

Apple's \$490 Million Securities Fraud Settlement Approved (1)

By Bernie Pazanowski

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

Bloomberg Law News 2024-09-20T10:13:32243435369-04:00

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

By Bernie Pazanowski 2024-09-19T12:27:20000-04:00

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

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.

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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Bloomberg Law News 2024-09-20T13:32:28769532817-04:00

Courts Remain Skeptical of Lawyers' Use of ChatGPT in Litigation

By Seth Cohen and Alan Mendelsohn2024-09-20T04:30:03000-04:00

- *Alston & Bird attorneys analyze AI use pitfalls in litigation*
- *Critical oversight and supervision needed to serve clients*

Generative artificial intelligence is making a bad first impression in the courts. Manhattan federal judge Edgardo Ramos recently described ChatGPT as an “[unreliable resource](#),” and he’s not alone in expressing such concern about AI. The recent decisions addressing use of generative AI by lawyers in New York federal courts demonstrate a persistent skepticism of the technology among the judiciary.

US District Judge Kevin Castel sanctioned lawyers in [Mata v. Avianca](#) last year for “abandon[ing] their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT.” The case made national headlines.

Since that time, some Manhattan federal judges have shone a bright line against any use of ChatGPT, repeatedly underscoring its purported unreliability beyond the context of basic legal research and citations.

For example, in the aforementioned case of [Z.H. v. N.Y.C. Dep’t of Educ.](#), Judge Ramos admonished a law firm for submitting questions and answers posed to and generated by ChatGPT as evidence of reasonable attorney hourly rates in support of an application by the firm for attorneys’ fees.

Ramos afforded no weight to the ChatGPT Q&A and noted that US Magistrate Judge Robyn Tarnofsky in [D.S. v. N.Y.C. Dep’t of Educ.](#) declined to credit a similar submission by the same lawyers “because ChatGPT has been shown to be an unreliable resource.”

Tarnofsky, in turn, supported her conclusion by citing to a line of cases where ChatGPT generated fake legal authorities, among which was [Park v. Kim](#), a recent medical malpractice dispute, where the US Court of Appeals for the Second Circuit described how certain technologies that “may produce factually or legally inaccurate content” shouldn’t replace “the lawyer’s most important asset—the

exercise of independent legal judgment.”

In [JG. v. NYC. Dep't of Educ.](#) earlier this year, US District Judge Paul Engelmayer took exception to the lawyers' failure to identify the “inputs on which ChatGPT relied” or to address “whether ChatGPT anywhere considered” key legal precedents.

Courts aren't inclined to impose a bright-line rule prohibiting attorneys' use of generative AI. In [Sillam v. Labaton Sucharow](#), US Magistrate Judge Ona Wang expressed skepticism about attorneys' use of generative AI tools for brief writing, but maintained that attorneys have a “gatekeeping role” to “ensure the accuracy of their filings.” Wang was also critical of the quality of the writing produced by generative AI tools, noting they resulted in “repetitive language” that “only restates general principles of law without making argument.”

Likewise, in [Mata](#), Judge Castel rejected the application of a bright-line rule against generative AI tools, noting that “[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.”

Integration of AI tools into litigation practice won't be limited to conducting legal research and writing briefs. Law firms are beginning to employ generative AI to facilitate and streamline document review and production. These tools may help attorneys to determine responsiveness to discovery requests, among other tasks.

Already, judges routinely require parties to exchange keyword search terms during discovery; it's only a matter of time before judges require parties to exchange information concerning their use of AI tools in discovery. This, in turn, is likely to implicate the attorney-client privilege and work product doctrine.

The prompts that attorneys input into generative AI tools to assist in brief writing are likely to be privileged and protected from disclosure under the work product doctrine. On the other hand, AI prompts used by attorneys to determine the relevance of certain documents in an action may not be subject to such privilege, just as keyword search terms are not privileged and are subject to disclosure.

The limited case law and public statements by judges concerning AI suggest that attorneys using generative AI should be prepared to explain to courts how they used AI, the sources of information the AI tool considered and relied upon, and that any use of AI was subject to their supervision and review. Likewise, there is bound to be litigation concerning the discoverability of such tools and its

tension with the attorney work product doctrine and other applicable privileges. All of this has implications for Rule 26 of the Federal Rules of Civil Procedure—stay tuned.

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Binance Defeats Egonex Investors' Suit Over Merger Intentions

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Investors in cryptocurrency exchange Egonex Ltd. failed to adequately allege that Binance Group and its Bifinity UAB unit intended to run it into the ground instead of completing a merger, a federal court ruled.

The proposed class action centers on allegations that Bifinity entered into a strategic partnership solely to take over its U.K.-approved custodial wallet services after its own had been rejected. But a “motive to access the U.K. market does not equate to a motive to bring down Egonex,” Judge Gregory H. Woods said in an order entered Thursday in the docket of the US District Court for the Southern District of New York. The plaintiffs will have another chance to plead their claims.

The events came amid a crackdown on the crypto sector by British authorities.

The investors alleged that Singapore-based Egonex derived about 80% of its revenue from its exchange business, and the rest from Digivault, which provided custodial services for digital assets; asset management services; and brokerage services. It allegedly entered into a strategic partnership with Bifinity, a newly launched Binance subsidiary, in March 2022 amid talk of a potential merger.

Statements at around that time by Binance, Bifinity, and members of Egonex leadership—whom those companies appointed—misleadingly omitted that the tie-up was simply Binance’s end-run around a British ban over concerns about fraud, money laundering, and other issues, the investors said.

With a loan agreement in place that gave Bifinity control of Egonex, executives announced within months that they would close the Egonex exchange and focus on the Digivault business, the investors said. Egonex’s stock price dropped and it eventually entered bankruptcy.

The court focused on two statements by Bifinity leaders who would also become involved in the leadership of Egonex. Bifinity’s president allegedly said at the beginning of the partnership that Egonex “complements our retail focus and will greatly benefit Bifinity over the long-term.”

“The statement refers only to the potential benefits of the Strategic Partnership for *Bifinity*,” Woods said. “It does not say anything about whether the Strategic Partnership would benefit Egonex or about a potential merger,” he said. “Thus, no reasonable investor could have

received the impression that the Strategic Partnership would support Eqonex or that the two companies would pursue a merger, which are the two allegedly false claims on which Plaintiffs base their allegations of fraud.”

As to intent, the allegations allow an inference that Binance had a motive to access the U.K. market, but that’s not enough to allege it wanted to take down Eqonex, Woods said. And other allegations “fail to provide sufficient circumstantial evidence that Defendants had knowledge of a scheme to cause Eqonex to collapse to allow Binance to take over Digivault,” he said.

The Rosen Law Firm PA is lead counsel for the investors. Cahill Gordon & Reindel LLP represents Binance, Bifinity, and the individual defendants.

The case is Bin Li v. Eqonex Ltd. , 2024 BL 329583, S.D.N.Y., No. 1:23-cv-03346, docketed 9/19/24 .

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Loving this new SEC enforcement action (shot):
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Misleading Revenue Projections

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

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

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

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I guess this is just ... how things are done?



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So the only target of this enforcement action is a bankrupt company? Any individuals?

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I only know what it says on the tin. There's a private lawsuit pending but only re: disclosures in the prospectus, not communications with analysts. That one includes individuals though.

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Incidentally it would be difficult, legally, for private pltfs to sue over communications with analysts.

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Because the private right of action only applies to the contents of the prospectus? Could an argument be made that those communications with analysts were a material omission?

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Section 11 only applies to prospectus comms, yes, and the only thing I can think is that it was misleading to disclaim outside statements when they knew they had encouraged those statements.

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Section 10b is an alternative - the antifraud statute - but there are rules that make it difficult to establish reliance on this kind of behind the scenes action.



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Discovery Holders' Team Seeks \$24.5 Million for Warner Bros Deal

By Jennifer Kay

Bloomberg Law News 2024-09-20T10:20:48244778375-04:00

Discovery Holders' Team Seeks \$24.5 Million for Warner Bros Deal

By Jennifer Kay 2024-09-19T14:22:32000-04:00

Attorneys who reached a \$125 million settlement for investors who challenged Discovery Inc.'s merger with AT&T Inc.'s WarnerMedia unit now seek \$24.5 million to cover legal fees.

A fee award amounting to 19.6% of the settlement falls within Delaware Chancery Court precedents and reflects the high level of work performed in a complex case, the attorneys wrote in a brief filed Wednesday. They "had to frame the case carefully to survive a motion to dismiss, which they did sufficiently well that Defendants did not even try," it said.

- Attorneys from Labaton Keller Sucharow, Bernstein Litowitz, Kessler Topaz, and Klausner Kaufman Jensen & Levinson represent the pension funds that challenged the merger. An individual investor also is represented by Friedman Oster & Tejtzel, Kaskela Law LLC, and Alfred G. Yates Jr. of Pittsburgh, Pa.
- If the court approves the settlement at an Oct. 10 hearing, \$100 million will be paid by Advance/Newhouse partnerships. Ex-Discovery Chairman Robert Miron and his son will cover the remaining \$25 million.
- The investors alleged company insiders gained improper benefits worth over \$1 billion in the 2022 merger.

The case is In Re Warner Bros. Discovery , Del. Ch., No. 2022-1114, brief 9/18/24 .

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[Securities Law News](#)

Sept. 19, 2024, 6:31 AM PDT; Updated: Sept. 19, 2024, 10:09 AM PDT

Wynn Agrees to \$70 Million Settlement in Worker Abuse Suit (1)

By Daniel Seiden

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

Bloomberg Law News 2024-09-20T10:21:15349070656-04:00

Wynn Agrees to \$70 Million Settlement in Worker Abuse Suit (1)

By Daniel Seiden 2024-09-19T09:31:30000-04:00

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

Wynn Resorts Ltd. and certain former 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.

"We are pleased to have resolved this long-standing legal matter through a settlement which we believe is advantageous for the company," Wynn Resorts said in an emailed statement.

"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," the company said.

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.

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 .

(Updated to include comment from Wynn Resorts.)

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Third Circuit Hears Challenges to \$31 Million Restitution Order

By Holly Barker

- Unusual case implicates restitution, class action procedure
- Defendant says distribution scheme isn't authorized by law

Bloomberg Law News 2024-09-20T10:23:14628572627-04:00

Third Circuit Hears Challenges to \$31 Million Restitution Order

By Holly Barker 2024-09-19T14:10:27000-04:00

- Unusual case implicates restitution, class action procedure
- Defendant says distribution scheme isn't authorized by law

A successful entrepreneur convicted of defrauding securities class action claims administrators of settlement funds meant to be distributed to defrauded investors is urging the the Third Circuit to toss a \$31.2 million restitution order.

The trial court made restitution payable to various class action claims administrators. But the claims administrators weren't the victims here, Joseph Cammarata's lawyer Peter Goldberger told the three-judge panel.

Restitution, like any other criminal penalty, is governed by statute. By ordering the restitution to be paid to entities that didn't suffer any loss, the lower court violated the statute, he said. If anyone lost anything, it was members of the class, according to Goldberger.

"This is, at least in my experience, a really unusual case, especially for somebody who's a class action groupie," Judge D. Brooks Smith said, noting that he's never seen a criminal case converge with the provisions of Rule 23 of the Federal Rules of Civil Procedure, which governs class actions.

He agreed the district court was wrong to refer to the claims administrators as victims, saying the real victim was the class itself.

Judge L. Felipe Restrepo suggested the administrators were merely serving as proxies, pressing Goldberger on why it was unlawful to charge the administrators with distributing the restitution funds to the ultimate victims.

"There's nothing in the restitution statute that authorizes this kind of delegation scheme," Goldberger said.

Goldberger also argued that his client shouldn't have been ordered to forfeit his interest in a vacation home that he and his now ex-wife purchased in Tobyhanna Township, Penn. According to Goldberger, the forfeiture order was unlawful because Cammarata was improperly deprived of the opportunity to have a jury decide the government's claim.

Rule 32.2 of the Federal Rules of Criminal Procedure provides defendants a limited right to trial by jury when the government seeks forfeiture of a specific item of property.

On the last day of trial, when the district court judge asked the government whether it was seeking forfeiture of any specific item of property, the prosecutor responded that the government was seeking "a money judgment only." According to Goldberger, by making that representation, the government effectively waived its right to make a claim for real or personal specific property at sentencing.

Waiver

Paul Shapiro, the Assistant United States Attorney arguing on the government's behalf, denied any waiver.

"We addressed a question about the presently existing state of facts," he said. According to Shapiro, while the government knew the property existed, it hadn't yet determined that the property was purchased with tainted proceeds. The rule, he said, allowed the government to proceed without a jury after it traced the property to Cammarata's crimes.

In rebuttal, Goldberger said it can't be right that the government can use its own lack of preparation to justify depriving a defendant of his rights under Rule 32.2.

Cammarata was convicted in 2022 of one count of mail and wire fraud conspiracy, four counts of substantive wire fraud, money laundering conspiracy, and two substantive money laundering counts.

Although Cammarata's appeal also asks the court to toss his underlying fraud convictions and further challenges the loss calculation on which his sentence was based, oral argument was limited to Cammarata's challenges to the trial court's restitution and forfeiture orders.

Cammarata is presently serving a ten-year prison sentence for the fraud scheme. He was subsequently convicted on tax evasion charges.

Judge Theodore A. McKee was also on the panel.

At the close of oral argument, each judge thanked Goldberger for his work before the court, praising the quality of his advocacy over the years.

There's a rumor that it might be his last argument, according to Restrepo. Goldberger said he might have one more.

The case is *United States v. Cammarata*, 3d Cir., No. 23-02110, 9/18/24 .

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Hormel Must Face Suit Over 401(k) Share Class Options, Costs

By Jacklyn Wille

- Stable value fund challenge rests on meaningful benchmark
- Claims of pricey mutual fund share classes move forward

Bloomberg Law News 2024-09-20T10:22:14147544468-04:00

Hormel Must Face Suit Over 401(k) Share Class Options, Costs

By Jacklyn Wille 2024-09-19T10:42:45000-04:00

- Stable value fund challenge rests on meaningful benchmark
- Claims of pricey mutual fund share classes move forward

Hormel Foods Corp. failed to shake a proposed class action challenging the funds in a pair of retirement plans covering the food manufacturer's workforce.

The lawsuit validly alleges that Hormel breached its legal duties in offering a stable value fund from MassMutual that provided a lower guaranteed interest rate than a less risky option from the same company, Judge Susan Richard Nelson said. This allegation of underperformance is based on a meaningful benchmark because it compares funds from the same insurer that share the same goal, and it argues that the option intended to be safer produced higher returns, Nelson said.

Nelson's opinion, issued Wednesday in the US District Court for the District of Minnesota, analyzed several recent cases in which the US Court of Appeals for the Eighth Circuit fleshed out the "meaningful benchmark" standard for challenging retirement plan investments under the Employee Retirement Income Security Act.

Under this standard, a plaintiff "must not only identify less expensive or better performing investment options as comparators, but those alternative options must also be similar enough to raise a plausible inference that a prudent investor in like circumstances would not have selected the challenged investment," Nelson said. "When determining whether a comparator is sufficiently similar to the fund at issue, courts may look to its structure, objectives, strategy, and risk profile."

The judge also greenlighted claims saying Hormel wrongly offered mutual funds in high-cost share classes instead of opting for cheaper versions of the same investments.

The lawsuit, filed in February by plan participant Scott Payne, centers on a general-account guaranteed investment contract from MassMutual, which isn't named as a defendant. These types of investments are intended to protect against losses while providing a guaranteed, modest rate of return, but the MassMutual fund offered by Hormel had a substantially lower return than other similar investments despite exposing participants to more risk, according to the lawsuit.

Hundreds of lawsuits challenging retirement plan fees have been filed over the past few years, and federal appeals court rulings have been mixed.

The Third, Fifth, and Ninth circuits revived lawsuits against Wesco Distribution Inc., United Surgical Partners, Salesforce Inc., and Trader Joe's Co. while the Sixth, Eighth, Tenth, and D.C. circuits issued employer-friendly decisions largely favoring CommonSpirit Health Inc., TriHealth Inc., MidAmerican Energy Co., O'Reilly Automotive Inc., Barrick Gold, and Georgetown University. The Seventh Circuit rejected a plan fee challenge against Oshkosh Corp. in 2022, but last year it allowed key claims to proceed against Northwestern University.

Dorsey & Whitney LLP represents Hormel. Wanta Thome PLC represents Payne.

The case is *Payne v. Hormel Foods Corp.*, 2024 BL 327835, D. Minn., No. 0:24-cv-00545, 9/18/24.

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Sept. 19, 2024, 7:52 AM PDT

ServiceNow Beats Challenge to 401(k) Plan's Target Date Funds

By Jacklyn Wille

- Lawsuit lacks details about fiduciary process, judge says
- Several recent cases have challenged 401(k) target date funds

Bloomberg Law News 2024-09-20T10:21:54788305304-04:00**ServiceNow Beats Challenge to 401(k) Plan's Target Date Funds****By Jacklyn Wille 2024-09-19T10:52:38000-04:00**

- Lawsuit lacks details about fiduciary process, judge says
- Several recent cases have challenged 401(k) target date funds

ServiceNow Inc. defeated a proposed class action by two former employees who challenged the American Century target date funds in the software company's 401(k) plan.

The lawsuit claims investment underperformance but doesn't adequately allege any flaws in ServiceNow's process for managing the plan and its investments, Judge Trina L. Thompson said in an opinion issued Wednesday in the US District Court for the Northern District of California. There are no details in the complaint about the company's fiduciary conduct in making its investment decisions or the proper process for investigating and evaluating particular investments, according to the judge.

Thompson said that while she "recognizes Plaintiffs' concern" that it's difficult to produce these facts before engaging in discovery, plaintiffs claiming fiduciary breach under the Employee Retirement Income Security Act "are still required to include allegations, such as process failure allegations, so that there are sufficient facts to show that there was more than just mere underperformance alone."

She also concluded that the lawsuit wasn't based on appropriate comparisons between the challenged funds and better-performing investments with similar aims, risks, and potential rewards.

The lawsuit challenges ServiceNow's decision to offer the actively managed suite of American Century One Choice target date funds in its \$967 million retirement plan. These funds are invested too conservatively and have consistently underperformed their chief competitors, driving more than \$22 million in lost retirement savings for ServiceNow employees, according to the complaint.

Target date funds, which are designed to gradually shift investment strategies as investors approach retirement, have driven dozens of recent lawsuits claiming fiduciary breach under the Employee Retirement Income Security Act. Recent cases have centered on 401(k) plans that offer target date funds from BlackRock Inc., Northern Trust, Fidelity, and Wells Fargo & Co.

Thompson gave the ServiceNow workers an Oct. 8 deadline for filing an amended complaint.

American Century isn't a party to the lawsuit.

Morgan, Lewis & Bockius LLP represents ServiceNow. Creitz & Serebin LLP and Walcheske & Luzi LLC represent the employees.

The case is Rubke v. ServiceNow, Inc. , N.D. Cal., No. 3:24-cv-01050, 9/18/24 .

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Republican states balk at Google privacy settlement in US appeal

 [reuters.com/legal/transactional/republican-states-balk-google-privacy-settlement-us-appeal-2024-09-19](https://www.reuters.com/legal/transactional/republican-states-balk-google-privacy-settlement-us-appeal-2024-09-19)

Mike Scarcella

A view shows the Google logo on a building in San Salvador, El Salvador, July 26, 2024. REUTERS/Jose Cabezas Purchase Licensing Rights , opens new tab

Sept 19 (Reuters) - A group of Republican state attorneys general on Wednesday urged a U.S. appeals court to reject a \$62 million consumer privacy settlement with Google (GOOGL.O) , opens new tab that awards money to the plaintiffs' lawyers and to advocacy groups, but not to class members.

The 20 state attorneys general, led by Iowa and including Florida, Ohio, Georgia and Virginia, told the 9th U.S. Circuit Court of Appeals that the deal provides more benefits to "controversial political organizations" than to class members.

The states' friend-of-the-court brief , opens new tab backing a challenge to the accord said it was improper to funnel the settlement funds to third-party groups whose areas of focus include "environmental justice, abortion, and controversial positions on sex and sexuality." The states said their work was "wholly unrelated to the class's data privacy claim." Google in a statement said the organizations selected by the parties in the case "have a strong commitment to promoting online privacy." The company said the states had an opportunity to object earlier to the settlement terms but had not done so.

Lawyers for the plaintiffs, who will receive \$18 million in fees from the deal, did not immediately respond to a request for comment.

Iowa Attorney General Brenna Bird in a statement said the Google settlement "wrongfully prioritizes left-wing political agendas over the people the lawsuit was supposed to help."

In the underlying case, Google was accused of unlawfully tracking and storing location data for 247.7 million U.S. mobile users who had disabled "location history" on their phones. Google denied any wrongdoing in agreeing to settle.

The judge who approved the deal in May found payments to class members would be too small to be practical.

The dispute offers the San Francisco-based appeals court its latest opportunity to examine the propriety of "cy pres only" settlements in which funds are earmarked for independent groups to pursue interests tied to the claims in the case.

The 21 recipients [opens new tab](#) of \$42.6 million in settlement funds include the ACLU Speech, Privacy, and Technology Project; Free Press; and Yale Law School's Information Society Project. The groups did not immediately respond to requests for comment on Thursday.

A group of class members appealed the approval of the settlement to the 9th Circuit. The challengers are led by Theodore Frank, director at the Hamilton Lincoln Law Institute and the Center for Class Action Fairness.

In a filing [opens new tab](#) last week, Frank criticized what he called the "tremendous size of the cy pres fund with no effort to distribute to the class."

Iowa and the other states argued that many of the recipients of settlement funds do not have a "substantial nexus" to the class members' interests.

The states asked the appeals court to at least order the reconsideration of third-party groups that "do not solely advance the social justice aims of the defendants and class counsel."

The case is *Napoleon Patacsil et al v. Google*, 9th U.S. Circuit Court of Appeals, No. 24-3387.

For plaintiffs: Michael Sobol of Lieff Cabraser Heimann & Bernstein; and Tina Wolfson of Ahdoot & Wolfson

For objectors: Theodore Frank of Center for Class Action Fairness

For states: Eric Wessan of the Iowa Attorney General's Office

Read more:

Google privacy deal yields \$18 mln for lawyers, no funds for consumers

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NEWS

OpenSea Faces Class Action Lawsuit in Miami Over NFT Sales

“We’re not just suing OpenSea in a class action like other lawsuits that will follow ours; we want to use this litigation to help create the framework of NFTs moving forward,” said Adam Moskowitz, the managing partner at the Moskowitz Law Firm.

September 20, 2024 at 12:08 PM

Cryptocurrency



Michael A. Mora



What You Need to Know

- The U.S. Securities and Exchange Commission issued a Wells Notice to Ozone Networks Inc. or OpenSea.
- The plaintiffs alleged that OpenSea misled investors that the NFTs sold on its website did not constitute the sale of securities.
- The attorney behind the class action said he has reached out to OpenSea to create a framework for NFT regulation and encouraged others to contribute.

The non-fungible token marketplace OpenSea has been hit with a securities class action in a federal district court in Miami over its alleged scheme to mislead investors that the NFTs sold on its website did not constitute the sale of securities, despite a clear indication from the U.S. Securities and Exchange Commission that they did.

Adam Moskowitz, the managing partner at the Moskowitz Law Firm in Coconut Grove, Florida, is among the attorneys who represent the plaintiffs, Anthony Shnayderman and Itai Bronshtein, on behalf of themselves and all others similarly situated against the defendant, Ozone Networks Inc. or OpenSea.

“We’re not just suing OpenSea in a class action like other lawsuits that will follow ours; we want to use this litigation to help create the framework of NFTs moving forward,” Moskowitz said. “Let’s now sit down and try to work on constructive NFT regulation so that people that were injured not only have a path to damages, but we can make sure this doesn’t happen again.”

OpenSea did not respond to a request for comment.

Now, the case against OpenSea is pending before the U.S. District Judge Cecilia M. Altonaga of the Southern District of Florida, in which the plaintiffs alleged violations of New York General Business Law Section 349, breach of warranty, unjust enrichment, and violations of the Florida Securities and Investor Protection Act and the Florida Deceptive and

Unfair Trading Practices Act.

In addition, the plaintiffs seek to represent a global class, a nationwide class, a New York subclass and a Florida subclass.

OpenSea was founded in 2017 by Devin Finzer and Alex Atallah and soon became the largest peer-to-peer digital marketplace by volume, sales and traders for crypto collectibles and NFTs. NFTs are tokenized versions of digital or real-world assets that function as proof of authenticity and ownership. They rely on scarcity to drive up value.

OpenSea is best described as a platform or exchange that supports trading through a variety of blockchains, including Ethereum, Polygon, Solana, Arbitrum, Optimism, Klaytn, Avalanche, Zora, Base, Blast and Sei.4. In 2021, OpenSea’s revenue increased from \$9 million in the second quarter to \$186 million in the fourth quarter.

However, after a series of poor, unethical business decisions, OpenSea’s turbulence began—it reported a “net loss of \$170.7 million in the second quarter of 2022,” according to the lawsuit. “In September 2021, OpenSea’s head of product was pushed out due to insider trading. Unbeknownst to OpenSea’s customers, their trust in the company to make intelligent investment decisions was unfounded,” it said.

“Amidst OpenSea’s net loss of \$170.7 million in the second quarter of 2022, one of OpenSea’s former employees even pondered, ‘What the f***, you’re not somebody’s personal investor. Why are you gambling on this when we have so much more upside?’”

As a result, OpenSea’s internal officials warned of its potential legal liability for these products, most prominently through its sale of NFTs.

Meanwhile, the plaintiffs said in the lawsuit that the SEC’s apparently consistent stance since as early as 2017 that crypto, digital trading platforms, initial coin offerings and other digital asset products constitute securities under relevant securities law. That stance should have alerted OpenSea that its sales of NFTs constituted unregistered securities.

“While Finzer continues to double down on OpenSea’s deceptive operations by remaining confident that OpenSea is not violating any securities laws, the Wells Notice [issued by the SEC] suggests that OpenSea is in the hot seat and may be found liable for facilitating the exchange of unregistered securities,” according to the complaint.

Read the Complaint:

Case 1:24-cv-23616-XXXX Document 1 Entered on FLSD Docket 09/19/2024 Page 1 of 44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. []

ANTHONY SHNAYDERMAN, *et al.*, on
behalf of themselves and all others similarly
situated,
Plaintiffs,
v.
OZONE NETWORKS, INC. (d/b/a
OPENSEA),
Defendant.
Defendant.

CLASS ACTION COMPLAINT
JURY DEMAND

CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

RELATED STORIES

‘Any NFT Is a Security’: What an SEC Wells Notice Sent to OpenSea Could Mean for Attorneys

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https://www.law.com/2024/09/19/another-mistrial-in-zantac-fourth-illinois-jury-fails-to-award-damages/?cmp=share_twitter



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NEWS

Another Mistrial in Zantac: Fourth Illinois Jury Fails to Award Damages

On Wednesday, a jury in Cook County Circuit Court in Illinois ended in a mistrial in a case against Zantac manufacturer Boehringer Ingelheim, the second in the past two months.

September 19, 2024 at 07:46 PM



Amanda Bronstad
staff reporter



What You Need to Know

- Another jury in the same courthouse handed a verdict last month to a separate Zantac manufacturer, GlaxoSmithKline.
- On May 23, an Illinois jury sided with both drug manufacturers in the first Zantac trial in the nation.
- The first trial in California state courts is scheduled to begin with jury selection on Sept. 30 in Oakland’s Alameda County Superior Court.

A fourth Chicago jury failed to award damages to cancer victims suing a manufacturer of over-the-counter heartburn medication Zantac, but the first trial in California is ramping up.

On Wednesday, a jury in Cook County Circuit Court in Illinois ended in a mistrial in a case against Zantac manufacturer Boehringer Ingelheim, the second in the past two months. Another jury in the same courthouse handed a verdict last month to a separate Zantac manufacturer, GlaxoSmithKline. And, on May 23, a jury sided with both drug manufacturers in the first Zantac trial in the nation.

Both sides declared victory in Wednesday’s mistrial.

“It’s pretty remarkable that Boehringer Ingelheim has not been able to convince a jury that they’re right on the science,” Eric Olson, of Denver-based Olson Grimsley Kawanabe Hinchcliff & Murray, who represented plaintiff Ronald Kimbrow, told Law.com. “They say in the trial, ‘All you need to know is the science and we win,’ and that argument hasn’t won two times in a row.”

The plaintiff, Kimbrow, 73, bought Zantac or its generic equivalent products at Walgreens beginning in 1995. He was diagnosed with prostate cancer in 2017.

The latest trial began on Aug. 28, three weeks after a previous jury failed to reach a verdict in another Zantac case against Boehringer Ingelheim.

Ashley Keller, of Chicago's Keller Postman, co-counsel on both trials, said: "We look forward to retrying both cases."

In a statement, Boehringer Ingelheim said it was "pleased" that "once again, plaintiffs have failed to convince another jury of the merits of their baseless claims regarding Zantac."

"While we would have preferred that the jury reach a unanimous verdict in the Kimbrow case, Boehringer considers this another defense victory, especially in light of the fact that the jury voted 11—1 in Boehringer's favor," the statement says. "Plaintiffs' inability to prove liability in any of the trials thus far is rooted in one simple fact: the totality of the scientific evidence, which includes numerous recently conducted epidemiological studies, all point to only one conclusion that Zantac does not cause any type of cancer. We intend to continue to vigorously defend all remaining Zantac cases."

'Aggressively Attack the Plaintiff'

Among those is the first trial in California state courts, which is scheduled to begin with jury selection on Sept. 30 in Oakland's Alameda County Superior Court. Opening statements are expected Oct. 7. That trial consolidated two cases but is against only Boehringer Ingelheim after GlaxoSmithKline, on Tuesday, announced it had settled.

"Plaintiffs John Russell and Annette Hughes have settled their claims and we are pleased that defendant, GlaxoSmithKline, agreed to settle each of their cases and finally bring closure to Mr. Russell and Ms. Hughes," plaintiffs lawyers Jennifer Moore, of Moore Law Group in Louisville, Kentucky, and R. Brent Wisner, of Los Angeles-based Wisner Baum, said in a joint statement. "We are still proceeding to trial against Boehringer Ingelheim for these bellwether clients, which will be the first Zantac trials in California."

GlaxoSmithKline didn't admit liability in either settlement, both of which were confidential.

"GSK will continue to vigorously defend itself and manage this litigation in the best interests of the company and shareholders," the statement says.

Russell had bladder cancer, and Hughes had colon cancer, according to the complaints. Onder Law Firm also represents Hughes.

Olson noted that, like the three other prior Zantac trials in Illinois, the case was scheduled to go before jurors due to the plaintiff's age. Unlike a traditional bellwether trial process, all the plaintiffs in Illinois so far have been 70 years or older, leaving them vulnerable to defense arguments about alternative causes for their cancer and lapses in memory, he said.

The two defendants that have faced jurors also have different counsel: Goldman Ismail Tomaselli Brennan & Baum represents GlaxoSmithKline, while King & Spalding is counsel for Boehringer Ingelheim.

"Boehringer's approach has been to aggressively attack the plaintiff and claim the science supports them, when in fact it does not," Olson said. "And what you see is you're going to get divisions in the jurors, because some of them buy into the attack on the plaintiffs. Some see through that and look at the science and see things more our way."

In the latest trial, for instance, evidence came out that Kimbrow was in Vietnam for two and a half months and, even though he never sprayed or touched Agent Orange, Boehringer Ingelheim's counsel "made a huge push in trial that Agent Orange causes prostate cancer," Olson said.

‘Consistent With the Scientific Consensus’

In 2020, the U.S. Food and Drug Administration announced an involuntary recall of Zantac and other heartburn medications containing ranitidine, after discovering the presence of a possible carcinogen.

But in 2022, a federal judge in Florida tossed 10 plaintiffs’ experts in the Zantac multidistrict litigation, granting summary judgment for about 50,000 claims. Since then, plaintiffs’ lawyers have filed cases in state courts, primarily in Delaware, California, Pennsylvania and Illinois.

In Delaware, where there are nearly 75,000 Zantac plaintiffs, Superior Court Judge Vivian Medinilla refused on May 31 to dismiss expert opinions linking Zantac to 10 types of cancer. Last month, the Delaware Supreme Court agreed to take up an interlocutory appeal of her order.

So far, only four Zantac trials have reached juries, all in Cook County Circuit Court.

In addition to the two mistrials, and the first verdict, which sided with both drug manufacturers, another jury came out on Aug. 5 for GlaxoSmithKline. Prior to that verdict, according to GlaxoSmithKline, the judge denied potential punitive damages.

According to GlaxoSmithKline, that defense verdict, in a case brought by Carrie Joiner, who had colorectal cancer, is “consistent with the scientific consensus that there is no consistent or reliable evidence that ranitidine increases the risk of any cancer.”

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In American Girl dolls case, US appeals court makes it easy to sue e-retailers in N.Y.

 [reuters.com/legal/litigation/column-american-girl-dolls-case-us-appeals-court-makes-it-easy-sue-e-retailers-2024-09-19](https://www.reuters.com/legal/litigation/column-american-girl-dolls-case-us-appeals-court-makes-it-easy-sue-e-retailers-2024-09-19)

Alison Frankel

American Girl dolls, a brand owned by Mattel, are seen at the American Girl Place New York in Manhattan, New York City, U.S., November 24, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

Sept 19 (Reuters) - Remember the debate last year in U.S. Supreme Court briefings about whether an online merchant's delivery of a single product in a particular state is enough to establish that state's jurisdiction over the e-retailer?

Here's a quick refresher.

Federal circuits have reached different conclusions about jurisdictional requirements for lawsuits against internet businesses that operate across the country and the world. The 7th U.S. Circuit Court of Appeals has said that courts in its ambit can hear cases against internet sellers that have delivered a single product into the venue. The 9th Circuit hasn't set a particular number but has also ruled that the delivery of a small number of physical products can establish a state's jurisdiction against an online retailer.

The 5th and 8th Circuits, meanwhile, have voiced skepticism that the delivery of a single product can satisfy jurisdictional requirements.

The 2nd Circuit has long been counted in the single-product camp. In 2010, the court held , opens new tab in *Chloe v. Queen Bee of Beverly Hills* that Manhattan federal courts had jurisdiction to hear the French luxury handbag company's trademark infringement claims against a website operator that sold allegedly counterfeit handbags, because the defendant accepted an order from and then shipped a handbag to a New York resident. (The resident was a legal assistant at the law firm representing Chloe.)

The 2nd Circuit's Chloe precedent is routinely cited, along with the 7th Circuit's similar 2022 ruling , opens new tab in a case involving allegedly counterfeit NBA-branded clothing, for the proposition that the delivery of a single product could trigger jurisdiction.

But it turns out that New York's jurisdictional test is even more lenient than that: The appeals court ruled , opens new tab on Tuesday that dollmaker American Girl can proceed with a lawsuit in New York federal court against Zembrka, a China-based company that allegedly sold counterfeit American Girl dolls through its international website, even though American Girl offered no evidence that Zembrka delivered a counterfeit doll in New York.

At the trial court, U.S. District Judge Mary Kay Vyskocil of Manhattan dismissed , opens new tab the lawsuit for lack of jurisdiction, ruling that American Girl's failure to show that the

defendant shipped even a single infringing product into New York distinguished its case from Chloe's.

The 2nd Circuit said in Tuesday's ruling that Vyskocil misunderstood its Chloe precedent.

The key fact in that case, wrote Judge Barrington Parker for a panel that also included Judges Jose Cabranes and Maria Araújo Kahn, was not that the defendant had shipped a physical product – an allegedly counterfeit handbag – to a purchaser in New York. Instead, the 2nd Circuit said, the critical question was whether the defendant purposefully conducted business in New York and engaged in at least one transaction in the state.

“Our holding in Chloe did not depend on the shipment of goods, but rather on the fact that a single act can potentially suffice for establishing personal jurisdiction,” the court said.

“Neither Chloe nor any of our other cases should be read as indicating that shipment is required to demonstrate a business transaction.”

New York's long-arm statute, Parker wrote, demands proof only that the defendant engaged in a business transaction in New York. Here, the 2nd Circuit said, American Girl satisfied that requirement by offering evidence that its own New York-based lawyer used the Zembrka website to place an order and submit payment for an allegedly counterfeit American Girl doll, then received emails from Zembrka confirming the order and pledging to deliver the product.

American Girl's lawyers at Epstein Drangel also provided evidence that 38 other would-be purchasers from New York submitted orders to Zembrka for allegedly counterfeit dolls, in addition to evidence that New Yorkers purchased 700 other items from Zembrka.

That proof – as well as an admission by Zembrka's lawyer from Glacier Law during oral argument in July that the company is doing business in New York via the internet – showed that the China-based company had availed itself of New York's laws.

For jurisdictional purposes, the 2nd Circuit said, it does not matter than Zembrka subsequently canceled orders from New Yorkers, including counsel for American Girl, and refunded the purchase price. Under New York's “relatively permissive” statute, the court said, American Girl showed that Zembrka transacted business in New York and that the doll company's claim arose from those transactions.

Zembrka counsel Ruoting Men of Glacier Law did not respond to my query. American Girl lawyers Kerry Brownlee and Jason Drangel declined to provide a statement.

The newly clarified New York jurisdictional standard for lawsuits against online retailers won't end the debate over where internet companies can be sued. The en banc 9th Circuit, for instance, is scheduled to hear oral arguments next week in a high-stakes privacy case against online payment platform Shopify, after vacating a three-judge panel's ruling that California courts do not have jurisdiction over Shopify. The company and its amicus

supporters, as I've told you, contend that loose jurisdictional rules forcing defendants to appear in courts across the country will destroy internet commerce.

The Supreme Court, meanwhile, has twice declined to hear cases asserting a circuit split on jurisdiction over online retailers that delivered at least one product into a venue, most recently in a challenge earlier this year to a 9th Circuit decision allowing Herbal Brands to proceed in Arizona with a trademark lawsuit against Amazon resellers.

It will be interesting to see whether the new 2nd Circuit interpretation of New York's jurisdictional law influences appellate consideration of other states' long-arm statutes. But for now, online retailers are on notice: If you take orders from New York customers, you'd better be prepared to be sued in New York courts.

Read more:

Shopify appeal has become battle royale over where internet companies can be sued

In Shopify class action, US appeals court will revisit thorny venue issue

Amazon resellers ask Supreme Court to clarify where online businesses can be sued

Reporting By Alison Frankel

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Alison Frankel

Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

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NEWS

Nearly a Dozen Law Firms Engaged in Baltimore Bridge Collapse Claims

Firms have been retained by the cargo ship that crashed, as well as the city and county of Baltimore and victims' families.

September 19, 2024 at 03:23 PM

Law Firm Client Relationships



Abigail Adcox



What You Need to Know

- The owner and vessel manager of the Dali cargo ship that crashed into the bridge are working with Duane Morris and Blank Rome.
- Numerous claims have been filed against the Dali's owner and vessel manager.
- The city of Baltimore is working with DiCello Levitt and Saltz Mongeluzzi Bendesky.

Litigation stemming from the collapse this year of the Francis Scott Key Bridge in Baltimore is [piling](#) up, with at least 10 law firms, including Am Law 100 firms and plaintiff-side firms, engaged in litigation or potential claims.

Blank Rome; Duane Morris; DiCello Levitt; Saltz Mongeluzzi Bendesky; Stewart Miller Simmons Trial Attorneys; Kreindler & Kreindler; Smouse & Mason; Grant & Eisenhofer; Bekman, Marder, Hopper, Malarkey & Perlin; and Gupta Wessler are among the firms involved.

Firms have been retained by the cargo ship that crashed into the bridge's owner and manager, as well as the city and county of Baltimore and victims' families, according to court records and media releases.

Am Law 100 firms Duane Morris and Blank Rome are heading up the legal response for the owner and manager of the Dali cargo ship that lost power and ran into the bridge on the morning of March 26, killing six people and causing the collapse of a major thoroughfare.

Duane Morris and Blank Rome jointly filed a petition in Maryland federal court at the beginning of April on behalf of Singapore-based Grace Ocean Private Ltd., which owns the Dali, and Synergy Marine Pte Ltd., the ship's manager, seeking exoneration or limited liability for any losses or damage caused by the deadly incident.

So far, several claims by other parties about the bridge collapse are happening in that same federal court docket.

Baltimore-based Duane Morris partner Robert Hopkins and associate Laurie Furshman are listed as lead attorneys for Grace Ocean and Synergy, according to court records.

Blank Rome partners Kierstan Carlson, Thomas Belknap and William Bennett; of counsel Alan Weigel; and associates Neil McMillan, Noe Hamra and Emma Jones—who all specialize in maritime law—are also representing the Dali's owner and vessel manager.

Those seeking to file claims against the Dali's owner and vessel manager in response to their petition must do so by the Sept. 24 deadline. Several parties already have, including the city of Baltimore, the DOJ, and American Publishing.

Most recently, on Wednesday, the Department of Justice filed a [civil lawsuit](#), seeking more than \$100 million in damages from Grace Ocean and Synergy in the Maryland federal court case.

The city of Baltimore, which [announced](#) a partnership earlier this year with plaintiff law firms DiCello Levitt and Saltz Mongeluzzi, has filed claims in the same docket against the Dali's owner and vessel manager alleging negligence.

Saltz Mongeluzzi partners E. Douglas DiSandro, Andrew Duffy and Jeffrey Goodman as well as DiCello Levitt partners Adam Levitt and Diandra Debrosse Zimmermann and senior counsel Daniel Schwartz entered appearances for the city of Baltimore in the Maryland federal court case.

Attorney Roy Mason of Annapolis, Maryland-based plaintiffs firm Smouse & Mason has entered an appearance for American Publishing in the docket.

The Baltimore-based publisher argued in a court filing against the Dali's owner and vessel manager in April that it suffered significant losses after the bridge collapse, alleging local businesses reduced ad placements.

Though several claims against the Dali's owner and vessel manager have already been filed in the case, more could arise before the deadline later this month.

Principal Matt Wessler of plaintiff-side appellate boutique Gupta Wessler [said](#) Tuesday in a press conference that the firm intends to file claims against the Dali's owner and vessel manager on behalf of several families impacted by the bridge collapse, including Maria del Carmen Castellón, whose husband Miguel Luna died when the bridge fell.

Attorneys Chris Stewart and Justin Miller of Stewart Miller, along with Daniel Rose and Kevin Mahoney of Kreindler & Kreindler, previously [said](#) they are representing the families of Alejandro Fuentes and José López, who died in the bridge collapse, and Julio Cervantes, one of two surviving victims.



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J&J Lifts Baby Powder Settlement Bid to More Than \$8 Billion (1)

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The Johnson & Johnson logo is displayed outside the company's headquarters in New Brunswick, New Jersey, U.S., on Saturday, Aug. 1, 2020.

Photographer: Mark Kauzlarich/Bloomberg

Sept. 20, 2024, 6:51 AM PDT

Jef Feeley



- Company adds more than \$1.7 billion to cancer claimants offer
- Company is seeking to resolve thousands of remaining lawsuits

Johnson & Johnson has boosted to more than \$8.2 billion its offer to settle thousands of lawsuits by people who say its baby powder gave them cancer, according to people familiar with the matter.

The offer, an increase from the drugmaker's previous

bid, signals that J&J may have to pay at least \$1.7 billion more to resolve all of the claims in the yearslong litigation. Under the new terms, claimants could get bigger payouts and about \$650 million in legal fees covered, said the people, who asked not to be identified discussing the deliberations. J&J declined to comment.

Johnson & Johnson signage at their campus in Raritan, New Jersey,

Photographer: Gabby Jones/Bloomberg

The settlement talks are continuing. J&J maintains its now-withdrawn talc-based powders never caused cancer and it appropriately marketed its baby powder for more than 100 years.

J&J recently garnered support from more than

of baby powder claimants for an out-of-court deal that includes claims that the talc-based version caused ovarian and other gynecological cancers. Getting even more people to sign on to the settlement could help the company more quickly use the bankruptcy courts to confine liability to a unit it set up to resolve the suits.

The company could file its latest Chapter 11 case in the coming days, even as a group of alleged victims has still thus far refused to the terms.

J&J shares slipped less than 1% in early Friday trading. The stock has rallied about 5% so far this year, including more than 13% since a low hit in late May.

Earlier this month, the company said it had reached an agreement with a key plaintiff's group that should help move its settlement forward quickly. That deal came after negotiations with Allen Smith, a Mississippi lawyer who tried the first case alleging the company's talc-based baby powder caused ovarian cancer in 2009, and opposed J&J's settlement proposals for years.

Company Paying

Separately, the company has said it's resolved 95% of claims its baby powder was tainted with asbestos and caused mesothelioma, a type of cancer that forms in tissues around the heart and lungs.

Guggenheim analyst **Vamil Divan** said in a recent note to investors that an additional \$1.1 billion would be "within the range of what we believe investors would be comfortable with the company paying." A possible increase of \$1.1 billion from the \$6.5 billion bid had been previously reported.

"We believe the positive headlines pointing towards this getting resolved have likely played a role in the move we have seen" in the company's stock in the past few months, he wrote. J&J shares have increased by more than 13% in the past three months.

J&J's decision to sweeten its settlement offer would bring the total the firm has agreed to pay out — or already expended — to resolve baby powder cases to more than \$13.4 billion. Most of the cases are gathered before US District Judge Michael Shipp in Trenton for pre-trial information exchanges.

The New Jersey case is IN RE: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation, 16-md-2738, U.S. District Court for the District of New Jersey (Trenton).

(Adds stock price movement in paragraph six.)

--With assistance from **Matt Turner**.

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NEWS

Federal Judge OKs Benzene Class Action to Proceed Over Differin Acne Product's Manufacturing Practices

The plaintiff, Skylar Williams, accused Galderma Laboratories of producing a skin-care line that contains benzene. In one of her claims, she maintained that the alleged presence established that Galderma didn't comply with the Food and Drug Administration's Good Manufacturing Practices, and that this failure resulted in the drugs being misbranded and adulterated.

September 20, 2024 at 11:13 AM

Class Actions



Riley Brennan



A consumer fraud class action will move forward in Illinois federal court against skin-care company Galderma Laboratories over allegations that its Differin line of acne treatments contains benzoyl peroxide, which can degrade into the carcinogenic compound benzene.

In a [Sept. 17 opinion](#), U.S. District Judge Lindsay C. Jenkins for the Northern District of Illinois denied Galderma Laboratories' motion to dismiss plaintiff Skylar Williams' Illinois Consumer Fraud and Deceptive Trade Practices Act (ICFA) claim, based on the theory that "benzene exists in Differin because Galderma does not adhere to current good manufacturing practices."

In *Skylar Williams v. Galderma Laboratories*, Williams accused the defendant of producing a skin-care line that contains benzene. In one of her claims, she maintained that the alleged presence established that Galderma didn't comply with the Food and Drug Administration's (FDA) Good Manufacturing Practices (cGMPs), and that this failure resulted in the drugs being misbranded and adulterated in violation of the Food, Drug and Cosmetics Act (FDCA).

Galderma argued Williams' cGMPs claim was preempted because it complied with all applicable federal law while manufacturing and labeling the product and that the claim failed on its merits, arguing Williams failed to adequately allege "which cGMPs Galderma did not follow and how that caused Differin to contain benzene."

Jenkins concluded Williams could proceed on the cGMPs related ICFA claim, based on the theory that that the presence of benzene in the product was the result of Galderma's failure to comply with cGMPs, which was an unfair practice under ICFA. The judge cited the U.S. Court of Appeals for the Seventh Circuit's 2010 holding in *Bausch v. Stryker Corp.*, "that parallel state claims can proceed based on general cGMP violations, and that a plaintiff need not point to a drug-specific requirement."

Jenkins further noted Galderma’s concession that cGMP violations can serve as the foundation for a parallel claim, further concluding that Williams’ adequately alleged this theory on its merits, concluding the facts plausibly suggest she is entitled to relief.

“A plaintiff may bring an ICFA claim based on either unfair or deceptive practices, which are to be construed ‘liberally,’” Jenkins said, noting that, in determining whether a practice is “unfair,” courts have to consider: whether the practice offends public policy, whether it is immoral or unethical, and whether it causes substantial injury to consumers.

The court found its 2023 ruling in *Barnes v. Unilever* instructive, as the plaintiff in that suit similarly alleged a product contained benzene as “its manufacturer failed to comply with cGMPs related to testing and screening, rendering the product adulterated.” The *Barnes* court held “allegations that Unilever put adulterated and therefore dangerous products into the marketplace without adequate testing or screening—which is the gist of Barnes’s claim—are sufficient to state a claim for an unfair practice violative of the ICFA,” and noted that a violation of cGMP requirements is a violation of federal law and therefore offends public policy. ”

“ Williams’s allegations in this case track closely to Ms. Barnes’s. Here, Williams contends Galderma’s failure to adhere to cGMPs in manufacturing Differin is the reason Differin contains benzene,” Jenkins said. “That is, the violation of at least one federal regulation caused Williams’s harm.”

While Galderma argued dismissal was necessary because Williams failed to allege which cGMP regulations it violated, and how that violation led to benzene in Differin, Jenkins concluded Williams met her pleading burden.

“Williams alleges that the scientific community has known for at least the past 30 years that BPO can decompose into benzene at warm temperatures, and that the presence of certain antioxidants can retard benzene formation,” Jenkins said. “Acknowledging benzene’s harmful impact on humans, the FDA prohibits the use of benzene in drugs unless it is unavoidable (which is not the case for topical acne treatments), and only then at 2 parts per million. Valisure’s testing—which included placing Differin at a temperature equivalent to the inside of the human body or a storage container for a few weeks—showed benzene in concentrations well above FDA-approved levels.”

The court also noted that Williams cited federal cGMP requirements which demonstrated that Galderma had an obligation to ensure its drugs meet the act’s requirements regarding safety, as well as quality and purity characteristics.

As to the two other purported failures by Galderma Williams pointed to, including that Galderma didn’t warn consumers of the presence of benzene on the product’s label, and that it didn’t list benzene as an inactive ingredient, Jenkins concluded the claims were preempted “to the extent she argues Galderma should have mentioned benzene on Differin’s label—either as a warning or as an inactive ingredient.”

Neither Williams’s attorney, John Hunter Bryson of Milberg Coleman Bryson Phillips Grossman, in New York, nor Galderma’s attorney, Anand Agneshwar of Arnold & Porter Kaye Scholer, in New York, immediately responded to requests for comment.

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Volkswagen's \$3.5 Million Data Breach Settlement Survives Appeal

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Volkswagen Group of America Inc., Audi of America LLC, and digital marketer Shift Digital will pay \$3.5 million to settle a class action lawsuit arising from a 2021 data breach that affected more than 3.1 million people, after a California appeals court rejected a challenge to the fairness of the deal.

Objector Amy Wynne argued the lower court improperly approved the settlement because a California subclass with the strongest claims would be looted under its terms to fund the claims of a nationwide class, but the California Court of Appeal, First District said Wednesday that the lower court had enough information to reasonably determine that the allocation of benefits and deductions was fair.

Wynne sued alleging violations of the California Consumer Privacy Act. Two other suits were consolidated as *In re Volkswagen Data Incident Litigation*. After mediation, the defendants and the plaintiffs in the consolidated action agreed to a \$3.5 million settlement, and informed the US District Court for the Northern District of California that they would dismiss the federal action and seek approval of the settlement in state court.

Three Subclasses

Under the settlement, the benefits were to be divided among three subclasses: a Tier 1 class of California residents whose sensitive personal information was exposed in the breach, a Tier 2 class of people outside California whose sensitive personal information was exposed, and a Tier 3 nationwide class of people whose non-sensitive personal information was exposed.

The settlement allotted \$2 million to Tier 1, \$800,000 to Tier 2, and \$700,000 to Tier 3.

Wynne's counsel appeared for the first day of mediation that led to the settlement, but didn't participate afterward. Wynne sought to intervene in the consolidated lawsuit while the Superior Court of Contra Costa County was considering the plaintiffs' motion for preliminary approval of the deal.

The court granted the plaintiffs' motion in December 2022.

'Lopsided' Allocation

Wynne argued on appeal that the settlement should be rejected because the parties didn't explain the "lopsided" allocation of money between the three settlement tiers, or why Tier 1, the subclass with the fewest members, would pay 57% of the proposed deductions for administration costs and litigation expenses.

Justice Monique Langhorne Wilson disagreed, finding that the record was sufficiently developed to allow the lower court to make an independent evaluation of the settlement's fairness and adequacy.

Considering the potentially low value of the claims for members of the class outside California who didn't enjoy the protection of the CCPA, and the risks, costs, and delays of litigation, the trial court "could have reasonably concluded that the cash payments for Tiers 2 and 3 represented a fair compromise for those subclass members that did not have significant financial losses," she said.

As to the share of settlement deductions allotted from Tier 1, it was difficult to see how it was "unfair and unreasonable to allocate 57 percent of the costs to the subclass that holds 57 percent of the settlement funds," she said.

Justices Kathleen M. Banke and Peter J. Siggins joined in the opinion.

Wolf Haldenstein Adler Freeman & Herz LLP and Arnold Law Firm represents the non-objecting class members. Righetti Glugoski PC represents Wynne. Squire Patton Boggs LLP represents Volkswagen. Winston & Strawn LLP represents Sanctus LLC, which does business as Shift Digital.

The case is *Hajny v. Volkswagen Grp. of Am. Inc.*, Cal. Ct. App., 1st Dist., Nos. A166931, A168736, unpublished 9/18/24 .

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COMMENTARY

Lawyers: Beware of AI Hallucinations

In the last month I have received four letters containing references and quotes from court decisions and statutes that were strongly opposed to positions...

September 20, 2024 at 01:19 PM

Artificial Intelligence
By Stuart Saft | September 20, 2024 at 01:19 PM



In the last month I have received four letters containing references and quotes from court decisions and statutes that were strongly opposed to positions I was taking that I was certain were correct. I work under the assumption that there is no certainty in anything we do or positions we take because at any moment a Judge somewhere could take a position that is contrary to what we think is the law. Moreover, one of the wonders of Common Law is its flexibility. I am well aware of the ability of Judges to reject a time honored statutory interpretation or legislatures who demand transparency from private institutions or, to paraphrase Nancy Pelosi, pass it and we will see what it provides. But this is not about human Judges reversing or distinguishing older decisions or legislatures changing statutory law, but a nonhuman source intervening to “make law.”

The first letter I received in this brave new world, cited a federal statute from the 1970s that I knew to take a contrary view but the decision specified that it was a New York statute from a decade later. I then looked for the New York decision based on the citation, the name of the decision and the court’s records, and the cited decision did not exist. Think about it. A New York State Supreme Court decision with citations interpreting a New York State statute with a name almost identical to a federal statute. In the last sentence the only aspect that was true was the federal statute. Later that week I was meeting with the head of AI at a medical center on whose council I sit and I asked her about what I found and was told that it was likely an “AI Hallucination, which is not an uncommon manifestation from AI systems.”

In researching AI “hallucinations,” I learned that in the field of artificial intelligence, a hallucination is a response generated by AI system which contains false or misleading information presented as fact. I found this startling because I initially assumed it was a mistake, but now I understand that a self-teaching machine can invent a response to satisfy the requirements of whoever is asking the question. One would think that the AI systems should be modified to prevent it from lying. AI hallucination draws a loose analogy with human psychology, where hallucination typically involves false *percepts*. However, there is a key difference: AI hallucination is associated with erroneous responses or beliefs rather than perceptual experiences. It does not appear that anyone understands what causes these manifestations, but the newspapers have reported on lawyers who were censored for submitting nonexistent decisions to Judges. Colleagues, I am here to tell you that this is not just something litigators have to be concerned about, but also all the rest of us.

Fortunately, the first time it happened, it was obvious to me that the citation was wrong because I knew the federal statute so well and had been involved in the case several decades ago in which the court applied the federal statute to facts involving New York Property law, and I knew there was no New York equivalent statute. I checked it out anyway because things change. Margaret Thatcher once said “the unexpected happens.”

In recent weeks, I have received correspondence from other lawyers taking positions that were wrong and citing non-existent decisions supporting those positions. Surprisingly, the decisions were right on point and were opposite of what I thought the law would be. As a result, I now routinely check the citation and every time I have done so in the last month I have found that the cited position either does not exist or is wrong.

Please note that I am not blaming the lawyers who sent me the decisions or assume they were doing so to trick me. We are all too busy to waste our time and energy trying to play adolescent tricks on each other. The problem is that we are all also too busy to check our work when we get support from an all knowing Artificial Intelligence system that has its disposal all human knowledge, which it can search in a nanosecond. The fact remains that AI can be wrong and we need to check to make certain that we are not caught up in its need to respond to every inquiry with an answer. Whenever you doubt the infallibility of AI think about HAL, the villain in “2001 A Space Odyssey.” I recognize that “2001” is fiction, but that does not make this issue less significant and troubling. Perhaps the AI System is not making mistakes, but has decided that lawyers are not necessary, so it is going to force us into making mistakes as part of its plan to replace us with a Legal Computers. I cannot wait to see how the Legal Computers function when they find out that other Legal Computers are lying to them.

Let’s slow the takeover of the legal profession by Big Brother and make certain that we check sources derived from AI before they leave our offices.

Stuart Saft *is a partner at Holland & Knight*

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Artificial Intelligence in Litigation: Streamlining deposition summarization and analysis

 [abajournal.com/columns/article/ai-in-litigation-streamlining-deposition-summarization-and-analysis](https://www.abajournal.com/columns/article/ai-in-litigation-streamlining-deposition-summarization-and-analysis)

Artificial Intelligence & Robotics

By Nicole Black

September 20, 2024, 9:55 am CDT

Nicole Black.

Generative artificial intelligence tools for legal professionals have been a large part of my focus in this column. Since 2017, I've written about all different types of software and have been covering AI tools. After the general release of ChatGPT in November 2022, one of my top priorities has been to include generative AI products designed for legal professionals.

Some of those articles have included coverage of AI tools for litigation practices, including AI software for creating pleadings and managing discovery, legal research and brief writing and analysis. There's no shortage of AI-powered software that promises to streamline litigation, reduce tedium and increase overall productivity.

I haven't yet discussed one essential litigation task where AI functionality can save significant time, and as we near the final quarter of the year, several programs and products are or will be available to help with what has long been one of the most labor-intensive tasks for trial attorneys out there: deposition summarization and analysis.

The benefits of AI-powered deposition review software

Using AI-driven algorithms, this technology reduces the time required to review deposition transcripts and extract essential insights. Automating these processes streamlines transcript review, enabling attorneys to focus on more strategic trial preparation tasks.

Some tools in this category can even identify key themes, witness inconsistencies and critical facts, offering deeper insights into the testimony without the need for manual review. In addition to speeding up the process, AI deposition tools can flag important sections, allowing lawyers to dive deeper into relevant issues and improve the overall accuracy of their litigation strategy.

These tools save time by enhancing the speed and precision of deposition analysis, enabling litigation teams to focus more on case preparation and ultimately deliver better outcomes. But to achieve that goal, you must first choose the right software for your law firm.

Key factors in selecting AI for deposition review

When investing in new software, the first step is to determine your goals and identify workflow challenges that have to be solved. Conduct a tech audit beforehand, and identify gaps in your firm's IT stack. Make sure to obtain feedback from everyone who will be using the software to ensure that you fully understand their needs and preferences.

The next step before researching AI deposition summary and analysis tools is to examine the tools that your firm is already using and ascertain whether the companies have indicated that they plan to incorporate deposition review features into their software in the near future, either through partnerships with other software companies or the addition of these features into their software. After all, why waste time and resources researching and investing in new software if a trusted vendor will soon solve the problem for you?

If you decide that moving forward with new software is the most viable option, you must carefully research your options and choose a tool that meets your firm's unique needs. The solutions listed below are a great place to start. Once you've narrowed it down to one or two tools that are of interest, utilize demos, free trials and any other opportunities to test-drive the software.

But before you do that, there are a few caveats to keep in mind. First, because AI tools are typically cloud-based, you will be entrusting your firm's confidential client data to a third party. Your ethical obligations require that you thoroughly vet the tech provider hosting and storing your firm's data. You must identify how your firm's data will be handled; where the servers on which the data will be stored are located; who will have access to it; and how often and when it will be backed up, among other things.

Additionally, as with all AI software, you'll want to explore accuracy rates; determine how the company protects your data; and whether your team's data inputs are used to train AI models to improve responses, among other issues.

Now, let's explore AI-powered deposition review software. Only publicly released options are included below; the list is not all-inclusive. If available, pricing will be provided.

AI products for deposition review and analysis

First, let's focus on single-purpose AI tools with document workflows that include deposition summarization and analysis features.

We'll start with LegalMation, which provides a suite of products that automate litigation tasks. Its Deposition Assistant solution enables the summarization and comparison of multiple deposition transcripts, along with the ability to query against uploaded documents to locate key facts, contradictions and more. Pricing is not available on the website.

Next, Lexlink AI utilizes AI algorithms to streamline the review of documents by automatically identifying, categorizing and extracting information from uploaded legal documents, including deposition transcripts. It assists in identifying and analyzing deposition summaries, timelines and inconsistencies in testimony. Pricing is not available on the website.

Another option is Depo IQ, which analyzes individual or multiple deposition videos and transcripts for sentiment, contradictions and inconsistencies. Summaries can be created, and the ability to query a document is also available. Pricing is not available on the website.

Automatise's Cicero touts the security of its private platform designed for legal professionals, which can be used with many types of documents, including deposition transcripts. It automates document summarization, chronology preparation and investigative research. Pricing is not available on the website.

Clearbrief is tool that operates as a Word add-on and, among other features, can summarize and analyze documents, including depositions. Timelines can also be created, and multiple deposition transcripts can be compared. Pricing starts at \$142 per user per month if paid annually.

CaseMark provides AI capabilities that support several different types of documents, including depositions, with a particular focus on summarization. The product offers multiple summary output formats and includes the ability to query the transcript to locate specific testimony or facts. Pricing starts at \$25 per summary.

Finally, the major legal research companies also offer AI tools that provide deposition review functionality, along with many other legal workflow tools. These include vLex's Vincent AI, Lexis+ AI and CoCounsel, a Thomson Reuters company.

If your firm is already using these platforms for legal research or is in the market for a legal research tool and AI-powered deposition review software, one of these platforms could be a good fit.

Wrapping up

As AI continues to reshape litigation workflows, selecting the right AI deposition review software can enhance your firm's efficiency. By thoroughly vetting potential tools, ensuring compliance with ethical obligations, and leveraging free trials or demos, you can make an informed decision that fits your specific needs.

With the right AI-powered deposition tool, your firm will save time, improve accuracy and ultimately provide better legal services. Now, it's time to explore your options to see how these advancements can benefit your practice.

Nicole Black is a Rochester, New York-based attorney, author and journalist, and she is the principal legal insight strategist at MyCase, a company that offers legal practice management software for small firms. She is the nationally recognized author of Cloud Computing for Lawyers and is co-author of Social Media for Lawyers: The Next Frontier, both published by the American Bar Association. She writes regular columns for ABAJournal.com and Above the Law, has authored hundreds of articles for other publications, and regularly speaks at conferences regarding the intersection of law and emerging technologies. Follow her on X (formerly Twitter) @nikiblack, or she can be reached at niki.black@mycase.com.

This column reflects the opinions of the author and not necessarily the views of the ABA Journal—or the American Bar Association.

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NEWS

UChicago Law Professors Release Desk Reference Breaking Down Crypto, Web 3 for Attorneys

“It’s bound to be the reference of choice for lawyers and judges alike,” Paul Grewal, the chief legal officer for Coinbase Inc., said on X.

September 19, 2024 at 06:24 PM

Cryptocurrency



Michael A. Mora



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

What You Need to Know

- Two editors at the University of Chicago Law School were the driving force behind an open-access legal desk reference released this week.
- The 241-page publication is broken down into two parts: project perspectives and legal subject matter perspectives.

The University of Chicago Law School this week released an open-access legal desk reference that lawyers can use to learn about Web3 to expand their transactional or litigation practice and that investors and managers can use to learn about the main legal risks they face.

Anup Malani and Todd Henderson, professors at UChicago Law, were the editors behind the publication. Malani observed that in her experience of teaching an introduction to blockchain course since 2017, the teaching materials to study law have increased, but the legal scholarship was of the classic law journal variety about what the law should do versus what the law actually does.

“There was nothing that was the equivalent of a desk reference,” Malani said in an interview. “If you were an attorney sitting at a firm and you were first thinking about moving into your first Web 3 client, what book would you open up? You wouldn’t open up the Harvard or University of Chicago Law Review.”

In conversations with law firm founders, Malani said they discussed the need for in-house lawyers to think about blockchain and Web 3 legal issues when they design the firm’s legal products. That was a driving force behind the launch of the Legal Matters in Web 3 conference. To share insight from those conferences with a broader audience, Malani was part of a team that recruited largely from the conference to write various chapters.

“Part one was from the perspective of a lawyer who knows the subject matter but doesn’t know the technology,” Malani said. “For that, we have sections that describes the technology, and given the technology, here are all of the issues that can come up. In the second section, we focus on the law itself. Instead of taking a perspective of a particular technology, like building a centralized exchange, what if you take the perspective of a securities lawyer?”

Now, UChicago Law has published the first edition of [Legal Matters in Web 3: A Desk Reference](#).

As Malani mentioned, the legal desk reference is broken down into two sections: project perspectives and legal subject matter perspectives. The project perspectives section delves into decentralized finance or DeFi, raising capital, centralized exchanges and custodial services. Meanwhile, the legal subject matter perspective section covers securities regulation of DeFi and commodities regulation, along with the Bank Secrecy Act and Web 3.

Paul Grewal, the chief legal officer for Coinbase Inc., who was not involved in the creation of the publication, said on X that the 241-page open access legal desk reference is an “incredible collection of the best thinking on Web 3 and the law anywhere.” He added: “It’s bound to be the reference of choice for lawyers and judges alike.”

Patrick Daugherty, a Chicago partner and head of [Foley & Lardner](#)’s blockchain task force, who teaches digital assets at Cornell Law School, wrote the chapter “Raising Capital.” Part litigator and part advisor, Daugherty said the chapter covers the business side of crypto assets, including the lawful compliance with Securities Act registration exemption requirements in capital-raising transactions.

“This is very much for lawyers,” Daugherty said in an interview. “This is not something entrepreneurs should undertake without a lawyer’s help.”

Daugherty noted that project leaders approached many potential contributors, including U.S. Securities and Exchange Commissioner Gary Gensler. The thinking was that the field is moving so fast that practitioners could provide just as valuable insight as full-time scholars.

“The University of Chicago is all about creating knowledge and that’s what we’ve done in this book,” Daugherty said. “Not just my chapter but the other chapters as well. This book has a great number of scholars and practitioners in sub-specialties, and they tell you how to do it. That was Anup’s design.”

Matt Levine's Money Stuff: 23andMe Is Just Me Now

By Matt Levine 2024-09-19T14:10:09581-04:00

Who controls 23andMe?

The basic rule is that the chief executive officer of a company works for the board of directors, and the directors work for the shareholders. Sometimes, though, the CEO is also the controlling shareholder, and this becomes circular: She works for the directors, who work for her. If they disagree, things get weird. If they're unhappy with her, they can fire her, but then she can fire them.

This doesn't come up all that often in basic job-performance situations: Presumably if you are a director at a company controlled by its founder, CEO and main shareholder, you're there because you believe in her vision for the company, and you don't spend a ton of time thinking about firing her and replacing her with someone else. It does happen, though: We talked last year about World Wrestling Entertainment Inc., whose board of directors pushed out founder-CEO Vince McMahon after sexual misconduct allegations, and then, as controlling shareholder, he pushed them out.

It comes up more often in mergers and acquisitions, and particularly in going-private transactions. The basic problem is:

- 1. The founder, CEO and controlling shareholder wants to take the company private: She owns much of the stock, but public shareholders own the rest, and she would like to buy their stock for herself.
- 2. She proposes a merger to the board of directors and names a price.
- 3. The board thinks the price is too low and asks for a higher price.
- 4. She says "nope, I'd prefer to pay the lower price."
- 5. They say "as fiduciaries for the public shareholders, we cannot approve a merger at this price, so we are saying no."
- 6. She says "as the controlling shareholder, you're fired," and then tries to find other directors who would be more amenable to the deal.

The directors work for *all* the shareholders, and they can't just do what the controlling shareholder wants if it's bad for the other shareholders. But the controlling shareholder *gets to pick the board*, and if they are too independent she can pick a new board. They can get fired for doing their job too well.

That is a pretty schematic description, and most actual going-private negotiations don't quite look like that, but they are conducted in the shadow of that possibility. For instance:

- Sometimes the CEO and controlling shareholder will come to the board and say "I'd like to take the company private at \$10 per share, are you down for that?" And the board will say "well we'd like to run an auction and see if there are any *other* bidders at a higher price." And the CEO will say "hahaha you do what you want, but if you find a higher bidder, I won't vote for the merger or sell them my shares, so they won't actually be able to complete the deal. The only deal you're going to get is a deal with me." And then the board will be like "okay fine we'll negotiate with you, can you pay \$11 per share?" But the board doesn't have much leverage, because the board knows, and the CEO knows, that there will not be another bidder.
- On the other hand, sometimes the board will say "we'd like to run an auction" and the CEO will say "sure, you run an auction, and if you find a bidder who will pay more than I will, I will support their deal." The CEO might do that to avoid getting sued — to create a record showing that her offer was in fact the best available deal for shareholders — or because she really thinks the company is worth \$12 per share, so she's a buyer at \$10 but a seller at \$14. (This is, roughly, Paramount.)

Also generally there is no need for the CEO to *fire* the board; they can see the writing on the wall and quit first.

There is a whole branch of this subject where the CEO is Elon Musk, but I will skip over that for now.

Anyway:

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

It is the latest challenge for 23andMe, which has struggled to find a profitable business model. The stock price rose a penny on Tuesday to \$0.35 per share. At that price, 23andMe's valuation is just \$7

million more than the cash on its balance sheet. That represents a 99.9% decline from its \$6 billion peak valuation just after going public in 2021.

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

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

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

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

Here are the company's [securities filing](#) and [press release](#); here's [Wojcicki's filing](#) with her response.

One possibility is that there is a genuine difference of reasonable opinions here, the old board was intransigently opposed to a deal with Wojcicki, and she'll go and find a new board who negotiates with her more reasonably and ends up with a deal that is good, or at least good *enough*, for public shareholders.

Another possibility is that Wojcicki has unreasonable plans to take the company private at a bargain-basement price, *any* board of independent directors would have said no, and now she'll go find a new board that will also resign in a month when they realize that they can't work with her. In theory this could go on forever!

EF Hutton

E.F. Hutton & Co. was a brokerage firm founded in 1904 that grew to be one of the biggest brokers in the US. “When EF Hutton talks, people listen,” its [old commercials said](#). Then it went through rough times and was acquired by Shearson Lehman in 1988. As far as I can tell from [Wikipedia](#), the corporate entity ended up as part of Citigroup Inc., which sold the E.F. Hutton brand to some alumni who planned to launch a new firm. That didn’t work out, but the brand kept kicking around, and eventually a firm called Kingswood Capital Markets got hold of it and rebranded itself as EF Hutton. And then it became a leading adviser to special purpose acquisition companies, the blank-check companies that were in vogue for a while as a way to take companies public. It worked on the Trump Media & Technology Group deal, [for instance](#).

Okay so. When I read, or write, a paragraph like that, I draw some inferences. Here you have a company that rebranded itself as “EF Hutton” to take advantage of a trusted old name that has no actual connection to the current firm. It works on SPACs, which have had a somewhat checkered past. It worked on the Trump SPAC specifically, which, you know. If you were to come to me with some scurrilous gossip about the current incarnation of EF Hutton, I might be inclined to believe you.

Here, though, is a [really quite extraordinarily nasty lawsuit](#) against Joseph Rallo, the chief executive officer of EF Hutton, saying that he “falsified and personally approved falsified expenses to fraudulently obtain millions of dollars of reimbursements from” the company, including for things like “tickets for premium seats at sporting events that he attended with his gambling bookie” and “intravenous drips, which upon information and belief, were used to treat hangovers from excessive alcohol and drug usage.” And:

Upon information and belief, Rallo has a severe gambling problem. Rallo bets often, he bets vast amounts (six to seven figures per bet), and he typically loses. Rallo would often share openly with EFH employees his ongoing and recent gambling history.

Upon information and belief, from 2021 until now, Rallo has incurred several millions of dollars in gambling losses, particularly, from sports wagers made through an illegal sports book run by a gambling bookie who he considers to be a close friend (the “Bookie”).

Upon information and belief, the Bookie also operates a gambling den out of a residential apartment in New York City that hosts card games throughout the day and evening; Rallo would frequent the gambling den during the middle of the workday to gamble and carouse, and afterwards come back to the office in a state that was not conducive or becoming of a CEO of an investment bank.

And also some allegations of securities fraud, why not:

On the morning of May 6, 2024, Federal Agents from the Department of Homeland Security and the United States Postal Inspection Service arrived at Rallo's home and served him with a search and seizure warrant issued from the United States District Court for the Eastern District of New York for the seizure of Rallo's cellular phone (the "Warrant").

The Warrant was issued in connection with an investigation by the United States Attorney's Office for the Eastern District of New York, and sought records relating to securities fraud, wire fraud and conspiracies to commit securities and wire fraud involving Rallo (the "EDNY Investigation").

Strong stuff! Anyway that lawsuit was filed *by EF Hutton*. "Our CEO is under investigation for securities fraud and also leaves the office in the middle of the day to gamble and carouse," says the company. I feel like, for a lot of investment banking clients, that would be kind of a negative? For some SPAC clients, though, maybe it's good.

Avon

The simple description of credit default swaps is that they are insurance against corporate default. You can buy some bonds of a company, and then you can buy CDS to hedge against the credit risk of the bonds. You pay a premium — like an insurance premium — for the CDS. If the company doesn't pay back the bonds — say, if it goes bankrupt — then you lose money on the bonds. But if that happens, the CDS pays out, and you get a payment on the CDS that is supposed to compensate you for your losses on the bonds.

Most of the time when we talk about CDS around here it's because that simple description is not quite right. Actually credit default swaps are a bit more complicated than that, in sometimes counterintuitive ways. Here are some of the ways.

First: You *could* buy CDS to hedge against risk that some bonds you own might default, but that's not the only reason to buy CDS. You might buy CDS to hedge against some other risk: Perhaps you are a supplier of the company, you worry that if it goes bankrupt you'll lose business, so you buy CDS to hedge. Or you might buy CDS, not as a hedge, but just as a bet on default: You did a lot of research on the company, you think it will go bankrupt, and you'd like to make some money if it does. (This is sometimes called "naked CDS" and people get mad about it, but efficient markets tend to allow

shorting.)

Or you might buy *index* CDS, not insurance against one company defaulting but a bundle of insurance against a bunch of companies defaulting, as a sort of bet against corporate credit generally, or as a hedge to your general corporate credit risk. Index CDS trades — including the popular [CDX series of indexes](#) — consist of a bundle of credit default swaps on individual companies. So you might buy the [CDX high-yield index](#), referencing a list of 100 junk-rated companies; if none of them default, then you lose your premium, but if a lot of them default you get paid. We talked once about Bill Ackman's very lucrative bet on index CDS at the start of the Covid-19 pandemic: That was not insurance against some particular company defaulting, but rather a bet that credit conditions generally would get worse.

Anyway what this all means is that a lot of people will own CDS on some company without also owning any bonds or loans of that company.

Second: The shorthand way to think about CDS is that it is insurance against default, and so it pays out *the amount you lose* on default. So if you lend the company \$100, and you buy \$100 of CDS, and the company goes bankrupt, and in the bankruptcy it divides up its assets and pays every creditor 40 cents on the dollar, then you will get \$40 back on your loan, and your CDS contract will pay you \$60, so that you get back a *total* of the \$100 you loaned the company. The CDS perfectly hedged your risk on default; it made you indifferent between the company paying you back (and getting \$100 on your loan) and going bankrupt (and getting \$40 on your loan and \$60 from the CDS).

But it can be complicated to *measure* how much you got back on default. If the company goes bankrupt and takes three years to emerge from bankruptcy, and when it does unsecured creditors get not 40 cents in cash but rather equity in the new company and new longer-dated bonds, how much should the CDS pay you?

One way to deal with this would be “physical settlement”: If the company defaults, and you own \$100 of CDS, you can deliver \$100 face amount of bonds or loans to the person who sold you the CDS (who “wrote” the CDS), and they have to pay you \$100. You are now indifferent — you got back your \$100 — and it's the CDS writer's problem to figure out how much the bonds are worth and to turn them into money.

This would be a pretty good solution, except that not all CDS *can* be physically settled, because not everyone who buys CDS also owns the underlying bonds. Again, some CDS buyers are buying index

CDS, or making naked bets, etc. If you own \$100 of CDS, but you *don't* own \$100 face amount of bonds or loans, you can't deliver the bonds for physical settlement.

So instead the way it mostly works is that, when a company defaults, there is an *auction* for the bonds and loans of the company. People who want them put in bids to buy them, people who want to get rid of them put in offers to sell them, and eventually there is some clearing price. (Also this facilitates physical settlement: If you bought CDS to hedge bonds that you own, you can sell them in the auction and get back cash for them; if you wrote CDS, you can bid for the bonds in the auction.) If the price is, say, 43 cents on the dollar, then the CDS pays out 57 cents on the dollar.

This elides a lot of complexity, because the auction will generally cover multiple different bonds and loans — “deliverable obligations” — of the company, and sometimes those obligations can be worth very different amounts of money, so sometimes the auction will produce a result that doesn't entirely reflect the value of the company's debt.

Here is a third complication. Sometimes a company will have a lot of CDS, and not a lot of bonds. One way for this to happen is:

- The company has a lot of bonds, and a lot of people want to buy CDS on it, so it has a deep, liquid CDS market.
- Its CDS is so deep and liquid that it gets included in a CDS *index*, so people buy the index — and, thus, the company's CDS — as a bet on general credit conditions.
- Then the company gets rid of all its bonds, but the index CDS is still around.

You could imagine this not mattering. For instance, maybe the company gets rid of all its bonds because it made so much money that it can pay off all its debt and now it's debt-free. Therefore it can't default, so it has no credit risk, so its CDS never *should* pay off, and the index CDS properly reflects the extreme safety of one of its components.

But more realistically what happens is that the company pays off all of its bonds by issuing *new* bonds out of a new subsidiary that is not covered by the old CDS. The company could still go bust, but if it does, the old CDS won't pay out. (This is called “orphan CDS.”) Or, worse: The company pays off *most* of its bonds that way, but there's still a little stub of old bonds outstanding. There's, like, \$1 billion of CDS outstanding on the company, but like \$20 million of bonds.

And then if the company does default, the CDS will be triggered, and there will be an auction for those bonds. How much are they worth? Well, I don't know, there will be a bankruptcy process, and eventually they will be paid back 0 or 40 or 80 or perhaps even 100 cents on the dollar. Let's say that we know it will be 40 cents on the dollar. If you have written, say, \$200 million of CDS on that company, you could just go to that auction and offer to buy all the bonds — all \$20 million worth. How much should you pay? Well, the bonds are worth 40 cents on the dollar, or \$8 million. But if the auction clears at 40, then you will have to pay out 60 cents on the dollar on the CDS you wrote, or \$120 million. You could bid to buy all the bonds at 100 cents on the dollar. You'll lose money on the bonds — you pay \$20 million for bonds worth \$8 million — but now the CDS won't pay out at all, so you'll save \$120 million on your CDS.

The actual numbers are rarely this stark, but this is a thing. It irritates people, because it seems to generate a CDS payout that is unconnected to economic reality. If you bought CDS on the company — say as part of a CDS index trade — and the company falls into a messy bankruptcy, and the CDS *doesn't pay out* because of weird auction dynamics, you will be annoyed. In fact this is such a thing, and such an *annoying* thing, that there is some history of companies *finding some extra bonds* to make the auction clear at more normal prices. “We thought we had only \$20 million of bonds outstanding, but actually we have \$400 million, so there are more bonds available in the auction.” And then the clearing price will be lower and the CDS payout will be more sensible.

It is kind of weird for a company to *find bonds lying around*, but it's possible. They could be intercompany notes, where one part of the company loaned money to another subsidiary, where the borrower subsidiary is covered by CDS. We talked about this when Sears Holdings Corp. randomly found some extra bonds for its CDS auction in 2018.

Isn't this fun? Anyway Avon Products Inc. is going through it now:

- Avon was a public company with a lot of debt outstanding, and it got into [various](#) high-yield CDS [indexes](#).
- Then it was acquired by a Brazilian cosmetics firm called Natura &Co, and [bought back most of its bonds](#).
- Not all, though: Bloomberg tells me that there are about \$21.9 million of Avon's bonds due 2043 still outstanding, out of an original \$250 million.
- It still has lots of credit default swaps outstanding.
- It [filed for bankruptcy last month](#) because of “legacy talc liabilities.”
- This triggered Avon's CDS.

- So there will be an auction for its [teeny little stub of bonds](#).

Prices of Avon CDS have whipsawed around: The annual premium for five-year Avon CDS was under 1% earlier this year (when it was orphaned CDS), but then it filed for bankruptcy and it began to trade at around a 50% upfront premium (implying that the bonds would pay back about 50 cents on the dollar). And then the price fell, when people realized that there were so few bonds and so much CDS: If you wrote a lot of CDS on Avon, you could just buy all \$21.9 million of bonds in the auction at par, and not have to pay anything out on your CDS.

And then the CDS price rose again, to something like 60% up-front, when people discovered new bonds. Again, what they actually discovered was an intercompany loan: In 2022, Avon apparently [borrowed \\$405 million](#) from its parent company, Natura. If that \$405 million loan was included in the auction along with the \$21.9 million of public bonds, the auction would presumably clear at a price that reflects something like the actual expected recovery on Avon's debt.

And then the credit derivatives determinations committee, the group of big banks and CDS traders who makes decisions on things like this, [met](#) and decided that in fact that loan [doesn't count as a deliverable obligation](#). To be deliverable, a debt instrument has to be a "bond or loan," and the committee decided that the promissory note wasn't a loan because it wasn't "documented by a term loan agreement, revolving loan agreement or other similar credit agreement": It's not signed by Natura (just by Avon), it doesn't have many covenants, it's just not a credit agreement. Nor is it a "bond," because it's not a security. So, even though it is unsecured debt of Avon, it is not the right kind of unsecured debt. And the CDS price fell again, because it looks like it won't pay off much.

CDS holders objected; here is a [memo from a law firm](#) arguing that in fact the promissory note is a "bond or loan," or at least, somewhere in between:

We believe that it would be inconsistent with the Sears ER Decision to apply the "Bond or Loan" requirement in such a way that an instrument would fail to meet this Deliverable Obligation Category merely because the DC cannot determine whether it is one or the other. It is true that the "Bond or Loan" Deliverable Obligation Category is defined as "either a Bond or Loan", but we believe this should be interpreted to encompass any instrument that is a "Bond" or "Loan" or anything in between. Therefore, in seeking to apply the facts of the Promissory Note here, any argument that the instrument is a "Bond" should not be burdened by the possibility that it might be a "Loan" and vice versa.

There is an argument about legal technicalities, but there is also the broader argument about: What is

the CDS *for*? If it is to insure holders against losses on their \$21.9 million of outstanding Avon bonds, then I guess it is basically working: If you own those bonds and also CDS, you'll probably get your money back. If it is to sensibly reflect the actual credit risk of a company that is, after all, in bankruptcy, this is all a pretty weird result.

Romance

One thing that sometimes happens is that people meet potential romantic partners on Instagram or LinkedIn. (Yes.) They chat, flirt, get to know each other, perhaps send each other explicit pictures. (Generally not on LinkedIn: Eventually they move to WhatsApp.) They talk about meeting up in person, but it never quite works out. And then one day the attractive woman messages the homelier man : “You know what would be really romantic is if you were to invest \$10,000 in my favorite crypto platform, here is the link, you can make 2% in risk-free returns each day, I can walk you through setting up the account.” And the man is like “for you, baby, anything,” and puts all his money into the crypto platform, which is *of course* a scam, and the platform steals it and the woman is fake and ghosts him. This is a [common scam](#) sometimes called “[pig butchering](#),” and there are variations, but the basic point is that it is a long con in which the mark is attracted not just by the prospect of making a lot of money but also by some fake romantic relationship.

Is this securities fraud? Ahahahaha [everything is securities fraud](#):

The Securities and Exchange Commission [Tuesday] charged five entities and three individuals in connection with two relationship investment scams involving fake crypto asset trading platforms NanoBit and CoinW6, respectively. The SEC’s two complaints allege that the defendants solicited investors via social media apps, lied to them to gain their trust and confidence, and then stole their money. These charges are the SEC’s first enforcement actions alleging these types of scams. ...

The SEC’s complaint in SEC v. CoinW6 alleges that, from approximately July 2022 to at least December 2023, scheme participants who purported to be young, wealthy professionals contacted prospective investors via LinkedIn and Instagram and pursued romantic relationships over WhatsApp. Scheme participants gained investors’ trust and then convinced them to open accounts on CoinW6’s supposed crypto asset trading platform. As alleged, the schemers claimed that investors could earn up to a three percent return per day from CoinW6’s crypto asset staking, mining, and yield farming products. In reality, investors’ funds were misappropriated, and their ostensible investments, profits, and account balances were fictitious. When investors tried to withdraw their purported profits, the

schemers allegedly demanded additional payments for taxes or fees, told investors that the crypto assets were frozen as part of a law enforcement inquiry, or tried to blackmail them using compromising.

I must say that [the SEC complaint](#) is one of the least romantic things I have ever read:

After establishing initial faux rapport with investors over social media, Scheme Participants sought to develop online romantic relationships with prospective investors using WhatsApp. The Scheme Participants would discuss travel, hobbies, prior relationships, and share photographs. Often after a month of conversations, with very little mention of “cryptocurrency,” a romantic relationship developed in which the investor had formed trust in the Scheme Participant, believing their story to be true and their romantic interest in them to be genuine.

After Scheme Participants had fostered romantic relationships with prospective investors, they introduced investors to so-called “cryptocurrency,” and recommended investment into crypto staking, mining, and yield farming products that the Defendant offered on the CoinW6 Platform. These products, as further described below, offered different daily returns on invested funds for different periods of time, such as 3, 7, 15, or 30 days. To invest in CoinW6’s products, the Scheme Participants directed investors to use U.S. dollars to purchase crypto assets such as Tether (USDT), which is a crypto asset purportedly pegged to the U.S. dollar, or Ethereum (ETH), on U.S.-based crypto platforms. From there, they showed investors, using screenshots over WhatsApp, how to open self-custodial crypto wallets, and then move their USDT or ETH crypto assets to those self-custodial wallets. The Scheme Participants then showed the investors how to open an account on the purported CoinW6 Platform and how to deposit their USDT or ETH crypto assets into those accounts. After the investors’ accounts on the CoinW6 Platform were purportedly credited with crypto assets, the Scheme Participants walked the investors through investing in CoinW6’s purported crypto asset staking, mining, and yield farming products. The investors selected the product almost always based on the Scheme Participants’ recommendation.

The complaint quotes a few chats, though it never quite captures the moment where the alleged con artist first switches from pillow talk to “here’s how you transfer USDT from your wallet to the yield farming platform.” (The opposite, yes: “I transferred 2059 to your account for you,” says one of them, adding “I don’t need your check, honey, I just hope that when we meet, you treat me to a delicious dinner and send me a bouquet of roses, I will be very happy.”) I do feel like that transition is the hard part? But they made it work.

But: Is it securities fraud? There's a reason that this is the SEC's first romance-scam case: The SEC regulates securities offerings, and it's not at all clear that a typical pig butchering scam is a securities offering. A security is "an investment of money in a common enterprise with profits to come solely from the efforts of others," and this sort of one-to-one romance fraud is not a classic securities offering. On the other hand, they *were* pitching crypto investment opportunities, and the SEC is pretty adamant that those are securities offerings, and they were fake, so, sure, securities fraud, I guess. The legal analysis is sometimes funny:

Investors' potential for profits depended entirely on CoinW6's ability to operate and maintain the CoinW6 Platform as well manage its purported crypto asset products. ... The Defendant – not the investor – chose which crypto assets to stake, into which crypto mining pool to invest, or into which liquidity pool to invest (yield farming), and transferred the purported income to the investor from these products. The investor's sole decision was for how long they wanted their crypto assets invested in CoinW6's products. As a result, investors potential for returns were dependent CoinW6's ability to make their crypto asset products profitable.

I mean ... no? They were just stealing the money? As the SEC also points out:

Reasonable investors would have considered it material to their decision to invest in the Defendant's crypto asset staking, mining, and yield farming products that the products did not exist and hence were not generating any income for investors.

Also:

No registration statement had been filed or was in effect for any of the securities offered and sold by the Defendant and no exemption applied.

Imagine if they had registered these sales! I would love to write that prospectus. "Our business model consists of taking your money, pretending to invest it in crypto, but actually stealing it. We obtain this opportunity by seducing you with fake names and profile pictures." It would probably still work.

Things happen

Get Ready to See [Stock Prices in Half-Pennies](#). Fed Opts for Outsize Cut as Powell Seeks to Ensure

Soft Landing. Big [Rate Cut](#) Forces Fed to Contend With New Obstacles. Dutch bank ING to [ditch climate laggards](#) as clients. Berlin 'very sceptical' about UniCredit move on Commerzbank. Xi Unleashes a Crisis for Millions of China's Best-Paid Workers. Tyson Foods Sued for [Greenwashing](#). JPMorgan appoints banker to oversee juniors' 'wellbeing.' Elon Musk's X Bypasses Brazil Ban Through a Software Update. "After [making his bitcoin payment](#) Wednesday, Trump said it went quick and 'beautifully.'"

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- 1. Actually it's kind of a weird reason? Why buy the bonds of some risky company and then also buy CDS to hedge the credit risk? Why bother putting in the work to understand the company, only to hedge out the credit risk? Why not just buy Treasuries instead? Sometimes banks will lend money to a company for relationship reasons, and then hedge the credit risk with CDS. But often if you are buying bonds and also CDS it is not so much "hedging" as it is a "basis trade," betting on the differences in prices in those two instruments.
- 2. Conceptually, in bankruptcy all debt of the same seniority — say, unsecured debt — gets reduced to the same kind of claim, so there should be no difference in price in bankruptcy between a 30-year bond paying 2% interest and a 2-year bond paying 10%. And in many distressed companies, all the debt tends to trade toward the same dollar price, instead of trading on yield. But there are lots of CDS situations that *don't* involve bankruptcy, where a 30-year 2% bond is *clearly worth way less* than a 2-year 10% bond, but the auction might lump them together. The classic trade that made use of this fact is Hovnanian Enterprises Inc., where the company was going to manufacture a default (to trigger its CDS) and *also* manufacture a new, long-dated, low-coupon bond to create a big payoff in the CDS auction. This was genius, but it was too beautiful to live, and eventually Hovnanian was told to knock it off and the trade didn't happen.
- 3. Index CDS is sort of static: Every six months there's a new version of the index and a new contract on it, but the old contracts still trade. (It would be weird to take a company out of the index just because it defaulted!)
- 4. Quite possibly by selling the bonds for 100 cents on the dollar in the auction, but maybe by selling them for X in the auction and getting 100 - X on the CDS.

- 5. My understanding is that these cons work fairly successfully with marks of any gender and sexuality, though the ones cited in the SEC complaint seem to be male marks conned by apparently female profiles.

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Macquarie Unit Settles SEC Fraud Allegations for \$79.8 Million

By Nicola White

Bloomberg Law News 2024-09-20T10:13:02993207666-04:00

Macquarie Unit Settles SEC Fraud Allegations for \$79.8 Million

By Nicola White2024-09-19T13:42:33450-04:00

Macquarie Investment Management Business Trust agreed to settle allegations by the Securities and Exchange Commission that the company inflated the value of thousands of illiquid investments and overstated the performance of client accounts.

Without admitting or denying the SEC's findings, the firm agreed to pay \$79.8 million to settle the matter, the SEC said Thursday.

From January 2017 to April 2021, the firm managed a fixed-income investment strategy invested in mortgage-backed securities, collateralized mortgage obligations, and Treasury futures. Investments included thousands of smaller, so-called odd-lot positions that traded at a discount to larger positions.

The investment adviser valued the smaller positions using prices from a third party that were intended for institutional lots only. This overvalued about 4,900 collateralized mortgage obligations held in 20 advisory accounts, including 11 retail mutual funds, the SEC said. To minimize losses, the firm arranged cross trades with affiliated accounts, according to the agency.

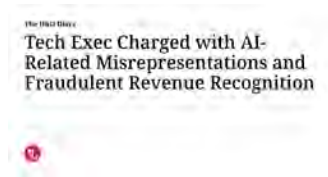
Marketing materials, due diligence questionnaires, performance reports and forms filed to the SEC contained false and misleading statements, according to the SEC, which said the firm stopped the strategy in April 2021, when the agency started an investigation.

"This legacy matter is not consistent with how we do business," Macquarie Asset Management said in a statement, adding that the investment adviser will remediate affected clients. "We have already undertaken and are focused on completing additional remedial steps to address the issues identified in the investigation, with clients the priority."

Tech Exec Charged with AI-Related Misrepresentations and Fraudulent Revenue Recognition

K [dandodiary.com/2024/09/articles/securities-enforcement/tech-exec-charged-with-ai-related-misrepresentations-and-fraudulent-revenue-recognition](https://www.dandodiary.com/2024/09/articles/securities-enforcement/tech-exec-charged-with-ai-related-misrepresentations-and-fraudulent-revenue-recognition)

September 19, 2024



By Kevin LaCroix on September 19, 2024
Posted in Securities Enforcement



In recent months, the SEC Chair and other government officials have made it clear that they are closely watching for companies that try to catch the AI wave by making exaggerated or false claims about the AI capabilities of their products or services. In the latest example of the crack down on these kinds of AI-related misrepresentations, both

the U.S. Attorney for the Southern District of New York and the SEC have filed charges against the former CEO and Chairman of the tech company Kubient. The government alleges that the executive, Paul Roberts, inflated the company's revenues and also lied about one of its signature products, an AI-powered tool that was supposed to detect ad fraud in the digital advertising industry. There are some interesting features of the charges against Roberts, as discussed below.

The Southern District of New York's U.S. Attorney's Office's September 16, 2024, press release about the criminal charges against Roberts, including a link to the criminal information filed against him, can be found [here](#). The SEC's September 16, 2024, press release about the charges it filed against Roberts and two other Kubient executives, including links to the agency's civil complaints, can be found [here](#).

Background and Allegations

Kubient is a digital advertising technology company. It completed an IPO in August 2020 and its shares traded on Nasdaq until November 2023. Kubient's flagship product was a proprietary fraud detection tool, Kubient Artificial Intelligence (KAI).

The charges filed against Roberts allege that as part of "a deliberate scheme" to "concoct phony revenue" in order to deceive investors and the company's auditor, Kubient and another unnamed entity entered several contracts in which they agreed to provide services to each other for \$1.3 million each, with Kubient to provide its flagship AI fraud detection

services to the other company. The money was paid under the services, and Kubient recognized the payments as revenue, but no services were actually rendered between the companies. Kubient reported the phony revenue in documents filed with the SEC in connection with its \$12.5 million IPO and subsequent \$20 million secondary offering.

The agencies' charges also allege, as summarized in the U.S. Attorney Office's press release, that Roberts "repeatedly made material misrepresentations in SEC filings about the efficacy of KAI in identifying and preventing digital ad fraud, including in connection with Kubient's initial and secondary public offerings, when Kubient was touting KAI as one of the company's premier products that would differentiate it from its competitors." The government alleges that Roberts "made these statements knowing that they were false." The government also alleges that Kubient's IPO and its secondary public offering "would not have been possible without Robert's fraudulent misrepresentations about KAI and the KAI transactions."

The U.S. Attorney's Office's press release states that Roberts has pled guilty to one count of securities fraud. The SEC's press release states that as a partial settlement Roberts has consented to injunctions from future violations of the charged violations while agreeing to litigate the appropriate remedies.

Discussion

In making their charges against Roberts, the government's complaints, as well as the press releases about the complaints, do not use the term "AI washing." One commonly accepted definition of the term is that AI washing is a marketing tactic where a company. Microsoft's AI-powered product Co-Pilot provided me with the following definition of AI Washing: "a marketing tactic where a company or organization falsely claims or exaggerates the use of artificial intelligence (AI) in their products, services, or operations." Using this AI-generated definition as I guide, I think it is fair to say that the government's charges against Roberts amount to AI washing, even though the government itself did not use that specific term.

As I have noted in prior posts on this blog, the SEC has previously brought AI washing-related enforcement actions. In at least one prior instance, the SEC enforcement action, like the one here, was accompanied by a parallel criminal prosecution as well. As discussed here, the SEC charged the founder and CEO of an AI- powered employment recruitment company, Joonko Diversity, Inc., with making false claims about the company's services. In addition to the SEC's action against the founder and CEO, the U.S. Attorney's Office for the Southern District of New York filed a criminal action against the individual as well.

But while there have been prior SEC enforcement actions and even criminal actions in which the government has alleged that companies and their executives engaged in securities fraud by AI washing, none of the prior cases of which I am aware have involved a publicly traded company. (Joonko was a privately-held company). As far as I am aware, the government's

charges against Roberts in connection with Kubient represent the first example of enforcement actions being brought against a listed public company based on AI washing-related allegations. (If any readers out there are aware of any prior action, please let me know.)

It might be argued that what went on here was basically what some commentators have referred to as “old school fraud.” But an important part of what went on here is the use of false AI-related claims in order to attract investor attention and perhaps to catch some of the AI lightning in order to maximize the returns on the fraudulent scheme.

It is clear that in the current environment, when investors are eager to capitalize on the new technological capabilities that AI promises, the government is worried that companies will seek to mislead investors by using AI-related buzzwords to attract attention. The government’s crackdown here underscores the risks that companies face when they misrepresent their AI-related capabilities – and the parallel criminal action further highlights the risks companies may face when they exaggerate or falsify their AI credentials. Of course, as readers of this site are well aware, the associated risks also include the possibility of AI-related securities class action litigation as well.

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FTX Auditor's \$2 Million Fine Reveals Wider Compliance Issues

- *Lehman College professor examines SEC's latest auditing fine*
- *Crypto exchanges, auditing firms increasingly in crosshairs*

Bloomberg Law News 2024-09-20T10:24:14195061929-04:00

FTX Auditor's \$2 Million Fine Reveals Wider Compliance Issues

By Sean Stein Smith2024-09-20T04:30:04000-04:00

- *Lehman College professor examines SEC's latest auditing fine*
- *Crypto exchanges, auditing firms increasingly in crosshairs*

Auditors being fined millions of dollars often makes headlines, but the reality is more nuanced—and possibly more concerning.

Prager Metis, one of the audit firms involved with collapsed crypto trading firm FTX, reached a \$1.95 million settlement this week to settle charges from the Securities and Exchange Commission over botched audits and separate conflict of interest violations.

Audit firms have a complicated history with financial fraud and unethical actors, with the realities of the audit process diverging from public perception. Audits aren't, and never have been, a 100% review of every entry and piece of financial data—although that may change with the billions of dollars in investments being invested in artificial intelligence.

Criticizing the performance of any single firm with the benefit of hindsight isn't productive to market confidence nor the important audit industry. Rather, investors and analysts should consider a few emerging market realities that may shape the trajectory of audit confidence in the near-to-medium term.

The SEC is sending a message. Any seasoned crypto investor knows that the SEC has pursued an aggressive stance when it comes to the crypto industry. Chair Gary Gensler's campaign to rein in the "Wild West" of crypto, and requesting additional funding (over \$150 million) specifically to increase crypto regulatory efforts, has made no secret of efforts to bring the sector under the singular oversight of the SEC.

From suing numerous exchanges and token issuers or seeking multibillion-dollar settlements from Ripple, or issuing pronouncements (SAB 121) chilling market appetite to service the space, the message is clear. Crypto is a high-risk industry in the eyes of the SEC, and audit firms should be prepared accordingly.

The SEC has engaged in 173 enforcement actions against the crypto industry from 2013 to 2023 and collected \$2.89 billion in fines during that same period. These includes actions against Coinbase (an SEC registrant) and Kraken, although FTX operated with near impunity until its collapse.

Audit quality is a bigger issue. When the Public Company Accounting Oversight Board released its latest audit quality report this month, the news was grim. At the Big Four, the accounting and auditing firms with the biggest budgets and headcounts, the US units had an audit deficiency rate of 24%, up from 13% in the previous report. Following the release of this negative report, the PCAOB adopted a wider range of measures that audit firms will need to report on, specifically focusing on improving audit quality.

This is all to say that auditing has deteriorated, and by the headlines being made at the SEC, multimillion-dollar fines and critiques of the audit field aren't going away.

Marcum agreed to pay \$13 million last year to settle SEC and PCAOB charges that its audits of special purpose acquisition companies had widespread failures. The SEC fined audit firm BF Borgers \$12 million in May following fraud allegations impacting public company audits.

Whether this uptick in audit deficiencies has to do with a lack of employees (the accounting pipeline is a well-known problem) or pressure being brought to bear as private equity continues to make inroads is up for debate. In any case, the reputation of the audit profession, audit quality, and market expectations continue to be on a less-than-desirable course.

Upskilling is imperative. With fewer accounting professionals coming into the profession, and non-CPA firms making forays into the analytics and forecasting aspect of accounting, there was already increasing pressure on those individuals working in the audit field.

When combined with the continued rise of tokenized assets (spot exchange-traded funds and state-issued stablecoins, to mention just two), the massive interest and investment in AI across the economy, and the staying power that environmental, social, and governance has had (despite recent pushback from ESG opponents), upskilling increasingly looks like a permanent aspect of the accounting and auditing space.

Audits most likely will never be perfect, and the SEC seems to be singling out the crypto space for outsized fines and punishments, but that's no excuse. Auditors, and the market, deserve continuously improving audit services. It's up to the profession to deliver.

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Trump Media Stock Drops as Lockup Ends

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By

WSJ Staff

Shares in **Trump Media & Technology Group (DJT)** fell for the fifth day in a row to their lowest level since the company went public through a blank-check merger.

A lockup agreement barring Donald Trump and some other investors from selling shares in the social-media company expired Friday.

The Republican presidential candidate recently said he doesn't intend to sell. He holds a near-60% stake in Trump Media, which is the parent company of his Truth Social platform.

The stock, which trades using the ticker DJT, recently stood nearly 7% lower. Trump Media went public in March by merging with a special purpose acquisition company.

As of Thursday's close, the stock was already down about 75% from its closing price on March 26, the first trading day after the SPAC deal closed, according to Dow Jones Market Data.

That is the second-worst performance over that time period among 2,057 U.S. exchange-listed companies with a current market value of \$2 billion or greater, data from DJMD shows.

Trump Media & Technology Group Corp.

DJT (U.S.: Nasdaq)

\$14.04 USD -0.66 -4.50% 

Trump Can Cash In His Slumping Stock Now. But He Promised Not To

Published: Fri Sep 20 10:48:51 EDT 2024

- Former president can now capitalize on \$1.5 billion stake
- Capitalizing on investment may be difficult for insiders

By Bailey Lipschultz

(Bloomberg) --

Donald Trump can finally turn his more than \$1.5 billion stake in his media company into cash after restrictions preventing him from selling the stock expired Thursday. There are only two problems: Unloading the shares won't be simple, and he already promised not to do it.

Trump Media & Technology Group Corp. stock is trading at the lowest price since its soaring debut on March 26, falling as much as 8.2% to \$13.50 intraday Friday. Insiders in the company, which owns Trump's social media outlet Truth Social and went public through a merger with a special purpose acquisition company, had been unable to sell their positions due to a post-offering lockup agreement. Now they can, although the stock's more than 65% slide over the past two months wiped out upwards of \$4 billion in value since mid-July.

Trump, who owns about 60% of the company's stock, also can begin turning his paper stake into real cash. However, the issues standing in the way of that go beyond his pledge not to unload the shares.

Any sales by Trump would require filings with US regulators. But whether or not investors are tipped off that they're coming depends on the mechanism of the sales. He could sell a limited amount through open market transactions, which would require some filings with the US Securities and Exchange Commission. Or he could execute a so-called registered share sale, which could keep the details under wraps for a few days. Or he could adopt a scheduled plan, also known as a 10b5-1, which is something advisers would likely recommend.

"Typically, while not always required, affiliates and insiders sell stock via 10b5-1 plans as a matter of best practice and to minimize insider trading risks," said Paul Karger, managing partner at the financial advisory firm TwinFocus. While any substantial selling would likely "create downward

pressure on the stock price,” securities counsel would suggest a structured path, especially given Trump’s nearly 115 million share stake, he added.

Timing Sales

To offload stock in the open market, Trump would have to file paperwork with the SEC confirming his intention, although it could take two business days before any sales — and their size — are reported to regulators, securities lawyers say. If Trump uses this route, he’d be able to sell no more than roughly 8.7 million shares over three months, according to securities law.

The easiest way for Trump to quickly dump stock is through a registered program, which is how private equity can swiftly sell tens of millions of shares. For example, TPG Inc. and Canada Pension Plan Investment Board sold about 30 million shares of Viking Holdings Ltd. this month using this strategy. The timing of how investors would learn about the moves can be murky, a filing is required within two business days and investors can speculate on potential sales, as is common with block trades.

Typically large shareholders would sell stock through a scheduled program, as suggested by Karger, who co-founded TwinFocus to advise ultra-high-net-worth individuals to manage their wealth. That would enable Trump to unload stock over time, but it would also alert investors to the plans.

And then there’s Trump’s statement last week that he has “absolutely no intention of selling,” which sent the shares soaring on Friday that week before tumbling this week.

Regardless of what Trump decides to do, it would take months to offload his position given the size, regulatory requirements and the amount of shares that typically trade. Since Trump Media’s debut, just over 8 million shares on average have changed hands in each trading session. Meaning, if Trump began selling and the transactions accounted for half of the normal trading volume, it’d take more than five weeks for him to get rid of the 114.75 million share stake.

In addition, any sizable sales would flood the market with shares, reducing demand and pressuring the price. It also would signal that he didn’t believe in the company that bears his initials as its stock ticker.

Trump Media co-founders Andy Litinsky and Wes Moss, as well as Patrick Orlando, whose ARC Global Investments II LLC fund backed the blank check that took the company public, can freely sell shares given the size of their positions. Those transactions wouldn’t be immediately disclosed, but investors will be watching trading volume for spikes during Friday’s session.

Over the roughly six months Trump Media has been listed on the Nasdaq, the most active Friday saw 29 million shares change hands in the trading day after Trump's debate with President Joe Biden. Litinsky and Moss own 7.5 million shares, while Orlando's stake is almost 8.2 million, data compiled by Bloomberg show. The stock's daily average volume since the company went public is 8.2 million shares.

Supply And Demand

Any rush for the exits, or the perception of one, would likely hammer the stock.

"The laws of supply and demand cannot be repealed," said Usha Rodrigues, a professor of corporate law at the University of Georgia School of Law. "An increase in publicly available shares will drive down the price. Thinly traded shares will respond with more volatility. The spikes and troughs will be more extreme."

Corporate insiders are typically restricted from selling shares for six months after a company goes public to prevent predatory sales. The terms of Trump Media's deal enabled the lockup to be waived about a week earlier since the stock has held above \$12, terms of the deal show.

Read More: Trump Can Only Watch as His Media Stake Takes a \$4 Billion Dive

Shares of Trump Media have been under pressure in recent months as investors positioned for a flood of shares to hit the market. But if the former president wants to monetize his position without crashing the share price, there is an alternative. He could arrange a loan using his stake as collateral, something that's common for founders and marquee investors whose investments account for the bulk of their wealth.

But for Trump, such a move isn't cut and dried as it would be for someone like Elon Musk or Mark Zuckerberg. Trump Media's nearly \$3 billion valuation contrasts with a business that brought in less than \$1 million in revenue in the second quarter and posted a net loss of \$16.4 million. It's also not as heavily-traded as companies where founders, who are often still involved in day-to-day operations, use shares as pledges for loans.

"It will likely be very difficult to use the stock as collateral given thin volumes, potential volatility," and regulatory restrictions, Karger said. "Overall performance of the stock is not only subject to market forces, but also to underlying company performance."

(Updates stock move after market open.)

--With assistance from Matt Turner.

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<https://www.wsj.com/politics/elections/donald-trump-campaign-crypto-bitcoin-7a2e2e4f>

Bitcoin, Burgers and Big-Money Donors: Inside the Trump Crypto Alliance

By *Ben Foldy* [Follow](#) , *Vicky Ge Huang* [Follow](#) and *Caitlin Ostroff* [Follow](#)

Updated Sept. 20, 2024 10:18 am ET

Donald Trump this week pivoted to embrace a niche constituency that few would have expected him to champion—cryptocurrencies and the deep-pocketed investors who have made them their domain.

The former president and onetime bitcoin skeptic on Monday helped launch a new crypto business with his family. On Wednesday, he bought a round of burgers for denizens of a bitcoin-theme dive bar in New York. Pledges to block a Federal Reserve-backed digital currency and establish a “strategic national bitcoin stockpile” stand out in stump speeches that mostly focus on such center-of-the-plate political issues as immigration and trade.

All of this has won him fervent support from a growing subset of single-issue voters—and wealthy donors—who say the government’s treatment of cryptocurrency will determine how they pull the lever on Election Day.

An industry often at odds with government has been invigorated by having a potential champion in the White House, said Dennis Porter, chief executive officer of Satoshi Action Fund, a bitcoin-backing nonprofit.



Donald Trump visited a bitcoin-themed bar in New York on Wednesday. PHOTO: SPENCER PLATT/GETTY IMAGES

“This is an industry full of voters who are getting wealthier and more influential, and now there’s someone who wants to be a voice for them,” Porter said. “They’re going to give him votes, and they’re going to give him money.”

While the value of those votes remains to be seen, the money has already proven helpful.

A blanket endorsement

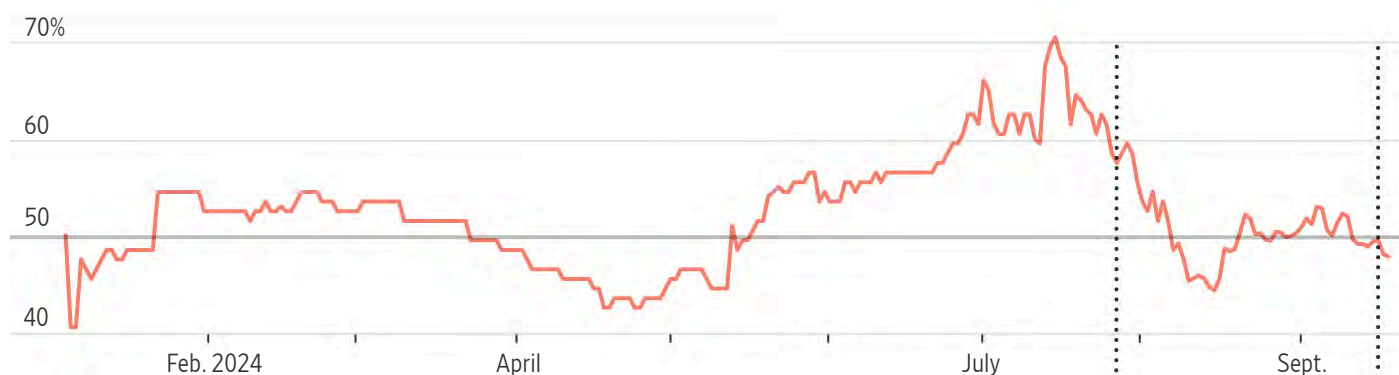
Marc Andreessen and Ben Horowitz, co-founders of the venture investor Andreessen Horowitz, said on a podcast in July that they were supporting Trump after he personally “rewrote the Republican National Committee platform” into what they called a “flat-out, blanket endorsement of the entire space.”

They have been joined in their support by Cameron and Tyler Winklevoss, the billionaire founders of the crypto exchange Gemini. They said they are backing Trump because he is “pro-bitcoin, pro-crypto and pro-business” and gave his campaign \$1 million each in crypto. The donations were partially refunded because they exceeded federal campaign contribution limits. Jesse Powell, a co-founder of the crypto exchange Kraken, said he donated \$1 million to Trump’s campaign and a pro-Trump super PAC, mostly in ether tokens, according to his post on X and Federal Election Commission filings.

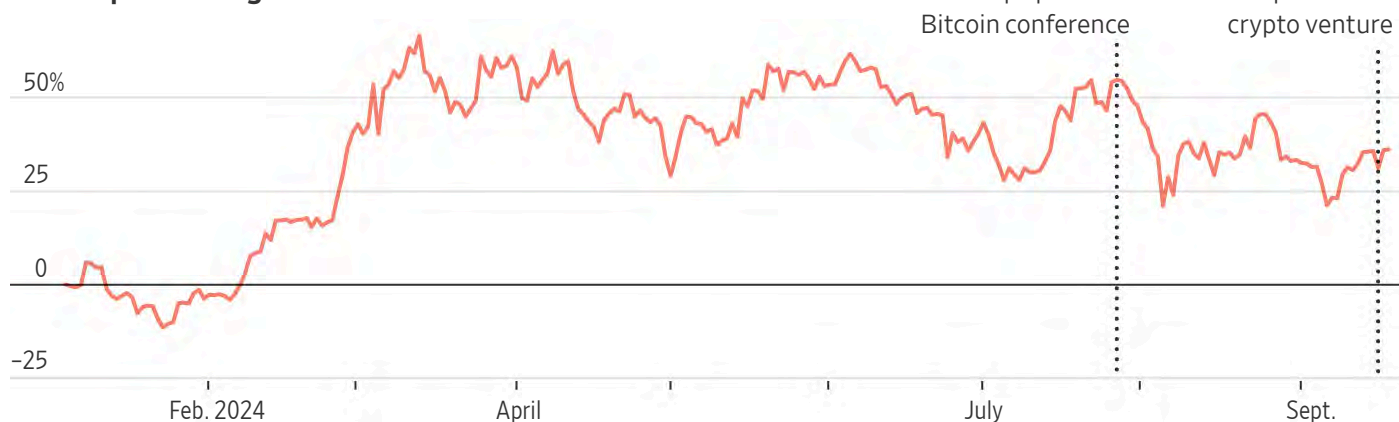
The tech moguls’ contributions are an offshoot of the growing campaign clout of the crypto industry, whose network of nonpartisan super political-action committees has amassed a nearly \$170 million war chest to spend in the 2024 election cycle. Trump’s campaign has raised millions of dollars in contributions made in cryptocurrencies, too.

Crypto's deepened pockets are a turnaround of the past two years, when cryptocurrencies and companies blew up, creating a cascading effect that pulled prices lower yet. Everyday traders saw investments wiped out, and the Justice Department charged several former industry leaders with fraud, sending some to prison. Crypto prices have gone through similar boom-bust cycles in years past. This year, bitcoin's price has climbed back to near record highs.

Bettors' odds of Trump winning the election



Bitcoin price change



Note: Data from Jan. 4 to Sept. 18. Bitcoin performance measured against the dollar.

Sources: Polymarket (odds); CoinDesk (bitcoin)

As of yet, this broader spigot hasn't splashed into the presidential election, focusing instead on congressional races. The potential impact in those races has been immense, with crypto companies constituting nearly half of all corporate contributions to nonpartisan PACs, according to Public Citizen, a nonprofit consumer advocacy group.

Trump's crypto campaign echoes some other presidential candidates who have dedicated themselves to specific fiscal policies. Much of William Jennings Bryan's 1896 campaign was a protest of the gold standard. After taking office, Franklin D. Roosevelt issued an order restricting the private use of gold. Ron Paul's 2008 campaign assailed the Federal Reserve.

Crypto went courting

The crypto industry's courting of Trump was on full display at a June fundraising dinner in San Francisco. In attendance were representatives from some of crypto's largest U.S. businesses such as the exchange Coinbase and the payments platform Ripple, as well as the Winklevoss twins, whom Trump jokingly referred to as "supermodels."

At the dinner, Trevor Traina—who was ambassador to Austria during the Trump administration and is now a crypto entrepreneur—stressed that while most of the major internet businesses were U.S.-based, many large crypto companies are based elsewhere because of perceived hostility from the government.

Traina asked whether the U.S. wanted to miss out on a massive industry. Trump said that would be terrible.



Trevor Traina, U.S. ambassador to Austria during the Trump administration, is now a crypto entrepreneur. PHOTO: THOMAS KRONSTEINER/GETTY IMAGES

The talk quickly turned to a shared dislike of Securities and Exchange Commission Chair Gary Gensler, whose aggressive enforcement agenda has made him something of a boogeyman for crypto companies.

"We all sort of agreed that Gensler is like in that movie 'A Quiet Place,'" said Traina. "If you make a sound, he sues."

That month, Trump also hosted about a dozen executives from the bitcoin-mining industry—which uses computers to generate random numbers in the hopes of unlocking fresh bitcoin—at his Mar-a-Lago resort. Over sodas and macadamia cookies, Trump asked the executives about the energy consumption needs of bitcoin mining and told them his campaign would develop friendly talking points about the industry in the coming months.

“He actually made the statement that he would like nothing more than to see all of the remaining bitcoin mined in the U.S.,” said Matthew Schultz, executive chairman of the bitcoin miner CleanSpark, who attended the event.

A Wall Street linkup

Trump’s embrace of crypto has found its purest form in his appointment of Howard Lutnick, chairman and CEO of Cantor Fitzgerald, as a co-chair of his transition team. By handing the position to his longtime friend and fundraiser Lutnick, Trump gives the crypto industry’s biggest cheerleader on Wall Street a potentially powerful role.

Before Lutnick’s appointment, both men spoke at a late July bitcoin conference in Nashville, Tenn.

“The rules will be written by people who love your industry, not hate your industry,” Trump said in his speech.

Lutnick regaled the audience with Cantor’s crypto bona fides, established as he has pushed Cantor deeper into the industry since 2020. The company now owns “a shedload of bitcoin,” Lutnick said, and announced that the company was opening a \$2 billion facility to lend against bitcoin collateral.

Lutnick also has tied Cantor to Tether, one of the largest and most profitable companies in crypto. Tether’s main product is the world’s most-used stablecoin, also called tether, which essentially functions as an unregulated digital dollar with \$119 billion in circulation. Cantor manages Tether’s portfolio of U.S. Treasuries.



Trump, Cantor Fitzgerald CEO Howard Lutnick and JD Vance at New York City’s 9/11 memorial ceremony last week.

PHOTO: ADAM GRAY/AFP/GETTY IMAGES

Trump's crypto-related promises often have direct effects on these backers. A "strategic national bitcoin stockpile" of the kind that Trump has proposed would legitimize bitcoin as a reserve asset. His promise to block a Fed-issued digital currency would potentially keep a powerful competitor to Tether out of the market.

Some investors and analysts view Trump's candidacy as being generally positive for crypto prices more broadly, even beyond his efforts to woo the digital-currency crowd. Because of the candidate's habit of making comments that seem aimed at rattling the status quo, a Trump presidency is widely regarded on Wall Street as being likely to lead to greater volatility in all asset classes—an environment that has been good for bitcoin in the past.

At the conference, Trump also reiterated a pledge to commute the sentence of Ross Ulbricht. Using the alias "Dread Pirate Roberts," he created and ran the crypto-fueled Silk Road online drug marketplace before being sentenced to life imprisonment on federal drug and computer crime charges.

Not a fan of the SEC chair

But Trump's most popular crypto-wooing pledge is his promise to remove Gensler from atop the SEC.

In their podcast, which was recorded before Trump's pledge, Andreessen and Horowitz complained that Gensler has refused to meet with them on several occasions, despite their firm's being among the biggest investors in cryptocurrency. Powell's Kraken has been locked in legal combat with the regulator, having been charged by the agency with breaking securities laws and separately paying a \$30 million settlement to the SEC.

"The U.S. securities laws have worked to protect investors for 90 years, and there's nothing incompatible about the crypto field with these time-tested laws," a spokeswoman for the SEC said.

Trump's pledge to fire Gensler on his first day in office was met with such thunderous applause and loud cheers from the audience at the bitcoin conference that he repeated the promise.

"I didn't know he was that unpopular. Let me say it again," he said. "On day one, I will fire Gary Gensler."



Trump spoke in July at the Bitcoin 2024 conference in Nashville, Tenn. PHOTO: JON CHERRY/GETTY IMAGES

‘Crypto is one of those things we have to do’

Trump’s tendency to entwine his business interests and political career also has taken a crypto turn.

Trump has launched and sold four collections of nonfungible tokens—crypto’s version of digital trading cards—to his supporters since 2022.

His latest crypto business venture, World Liberty Financial, launched with much fanfare Monday evening, through a two-hour livestream featuring Trump and his family on Elon Musk’s X platform.

The project, which said it wants to “make crypto and America great by driving the mass adoption of stablecoins and decentralized finance,” has shared few details about its mechanics so far. The team behind the project said it would sell and distribute a token to wealthy investors who meet certain income and net worth criteria.

Trump, World Liberty’s so-called chief crypto advocate, didn’t address the project directly during his 40-minute interview on the stream. Some of his speech focused on a second apparent assassination attempt foiled the day before, when a gunman was arrested after lying in wait at the Mar-a-Lago golf course. At the time, Trump was golfing with Steve Witkoff, one of World Liberty’s backers.



Tiffany Trump, Eric Trump, Lara Trump and Donald Trump Jr. at the Republican National Convention this summer in Milwaukee. PHOTO: JULIA NIKHINSON/ASSOCIATED PRESS

When he spoke about cryptocurrency, Trump said his children opened his eyes more than anything else. His sons Donald Jr. and Eric (World Liberty’s “Web3 Ambassadors”) have been teasing World Liberty and touting the power of decentralized finance on social media for weeks. His youngest son, Barron (World Liberty’s “Chief DeFi Visionary”), is also an enthusiast, with as many as four crypto wallets, or digital wallets that allow users to store, manage and transact cryptocurrencies, Trump said.

The former president’s comments fell in line with his tendency to paint his embrace of crypto in broad strokes.

“Crypto is one of those things we have to do,” he said. “Whether we like it or not, we have to do it.”

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Elon Musk and Tesla Shape America's Future. But Problems Run Deeper Than Tweets.

 [nakedcapitalism.com/2024/09/elon-musk-and-tesla-shape-americas-future-but-problems-run-deeper-than-tweets.html](https://www.nakedcapitalism.com/2024/09/elon-musk-and-tesla-shape-americas-future-but-problems-run-deeper-than-tweets.html)

By Yves Smith

September 20, 2024

This is Naked Capitalism fundraising week. 1311 donors have already invested in our efforts to combat corruption and predatory conduct, particularly in the financial realm. Please join us and participate via our donation page, which shows how to give via check, credit card, debit card, PayPal, Clover, or Wise. Read about why we're doing this fundraiser, what we've accomplished in the last year, and our current goal, more original reporting.

Yves here. This is a useful, wide-ranging discussion by William Lazonick of Elon Musk's operation of Tesla and SpaceX and the control problems he faces as Tesla is likely to need to issue more shares to fund further expansion. Note that there are other means of allowing a founder or controlling group stay in charge than the one Musk did put in place, such as dual classes of stock, with the widely-circulating shares having lesser voting rights. But regardless, Musk's steps suggest that he is planning against hedge fund demands for more buybacks or other short-term-investor-placating measures. Mind you, it's not as if Musk is all that respectful of shareholder rights, but he does appear to recognize that even he could be brought to heel.

Almost everything Elon Musk does these days makes headlines. The battle over his 2018 stock option package not long ago is no exception: After the Delaware Court of Chancery, which has jurisdiction over Tesla, invalidated his monster option package from 2018, Tesla shareholders voted to give it to him anyway.

Most of the press covered this story as another case of corporate excess and neglected the bigger story it pointed to: that America urgently needs bold leadership and a clear strategy in the electric vehicle sector. The U.S. risks falling behind if we don't get our act together while other nations—and in particular China—race ahead. A strong, forward-thinking approach is crucial not only for maintaining U.S. leadership but also for combating climate change effectively. But corporate financialization—the obsessive focus on shareholder value and personal gains—threatens investment in the productive capabilities that enable crucial innovation. Financialization has turned many an American powerhouse into a shadow of its former self: see Intel, IBM, General Electric, and Boeing, among others.

Will Tesla be next?

While Musk seeks to stave off corporate raiders by amassing enough shares to block their advances, his own leadership remains in question. Economist William Lazonick offers insights into what's happening at Tesla and why it matters for our future.

Lynn Parramore: Musk has been making headlines since the presidential debate, and not for good reasons. First, the tweet sexually harassing Taylor Swift, then the “joke” about the assassinations of Biden and Harris. Yet this is the same guy who has managed to run highly successful companies. What’s your view of this contradictory figure?

William Lazonick: His tweets are really a problem, but yes, he’s had tremendous success. Obviously, he has hired lots of people to do lots of things, but he’s the one who had the judgment to hire them. Tesla is impressive, and SpaceX is even more amazing. It broke barriers in terms of just cheapening the cost of making rockets. Reliable rockets, reusable rockets, and stuff like that. No doubt, Musk is kind of obsessive, but this recent stuff is very concerning, for a guy running a public company to be doing this.

LP: And this is a very critical time for Tesla. Can you say a little about the state of play with electric vehicles?

WL: It’s been clear for a long time that the Chinese were going to develop electric vehicles. Tesla certainly, through its success, has speeded that up. It was really a stroke of genius for the Chinese to allow Tesla in 2019 to be the first foreign car company without Chinese partners to come into China and start manufacturing them there because it pushed Chinese companies like BYD, NIO, Geely, and others to speed up the electric vehicle transition. Tesla revved up the market, creating much more interest in electric vehicles.

Tesla’s profitability has a lot to do with all the cars it’s selling in China. Tesla had known since 2018 – we can discuss why in a bit — that it was on the cusp of mass-producing an affordable EV, and once they got into China, that sealed the deal in terms of being a global leader.

But a company like BYD is extremely well-positioned to respond. It started out as a rechargeable battery maker for various devices and then got into cars in 2003. It manufactures its own innovative batteries, which is something that Tesla doesn’t have. It can now produce a car in China for \$10,000. Tesla will never be able to do that. Those cars might sell abroad for \$20,000.

BYD is capturing a huge share of the global EV market.

LP: So the competition is really out there now.

WL: Yes. Tesla’s strategy was to first produce very high-end cars to get brand name recognition and accumulate learning to set the stage for a high-end, mass-produced car, which was a Model S, which began deliveries in 2012, and then transition to the more affordable Model 3, starting in 2017.

That was Musk's strategy from the beginning. I think Tesla sped up the electric vehicle transition by several years. Tesla also built its own supercharging network, which makes it possible for many car buyers to choose a pure EV. (Although China has a far bigger charging network than the United States).

But basically, the transition to electric vehicles is on, and it's going to be about smaller or regular-sized cars. Right now, Tesla is the global leader. So then you have to consider, who's making decisions for the electric vehicle transition and what does that mean for its future? What does it mean to have Elon Musk deciding Tesla's strategy, organization, and finance going forward?

LP: Musk has been concerned about hedge fund activists moving in to take over Tesla. What's going on?

WL: After Tesla was founded in 2003, Musk came in quickly in 2004 and put in some of the initial money to develop and manufacture the Roadster, which they started selling in limited numbers starting in 2008. Then, after rounds of venture finance, Tesla wanted to go public in order to raise more money and did its IPO in June 2010. Musk realized, however, that success might mean that hedge fund activists could come in, change the board of directors, kick him out, and grab the profits. Back in 2003, the SEC had sanctioned changes to the proxy voting system, which gave hedge fund activists more power to loot companies.

With the changes, if you were a hedge fund activist and had a few billion dollars that you could invest in a company's stock — and it might only be 1% of the company's outstanding shares — you could line up the votes of the institutional shareholders, with help from proxy advisory firms Glass Lewis and ISS to endorse your strategy and change the board of directors. Or you could convince some of the existing board members that they should side with you, not with the CEO. Or you could just get the CEO quaking in his or her boots and get them to go along with whatever you wanted. There were cases of CEOs being forced to resign at the pinnacle of their careers.

LP: And as you've shown, once the hedge fund activists — the corporate raiders — get hold of a company, they often start focusing solely on extracting value for themselves by jacking up the company's stock price through shenanigans like stock buybacks, cutting jobs, suppressing wages, and price gouging.

WL: Right. So Musk was saying, if I'm going to put all my work into building this company, I don't want to be kicked out by corporate raiders (whom he would later call "dubious interests") once we go public.

LP: And Musk had a clever strategy for defending himself from hedge fund activist takeovers.

WL: Yes. He amended Tesla's certificate of incorporation to lower the threshold for blocking such activists, allowing him to be invulnerable to attack with only 33.4% of voting shares instead of the usual 50.1%. Tesla had a very simple certificate of incorporation in 2003 before Musk even arrived. In 2009, as they were preparing to do the IPO, they threw in a bylaw, right at the end, that says that any substantial change at Tesla, including board membership, would need a supermajority of 66.7%.

LP: They sort of snuck it in there.

WL: Yeah. That kind of move has upsides and downsides. If people had confidence in Musk – and at the time he seemed very on top of his game and focused – then potential investors might think it was good that that he couldn't be kicked out as easily. But there was a downside, too, because the IPO might not go as well if investors did not have confidence in him. But in this case, it seems to have worked out for Musk.

The other thing to know is that Musk was chairman of the board at three specific times in 2009, 2012, and 2018 when the directors awarded him big stock option packages—potentially worth, respectively, 8%, 5%, and 12% of Tesla's outstanding shares. These option plans were designed not to compensate him, but to give him more shares to increase his voting power, largely contingent on Tesla achieving its goals of producing EVs. In the end, the value of the shares that he has acquired from exercising stock options has made him among the richest people in the world.

It might seem self-serving for Musk to claim, even before Tesla's success, that he aimed to prevent dubious activist shareholders from gaining influence. This stance also conveniently helps justify the stock option packages that, in combination with shares he purchased for \$292 million, have enabled him to beneficially own 20% of Tesla's shares outstanding if his 2018 options remain intact, and 13% if they don't.

He deftly used what looked like compensation packages to allocate a substantial proportion of Tesla's shares to himself.

LP: 2018 was the last time he got one of these big packages that gave him lots of shares. But he hit a legal hurdle.

WL: Right. In 2018, he got a stock option package that turned out to be possibly worth \$50 billion (depending on the prevailing stock price when he would exercise the vested options) once the company was successful. At the time he was awarded the package, the grant-date value of the shares was about \$2.3 billion, but what was important was not the \$2.3 billion, but the fact that he stood to reap 12% of the shares outstanding if, for the shares to vest between 2018 and 2023, Tesla achieved various performance criteria, including car sales. So it wasn't for a foregone conclusion that he was going to get the shares.

In the United States, performance criteria for the vesting of option grants are unusual. Usually, all you need to do is wait, and if the current stock price exceeds the grant-date price, you exercise your option and realize gains. But with Tesla, Musk had to meet the criteria, and it was done in 12 stages up through 2023. By 2023, almost all the requirements had been met.

The board's justification for giving him that stock package was that he was running the company well and they wanted him to stick around.

LP: But a Delaware court actually rescinded the package. On what grounds did the court do that?

WL: A guy bought nine Tesla shares and hired a lawyer to bring a lawsuit in the Delaware court, which has legal jurisdiction over Tesla, arguing that the 2018 option package was unfair to shareholders not named Elon Musk.

The court's decision, handed down last January, was not that the 2018 option package was something that Tesla didn't have the right to do, but that it was kind of incestuous – the board members weren't independent, the shareholders weren't informed, etc. Musk was chairman of the board at the time, so he was granting the options to himself as CEO. As it turned out, in 2019, he was forced by the SEC to relinquish the chairmanship for three years after he tweeted about taking the company private. After that, he decided not to become chair again. Instead, he installed another director as chair, who now has reaped \$353 million from her own stock options just by sitting on the board.

LP: Musk went back to his own board and got the package reinstated. Wouldn't that be a violation of the court's decision? What's at stake for Musk now?

WL: Yes, Tesla is trying to get the Delaware court's decision overturned. Last June, after much campaigning from Musk and his other directors, Tesla shareholders overwhelmingly voted to re-ratify the 2018 stock option package and also change the legal jurisdiction of the company to Texas. Right now, Musk's lawyers are trying to convince the Delaware court to vacate its ruling that the 2018 option package is null and void. They are trying to convince the judge that problems of insider influence and lack of transparency in the original granting of the package in 2018 have been fixed.

Back in 2018, Tesla was confronted by hedge funds as short sellers who were trying to drive the stock price down. The company still needed to raise money on the stock market at that time to get to the last stage of mass production. Tesla has achieved that goal, and from 2021 through the first half of 2024 recorded \$35.8 billion in profits. Now the hedge fund activists could be eyeing those profits, seeking to get Tesla to do stock buybacks to give manipulative boosts to its stock price.

The recent June vote on his option package may have been a signal to the hedge fund activists that Musk can mobilize the small shareholders to support him, whereas it is much easier for the activists to mobilize the institutional shareholders. It's very hard to get the scattered votes of small shareholders, who own about 40% of the company's shares outstanding. Tesla created a special website and a campaign to get their votes.

LP: What does all this potentially mean to the future electric vehicles, which are important for dealing with climate change?

WL: Hedge fund activists coming in could do a lot of damage – massive buybacks, big layoffs, price gouging, etc. All the stuff that falls under the umbrella of financialization and has damaged so many other once innovative U.S. firms.

Musk is actually doing some of that with his layoffs. He's not doing buybacks, but I could see him doing \$30-\$40 billion per year if Tesla should become super profitable, averaging, say, \$70 billion in profits a year, as Apple had done over the past decade. For one thing, in wasting Tesla's money to manipulate its stock price, Musk would also be increasing his proportional voting power by taking shares off the market.

Ultimately, the whole system of corporate governance in America is corrupt – not just at Tesla, but in general.

LP: Is Tesla any different from typical cases you've been studying?

WL: Yes and no. Companies where all the financialization is going on are companies that used to be innovators, like Apple and Microsoft. Intel gave in to financialization until recently. The asset stripping, layoffs, and other measures that come with predatory value extraction destroy their innovative capabilities.

LP: So Tesla is at a tipping point between continuing innovation and succumbing to financialization.

WL: Yes. It could go in that direction.

LP: Would it be better for Musk to stay?

WL: That's questionable. If someone put me on the board, I would look for a guy like Pat Gelsinger, who now runs Intel. He's trying to help the company recover from all its buybacks – \$108 billion worth from 2005 through 2020 under the three previous CEOs, who were all finance guys. He's interested in making the company productive. Tesla has some issues – the EV car market has slowed. They've laid off about 14% of the labor force in 2024 – it's far from clear if that was necessary. If I were on the board, I would question doing mass layoffs on what seems to be a whim. It certainly makes no sense that Musk fired the whole

supercharger group – a group responsible for a critical part of their strategy for the EV transition going forward. Getting these high-speed charging stations put in place isn't easy. It requires intense negotiations and so on.

Then there's Musk ruining the name of the brand, supporting a president who calls climate change a hoax. One who says we should get rid of all electric vehicles. That's kind of "bonkers" rhetoric (to use Musk's own term about a state of mind that might justify his removal as CEO).

From the U.S. point of view, Tesla is a company that got a lot of subsidies, and a lot of support from being in the United States. It's another one of these critical technologies, like silicon chips, where the U.S. has been a leader, but, with an impetuous, narcissistic, and sociopathic person at the driving wheel, Tesla could quickly fall behind. In this case, there's a danger posed by the personality of the CEO who exercises strategic control. In that way, Tesla is different from the usual case. No one would say that Tim Cook is off his rocker, although, as CEO of Apple with its \$701 billion in buybacks since October 2012, he has directed the greatest looting of a corporate treasury in history.

It's a serious problem. There aren't any other companies in the U.S. coming up that could replace Tesla as global competitors in the EV transition. Tesla's success led the board at General Motors, for example, to downplay the electric vehicle transition. They can see they aren't going to dominate it, and so they're making their money from gas guzzlers. They're busy doing massive buybacks—as Matt Hopkins and I noted in an INET article published in December 2023.

LP: So like it or not, if we want electric vehicles, our fate, for now, is tied to Elon Musk and Tesla.

WL: Yes, as Americans, that is the case.

LP: You've advocated for banning stock buybacks, this innovation-killing activity. How do things stand currently in Washington?

WL: Reining in stock buybacks was certainly on Biden's policy agenda before he became president, but I don't know about Harris. It is not a topic in the current campaign, although many Democrats in Congress would like to get rid of buybacks. Patience may be a virtue here. Let's first make sure that Elon Musk's new buddy who used to occupy the White House does not get back there again.

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Sept. 20, 2024, 12:30 AM PDT

A Tiny Fraction of Carbon Projects Are High Quality, MSCI Says

By Frances Schwartzkopff

- Study is latest blow for voluntary carbon-credit market
- The MSCI review covered more than 4,000 projects globally

Bloomberg Law News 2024-09-20T10:24:48459645-04:00

A Tiny Fraction of Carbon Projects Are High Quality, MSCI Says

By Frances Schwartzkopff2024-09-20T03:30:00000-04:00

- Study is latest blow for voluntary carbon-credit market
- The MSCI review covered more than 4,000 projects globally

Just 5% of more than 4,000 projects in the global carbon-credit market are considered high quality, according to an analysis by MSCI Inc.

The findings are the latest blow to the voluntary carbon-credit market, which has struggled amid revelations of offerings that fail to deliver promised emission reductions. In July, the Science Based Targets initiative, the world's top arbiter of corporate climate goals, said a review that it conducted found most credits "ineffective."

[Read More: Carbon Credits Found to Be Mostly 'Ineffective' in Key Study](#)

In its research, MSCI said it looked at more than 10,000 documents and one million data points, and applied to each project a variety of criteria to determine its impact. It then scored projects, with ratings ranging from AAA to CCC.

No project got the top score, while just 7% were either A or AA. In what MSCI said was a sign that "many low-integrity projects do remain in the market," almost half got the two lowest scores possible.

- [Here is link to MSCI report.](#)

Efforts are underway to bring greater transparency and improve quality, including the establishment of the Integrity Council for Voluntary Carbon Markets' core carbon principles, MSCI said. Already new projects "appear to be, on average, of higher integrity."

Higher quality projects, particularly those with additional positive social or environmental benefits, command better pricing, MSCI said. It scored integrity on a 1 to 5 point scale, with each 1 point gain equal to an 8% increase in the spot price of a project's credits.

Rather than go to the market, though, buyers are "increasingly" entering "longer-term deals rather than buying credits on the spot market and, in some cases, are providing capital to help develop projects," according to the MSCI report. "This is particularly the case for nature-restoration projects, which often require significant upfront capital to acquire land and plant trees."

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House Republicans Pass Anti-ESG Bills, Teeing Up 2025 Priorities

By David Hood

- Provisions would limit disclosure rules, curb investor bids
- Bill advanced in a 215-203 vote, faces long odds in Senate

Bloomberg Law News 2024-09-20T10:33:57467651877-04:00

House Republicans Pass Anti-ESG Bills, Teeing Up 2025 Priorities

By David Hood 2024-09-19T16:42:16000-04:00

- Provisions would limit disclosure rules, curb investor bids
- Bill advanced in a 215-203 vote, faces long odds in Senate

The House passed a package of Republican-led bills meant to rein in environmental, social, and governance initiatives across corporate America.

The package passed Thursday in a 215-203 vote, with one lawmaker voting present. It would limit the Securities and Exchange Commission's power to require public companies to report on issues seen as unrelated to their financial health. The legislation also forces the SEC to study the impact of a European climate-change disclosure rule on American companies. Another provision seeks to allow companies more power to reject ESG-related shareholder proposals offered at their annual meetings.

The floor vote comes on the heels of the House's Wednesday passage of a separate legislative package targeting "woke" investing in retirement accounts. It caps Republican lawmakers' 18-month push against ESG that had stalled over the summer but was resurrected in what is the House's second to last week in session before breaking for the upcoming November elections.

Neither package is likely to advance in the Democrat-controlled Senate and swing state congressional campaigns have focused more on issues that poll well with voters like the economy and border security. But the measures offer an important preview of Republicans' anti-ESG priorities should they retain control of the House next year and pick up a majority in the Senate. They also signal areas where Donald Trump could attempt executive action if he is elected president again.

"These are bills that set the stage or the groundwork for future discussions coming in the next Congress, in 2025," said Tim Doyle, a Republican who works as an independent political consultant. "They wanted to make sure that they had these in a version, in a way that they could start the debate and start discussions."

SEC Overreach

Republicans have long-argued that SEC Chair Gary Gensler overstepped his authority in ESG-related rulemaking. The agency's March regulations requiring companies to disclose the greenhouse gas emissions associated with their operations and energy use have been a particular target. Those rules are now suspended amid litigation.

The provision of Thursday's package limiting the SEC's power to impose new corporate disclosure requirements would correct an agency gone rogue, the measure's author Rep. Bill Huizenga (R-Mich.) said.

Democrats have been "using their regulators, I would argue, in an extra-legal fashion" and "they've been getting slapped down by the courts," he said. "Hopefully, with a new administration, there will be a restoration of both the traditional and the legal standing of those regulators."

Huizenga's bill would not unravel the climate rules, but targets pending regulations on the agency's to-do list that would require companies to publicly disclose workforce demographic data.

The workforce disclosure rules already are facing headwinds. They're among several prominent ESG-related rules that have stalled at the agency as Gensler approaches what could be his last four months as commission chair. A task force within the agency's Enforcement Division focused on fighting misleading ESG claims in court was quietly disbanded over the summer.

Shareholder Proposals

Thursday's legislative package pulls together bills that originated in the House Financial Services Committee. Another provision would restrict shareholders' ability to bring proposals for a vote during a company's annual meeting.

Proposals with subjects that are "environmental, social, or political" could be excluded from corporate ballots under the legislative package.

Current SEC rules let those holding at least \$2,000 in shares for three years continuously submit a proposal for an investor vote. Companies can disregard a shareholder proposal in certain situations and leave it off their ballot. They often ask the SEC to weigh in on the reasoning.

Conservatives say the process is ripe for abuse. Exxon Mobil Corp. earlier this year sued activist investors directly to stop a climate proposal, bypassing the SEC. The case was dismissed, but Exxon CEO Darren Woods said earlier this month during an institutional investor conference in Brooklyn, New York that his company will file more suits if it believes the proxy process continues to be abused.

Democrats, however, said the proxy reform provision would hamper shareholder democracy and diminish the influence of investors who put their money into companies.

"The effect of this bill would deprive investors of what is today, right now, a legal right to have proposals of any kind included," said Rep. Maxine Waters (D-Calif.), ranking member of the House Financial Services Committee.

Path Forward

While the package of bills is unlikely to get a vote in the Democrat-controlled Senate, Republicans are hoping to work on compromises for some of the provisions with Democrats, said Doyle, the political consultant. He did not indicate which ones, specifically.

"They certainly hope, in the next Congress, that they will be able to work on these with Democrats and get some consensus on them," he said. "Realizing that you might not be able to get it on all of them, but certainly that's the intent."

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Caterpillar Joins Ford, Lowe's in DEI Rethink as Backlash Grows

By Jeff Green

- Company says executives communicated with anti-DEI activist
- Caterpillar stopped participating in LGBTQ ranking last year

Bloomberg Law News 2024-09-20T10:34:20788972559-04:00

Caterpillar Joins Ford, Lowe's in DEI Rethink as Backlash Grows

By Jeff Green2024-09-19T17:19:13410-04:00

- Company says executives communicated with anti-DEI activist
- Caterpillar stopped participating in LGBTQ ranking last year

Caterpillar Inc. is introducing new guidelines on external sponsorships and donations as part of a review of some of its DEI initiatives, after anti-diversity activist Robby Starbuck told the company he was preparing a social media attack against its policies.

The construction and mining equipment maker said it will focus all employee training programs on fostering "high performance," require senior manager approval for external speakers at company events, and implement new guardrails around its employee resource groups. The changes were communicated in a letter to employees that Starbuck shared on his social media page.

Caterpillar spokesperson Joan Cetera confirmed the contents of the memo and said executives had communicated with Starbuck after he reached out. She refuted Starbuck's claim that the company had withdrawn itself from a notable ranking by an LGBTQ advocacy group as part of the changes. Caterpillar decided last year to stop participating in the ranking from the Human Rights Campaign, she said.

What Is DEI and Why Is It Under Attack?: QuickTake

Caterpillar is joining a string of US firms rethinking their policies on workplace diversity, equity and inclusion. However, its tweaks fall short of some of the more substantial changes made by companies like Tractor Supply Co., which in July said it would retire diversity targets, eliminate DEI roles and withdraw its carbon emission goals after Starbuck started a social media campaign. Ford Motor Co. and Lowe's Cos. last month said they would stop participating in the HRC ranking.

Caterpillar shareholders in June 2023 rejected a proxy proposal from the conservative activist group National Center for Public Policy Research that asked the manufacturer to audit its DEI activities for negative impact on the business. Only 1.7% of shareholders voted in favor of the proposal.

A 2021 proposal from a DEI advocacy group asking the company to audit the effectiveness of the proposals received more than a third of shareholder support.

US corporations are under pressure from conservative activists to cancel programs many of them adopted after the murder of George Floyd by a White policeman in 2020. A Supreme Court decision last year banning affirmative action at universities has emboldened opponents of corporate diversity programs, even though they are governed by different laws.

--With assistance from **Sana Pashankar**.

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US FTC sues drug 'gatekeepers' over high insulin prices

 [reuters.com/business/healthcare-pharmaceuticals/us-ftc-sues-drug-gatekeepers-over-high-insulin-prices-2024-09-20](https://www.reuters.com/business/healthcare-pharmaceuticals/us-ftc-sues-drug-gatekeepers-over-high-insulin-prices-2024-09-20)

Jody Godoy, Ahmed Aboulenein

A Type 2 diabetes patient gives himself an insulin shot in Glenarden, Maryland, U.S., July 15, 2021. REUTERS/Hannah Beier/file photo Purchase Licensing Rights , opens new tab

Sept 20 (Reuters) - The U.S. Federal Trade Commission sued the country's three largest pharmacy benefit managers on Friday, accusing them of steering diabetic patients towards higher priced insulin in order to reap millions of dollars in rebates from pharmaceutical companies.

The case accuses UnitedHealth Group Inc's (UNH.N) , opens new tab Optum unit, CVS Health Corp's (CVS.N) , opens new tab CVS Caremark and Cigna Corp's (CI.N) , opens new tab Express Scripts of unfairly excluding lower cost insulin products from lists of drugs covered by insurers.

Driving down drug prices has been a key goal for the Joe Biden administration, and Vice President Kamala Harris, the Democratic nominee, has emphasized her work for patients, and in particular on lowering insulin prices, on the campaign trail.

The conduct hurt patients, such as those with coinsurance and deductibles, who were not eligible for the rebated price. The three PBMs together administer 80% of all prescriptions in the U.S., according to the case, which was filed in the FTC's in-house court.

The suit also named Zinc Health Services, Ascent Health Services, and Emisar Pharma Services, purchasing organizations created by the companies in recent years.

Rahul Rao, Deputy Director of the FTC's Bureau of Competition, said in a statement that the three pharmacy benefit managers are "medication gatekeepers" that have "extracted millions of dollars off the backs of patients who need life-saving medications."

"Millions of Americans with diabetes need insulin to survive, yet for many of these vulnerable patients, their insulin drug costs have skyrocketed over the past decade thanks in part to powerful PBMs and their greed," he said.

The FTC did not sue the three major makers of insulin, Eli Lilly (LLY.N) , opens new tab, Sanofi (SASY.PA) , opens new tab, and Novo Nordisk (NOVOB.CO) , opens new tab, but it did criticise their role in what it called a broken system, and said it reserves the right to sue the pharmaceutical companies later.

The three PBMs have criticised the FTC's approach to the industry, accusing it of bias. Express Scripts sued the FTC earlier this week seeking to force it to withdraw a report that said PBMs enrich themselves at the expense of smaller pharmacies.



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Apple's \$490M Deal Over China Sales OK'ed, Attys Get \$110M

By **Dorothy Atkins**

Law360 (September 19, 2024, 7:40 PM EDT) -- A California federal judge approved Apple Inc.'s \$490 million securities fraud settlement under which class counsel will receive \$110.45 million in fees and costs plus interest, resolving years-old litigation alleging Apple and its top brass misled investors about iPhone sales in China.

In a **14-page order**, U.S. District Judge Yvonne Gonzalez Rogers on Wednesday signed off on the deal under which class counsel will receive \$107.8 million, or 22% of the total settlement, plus interest. The amount was slightly less than the \$122.5 million, or 25%, counsel had **initially sought**.

Class counsel will also recover \$2.65 million in litigation costs plus interest, and the lead plaintiff — the U.K.'s Norfolk Pension Fund — will receive a \$29,800 incentive payment. Meanwhile, class members will receive pro rata shares of the net settlement based on the type of security transacted and the relative size of their claims.

Investors' counsel Shawn Williams of Robbins Geller Rudman & Dowd LLP, said in a statement Thursday the litigation was intensely fought at every stage, and he and his clients are very pleased with the settlement, which was **announced in March** ahead of a planned September jury trial.

"Our client's determination to pursue the case to [the] brink of trial made all the difference here," Williams said.

Mark Solomon, Williams' co-counsel at Robbins Geller, added that the investors' recovery can serve as a reference point for future shareholder-led accountability.

"A committed U.K. fund led this case to the brink of trial against one of the most powerful companies on the planet, securing accountability and a historic result for Apple investors worldwide," Solomon said.

Counsel and representatives for Apple and its executives didn't respond to requests for comment Thursday.

The judge's order resolves a yearslong consolidated dispute between the class of stockholders and the tech giant over statements about Apple's iPhone sales in China made by CEO Tim Cook and Chief Financial Officer Luca Maestri in 2019.

Investors accused Apple and its executives of failing to disclose that the "trade war" between the U.S. and China was taking a toll on the demand for iPhones in what is considered to be one of the company's most important markets.

The investors alleged Apple hid this sales slump, leading investors to believe the company's financial prospects were stronger than they actually were, causing Apple's stock to drop more than 9% after Apple missed its revenue projections by up to \$9 billion, according to the investors.

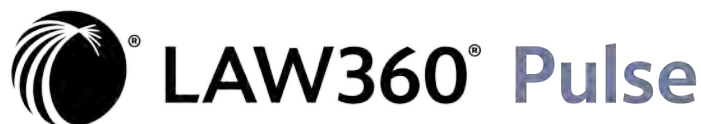
The investors are represented by Shawn A. Williams, Daniel J. Pfefferbaum, Mary K. Blasy, Mark Solomon and Ellen A. Gusikoff Stewart of Robbins Geller Rudman & Dowd LLP, and Christine M. Fox of Labaton Keller Sucharow LLP.

Apple and its executives are represented by James N. Kramer and Tristan K. Allen of Orrick Herrington & Sutcliffe LLP, and Daniel J. Kramer, Melinda Haag and Audra J. Soloway of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Apple Inc. Securities Litigation, case number 4:19-cv-02033, in the U.S. District Court for the Northern District of California.

--Additional reporting by Emilie Ruscoe and Katryna Perera. Editing by Lakshna Mehta.

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Taylor English Adds Ex-Boutique Leader To IP Team In Atlanta

By **Emily Johnson**

Law360 (September 19, 2024, 4:10 PM EDT) -- Taylor English Duma LLP has brought on the former managing partner of Herman Jones LLP in Atlanta, strengthening its intellectual property practice with a litigator who handles disputes involving IP and commercial claims as well as class actions, the firm announced Thursday.

Peter Jones has joined the firm as a partner, bringing with him over two decades of litigation experience in the U.S., Taylor English said. His practice also includes guiding clients on product liability and premises liability matters.

Jones' addition comes after the firm **brought on** patent procurement expert Kenn Bruley as an Atlanta partner from Ballard Spahr LLP earlier this month — and after nearly 20 former Taylor English attorneys in Atlanta were recruited by other firms in recent months.



Peter Jones

Eight Taylor English attorneys **departed** for Clark Hill to help it launch its first Atlanta office in July. Taylor English also **saw two groups of attorneys leave** after that. In August, Buchalter PC opened its first Atlanta office with six former Taylor English intellectual property attorneys, and Burr & Forman LLP brought on five former Taylor English attorneys.

Jeff Kuester, leader of the firm's IP practice, said in a statement that they are glad to have Jones join the group.

"We are excited to welcome Peter to our IP team," Kuester said. "His diverse experience makes him an excellent addition as the firm continues to strengthen our bench of IP litigators."

Taylor English said Jones brings a background of working for excellent firms, a defense firm and a plaintiff firm. Jones has represented businesses and individuals in recovering monetary damages.

Jones left Herman Jones in August 2023, according to a spokesperson for Herman Jones.

According to his LinkedIn profile, Jones also served as an associate and then made partner at Robbins Geller Rudman & Dowd LLP. Before his time at Robbins Geller, Jones was a law clerk for Senior U.S. Circuit Judge J.L. Edmondson of the U.S. Court of Appeals for the Eleventh Circuit. He also served as an associate for King & Spalding LLP.

Jones earned his bachelor's degree from the University of the South and his law degree from the University of Georgia School of Law.

Jones was not immediately available for an interview Thursday.

Taylor English has 133 attorneys, including 92 attorneys based in Atlanta, according to a firm spokesperson. The firm's office locations include California, Pennsylvania, New York, Texas, Florida, North Carolina and Washington, D.C., according to the firm's website.

--Editing by Emma Brauer.



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Amazon, Bezos Deny Blue Origin Deal Challenges In Del.

By **Jeff Montgomery**

Law360 (September 19, 2024, 5:12 PM EDT) -- An Amazon.com stockholder suit seeking damages from the e-commerce giant for purportedly conflicted dealing with company founder Jeff Bezos' Blue Origin space launch business can't get off the ground in Delaware's Court of Chancery, attorneys for the Amazon parties argued in a new brief filed late Wednesday.

The suit, filed in August 2023 and amended in February, alleged that Amazon's proposals to loft thousands of internet-linking satellites into orbit aboard Blue Origin space exploration rockets will funnel billions from Amazon to the launch company. The deal also would allegedly keep Bezos in the running in an ego race with SpaceX founder Elon Musk.

Amazon disclosed in 2022 that \$2.7 billion would be paid to Blue Origin for part of the company's low-earth-orbiting internet linkage plan, dubbed "Project Kuiper" after the solar system's vast Kuiper Belt region of icy objects orbiting the sun beyond Neptune.

In the reply brief filed Wednesday in Vice Chancellor Nathan A. Cook's court, attorneys for Bezos — who is also the executive chairman, and former president and CEO of Amazon — and other company directors argued that the Cleveland Bakers and Teamsters Pension Fund failed to show that a majority of Amazon directors lack independence from Bezos. The reply also said that those named in the suit don't face a substantial likelihood of liability in connection with the claims.

Instead, Amazon's reply argued, an amended version of the suit "attempts to circumvent, rather than rebut," presumptions of director independence "without alleging any ties or relationships that would suggest a motive for the director to favor the interests of another over those of the corporation."

In addition, the directors argued, the suit failed to show that Bezos, who owns 12.7% of Amazon's shares, controls the business.

"Defendant did not argue that Bezos is not a controlling stockholder because it is impossible for a minority holder to be deemed a controlling stockholder," the reply said. "Rather, defendant showed that the complaint fails to allege facts showing that Bezos exercised control — whether general or specific — despite holding far less than a majority of Amazon's stock."

The shareholder suit alleged that Amazon's board "sat supine" while "Bezos' Amazon board management negotiated these multibillion-dollar contracts" with Bezos' Blue Origin management.

"Ignoring all of the flashing signs that should have caused the board to proceed with extreme vigilance, the audit committee needed only a few minutes of discussion to approve" the allegedly Bezos-favoring launch agreements, the stockholder suit alleged.

In part, the reply on Wednesday argued that the stockholders had failed to find support for their reliance on potential board liability claims to shore up claims that the same officials lacked independence from the Amazon founder.

"And that is to be expected, given the different purposes of the liability and independence inquiries," the reply said. "The purpose of the liability inquiry is to determine whether the claim against the director is strong enough that the director would reject a demand to avoid a personal risk of liability."

Independence concerns, in contrast, focus on "whether a director's tie to an interested party is strong enough that the director would reject a demand to avoid a risk of liability to that party," the reply added, noting that efforts to "conflate these two demand-futility inquiries is contrary to the Delaware Supreme Court's repeated recognition of their distinct functions, and the distinct showing necessary" for both.

Claims that directors disregarded their fiduciary duties and acted in bad faith rest "on asserted imperfections in the board process, not a deliberate failure to undertake any reasonable process at all," the reply also contended. It added: "In assessing whether a bad-faith claim is adequately pleaded, the question is not 'whether disinterested, independent directors did everything that they (arguably) should have done,' but 'whether those directors utterly failed' to try to fulfill their fiduciary duties."

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

The Cleveland Bakers and Teamsters Pension Fund is represented by Christopher J. Orrico, Michael J. Barry, Christine M. Mackintosh, John C. Kairis, Vivek Upadhyia and Edward M. Lilly of Grant & Eisenhofer PA.

Bezos and the other defendants are represented by Garrett B. Moritz of Ross Aronstam & Moritz LLP, and William Savitt, Anitha Reddy and Adam M. Gogolak of Wachtell Lipton Rosen & Katz.

The case is Cleveland Bakers and Teamsters Pension Fund et al. v. Jeffrey P. Bezos et al., case number 2023-0868, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera and Leslie A. Pappas. Editing by Melissa Treolo.



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Feds Can't Order \$31M To Refill Class Funds, 3rd Circ. Told

By **George Woolston**

Law360 (September 19, 2024, 9:22 PM EDT) -- A New Jersey man convicted for stealing \$40 million from settlements in stockholder class actions told a Third Circuit panel Thursday the multimillion-dollar restitution ordered at his sentencing is unlawful and should be vacated, arguing that the settlements weren't harmed.

Joseph Cammarata told the three-judge panel sitting in Philadelphia that a Pennsylvania district court erred **in ordering** him to pay \$31 million in restitution to class action settlement funds in order for the fund administrators to distribute the restitution to underpaid claimants, arguing the funds had suffered no clearly identifiable loss.

"There is nothing in the restitution statute that authorizes this kind of delegation scheme," said Peter Goldberger, counsel for Cammarata, during oral argument.

U.S. Circuit Judge D. Brooks Smith, who noted the case's convergence of civil and criminal proceedings was "really unusual," asked the government how it would be disadvantaged if the panel were to determine "it was the class that was defrauded here and experienced the loss?"

"Not at all, because that's who restitution was made payable to," said Paul G. Shapiro of the U.S. attorney's office. "The judge made restitution payable to settlement funds for the claims administrators to distribute. It isn't as if the judge made a mistake and made restitution payable to the administrator."

Cammarata further argued the lower court's forfeiture order of a vacation home located in the Poconos Mountains of Pennsylvania was also illegal, claiming the government had expressly waived its opportunity to forfeit any parcel of real estate at the close of trial.

Shapiro countered that the government was well within its rights to seek the forfeiture of the home at Cammarata's sentencing, arguing it didn't have the evidence at the close of his trial in October 2022 to show the home was bought with some of the fraudulent proceeds.

"We did nothing wrong and the court did nothing wrong here," Shapiro said. "Here, that knowledge came to our attention after trial and before sentencing, so we did what the rule requires us to do."

Goldberger called the government's argument "shocking."

"By choosing not to prepare for trial, we can't defer this issue that is to be decided at trial to some later stage where the defendant doesn't get a jury," Goldberger said. "That shows they're wrong. They chose not to prepare, and are using lack of preparation as a defense. That can't be right."

Cammarata was sentenced to 10 years in prison and ordered to pay \$31 million in restitution to a list of class action settlements in June 2023 after a Pennsylvania federal jury **found him guilty** of wire fraud, money laundering and conspiracy charges for stealing millions from funds created as a result of settled securities class actions and U.S. Securities and Exchange Commission enforcement actions.

According to federal prosecutors, Cammarata and his co-conspirators Erik Cohen and David Punturieri formed Alpha Plus Recovery, a "claims aggregator" that would theoretically work with investors to help them recover lost funds by filing claims in applicable shareholder class action settlements or

enforcement actions by the SEC.

However, Alpha Plus submitted claims to administrators on behalf of three sham clients they created — Quartis Trade and Investment LLC, Nimello Holding LLC and Inversiones Invergasa SAS — by falsely stating they had bought shares in the securities at issue in the lawsuits and enforcement actions, prosecutors and the SEC said.

Cammarata received roughly \$18.9 million of the over \$40 million total that the scheme collected, and he used a significant amount of the stolen funds for trips on private jets, the purchase of expensive homes, luxury cars and yachts, and even the maintenance of a private island in the Bahamas, the government alleged.

Cohen allegedly received about \$9.7 million and Punturieri about \$12.3 million. Punturieri and Cohen previously pled guilty to their criminal charges. Both men were sentenced to 18 months in prison in late 2023 and early 2024 and ordered to pay \$31 million in restitution, according to court records.

The SEC filed its complaint against Cammarata, Cohen, Punturieri and Alpha Plus on Nov. 4, 2021, the same day federal prosecutors announced the criminal charges.

Cammarata was also found guilty of five counts of tax evasion for dodging more than \$16 million he stole from the securities fraud victims following a two-week trial in New Jersey federal court late last year; he **was sentenced** to six years in prison and ordered to pay \$6 million in restitution. Because Cammarata filed his taxes from New Jersey, the tax evasion case was brought in the District of New Jersey, the government said.

U.S. Circuit Judges L. Felipe Restrepo, Theodore A. McKee and D. Brooks Smith sat on the panel for the Third Circuit.

The government is represented by Paul G. Shapiro of the U.S. Department of Justice.

Cammarata is represented by Peter Goldberger.

The case is U.S. v. Cammarata, case number 23-2110, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Sydney Price, Matthew Santoni and P.J. D'Annunzio. Editing by Andrew Cohen.



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No Coverage For Santander Shareholder Suit, Allianz Says

By **Jennifer Mandato**

Law360 (September 19, 2024, 4:31 PM EDT) -- Allianz told a Massachusetts federal court that it doesn't owe coverage to Santander Holdings for an underlying class action brought by shareholders over the company's \$2.5 billion deal to take its consumer finance entity private, arguing that multiple exclusions bar coverage for claims arising from the transaction.

Allianz Global Risks U.S. Insurance Co. **sued** Santander Holdings U.S.A. Inc. on Tuesday, maintaining that its policy was purchased five months after the transaction was finalized and that, as a result, the directors and officers policy included multiple terms explicitly eliminating or limiting coverage for claims stemming from the deal.

Should the court find that coverage is available, Allianz requested that amounts incurred in the underlying suit be allocated between covered and uncovered amounts.

In July 2021, Santander Holdings made a proposal to acquire the 20% of Santander Consumer that it didn't already own, the complaint said. After negotiating with the Santander Consumer directors, the transaction closed in January 2022.

Following the deal, Santander Holdings obtained a tower of D&O coverage from Allianz, which became effective July 1, 2022.

"Not surprisingly, since the prospect of the transaction and the potential for shareholder claims that inevitably follow such transactions was well-known prior to the applicable insurance policy period, the D&O insurance that Holdings purchased included multiple terms that explicitly eliminate or limit coverage for claims that could arise out of the transaction," Allianz told the court.

Following the transaction, former shareholders of Santander Consumer filed the underlying litigation, alleging breaches of fiduciary duty by Santander Holdings, Banco Santander and the Santander Consumer directors. The class accused the defendants of "[committing] various actions prior to the completion of the transaction that were unfair to the minority shareholders of Consumer and that, as a result, claimants did not receive fair compensation for their investments in Consumer."

Allianz cited three exclusions in the complaint: a consumer transaction exclusion, a consumer prior acts exclusion and a securities exclusion.

According to the complaint, the first precludes coverage for a loss stemming from a claim made against the Santander Consumer directors that explicitly arose from the completed transaction.

The consumer prior acts exclusion bars coverage for loss arising from a wrongful act committed by Santander Consumer or any insured persons prior to the closing of the transaction, the complaint said. The securities exclusion precludes coverage for a loss based upon the purchase or sale of publicly traded securities for which the Santander entities' are subject to the Securities Exchange Act of 1934.

Based on the policy language, Allianz urged the court to hold that it has no obligations to Santander Holdings for the underlying litigation.

Santander U.S. told Law360 on Thursday that the company believed the complaint was without

merit.

"We are highly confident in our position and will vigorously defend it," the company said.

A representative of Allianz did not immediately respond to requests for comment Thursday.

Allianz is represented by John Donovan III and Emily Zwerman of Sloane and Walsh LLP.

Counsel information for Santander Holdings was not immediately available.

The case is Allianz Global Risks US Insurance Company v. Santander Holdings USA, Inc., case number 1:24-cv-12377, in the U.S. District Court for the District of Massachusetts.

--Editing by Amy Rowe.

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'Biblical Values' Firm To Pay \$300K For Misleading Investors

By **Katryna Perera**

Law360 (September 19, 2024, 6:30 PM EDT) -- The U.S. Securities and Exchange Commission on Thursday order Idaho-based investment adviser Inspire Investing LLC to pay a \$300,000 fine on allegations it made misleading statements and failed to institute compliance measures related to the firm's execution of its "biblically responsible investing" strategy.

The SEC issued an **order** requiring Inspire to cease and desist from any further violations of the Investment Advisers Act and the Investment Company Act and pay the \$300,000 civil monetary penalty. The order also states that the firm has been censured.

According to the order, Inspire has been a registered investment adviser with the SEC since 2017, and as of March 2024, it reported having approximately \$2.5 billion in regulatory assets under management.

The firm currently advises eight exchange-traded funds, known as the Inspire ETFs, and separately managed accounts, or SMAs, that employ a strategy that is supposed to exclude investments in companies that engage in certain enumerated business practices that Inspire has determined "do not align with biblical value," the complaint states.

Inspire has stated that it uses a science- and data-driven methodology to provide positive or negative scores for companies based on their business practices. The SEC said that from at least 2019 through 2024, Inspire represented through the ETF and SMA prospectuses that activities or products that do not align with their investing strategy include those that relate to abortion legislation, alcohol, cannabis cultivation and/or processing, gambling, in vitro fertilization, LGBT legislation and tobacco.

"The prospectuses further stated that Inspire utilizes 'software that analyzes publicly available data relating to the primary business activities, products and services, philanthropy, legal activities, policies and practices when assigning Inspire impact scores to a company,'" the order states. "On its website, Inspire described its methodology as 'objective' and 'rules-based' and represented that it 'brings together the most robust data sets from the world's leading providers.'"

However, the SEC says that Inspire misrepresented its research process, did not apply its investment criteria consistently and often invested in companies that should have been excluded based on its criteria.

The SEC says Inspire did not utilize software to analyze company data in its research process but instead relied on a small staff to conduct manual research and did not "introduc[e] best-practice disciplines of data science into the collection, organization, and analysis of faith-based screening data," as represented to investors.

"Inspire employees' research was primarily limited to cross-referencing company names with donor and sponsor lists of well-known national organizations that it determined were associated with prohibited activities," the order states. "Despite its representations to clients, Inspire did not typically conduct research at an individual company level to determine whether a company engaged in any of the prohibited activities."

There were also numerous instances in which Inspire's screening process resulted in investments in companies that engaged in the firm's list of prohibited activities.

"For example, certain companies were excluded from Inspire's investment universe for donating to certain advocacy organizations or sponsoring certain events that Inspire considered to be prohibited activities," the order states. "At the same time, multiple companies held within the Inspire ETF portfolios donated to organizations or sponsored events that were the same or similar."

The firm also failed to adopt and implement written compliance policies and procedures, according to the SEC, which resulted in the inconsistent application of its investment criteria.

In issuing the order, the SEC said it considered remedial acts undertaken by Inspire and its cooperation with the regulator.

In addition to the civil money penalty, the order states that Inspire has agreed to retain an independent consultant to review the firm's practices, disclosures and written policies.

In a statement Thursday, Corey Schuster, co-chief of the SEC's Asset Management Unit, said: "Investors must be able to rely on advisers acting consistently with their represented investment process or strategy. Here, Inspire Investing's investment screening process was not what it represented to investors, resulting in it making investments that were contrary to its stated investment criteria."

Inspire did not immediately respond to requests for comment Thursday.

Inspire is represented by Todd Ratner of Ratner Law.

Counsel information for the SEC was not immediately available.

The case is In the Matter of Inspire Investing LLC, case number 3-22145, before the U.S. Securities and Exchange Commission.

--Editing by Michael Watanabe.



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Macquarie Unit To Pay \$80M To End SEC's Overvaluation Claims

By **Sarah Jarvis**

Law360 (September 19, 2024, 5:17 PM EDT) -- A subsidiary of Australian financial services company Macquarie Group Ltd. agreed Thursday to pay the U.S. Securities and Exchange Commission nearly \$80 million to settle charges it overvalued largely illiquid mortgage-backed securities and carried out cross-trades that favored certain clients over others.

Without admitting or denying the SEC's findings, investment adviser Macquarie Investment Management Business Trust agreed to pay a \$70 million penalty and \$9.8 million in disgorgement with interest, according to a **cease-and-desist order**.

The SEC alleged that from January 2017 through April 2021, MIMBT managed a fixed-income investment strategy centered on mortgage-backed securities, collateralized mortgage obligations and treasury futures. The strategy investments included thousands of smaller-sized "odd lot" collateralized mortgage obligation positions that traded at a discount to institutional, larger-sized positions.

MIMBT used a third-party pricing service to determine the values of its odd lot collateralized mortgage obligations, or CMOs. But those prices were intended exclusively for institutional lots, and the pricing service did not provide separate valuations for odd lots, the SEC said.

"MIMBT did not have a reasonable basis to believe that the pricing vendor marks accurately reflected the price the strategy accounts could reasonably expect to receive for the odd lot relevant CMO positions in a current market sale," it said in its order.

The firm's marketing materials stated that liquidity was a "key advantage and important distinguishing feature" of its investment strategy, even though the CMOs at issue were largely illiquid and couldn't be sold at the pricing vendor's valuations.

"No marketing materials disclosed that odd lots of the relevant CMOs were being valued at higher, round lot prices or that the securities were generally illiquid," the SEC alleged.

According to the regulator, MIMBT overvalued about 4,900 largely illiquid CMOs held in 20 advisory accounts, including 11 retail mutual funds.

The SEC further alleged MIMBT tried to minimize losses to redeeming investors by arranging cross-trades with affiliated accounts, instead of selling the overvalued CMOs into the market.

MIMBT agreed to a censure and to retain a compliance consultant to review its policies and procedures relating to CMO valuation and associated liquidity risks, as well as cross-trading, per the SEC's order.

"It is alarming that a fiduciary took advantage of retail mutual funds it advised and executed unlawful cross trades to mitigate its overvaluation of fund assets," Eric I. Bustillo, director of the SEC's Miami Regional Office, said in a statement Thursday. "Utilizing a third-party pricing service does not negate an investment adviser's obligation to value assets accurately."

Macquarie Asset Management said in a statement Thursday that its business is built on the principles of integrity and accountability, and that the controversy at issue in the SEC matter "is not consistent

with how we do business."

"We have already undertaken and are focused on completing additional remedial steps to address the issues identified in the investigation, with clients the priority," it said. "We also continue to invest in our risk culture to ensure we discharge our fiduciary duties to the highest standard."

MIMBT is represented by Doug Davison of Linklaters LLP.

The SEC is represented in-house by Christine Lynch, Crystal Ivory, Jessica M. Weissman, Fernando Torres and Glenn S. Gordon.

The case is In the Matter of Macquarie Investment Management Business Trust, case number 3-22144, before the U.S. Securities and Exchange Commission.

--Editing by Adam LoBelia.

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