamsin Ettefagh, accusing them of failing to use their power within the company to prevent misleading information from being published. The claims against Ettefagh were dismissed last June.

Co-lead plaintiffs Robert Ciecko and Mariusz Ciecko also named as defendants Chief Financial Officer Michael E. Dee and Chief Commercial Officer David Brenner. The suit further named Byron Roth, chairman and CEO of blank-check company Roth CH Acquisition I Co., with whom PureCycle completed a reverse merger in 2021.

Two years ago, U.S. District Judge Paul G. Byron rejected certain arguments from the company about purported omissions.

The plaintiffs had argued that PureCycle omitted information about its management team's past failures and an issue with its patented recycling method, but PureCycle argued that it had no obligation to disclose that information. Judge Byron said that a reasonable investor would be interested in the previous management experience of company leaders as well as performance issues with the recycling method, per the order.

Counsel for the parties did not immediately respond to requests for comment on Wednesday.

The investors are represented by Tamar A. Weinrib of Pomerantz LLP.

PureCycle, Otworth, Dee and Brenner are represented by Nina Riegelsberger, Julia Markham-

Cameron, Hayoung Park, Radhe Patel and Joni S. Jacobsen of Dechert LLP and Amy S. Shay and Matthew Justin Pearce of Stovash Case & Tingley PA.

Roth is represented by Ardith Bronson, Christine E. Ellice, David Priebe and John R. Loftus of DLA Piper LLP and Joni S. Jacobsen of Dechert LLP.

The case is Theodore v. PureCycle Technologies, Inc. et al., case number 6:21-cv-00809, in the U.S. District Court for the Middle District of Florida.

--Editing by Emily Kokoll.

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Telecom Co. PLDT Gets Final OK For \$3M Investor Settlement

By **Sydney Price**

Law360 (September 18, 2024, 6:20 PM EDT) -- A California federal judge has given final approval to a \$3 million deal settling investor allegations that Philippine telecommunications company PLDT Inc. hid an \$866 million budget overrun, giving class counsel a \$750,000 cut of the deal.

The order issued on Tuesday by U.S. District Judge Fernando L. Aenlle-Rocha said that class counsel dedicated 1,260 hours to litigating the case. The court agreed to give the attorneys 25% of the settlement fund, or \$750,000, for fees and an additional \$67,490.63 to reimburse litigation expenses.

U.S. District Judge Cormac J. Carney, who oversaw the case before it was reassigned to Judge Aenlle-Rocha in May, preliminarily approved the deal in March. He said at the time that the settlement yielded "an exceptional result" for the class. The settlement, which recovered about 15.4% of the estimated \$19.5 million of maximum recoverable damages, represents a premium over the 1.8% median ratio of settlement to investor losses in 2023, according to the motion for final approval filed in June.

For the purposes of the settlement, Judge Aenlle-Rocha certified a class of investors who had purchased or otherwise acquired PLDT shares between Jan. 1, 2019, and Dec. 21, 2022.

The investors allege in their July 2023 complaint led by shareholder Kevin Douglas that PLDT, its executives and directors failed to manage PLDT's capital expenditures over the nearly four-year period. According to the suit, PLDT and its competitor Globe Telecom Inc. "enjoyed a comfortable duopoly over the Philippine phone and internet industry" prior to the class period.

With no competition, there was little incentive for PLDT or Globe to invest in upgrading their network infrastructures or to lower data rate costs, and, as a result, Philippine President Rodrigo Duterte announced a series of new regulations in 2019 that would allow foreign competition.

In response to the new regulations, PLDT declared that it approved a \$6 billion capital budget to upgrade and expand its network and assets. The suit alleges, however, that PLDT went on "a massive spending spree" without ensuring it obtained the proper approvals and documentation for its expenditures, or that it stayed within the board-approved annual budget.

These shortcomings are what caused PLDT to underreport its capital expenditures during the class period, according to the complaint.

PLDT "shocked the market" on Dec. 19, 2022, the suit alleges, when it revealed that between 2019 and 2022, it overran its budget by \$866 million, or approximately 13%. PLDT and its executives further admitted that the overrun was the result of "weaknesses" in PLDT's internal controls, according to the suit.

Following the announcement, PLDT's American depositary shares declined \$6.35 each, or 24%, from a closing price of \$26.81 on Dec. 16, 2022, to a closing price of \$20.46 on Dec. 19, 2022.

Counsel for the parties did not immediately respond to requests for comment on Wednesday.

The investors are represented by David C. Jaynes, Shannon L. Hopkins and Gregory M. Potrepka of

Levi & Korsinsky LLP.

PLDT and the individual defendants are represented by Daniel Mumford Perry and Mark David Villaverde of Milbank LLP.

The case is Sophia Olsson v. PLDT Inc. et al., case number 2:23-cv-00885, in the U.S. District Court for the Central District of California.

--Editing by Patrick Reagan.

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Wynn Resorts To Pay Investors \$70M Over Misconduct Claims

By **Bonnie Eslinger**

Law360 (September 18, 2024, 9:46 PM EDT) -- Wynn Resorts, its former CEO Stephen Wynn and others have reached a \$70 million settlement in Nevada federal court to end an investor class action accusing the hotel and casino giant of deceiving shareholders by covering up allegations of Wynn's sexual misconduct, according to a Tuesday filing.

The litigation was filed in 2018, shortly after Wynn resigned as CEO. In addition to Wynn Resorts Ltd. and Wynn, the agreement resolves claims against the company's former executive vice president and general counsel Kimmarie Sinatra, former CEO Matthew Maddox and former Chief Financial Officer Stephen Cootey. The suit alleges that the defendants knew about or recklessly disregarded the sexual misconduct allegations made against Wynn and concealed them from investors.

In their motion for preliminary approval, noting the settlement was reached at an advanced stage of the "vigorous litigation" including class certification, the investors said that although they "are confident in the merits of their claims, the settlement provides certain, immediate recovery. In contrast, continuing litigation would have inherent risks, including the risk of a diminished recovery or no recovery at all."

The investors also said they plan to ask the court for permission to pay up to one-third of the \$70 million to their attorneys. "The proposed fee amount is reasonable in light of the work performed and the results obtained, and courts routinely approve similar fee requests in securities fraud class actions," they said.

The class — made up of individuals and entities that acquired Wynn Resorts securities between March 28, 2016, and Feb. 12, 2018 — has already been notified of the litigation and given an opportunity to exclude themselves from the class, the motion said. As of April 1, a claims administrator mailed a total of 244,626 notices to potential class members and received 15 requests for exclusion, one of which appears to be invalid.

No second opportunity for exclusion is needed, the motion said.

The two sides have reached a confidential supplemental agreement that would apply if the court requires a second opt-out opportunity. That agreement allows the defendants to terminate the deal "if the requests for exclusion from the class exceed certain agreed-upon criteria," the investors said.

The investors said the damages they sought were strongly contested and the defendants were fighting some claims related to when the public learned the extent of the Wynn allegations. If the court had found against those claims, the recoverable damages of up to \$926 million could have been reduced significantly to \$158 million, they said.

The settlement falls within the "range of reasonableness," even considering the damages if the plaintiffs had fully prevailed, the motion argued.

The \$70 million settlement amount represents 7.6% of the total maximum damages potentially available, "which is above the average recovery in securities class actions of a similar size," the investors said.

In addition, "success was not guaranteed, and the road to success remained long and arduous," they

said.

And even if the investors had prevailed, the Wynn defendants would have likely appealed, lengthening the litigation by years.

The stockholders sued after The Wall Street Journal published an article in January 2018 that reported on a history of sexual misconduct allegations against Wynn. The stock dropped 10% on the day the article was published, according to the complaint.

That report led to **investigations into the company** by the Nevada Gaming Control Board and the Massachusetts Gaming Commission, resulting in **\$55 million in fines** for covering up or ignoring the sexual abuse allegations.

The shareholders claimed the company made misleading statements or omissions regarding its code of conduct, compliance, regulatory risks, Wynn's potential departure from the company, and corporate culture, and in press releases responding to allegations made by Wynn's ex-wife, Elaine Wynn, of "reckless, risk-taking behavior," court records show.

The suit was dismissed in May 2020 when a judge found that the statements in question amounted to corporate optimism and puffery, or were forward-looking statements protected by the safe harbor provision of the Private Securities Litigation Reform Act.

Another judge later allowed two sets of purportedly misleading statements to **go forward**.

The court **certified the class** in March 2023 and also appointed Pomerantz LLP as class counsel and Muehlbauer Law as local/liaison counsel.

Among twists in the case, U.S. Magistrate Judge Elayna J. Youchah, who had earlier represented the company in a separate sexual assault suit, **recused herself in 2022**. Then, this July, U.S. District Judge Andrew P. Gordon also recused himself, "with good cause appearing." The court provided no details. The case is now before U.S. District Judge Cristina D. Silva.

"We are pleased to have resolved this long-standing legal matter through a settlement which we believe is advantageous for the Company," said Wynn Resorts spokesman Michael Weaver told Law360 in a statement Wednesday. "As is customary in such matters, our insurance has covered the majority of the \$70 million settlement, with Wynn Resorts covering \$9.4 million of the total."

Murielle J. Steven Walsh of Pomerantz LLP, counsel for the investors, told Law360 that "This case should serve as a warning to corporations that talk is not, in fact, cheap. Investors care about corporate integrity and accountability, and companies that are accused of making statements to cover up allegations of serious misconduct by their executives face a potentially steep financial reckoning."

The class is represented by Jeremy A. Lieberman, Murielle J. Steven Walsh and Emily C. Finestone of Pomerantz LLP and Andrew R. Muehlbauer of Muehlbauer Law Office Ltd.

Wynn Resorts and Matthew Maddox are represented by Mark Holscher, Austin Norris, Michael J. Shipley, Edward Hillenbrand and Matthew Solum of Kirkland & Ellis LLP and Patrick G. Byrne and Bradley T. Austin of Snell & Wilmer LLP.

Stephen Wynn is represented by Gary S. Lincenberg, Oliver Rocos and Jumin Lee of Bird Marella Rhow Lincenberg Dooks & Nessim LLP and J. Colby Williams of Campbell & Williams.

Stephen Cootey is represented by Daniel R. McNutt and Matthew C. Wolf of McNutt Law Firm PC.

Kimmarie Sinatra is represented by Erika Pike Turner and Dylan T. Ciciliano of Garman Turner Gordon LLP and James N. Kramer and M. Todd Scott of Orrick Herrington & Sutcliffe LLP.

The case is Ferris et al. v. Wynn Resorts Ltd. et al., case number 2:18-cv-00479, in the U.S. District Court for the District of Nevada.



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9th Circ. Won't Revive Gas Price-Fixing Suit Over Trump Pact

By **Jared Foretek**

Law360 (September 18, 2024, 9:09 PM EDT) -- The Ninth Circuit upheld the dismissal of a proposed class action alleging price fixing between major oil producers as part of the Trump Administration's 2020 deal with Russia and Saudi Arabia to cut production, saying that subjecting the pact to judicial review would be inappropriately "second-guessing" executive branch foreign policy.

In a published ruling issued Monday, a three-judge appellate panel affirmed the suit's dismissal in district court last year, holding that the federal courts lack subject-matter jurisdiction to consider the deal and the proposed class of gasoline-buyers' claims. According to the Ninth Circuit judges, neither the Sherman Act nor the Clayton Act — under which the plaintiffs brought their price-fixing claims — offer a path for the courts to review matters of foreign policy like those implicated in their complaint.

"By recasting the conduct of foreign relations and national security interests into antitrust terms, we are still being asked to evaluate foreign relations decisions of sovereign nations, including our own," U.S. Circuit Judge Ryan D. Nelson wrote in his opinion. "Plaintiffs cite no case to guide us. Nor were our antitrust laws designed to handle such difficult questions on areas of statecraft."

Without that guidance, Judge Nelson said, the court turned to a Fifth Circuit ruling from 2011, in which plaintiffs similarly alleged an antitrust price-fixing conspiracy between American oil producers and the Organization of the Petroleum Exporting Countries, or OPEC.

In that case, the Fifth Circuit judges found that "By adjudicating [the] case, the panel would be reexamining critical foreign policy decisions, including the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation."

The judges there upheld dismissal as well. But in this case, Judge Nelson wrote, the plaintiffs are even "more clearly barred from judicial review."

"Plaintiffs specifically implicate President Trump's foreign policy decision to negotiate with foreign powers," he wrote. "Such a direct foreign policy question was not at issue in [the Fifth Circuit case]. ... In sum, the political question [doctrine] bars Plaintiffs' claims because judicial review would intrude on the prerogatives of the political branches and create an unworkable judicial framework."

The 2020 deal was hatched as gas prices fell to historic lows during the height of the COVID-19 pandemic, hurting American oil companies. As part of the deal, OPEC and Russia agreed to curb worldwide production by about 10%, ending a price war between OPEC and Russia and bringing them into closer alignment with American companies like Chevron, Exxon Mobil and Phillips 66, which had already cut their production. Those American companies and some others were named as defendants in the proposed class action.

According to the plaintiffs, the agreements drove the price of a barrel of oil from under \$20 to more than \$100, hurting American consumers and violating Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act.

Seeking to depose Jared Kushner — Trump's son-in-law and then-senior advisor to the president — as part of the case, the plaintiffs asked the courts for damages and disgorgement of profits. But in January 2023, U.S. District Judge Jeffrey S. White **granted** the companies' motion to dismiss and

denied the plaintiffs' request to amend their suit, saying it would be futile given the issue with the political question doctrine, which dictates that federal courts should deny review of fundamentally political questions.

In his ruling, Judge Nelson — himself a Trump appointee — said the suit also ran afoul of the act of state doctrine, which typically bars federal courts from taking up challenges to acts by other nations.

"Plaintiffs ask the Judicial Branch to second-guess the foreign policy decisions of the Executive Branch. That would violate well-established limits on our judicial review," Judge Nelson wrote. "Deciding the merits of Plaintiffs' claims would also require us to evaluate the decisions of two foreign countries — Russia and Saudi Arabia. We cannot adjudicate the political decisions of foreign states."

Exxon Mobil, Phillips 66 and Chevron did not immediately respond to Law360's request for comment.

The case was **heard** by Judge Nelson, as well as U.S. Circuit Judges Ronald M. Gould and Richard C. Tallman.

The plaintiffs are represented by Joseph M. Alioto and Tatiana V. Wallace of Alioto Law Firm.

American Petroleum Institute is represented by Emily Johnson Henn, E. Kate Patchen and Kyle W. Chow of Covington & Burling LLP.

ChevronTexaco is represented by Ginger D. Anders, Helen E. White and Glenn D. Pomerantz of Munger Tolles & Olson LLP.

Phillips 66 is represented by Joshua D. Lichtman and Katherine G. Connolly of Norton Rose Fulbright LLP.

Exxon Mobil is represented by Dawn Sestito, Stephen McIntyre and Mark Randall Oppenheimer of O'Melveny & Myers LLP.

Occidental Petroleum is represented by Robert A. Sacks and Diane Lee McGimsey of Sullivan & Cromwell LLP.

Hilcorp Energy Company is represented by Stephen Silva, Daniel E. Laytin, Tabitha J. De Paulo and Max Samels of Kirkland & Ellis LLP.

Devon Energy is represented by Kevin Barnett Frankel of McGuireWoods LLP.

Continental Resources is represented by Kyle A. Casazza and Christopher Emrich Ondeck of Proskauer Rose LLP.

The case is Rosemary D'Augusta et al. v. American Petroleum Institute et al., case number 23-15878, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins and Bryan Koenig. Editing by Vaqas Asghar.



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BIPA Doesn't Conflict With Kids Safety Law, Judge Rules

By **Danielle Ferguson**

Law360 (September 18, 2024, 8:04 PM EDT) -- An Illinois federal judge on Tuesday rejected Meta's bid to dismiss a biometric privacy class action alleging it improperly stored Messenger and Messenger Kids users' facial geometries to apply bunny-ear and other filters, finding a federal child privacy law does not preempt the suit.

U.S. District Judge Nancy J. Rosenstengel said the Children's Online Privacy Protection Act does not bar parents' and children's claims that Meta improperly collects and keeps children's facial geometries, as the Illinois Biometric Information Privacy Act does not conflict with the federal statute that regulates the online collection of children's personal information.

Judge Rosenstengel said BIPA does not impose requirements that are inconsistent with COPPA's regulation of children's online activity that would trigger preemption of the claims, saying BIPA's subject matter is "almost entirely distinct" from COPPA's.

BIPA discusses biometric identifiers or information, whereas COPPA regulates personal information such as addresses, phone numbers, Social Security numbers and IP addresses, the judge said. BIPA and COPPA are also distinct in that BIPA does not have a children-specific policy requirement and requires the deletion of biometric data after a certain period.

"The thematic difference between biology-based and data-based identifying information should be apparent. And considering these distinct regulatory targets, there is no basis to conclude that BIPA's requirements are 'inconsistent' with COPPA's," Judge Rosenstengel said.

A proposed class of parents and their children — led by plaintiffs Rebecca Hartman and Joseph Turner — alleged in July 2023 that Meta collects their "face geometries" when they use the Messenger apps' filters, such as flower crowns or bunny ears, in violation of BIPA, which prohibits private entities from obtaining a person's biometric information without consent.

The class alleges Meta collected the data of child and adult users and then stored it on users' devices and on the company's servers.

Meta urged the court to dismiss the claims in November, arguing COPPA preempted the claims.

Judge Rosenstengel recognized the "paucity of authority discussing COPPA's preemptive effect on BIPA actions like this one," noting she and the parties identified just one other case that addresses the issue, *H.K. through Farwell v. Google*. In that case, according to Judge Rosenstengel's order, the plaintiffs brought BIPA claims alleging Google collected children's voice characteristics and their face geometries — and the court held COPPA preempted the BIPA claims.

However, Judge Rosenstengel found that *Jones v. Google*, a case that considered whether COPPA preempted consumer protection claims from multiple states, was "more aligned" with the Seventh Circuit's practice to narrowly construe preemption provisions. The Ninth Circuit in that case found state laws that "supplement or require the same thing as federal law do not stand as an obstacle to Congress' objectives and so are not 'inconsistent,'" according to Judge Rosenstengel's order.

Meta had also argued the BIPA claims fail because the company does not store information and the information at issue is not "biometric," as it is not able to identify individual users.

Judge Rosenstengel said the app users have sufficiently alleged the social media giant could match their identity to the scans the app takes of users' faces, as Meta requires adults' and children's names to set up an account and tracks face geometry in real time.

The complaint alleges the Messenger apps use augmented reality technology to create face scans, which modeled users' faces based on the location of different parts of their faces. This, Judge Rosenstengel said, is essentially the point of the filter feature. If the filters were based on a generic face template, filters could create an "odd appearance," she noted.

"Bunny ears could appear on the user's forehead or be superimposed in a location that is not connected to the face at all," Judge Rosenstengel said. "The technology would have little entertainment or commercial value if it applied these effects in such a non-personalized manner."

The company also argued the class doesn't properly allege Meta possessed the information, an element needed for a BIPA claim. Meta argued it could not have collected or possessed the information.

Judge Rosenstengel rejected this argument, saying the complaint explicitly alleges Meta collects the biometric data of each user and stores it on users' devices and on Meta's servers. This allegation also undercuts Meta's argument that it doesn't collect or possess the data, the judge said.

Meta argued that California law should govern the suit — as the company's terms of service selects California law to apply to its disputes — and said the BIPA claims are therefore not viable.

Judge Rosenstengel rejected the company's reliance on the terms of service, saying that at this motion-to-dismiss stage, it would not be appropriate to allow Meta to "cherry-pick" portions of its website to invoke a summary judgment-level analysis of the complaint. For now, Judge Rosenstengel said she would consider the viability of the BIPA claims under Illinois law, but that does not resolve the question of which state's law should govern the case, she said.

"For now, it is enough to recognize that a choice-of-law determination is not possible based solely on plaintiffs' complaint because the complaint says nothing about it," Judge Rosenstengel said.

Tanner A. Kirksey of Keane Law LLC, representing the plaintiffs, told Law360 on Wednesday they are pleased with the judge's "careful analysis" of the issues. He said the judge's determination that COPPA does not preempt the claims is significant because it gives "the state of Illinois the ability to make their citizens safer."

Attorneys for Meta did not immediately respond to a request for comment Wednesday.

The app users are represented by Ryan A. Keane and Tanner A. Kirksey of Keane Law LLC.

Meta Platforms Inc. is represented by Lauren R. Goldman, Michael Brandon, Senton Hartnett O'Brien and Lefteri J. Christos of Gibson Dunn & Crutcher LLP and Matthew D. Provance of Mayer Brown LLP.

The case is Hartman et al. v. Meta Platforms Inc., case number 3:23-cv-02995, in the U.S. District Court of Illinois Southern.

--Editing by Philip Shea.



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GM Beats Class Suit Alleging Piston Ring Defects

By **Jonathan Capriel**

Law360 (September 18, 2024, 9:52 PM EDT) -- General Motors LLC has beat a class action accusing it of selling vehicles with faulty engines that consume too much oil, as a Colorado federal judge determined that the drivers couldn't prove a defect now that their expert witness is disqualified.

U.S. District Judge Charlotte N. Sweeney gave the automaker summary judgment on Tuesday, rejecting a class of motorists' arguments that allegations of design defect weren't too technical for jurors to sort out on their own without the aid of an expert witness.

"To summarize, this case is not one in which causation is plainly identifiable by an average juror," Judge Sweeney said. "This issue is more, not less, technical than other causation issues about which courts in this circuit have required expert testimony."

The lead plaintiff, Roy White, **sued GM** in February 2021 alleging that the company hid faulty piston rings in one of its engines, called the Generation IV 5.3 Liter V8 Vortec 5300 LC9, causing excessive oil consumption, and that it continued to sell the cars even after learning about the issue. He scored class certification in May 2023.

What proved to be fatal to the case was Judge Sweeney's decision in late February to exclude opinions and testimony by White's expert, Werner Dahm.

Dahm testified that the "root cause" of the oil consumption defect was defective piston rings. GM argued that Dahm's opinion was unreliable because he didn't actually test or physically handle any of the vehicles in question, Judge Sweeney wrote.

While Judge Sweeney found that Dahm was indeed qualified to make such an opinion, she agreed with GM that his testimony wasn't based on sufficient facts or data and disqualified him.

General Motors then argued that without a technical expert, White couldn't advance his arguments regarding the alleged defect.

White argued that the jury could "easily infer that GM sold" him a defective vehicle. Moreover, White argued that the jury wouldn't be saddled with answering "technical questions that are beyond their discernment" during trial, according to an opposition filing he made in early March.

But Judge Sweeney said that White's claims, such as breach of warranty, require an expert to explain that the piston ring defect causes excess oil usage in the class of vehicles that can harm and disrupt the normal functioning of an engine in a number of ways.

GM has faced a number of lawsuits accusing it of selling vehicles with this defect. In 2022, a California federal jury **awarded \$102 million** to a class of nearly 38,000 car owners in California, Idaho and North Carolina, or \$2,700 each.

The class is represented by H. Clay Barnett III, W. Daniel "Dee" Miles III, J. Mitch Williams and Tyner D. Helms of Beasley Allen Crow Methvin Portis & Miles PC and Adam J. Levitt, John E. Tangren, Daniel R. Ferri and Blake Stubbs of DiCello Levitt LLP.

General Motors is represented by April N. Ross and Rachel P. Raphael of Crowell & Moring LLP and Mike Gallagher of Davis Graham & Stubbs LLP.

The case is Roy White v. General Motors LLC, case number 1:21-cv-00410, in the U.S. District Court for the District of Colorado.

--Additional reporting by Emily Field and Bonnie Eslinger. Editing by Brian Baresch.

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